

## University of Southampton Research Repository ePrints Soton

Copyright © and Moral Rights for this thesis are retained by the author and/or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder/s. The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given e.g.

AUTHOR (year of submission) "Full thesis title", University of Southampton, name of the University School or Department, PhD Thesis, pagination

**UNIVERSITY OF SOUTHAMPTON**

FACULTY OF BUSINESS AND LAW

School of Law

**COPING WITH MUDDLES AND UNCERTAINTY IN THE FIELD  
OF MULTIMODAL TRANSPORT LIABILITY**

By

**Haedong Jeon**

Thesis for the degree of Doctor of Philosophy

May 2013



# **UNIVERSITY OF SOUTHAMPTON**

## **ABSTRACT**

FACULTY OF BUSINESS AND LAW  
SCHOOL OF LAW

### **Doctor of Philosophy**

## **COPING WITH MUDDLES AND UNCERTAINTY IN THE FIELD OF MULTIMODAL TRANSPORT LIABILITY**

By Haedong Jeon

A multimodal transport contract is regarded as a contract of carriage whereby a multimodal carrier who acts as a principal and assumes responsibility for the performance of the contract, undertakes to perform or procure the carriage of goods by at least two different modes of transport from a place where the goods are taken in charge in one country to a place designated for delivery in a different country.

Much of the international transport of goods is now carried out on a door-to-door basis and this multimodal transport has played an important role in international trade. However, the current legal framework governing multimodal transport fails to appropriately reflect this development.

Firstly, there is currently no international uniform regime in force to govern liability for loss, damage or delay arising from multimodal transport. Instead, the current legal framework consists of a complex formation of international unimodal transport conventions, various regional/sub-regional agreements, national laws and standard form contracts. This is, indeed, a sorry state of affairs which requires a uniform set of rules to govern multimodal transport liability.

There are sufficient reasons for an international multimodal regime. The popularity of multimodal transport in a commercial area would be one of the reasons for an international multimodal regime. Second, the legal problems arising from the current legal framework for multimodal transport could be another aspect for the reason. The situation of muddles and uncertainty in the field of multimodal transport will certainly justify the reasons for an international multimodal regime.

The thesis has looked at two different approaches to an international multimodal solution. One is the Rotterdam Rules as a modified network system, the other is the EU Draft Regime as a modified uniform system. The former does not seem to be a true multimodal regime, only rewriting maritime and multimodal transports into one single Convention. Whereas, the EU Draft Regime seems a true multimodal regime, which would govern liability for loss of or damage to the goods or delay in delivery arising from multimodal transport.

Although the EU Draft Regime may be a streamlined straightforward uniform liability regime and may be an ideal solution, practical difficulties may well be encountered. It might need a further revolution in the system of cargo claims, including insurance. The Rotterdam Rules may not be the ideal solution to the current problems of multimodal transport, however, it may be the practical solution which suits in the current system of cargo claims.



# TABLE OF CONTENTS

TABLE OF CONTENTS .....	v
TABLE OF CASES .....	xiii
TABLE OF INTERNATIONAL CONVENTIONS .....	xv
DECLARATION OF AUTHORSHIP .....	xvii
ACKNOWLEDGEMENTS.....	xix
ABBREVIATIONS .....	xxi
CHAPTER 1 INTRODUCTION.....	1
1.1 The objectives of the thesis.....	1
1.2 The structure of the thesis .....	6
CHAPTER 2 GENERAL CONSIDERATIONS ON MULTIMODAL TRANSPORT ...	9
2.1 Introduction.....	9
2.2 The concept of multimodal transport .....	10
2.2.1 The definition of multimodal transport.....	10
2.2.2 The nature of multimodal transport .....	13
2.2.2.1 By at least two different modes of transport .....	13
2.2.2.2 On the basis of one multimodal transport contract.....	13
2.2.2.3 Under the responsibility of one multimodal carrier.....	14
2.3 The theories on the nature of the multimodal contract .....	14
2.3.1 The contract <i>sui generis</i> .....	15
2.3.2 The mixed contract .....	16
2.3.3 The absorbed contract.....	17
2.4 Distinction between similar terms.....	18
2.4.1 Combined transport .....	19
2.4.2 Through transport .....	20
2.4.3 Intermodal transport.....	21
2.4.4 Door-to-door transport.....	21
2.5 Current legal framework for multimodal transport.....	22
2.5.1 International conventions applicable to unimodal transport.....	23
2.5.1.1 Carriage of goods by air .....	24
2.5.1.2 Carriage of goods by road .....	27
2.5.1.3 Carriage of goods by rail .....	29
2.5.1.4 Carriage of goods by inland waterway .....	31
2.5.1.5 Carriage of goods by sea .....	31
2.5.2 Regional/Sub-regional multimodal solutions .....	34
2.5.2.1 Andean Community.....	34
2.5.2.2 MERCOSUR .....	36
2.5.2.3 ALADI.....	36
2.5.2.4 ASEAN.....	37
2.5.3 National multimodal solutions.....	39

2.5.3.1	THE NETHERLANDS .....	39
2.5.3.2	GERMANY .....	40
2.5.3.3	INDIA .....	42
2.5.3.4	SOUTH KOREA .....	43
2.6	Summary and conclusion .....	44
CHAPTER 3 THE NEED FOR AN INTERNATIONAL MULTIMODAL REGIME ...		47
3.1	Introduction .....	47
3.2	Practical aspects: The growth in container transport .....	47
3.2.1	The advent of containerisation .....	47
3.2.2	Cargo unitisation .....	48
3.2.3	The volume of traffic .....	48
3.2.4	The benefit of multimodal transport .....	49
3.3	Legal aspects: Muddles and uncertainty in the current regime .....	50
3.3.1	Fragmented and complex system .....	51
3.3.2	Application of various different rules .....	52
3.3.2.1	Rules on limitation of liability .....	53
3.3.2.2	Rules on time for suit .....	55
3.3.3	Uncertainty and unpredictability .....	57
3.3.3.1	Why certainty is important .....	57
3.3.3.2	Uncertainty in the current system .....	58
3.3.4	Non-localised loss and liability gaps .....	59
3.3.4.1	Non-localised loss .....	59
3.3.4.2	Liability gaps .....	60
3.3.5	Recourse actions .....	61
3.3.5.1	Multimodal carrier's recourse action .....	61
3.3.5.2	Practical problems of recourse actions .....	62
3.3.6	Alternative action in tort .....	64
3.3.7	Overlaps: Conflict of laws .....	65
3.4	Summary and conclusion .....	66
CHAPTER 4 PAST ATTEMPTS FOR INTERNATIONAL MULTIMODAL SOLUTIONS .....		67
4.1	Introduction .....	67
4.2	Multimodal international conventions – Past attempts .....	69
4.2.1	TCM Draft Convention .....	70
4.2.1.1	Background .....	70
4.2.1.2	Reasons for the failure of the TCM Draft Convention .....	71
4.2.2	United Nations Convention on International Multimodal Transport of Goods 1980 (MT Convention) .....	73
4.2.2.1	Background .....	73
4.2.2.2	Key features of the MT Convention .....	74
4.2.2.3	Reasons for the failure of the MT Convention .....	76
4.3	Multimodal contractual provisions – Interim solution .....	82
4.3.1	ICC Rules 1975 .....	82
4.3.1.1	Background .....	82
4.3.1.2	Key features of the ICC Rules .....	82

4.3.2	UNCTAD/ICC Rules for Multimodal Documents 1992 .....	83
4.3.2.1	Background.....	84
4.3.2.2	Key features of the UNCTAD/ICC Rules .....	84
4.3.3	Standard forms of contract.....	85
4.3.3.1	BIMCO's COMBICONBILL.....	85
4.3.3.2	BIMCO's MULTIDOC 95 .....	87
4.3.3.3	FIATA Bill of Lading (FBL).....	88
4.3.4	Limits to contractual solutions.....	90
4.3.4.1	Lack of legal force.....	90
4.3.4.2	Certain level of uniformity, but not enough .....	90
4.3.5	The legal function of multimodal transport documents.....	91
4.3.5.1	The distinct features of multimodal transport documents .....	91
4.3.5.2	Multimodal transport document as a document of title.....	92
4.3.5.3	Multimodal transport documents under COGSA 1992 .....	92
4.3.5.4	Negotiable or non-negotiable transport documents.....	93
4.4	Summary and conclusion .....	93
CHAPTER 5 POSSIBLE WAYS FORWARD .....		95
5.1	Introduction.....	95
5.2	Possible types of liability regimes .....	95
5.2.1	Uniform system .....	96
5.2.1.1	Principle.....	96
5.2.1.2	Advantages .....	97
5.2.1.3	Disadvantages.....	97
5.2.2	Network system .....	98
5.2.2.1	Principle.....	98
5.2.2.2	Advantages .....	99
5.2.2.3	Disadvantages.....	100
5.2.3	Modified/Limited system.....	101
5.2.3.1	Principle.....	101
5.2.3.2	Advantages .....	102
5.2.3.3	Disadvantages.....	102
5.2.4	Proposed system .....	103
5.3	Possible solutions to specific multimodal problems .....	104
5.3.1	Limitation of liability.....	105
5.3.1.1	No limitation of liability .....	106
5.3.1.2	Uniform dual system with high limits .....	107
5.3.1.3	Dual system with maritime limits.....	108
5.3.1.4	Network system plus the highest limit for non-localised loss .....	109
5.3.1.5	Network system plus the CMR limit for non-localised loss.....	110
5.3.1.6	Network plus the main mode limit for non-localised loss.....	111
5.3.1.7	Declaration of higher value .....	113
5.3.1.8	Proposed limitation solution.....	114
5.3.2	Time for suit .....	115
5.3.2.1	Do we need a time bar? .....	115
5.3.2.2	Time limit of 9 months .....	116
5.3.2.3	Longer limit.....	118

5.3.2.4	Shorter limit.....	118
5.3.3	Recourse actions .....	119
5.3.3.1	Time limit for recourse actions.....	119
5.3.4	Non-localised loss and liability gap.....	122
5.3.5	Conflict of laws.....	122
5.3.5.1	The Vienna Convention on the Law of Treaties (Vienna Convention)...	123
5.3.5.2	Conflict of conventions provisions.....	127
5.4	Summary and conclusions .....	129
CHAPTER 6 THE ROTTERDAM RULES AS A MODIFIED NETWORK SYSTEM		131
6.1	Introduction.....	131
6.2	Scope of application of the Convention.....	132
6.2.1	General scope of application .....	133
6.2.1.1	Contract of carriage .....	133
6.2.1.2	The geographical scope .....	135
6.2.1.3	Specific exclusions .....	136
6.2.1.4	Volume contracts.....	137
6.2.2	The multimodal scope of application .....	140
6.2.2.1	Desirability of a multimodal regime.....	140
6.2.2.2	Wholly or Partly by Sea .....	141
6.2.2.3	Unimodal or multimodal .....	141
6.2.2.4	The ‘maritime plus’ multimodal convention.....	142
6.2.2.5	Special Rules to avoid conflict with other conventions .....	143
6.3	Liability of carrier under the Convention .....	143
6.3.1	Whether one party is responsible.....	143
6.3.1.1	Period of responsibility of the carrier .....	144
6.3.2	Obligations and liability of the carrier.....	144
6.3.2.1	Key points about the Rotterdam Rules .....	144
6.3.2.2	Obligations of the carrier.....	145
6.3.2.3	Liability of the carrier.....	146
6.3.3	Obligations and Liability of the shipper .....	148
6.4	Limitation of liability .....	148
6.4.1	Basis of limitation of liability .....	148
6.4.1.1	Claims subject to limitation.....	149
6.4.1.2	Limitation amounts.....	149
6.4.1.3	The container clause.....	150
6.4.1.4	Exceptions to limitation.....	150
6.4.2	Limits of liability for loss caused by delay.....	151
6.4.3	Loss of the benefit of limitation of liability.....	152
6.4.4	Amendment mechanism .....	153
6.5	Time for suit.....	153
6.5.1	Key points about the Rotterdam Rules .....	154
6.5.2	Scope of application of time for suit.....	154
6.5.2.1	Notice of claim .....	154
6.5.2.2	Both court and arbitration proceedings .....	154
6.5.2.3	Period of time for suit.....	155
6.5.2.4	Claims or disputes arising from a breach of an obligation.....	155

6.5.3	Time-barred claim .....	156	
6.5.4	Extension of time for suit .....	157	
6.5.5	Action for indemnity.....	157	
6.5.6	Action against the person identified as the carrier.....	158	
6.6	The Carriage before loading and after discharge (Article 26) .....	159	
6.6.1	Introduction.....	159	
6.6.2	Modified network solution .....	160	
6.6.3	The analysis of article 26.....	160	
6.6.3.1	Solely before loading or after discharge.....	160	
6.6.3.2	International instrument.....	161	
6.6.3.3	No extension to national laws.....	162	
6.6.3.4	Hypothetical contract.....	163	
6.6.3.5	Only certain provisions to apply.....	163	
6.6.4	The provisions of the Rotterdam Rules affected by article 26 .....	164	
6.6.4.1	The Convention and CMR.....	164	
6.6.4.2	The Convention and COTIF-CIM.....	165	
6.6.4.3	The Convention and Montreal Convention .....	166	
6.6.4.4	The Convention and CMNI.....	166	
6.6.4.5	Demarcation difficulties .....	167	
6.7	Conflicts with other conventions (Article 82).....	168	
6.7.1	Background.....	168	
6.7.2	Distinction between article 82 and article 26.....	170	
6.7.3	The analysis of article 82.....	171	
6.7.3.1	Conventions already in force only.....	171	
6.7.3.2	Scope of article 82.....	171	
6.7.3.3	Carriage of goods by air - article 82(a) .....	172	
6.7.3.4	Carriage of goods by road - article 82(b) .....	173	
6.7.3.5	Carriage of goods by rail - article 82(c) .....	174	
6.7.3.6	Carriage of goods by inland waterway - article 82(d).....	174	
6.8	Relationship with other earlier maritime conventions (Article 89) .....	175	
6.8.1	Introduction.....	175	
6.8.2	Possible approaches to the solution .....	175	
6.8.2.1	Where there is no indication.....	175	
6.8.2.2	Dual uniform legal regime.....	176	
6.8.2.3	Denunciation of other earlier conventions .....	176	
6.8.3	Denunciation approach by the Convention.....	177	
6.9	Summary and conclusion .....	178	
<b>CHAPTER 7 THE MODIFIED UNIFORM SYSTEM BASED ON THE EU DRAFT</b>			
<b>REGIME.....</b>			<b>181</b>
7.1	Introduction.....	181	
7.2	The background of the EU Draft Regime .....	182	
7.2.1	The 1999 Final Report .....	182	
7.2.2	The 2005 ISIC Study on intermodal liability and documentation .....	183	
7.2.3	The 2009 Final Report .....	184	
7.3	The EU Draft Regime .....	185	
7.3.1	Scope of application .....	185	

7.3.1.1	Contracts of transport .....	185
7.3.1.2	The geographical scope .....	186
7.3.1.3	The opt-out approach.....	187
7.3.2	Liability of the Transport Integrator .....	188
7.3.2.1	Strict liability .....	188
7.3.2.2	Only defence?.....	189
7.3.3	Limitation of liability.....	192
7.3.3.1	The 2005 proposal .....	192
7.3.3.2	The 2009 proposal .....	192
7.3.4	Non-localised loss and liability gap.....	193
7.3.5	Time for suit .....	194
7.3.6	Conflict of laws.....	195
7.4	Summary and conclusions .....	195
CHAPTER 8 INSURANCE AND MULTIMODAL TRANSPORT .....		197
8.1	Introduction.....	197
8.2	The role of insurance in multimodal transport.....	197
8.2.1	The function of insurance .....	197
8.2.2	Subrogation.....	198
8.2.2.1	The nature of the right of subrogation.....	198
8.2.2.2	Marine Insurance Act 1906 .....	199
8.2.3	Insurance involvement in multimodal transport .....	200
8.3	Cargo insurance for cargo interests.....	201
8.3.1	Cargo insurance in general .....	201
8.3.1.1	The cargo policy forms.....	202
8.3.1.2	The Institute Cargo Clauses.....	203
8.3.2	Who needs a cargo insurance .....	203
8.3.2.1	Insurance by the buyer.....	204
8.3.2.2	Insurance by the seller .....	205
8.3.3	The scope of cargo insurance cover.....	206
8.3.3.1	Institute Cargo Clauses (A) (B) (C).....	207
8.3.3.2	All risks: ICC (A) .....	207
8.3.3.3	Delay .....	208
8.3.3.4	The duration of transit under cargo insurance .....	210
8.3.3.5	Insurance cover and international sale contracts .....	214
8.3.4	Relationship between cargo insurance and multimodal regime .....	216
8.3.4.1	Impact on cargo insurance.....	217
8.3.4.2	Mismatch of the rules .....	220
8.4	Insurance for multimodal carriers .....	221
8.4.1	Liability insurance cover .....	221
8.4.1.1	The insurance market .....	221
8.4.1.2	Mutual insurance clubs or associations .....	222
8.4.2	Multimodal carriers and their insurance .....	223
8.4.2.1	Shipowner container operators .....	223
8.4.2.2	Freight Forwarders .....	224
8.4.3	Relationship between liability insurance and multimodal regime .....	225
8.4.3.1	The impact on liability insurance .....	225

8.5 Summary and conclusion .....	227
<b>CHAPTER 9 CONCLUSION .....</b>	<b>229</b>
9.1 Multimodal transport .....	229
9.1.1 The concept of multimodal transport.....	229
9.1.2 The current legal framework for multimodal transport .....	229
9.2 The need for an international multimodal regime.....	230
9.2.1 The practical and legal aspects .....	230
9.2.2 The result of survey by the UNCTAD.....	231
9.3 Coping with muddles and uncertainty .....	232
9.3.1 The lessons from the past .....	232
9.3.2 Possible multimodal solutions .....	232
9.3.2.1 Do nothing option.....	232
9.3.2.2 Modified network system .....	233
9.3.2.3 Modified uniform system .....	234
9.3.3 The main benefits of the possible multimodal solutions .....	235
9.3.3.1 Cost-effective .....	235
9.3.3.2 Uniform international regime .....	236
9.3.3.3 Acceptable to the transport industry .....	237
9.3.3.4 Compatible with existing international law.....	237
9.4 The insurance implications .....	237
9.4.1 Several issues in regard to cargo insurance .....	237
9.4.1.1 The impact on cargo insurance.....	237
9.4.1.2 Practical issues regarding cargo insurance .....	239
9.4.2 The impact on liability insurance.....	240
9.5 The application to the Case study .....	241
<b>BIBLIOGRAPHY .....</b>	<b>245</b>
<b>APPENDICES .....</b>	<b>259</b>
1. The Rotterdam Rules .....	259
2. The EU Draft Regime.....	299



# TABLE OF CASES

## ENGLISH CASES

- Barcore, The* [1896] P 294
- Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co* [2003] 1 Lloyd's Rep 131
- Bee v Jenson* (No.2) [2008] Lloyd's Rep IR 221
- Bellina Maritime SA v. Menorah Insurance Co Ltd* [2002] 2 Lloyd's Rep 575
- British & Foreign Marine Insurance Co v. Gaunt* [1921] 2 AC 41
- Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595
- Captain Gregos, The* [1990] 1 Lloyd's Rep. 31
- Federation Insurance Company of Canada v Coret Accessories Inc & Hirsch* [1968] 2 Lloyd's Rep 109
- Gould v SE & Chatham Ry* [1920] 2 KB 186
- Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570
- H Cousins Ltd v D & C Carriers Ltd* [1971] 2 QB 230
- Hobbs v Marlowe* [1978] AC 16, at 39
- Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep 571
- Hudson v Baxendale* (1857) 2 H & N 575
- In R Miller, Gibb & Co Ltd* [1957] 1 WLR 703
- J Aron and Co (Inc) v Miall* (1928) 34 Com Cas 18
- John Martin of London Ltd v Russel* [1960] 1 Lloyd's Rep 554
- Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785
- Lickbarrow v Mason* (1794) 5 TR 683
- Mauritius Oil Refineries Ltd v Stolt-Nielsen Nederlands BV (The Stolt Sydness)* [1997] 1 Lloyd's Rep 273
- Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317
- Merak, The* [1964] 2 Lloyd's Rep 622
- Middows Ltd v Robertson* (1940) 68 Ll L Rep
- Miruvaor Ltd v National Insurance Co Ltd* [2003] HKEC 237
- Napier and Ettrick v Hunter* [1993] 1 Lloyd's Rep 197
- Nugent v Smith* (1876) 1 CPD 423
- Panamanian Oriental Steamship Corporation v Wright (The Anita)* [1970] 2 Lloyd's Rep 365
- Pristam v. S.Russel & Sons Ltd* [1973] Q.B. 366
- Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402
- Quantum Corporation Inc. and Others v Plane Trucking Ltd. And Another* [2001]

CLC 1192; [2002] 2 Lloyd's Rep 25  
*Röhlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18  
*Russell v Niemann* (1864) 17 CBNS 163  
*Transcontainer Express v Custodian Security* [1988] 1 Lloyd's Rep 128  
*York-Shiplely Inc v Atlantic Mutual Insurance Co*, 474 F. 2d 8(1973)  
*Yorkshire Insurance Co Ltd v Nisbet shipping Co Ltd* [1961] 1 Lloyd's Rep 479

### **U.S. CASES**

*Commercial Union Ins. Co. v Alitalia Airlines, S.p.A.* 347 F.3d 448 (2 Cir, 2003)  
*Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp* (2010) 561 US

### **GERMAN CASES**

The Supreme Court of Germany 17 July 2008 (I ZR 181/05).

### **SINGAPORE CASES**

*Press Automation Technology v Trans-Link Exhibition Forwarding* [2003] 1 SLR 712

## TABLE OF INTERNATIONAL CONVENTIONS

- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, 25 August 1924), entered into force 2 June 1931. (*Hague Rules*)
- Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (23 February 1968), entered into force 23 June 1977. (*Hague-Visby Rules*)
- United Nations Convention on the Carriage of Goods by Sea, (Hamburg, 31 March 1978), entered into force 1 November 1992. (*Hamburg Rules*)
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 11 December 2008) (*Rotterdam Rules*)
- United Nations Convention on International Multimodal Transport of Goods (24 May 1980), not yet in force. (*MT Convention*)
- Convention on the Contract for the International Carriage of Goods by Road (19 May 1956) (*CMR*)
- Convention Concerning International Carriage by Rail (9 May 1980), which incorporates the Uniform Rules concerning the Contract for International Carriage of Goods by Rail. (*COTIF-CIM*)
- Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (3 October 2000). (*CMNI*)
- Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 October 1929), entered into force 1934. (*Warsaw Convention*)
- Convention for the Unification of Certain Rules for International Carriage by Air (*Montreal Convention*) (28 May 1999), entered into force 2003.



# DECLARATION OF AUTHORSHIP

I, HAEDONG JEON, declare that the thesis entitled

## **COPING WITH MUDDLES AND UNCERTAINTY IN THE FIELD OF MULTIMODAL TRANSPORT LIABILITY**

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- none of this work has been published before submission.

Signed: .....

Date:.....



# ACKNOWLEDGEMENTS

I would like to take a moment to say thank you to everyone who has kindly supported me. In the first instance, I wish to express my gratitude to my supervisor, Professor Yvonne Baatz, for her insightful advice throughout every stage of my PhD study and also for encouraging me and helping to steer me towards successfully submitting my thesis. She has been a mentor, adviser, friend, confidante and also a voice of reason.

I would like to thank Mr. Filippo Lorenzon for his help and guidance as an adviser and coach, helping guide me in the right direction during my PhD. I am also grateful to Professor Mikis Tsimplis and Professor Baris Soyer for being examiners and providing valuable advice and comments which are critical to this work's development.

Moreover, I would like to express special thanks to Professor Yun-cheol Lee and Professor Jin-kwon Kim for inspiring me to begin to have interests in the field of maritime law and policy and encouraging me to undertake further research on maritime law in the UK.

I would also like to thank Andrew for kindly undertaking the task of proofreading my thesis and Yunjung for arranging this.

I am deeply indebted to my family, especially my mother, Sunsuk Lee, my brother, Haenam, and my heavenly father and heavenly grandparents.

Lastly, many thanks must go to my fiancée, Sukin for her great emotional support and constant understanding. Without her support and patience, the completion of this thesis would not have been possible.

May 2013

Southampton, UK



# ABBREVIATIONS

ALADI	Asociación Latinoamericana de Integración (Latin American Integration Association)
ASEAN	Association of Southeast Asian Nations
BIFA	British International Freight Association
BIMCO	Baltic and International Maritime Council
B/L	Bill of lading
CIM	Uniform Rules concerning the Contract of International Carriage of Goods by Rail.
CLECAT	European Association for Forwarding Transport Logistics and Customs Services
CMI	Comité Maritime International
CMNI	Budapest Convention on the Contract of Carriage of Goods by Inland Waterways 2000
CMR	Convention on the Contract for the International Carriage of Goods by Road, 1956.
COGSA	Carriage of Goods by Sea Act
COMBICONBILL	BIMCO Combined Transport Bill of Lading: transport
COTIF-CIM	Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999 to its Appendix B, containing Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)
DCC	Dutch Civil Code
FIATA	Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Freight Forwarders Associations).
FBL	FIATA Bill of Lading
HGB	German Commercial Code (Handelsgesetzbuch)
HR	Hague Rules
HVR	Hague-Visby Rules
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce
IMCO	Inter-governmental Maritime Consultative Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
INCOTERMS	International Commercial Terms

IPG	Intergovernmental Preparatory Group
IRU	International Road Transport Union
ISIC Study	Integrated Services in the Intermodal Chain Study of 2005
JBL	Journal of Business Law
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
KCC	Korean Commercial Code
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MERCOSUR	Mercado Común del Sur
MT Convention	United Nations Convention on the Multimodal Transportation of Goods 1980
MTO	Multimodal Transport operator
MULTIDOC	BIMCO Multimodal Transport Bill of Lading
OTIF	Organisation for International Carriage by Rail
Ro-Ro	Roll on–Roll off
RR	Rotterdam Rules
SDR	Special Drawing Rights
TCM	Transport Combine de Merchandises.
TI	Transport Integrator
UIC	International Union of Railways
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTAD/ICC Rules	UNCTAD/ICC Rules for Multimodal Transport Documents 1992
UNECE	United Nations Economic Commission for Europe
UNIDROIT	International Institute for the Unification of Private Law
WCO	World Customs Organization
WTO	World Trade Organization

# CHAPTER 1 INTRODUCTION

## 1.1 The objectives of the thesis

International transport of goods into, out of and around a country plays an important part in improving economic growth through efficient transport networks. Over the last few decades, the scope of the maritime transport operations has greatly increased due to the advent of containerisation and the overall improvement of maritime logistics. This containerised carriage of goods has become widespread practice in the shipping industry<sup>1</sup> and has consequently facilitated the international transport of goods on a multimodal or door-to-door basis.<sup>2</sup> Given the desirability of multimodal operations, carriers also extend their responsibilities in these maritime logistic chains from port-to-port to door-to-door transport operations.

Much of the international trade is now carried out on a door-to-door basis, under one contract and with one responsible party and this multimodal transport has played an important role in international trade. However, the current legal framework governing multimodal transport fails to appropriately reflect these developments.

“The multimodal transport industry is inherently complicated.”<sup>3</sup>

It is true that the current legal regimes in the multimodal transport industry is quite complicated and fragmented. When it comes to the current multimodal regimes, one would have to admit that there is currently no international uniform regime in force to govern liability for loss, damage or delay arising from multimodal transport.

---

<sup>1</sup> The report by the UNCTAD provides that the world port container throughput, which is the number of movements taking place in ports, has substantially grown from zero in 1965 to approximately 488.9 million in 2007 and 515.7 million in 2008. See UNCTAD, *Review of Maritime Transport*, 2010, 95-96.

<sup>2</sup> Report of the United Nations Commission on International Trade Law on its thirty-fifth session (17-28 June 2002, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), paras. 223-224; Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), UN Doc. A/CN.9/510 (2002), paras. 26-32.

<sup>3</sup> C Hilton, ‘Multimodal Transport Operators-Recourse Actions’, in Chapter 3 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 40.

Instead, the current legal framework consists of a complex formation of international unimodal transport conventions designed to regulate carriage by sea, air, road, rail and inland waterway respectively,<sup>4</sup> various regional/sub-regional agreements, national laws and standard form contracts.<sup>5</sup>

The complexity of the situation has consequently caused muddles and uncertainty in the field of multimodal transport liability and resulted in difficulties when determining applicable liability rules in cases of loss, damage or delay. The present complicated and fragmented regime governing multimodal transport creates uncertainty, which in turn creates costly litigation, transaction costs and rising insurance costs.<sup>6</sup> The uncertainty and unpredictability produced by a complex legal base is thought to be inefficient and costly, producing a generally inhibiting effect.<sup>7</sup>

Although there have been several attempts to draft a set of rules to regulate liability arising from multimodal transport over the last few decades, none of these has brought about international uniformity. In 1980, the United Nations Convention on International Multimodal Transport of Goods (MT Convention) was adopted, but it did not attract the necessary number of ratifications and has not entered into force yet.<sup>8</sup> In the early 1990s, a set of standard contractual terms was prepared for incorporation into commercial contracts, i.e. the UNCTAD/ICC Rules. However, as these rules are contractual in nature, they are, by definition, subject to any applicable mandatory law and are, thus, not an effective means of achieving international uniformity.

Since the adoption of the MT Convention, more than 30 years have passed and

---

<sup>4</sup> The question as to whether the unimodal transport conventions could apply to the international unimodal stage of a larger multimodal transport contract is discussed in paragraph 2.5.1.

<sup>5</sup> For more details about the complicated current legal framework, see the UNCTAD Report on 'Implementation of Multimodal Transport Rules - Comparative Table', UNCTAD/SDTE/TLB/2/Add.1 (2001), which provides the summarised contents of existing international unimodal conventions, and regional, sub-regional and national multimodal laws and regulations.

<sup>6</sup> Furthermore, this problem is more serious among the developing countries having small and medium shipping companies as if there is no predictable legal framework, 'equitable access to markets and participation in international trade' would be much harder for those companies. UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), 10.

<sup>7</sup> European Commission, Final Report on Intermodal Transportation and Carrier Liability, which is the study co-funded by the European Commission, Director General for Transport, DGVII (June 1999), 5-11.

<sup>8</sup> For the reasons for the failure of the MT Convention, see paragraph 4.2.2.3.

during this time globalisation and the container revolution have led to an increased emphasis on multimodal transport. In response to these developments, and in view of the absence of international uniform regulation of liability, there has been a proliferation of diverse national, regional and sub-regional laws and regulations,<sup>9</sup> which often contain substantial elements of the MT Convention<sup>10</sup> and/or the UNCTAD/ICC Rules.<sup>11</sup> However, this has led to further disunification at the international level. Here, a more practical illustration of the inherently complicated multimodal transport will be explored through the following case study.

### **CASE 1**

Let us explain in a more practical way. Assume that A Line agreed to carry Samsung tablets stuffed in two containers for shipping from South Korea to inland United States destinations. A Line issued a multimodal bill of lading, i.e. a bill of lading covering both the ocean and inland portions of transport in a single document. A Line subsequently arranged the journey, subcontracting with B for rail shipment in the United States. The goods were shipped in A Line vessel to California and then loaded onto a B's train. A derailment along the inland route allegedly destroyed the cargo. The receiver tried to seek compensation for the damage to the goods.<sup>12</sup>

### **CASE 2**

Assume that AA airline agreed to carry goods from Singapore to Dublin. AA engaged the BB Trucking company, as a subcontractor to carry the goods from Paris to Dublin by road, including two roll-on, roll-off movements of goods from Paris across the English Channel to Manchester and from there across the Irish Sea to Dublin. The

---

<sup>9</sup> For the selective discussions of regional, sub-regional and national multimodal rules, see paragraphs 2.5.2 and 2.5.3. For more details about regional, sub-regional and national multimodal rules, see the UNCTAD Report on 'Implementation of Multimodal Transport Rules - Comparative Table', UNCTAD/SDTE/TLB/2/ Add.1 (2001).

<sup>10</sup> See paragraph 4.2.2.

<sup>11</sup> See paragraph 4.3.2.

<sup>12</sup> These facts are similar to *Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp* (2010) 561 US, where the cargo owner sued the carrier in a US court but the defendant carrier objected that there was no jurisdiction, because the bill of lading issued at the start of the carriage was subject to Tokyo jurisdiction. The cargo owner argued that it fell under the so-called US Carmack Amendment, which limited and apportioned liability in relation to rail carriage to the receiving carrier and the delivering carrier; and which also limited the parties' choice of jurisdiction to US state and federal courts.

goods were loaded by BB onto two trailers in Paris. Whilst in the course of being carried by road in England, some of the goods were stolen by a BB Trucking company driver. In addition, some of the goods were found to be damaged when they arrived in Dublin, but it cannot be identified exactly where the damage occurred. The receiver tried to seek compensation for the loss of and damage to the goods. Here, the AA airline as a multimodal carrier contracted to carry the goods from Singapore to Dublin and the contract was evidenced by an air waybill which indicated that the goods would be carried by air from Singapore to Paris and from there to Dublin on a road vehicle operated by AA airline.<sup>13</sup>

Here, because there is no applicable mandatory international convention, the parties to a multimodal transport contract are, of course, entitled to negotiate their own terms and can impose on the carrier a uniform liability throughout the period of transit. However, the claimant whose goods were lost during international multimodal transport may have to not only come to contract terms of A Line's bill of lading or AA airline's air waybill, but also the various cargo liability regimes, such as the Montreal Convention or Warsaw Convention, CMR, COTIF-CIM, Hague Rules, Hague-Visby Rules or Hamburg Rules in order to find out which one applies.<sup>14</sup> It would seem absurd that even though the parties wish to arrange a single contract of carriage, relying on their contractual terms through the whole journey, there are so many hurdles for their intention to apply. Any attempt to solve the problem by agreement is similarly restricted, since contractual provisions are liable to be overruled where a unimodal convention is mandatory on a particular leg.<sup>15</sup> Furthermore, the claimant also has to look at any applicable mandatory regional or national regulations. Therefore, in CASE 1, the question arose as to whether the US Carmack Amendment<sup>16</sup> or the US COGSA is applicable or not.

Another crucial problem is to determine where and when the cargo was lost or damaged and, thus, whether a particular unimodal transport convention for road or

---

<sup>13</sup> These facts are similar to *Quantum Corporation Inc. and Others v Plane Trucking Ltd. And Another* [2002] 2 Lloyd's Rep 25. See paragraph 2.5.1.2.

<sup>14</sup> For an overview of the fragmented and complex current multimodal system, see paragraph 3.2.1.

<sup>15</sup> JF Wilson, *Carriage of Goods by Sea* (7th edn, Pearson, 2010), 254. See also paragraph 2.5.1.

<sup>16</sup> The Carmack Amendment imposes liability on rail carriers under US federal law. See 49 USC sec 11706 (rail carriers).

air applies its compulsory regime. If the place of loss or damage cannot be localised or where damage has developed gradually throughout different legs of the journey, none of the unimodal convention regimes are relevant. The issue of non-localised is a typical problem in multimodal transport and it is worth mentioning that a high percentage of cargo damage is non-localised.<sup>17</sup> In that case, there may be a liability gap altogether, leaving the matter to be determined by the applicable national law and the standard form contract together with any international contractual rules or standard trading conditions incorporated into the contract, such as BIMCO's MULTIDOC 95, FIATA multimodal transport bill of lading<sup>18</sup> which incorporated the UNCTAD/ICC Rules for Multimodal Transport Documents.<sup>19</sup>

Here, it is also worth noting that a large scale survey conducted by the UNCTAD secretariat,<sup>20</sup> which was carried out through the industry and governments concerning the question of the feasibility of establishing a new international legal instrument for multimodal transport, pointed out that the great majority of all respondents do not consider the existing legal framework for multimodal transportation to be satisfactory and most respondents also do not consider the existing legal framework to be cost-effective.<sup>21</sup>

These difficulties presented by the various regimes and their potentially differing interpretation under the different applicable laws are obviously not desirable. This may result from the lack of an international uniform regime to govern liability for loss, damage or delay arising from multimodal transport. Consequently, the following question may arise;

What if there was an international multimodal convention governing a carrier's liability for loss, damage or delay in the field of multimodal transport?

---

<sup>17</sup> E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), A14. See paragraph 3.3.4.

<sup>18</sup> See paragraph 4.3.3.

<sup>19</sup> See paragraph 4.3.2.

<sup>20</sup> See Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003).

<sup>21</sup> Over 80% of the respondents considered that the current regime is not satisfactory and almost 80 % of the respondents also said that it is not cost-effective, citing in particular additional costs in relation to insurance, claims and legal advice as relevant factors increasing overall transport costs. *Ibid*, para 21.

This is the main objective of the thesis. The work will endeavour to take a step towards establishing the feasibility of an international multimodal liability regime, in particular, the desirability in principle of international multimodal convention, the acceptability of potential solutions and approaches to pursue this matter further in order to cope with muddles and uncertainty in the field of multimodal transport liability.

## **1.2 The structure of the thesis**

In order to pursue the objectives and aims of the thesis, it is divided into nine chapters, including the Introduction and Conclusion.

Chapter 1 will explore an overview of the thesis, focusing on the objectives and aims of the thesis. This chapter will also provide the overall structure of the thesis.

Chapter 2 will consider the concept of multimodal transport, specifically looking at the definitions and legal nature of multimodal transport. The theories on the nature of the multimodal transport contract are also discussed. This chapter will then describe the overview of the current regimes for multimodal transport and outline most of the different types of rule that may be applied in the field of multimodal transport.

Chapter 3 will find out the reasons for or desirability of an international multimodal liability regime in order to examine whether an international regulation for multimodal transport is necessary or not. This chapter will focus on the practical aspects, i.e. the substantial growth in container or door-to-door transport, and the legal aspects or problems arising from the current legal framework for multimodal transport.

Chapter 4 will look at past attempts for international multimodal solutions. Here, it is crucial to examine the fundamental question of why the past attempts failed and what we need to do in order to find something that would work internationally. In this regard, this chapter will especially scrutinize the reasons why the TCM Draft Convention<sup>22</sup> failed to draw enough support to be adopted and the reasons why the

---

<sup>22</sup> Transport Combine de Merchandises (TCM) Draft Convention. See paragraph 4.2.1.

MT Convention did not attract sufficient ratifications to enter into force. This chapter will then examine the contractual multimodal regimes, focusing on their common usage in multimodal transport contract and the limits to those contractual rules.

Chapter 5 will consider the possible ways forward for an international multimodal transport solution, having recognised that the current legal framework for multimodal transport is so fragmented and complex that the existence of an appropriate legal regime at the international level is essential. Here, the questions to be asked are which type of liability regime should be adopted in a possible international multimodal regime, and how to deal with specific issues arising from multimodal transport, i.e. limitation of liability, time for suit, recourse actions, non-localised loss as well as conflict of laws, and so on.

Chapter 6 and Chapter 7 will analyse two possible multimodal regimes, i.e. the Rotterdam Rules as a modified network system<sup>23</sup> and as the modified uniform system based on the EU Draft Regime,<sup>24</sup> which were recently introduced. As a result, it is worth looking at the whole picture of a possible international regime in order to find out whether the suggested type of liability system and each solution of the key substantive features could work well in practice.

Chapter 8 will consider the insurance aspects in multimodal transport. This chapter will explore the role of insurance in the context of multimodal transport, focusing on cargo insurance and liability insurance. Here, the question is to ask whether the insurers would agree to cover the liability under the EU Draft Regime or the Rotterdam Rules. It will always be a real practical problem. Another question is to ask about what the insurers would think, or whether insurance would be available for the multimodal liability.

In the conclusion, those issues will be summarised and some further comments will be provided.

---

<sup>23</sup> See Chapter 6.

<sup>24</sup> See Chapter 7.



# CHAPTER 2 GENERAL CONSIDERATIONS ON MULTIMODAL TRANSPORT

## 2.1 Introduction

In a multimodal context, ocean cargo carried from one location in one country to another location in another country would typically first travel by road haulier from a manufacturing plant to a port of loading and then it would travel by ship from the port of loading to a port of discharge. The cargo would then travel by train, followed by carriage by road haulier, to a retailer's warehouse.

This door-to-door movement of goods, involving more than one mode of transport is considered as multimodal transport. However, the appropriate concept, definition and language of multimodal transport have not been settled as yet because of the failure to agree a widely accepted international multimodal convention. Several phrases, such as 'multimodal transport', 'combined transport', 'intermodal transport' and 'through transport' have been used interchangeably and loosely.<sup>25</sup> Therefore, the first section of this chapter will explore the concept of multimodal transport, especially looking at the definitions and legal nature of multimodal transport.

Following that, another issue shall be considered as to whether the current legal framework governing multimodal transport appropriately reflects the recent developments of multimodal carriage in the transport industry. In other words, what are the current multimodal regimes which govern the liability of the multimodal carrier? The second section of this chapter will, therefore, describe the overview of current regimes for multimodal transport and sketch out most of the different types of rules that may be applied in the field of multimodal transport.

---

<sup>25</sup> See paragraph 2.4.

## **2.2 The concept of multimodal transport**

Given the fact that there is currently no international multimodal convention with worldwide acceptance, it might be said that there is no agreed single concept or definition of multimodal transport or multimodal transport contract. Having looked at the definitions from several regulations or rules, it, however, seems that there are some common elements in them.

### **2.2.1 The definition of multimodal transport**

#### **The definition under the MT Convention<sup>26</sup>**

In the first instance, it is worth looking at the definitions provided in article 1 of the MT Convention which might be the most authoritative and precise definition of the term at present.<sup>27</sup> Article 1.1 of the MT Convention provides that “international multimodal transport means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.” This should be read together with the definition of “multimodal transport operator (MTO)” provided in article 1.2 of the MT Convention.<sup>28</sup>

Here, there are several essential elements. The concept requires not only the physical combination of transports but also the contractual aspects for the carriage. One of the most significant elements is that the carrier bears legal responsibility for

---

<sup>26</sup> The United Nations Convention on International Multimodal Transport of Goods 1980 (MT Convention) was adopted at Geneva on 24 May 1980, but has not entered into force. The reasons for the failure of the Convention to attract wide international support will be dealt with later in paragraph 4.2.2.3.

<sup>27</sup> The definition of multimodal transport was shaped largely by the MT Convention and the currently widespread concepts of multimodal transport are very similar to the one in article 1 of the MT Convention.

<sup>28</sup> Article 1.2 of the MT Convention states that “Multimodal Transport Operator (MTO) means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.” For the purpose of the thesis, the “MTO” or “multimodal carrier” will be interchangeably used to serve the above conception.

the entire transport of goods from the moment he takes the possession of the goods until the moment that they are delivered to the consignee.

### **The definition under the UNCTAD/ICC<sup>29</sup> Rules 1992<sup>30</sup>**

Rule 2.1 of the UNCTAD/ICC Rules provides that “multimodal transport contract means a single contract for the carriage of goods by at least two different modes of transport,” and also provides in rule 2.2 that “multimodal transport operator (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.”

The UNCTAD/ICC Rules do not provide the exact definition of multimodal transport, but rather focus on the multimodal transport contract. Furthermore, the definition in the UNCTAD/ICC Rules is similar to the definition in the MT Convention. Here, it is worth noting that the ICC Uniform Rules for a Combined Transport Document 1975 (ICC Rules 1975), which is the predecessor of the UNCTAD/ICC Rules 1992, provide for the definition of combined transport that “combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country.”<sup>31</sup> Although the term ‘combined transport’ was used instead of multimodal transport, it should be noted that those terms have been used interchangeably with the similar meaning.

### **The definition defined by the UNECE<sup>32</sup> and UNCTAD**

According to ‘Terminology on Combined Transport’<sup>33</sup>, multimodal transport can be defined as “carriage of goods by two or more modes of transport”. The UNCTAD

---

<sup>29</sup> United Nations Commission on Trade and Development (UNCTAD) / International Chamber of Commerce (ICC).

<sup>30</sup> UNCTAD/ICC Rules for Multimodal Transport Documents 1992 (UNCTAD/ICC Rules).

<sup>31</sup> Rule 2(a) of the ICC Rules 1975.

<sup>32</sup> The United Nations Economic Commission for Europe (UNECE).

<sup>33</sup> UNECE issued ‘Terminology on Combined Transport’, which provides the principal terms used in combined transport or related to it. This is intended for the work of the three intergovernmental organisations, i.e. the European Community (now the European Union (EU) as from 1<sup>st</sup> December 2009 with the coming into force of the Lisbon Treaty), the European Conference of Ministers of Transport (ECMT) and the UNECE, but it may be applied to other regions of the world. See UNECE, TRANS/WP.24/2000/1. However, it is noted that those definitions are not applicable in their strictest sense to the legal field.

also defined multimodal transport broadly as “the movement of goods from one country to another by at least two different modes of transport (e.g. sea, land or air) performed under one contract.”<sup>34</sup>

This provides a simple and concise definition of the term, but it does not mention that it is under one contract and one responsible party. In this respect, the definition of the MT Convention is more accurate.

### **The definition defined by the Dutch Civil Code (DCC)**

There are several countries which enacted national regulations for multimodal transport.<sup>35</sup> Among others, the Dutch Civil Code provides a similar definition in article 8:40 which states that “A contract of multimodal carriage of goods is the contract of carriage whereby the carrier (MTO) engages himself under one single contract towards the consignor to perform the transport in part by sea, inland waterway, road, railway, air, pipeline or by means of any other mode of transport.” The definition itself is somewhat similar to that in the MT Convention, but it extends the scope of application to carriage by pipeline as well.

### **The definition for the purpose of the thesis**

For the purpose of the thesis, the definition of multimodal transport or multimodal transport contract can be reproduced as follows. However, there is nothing new about this concept, but it is quite similar to and paraphrased from the definitions given above.

A multimodal transport contract means a contract of carriage whereby a multimodal carrier or MTO, who acts as a principal and assumes responsibility for the performance of the contract, undertakes to perform or procure the carriage of goods by at least two different modes of transport from a place where the goods are taken in charge in one country to a place designated for delivery in a different country.

---

<sup>34</sup> See the report by the UNCTAD secretariat, ‘Facing The Challenge of Integrated Transport Services’, UNCTAD/SDD/MT/7 (28 April 1995), 17.

<sup>35</sup> See paragraph 2.5.3.

## **2.2.2 The nature of multimodal transport**

Although there is no international authority which could provide the legal natures of multimodal transport at present, there are, as seen above, commonly agreed natures or characteristics of multimodal transport.

### **2.2.2.1 By at least two different modes of transport**

Firstly, multimodal transport is normally defined as carriage consisting of at least two different modes of transport.<sup>36</sup> As seen above, the main element is that multimodal transport is broadly regarded as the transport of goods from one country to another by at least two different modes of transport.

However, this physical linkage of transport modes should come together with the contractual meaning, which will be discussed below. Because if the emphasis is only on the physical linkage, then it is not confined to a link based on a single contract in the sense of a multimodal contract providing for a through liability.<sup>37</sup> Here this physical nature could not distinguish between the contract of carriage procured by freight forwarders as agent only and the contract of carriage procured by freight forwarders as principal. They both provide for the linking of modes by combining contracts, which is typical of arrangements made by freight forwarders. However in order to refine the nature of multimodal transport further, the following natures should also be considered.

### **2.2.2.2 On the basis of one multimodal transport contract**

The second important feature is that the carriage should be based on one single contract between a multimodal carrier and a shipper. This means that a multimodal transport contract is the main contract which would regulate the relationship between the multimodal carrier and the consignor or consignee. When a multimodal carrier agrees to be responsible for the whole transport of goods, in general, it is unlikely that they will carry the goods on their own vessels or vehicles for the entire

---

<sup>36</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), 1.

<sup>37</sup> DA Glass, *Freight forwarding and multimodal transport contracts* (2nd edn, Informa, 2012), para 1.1 (fn 1).

multimodal stage, but they will rather subcontract some of or all of the multimodal transport. In this case, the relationship between the multimodal carrier and the shipper would be governed by one single multimodal transport contract, whereas the relationship between the multimodal carrier, acting as a shipper, and subcontracting carriers would be regulated by relevant unimodal conventions.

### **2.2.2.3 Under the responsibility of one multimodal carrier**

The third important feature is that the multimodal carrier or MTO accepts responsibility for the whole carriage, from the moment the goods are taken over from the consignor until the moment they are delivered to the consignee. As mentioned above, the multimodal carrier themselves may actually perform only part of the multimodal carriage, or even none of it, only arranging subcontracting carriers to perform it. What is important here is that the multimodal carrier is responsible for the whole carriage to the shipper if the goods are lost or damaged. Thus, if the carrier only acts as an agent, or on behalf of the consignors or the carriers participating in the multimodal transport operations, it would not be sufficient for the nature of multimodal transport. The multimodal carrier should act as a principal and assumes responsibility for the whole performance of the contract. In acting as a principal, the multimodal carrier is distinguished from the freight forwarder, who acts as an agent.

Therefore, it seems that the concept of multimodal transport covers the carriage of goods by at least two different modes of transport on the basis of one multimodal transport contract under the responsibility of a single transport operator.<sup>38</sup>

## **2.3 The theories on the nature of the multimodal contract**

One of the questions that may arise is whether a contract for multimodal transport can be regarded as a form of contract *sui generis*, essentially different from contracts

---

<sup>38</sup> The concept of multimodal transport should imply multimodal 'international' transport as the literal meaning of multimodal transport may indicate only the combination of more than two modes of transport regardless of whether it is international or not. For the purpose of the thesis, multimodal transport means international multimodal transport.

solely concerned with carriage by a single mode, or a form of mixed contract, which is composed of unimodal transport forms whose regimes are, therefore, still applicable. This is both relevant to whether rules focused on multimodal transport can conflict with unimodal ones and to whether there is a clear line to be drawn between different types of multimodal transport. For instance, if goods in transit are damaged on the international road leg of a multimodal transport, the question may arise as to which rules apply. Thus, one of the questions that may arise is whether the CMR applies to multimodal transports of itself or the CMR can only apply if the national law applicable refers to it.<sup>39</sup> The answers may vary depending on the theories on the nature of multimodal transport.

### **2.3.1 The contract *sui generis***

The main idea behind the contract *sui generis*<sup>40</sup> approach is that, since a contract for multimodal transport is an autonomous form of contract, it should not be regarded as a contract for a particular mode or fall within rules directed towards contracts for a single mode. Thus, a multimodal transport contract is a contract *sui generis* which is not made up of a series of unimodal contracts.<sup>41</sup> When this approach is applied to the multimodal contract, this contract is considered to be of a new type of contract with its own unique character, formed by combining several contracts into a new whole.<sup>42</sup> Hence, whenever modes of transport are combined in a contractual framework,<sup>43</sup> a new form of contract is created which can no longer be regarded as a contract for each of the individual modes.

It is theoretically possible that there cannot be any conflict between unimodal

---

<sup>39</sup> This question might in future be answered by article 26 of the Rotterdam Rules. See paragraph 6.6.

<sup>40</sup> The term *sui generis* means 'being the only example of its kind' or 'constituting a class of its own'.

<sup>41</sup> E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), A17; DC Jackson, 'The Conflict of Conventions', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), G2; See also DA Glass, *Freight forwarding and multimodal transport contracts* (2<sup>nd</sup> edn, Informa, 2012), paras 3.117-3.118.

<sup>42</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 2.3.2.1.3.

<sup>43</sup> Because at present there is no international law specifically regulating the multimodal contracts and therefore it is subject to the general rules of contract law and/or transport law only.

and multimodal transport conventions. This is because one could argue that multimodal transport is something entirely different from unimodal transport. In other words, despite the fact that a certain unimodal transport convention according to its applicability rules would be applicable, that would not be the case if the form of transport in question formed part of a multimodal transport. According to this theory, multimodal transport is a contract *sui generis* and, therefore, from the outset, could not be subordinated to any unimodal transport convention. Under this approach, the multimodal contract is not a mere contract for the carriage of goods, rather it is considered not only the agreement for carriage, but also the important additional services inherent to multimodal transport such as transshipment or storage. The multimodal contract encompasses the complete organisation of the transport chain, which results in far more obligations for the multimodal carrier than any other unimodal carriers involved.<sup>44</sup>

The argument of a contract *sui generis* approach prevailed, in particular, during the time when the United Nations Convention on International Multimodal Transport of Goods 1980 was adopted. However, upon the failure of the MT Convention to attract more support, and in the absence of an international mandatory convention governing multimodal transport, the *sui generis* approach has been losing its support and, consequently, the mixed contract approach has become more popular. It is also worth noting here that this *sui generis* argument was attempted and failed in the decision of the Court of Appeal in *Quantum*.<sup>45</sup>

### **2.3.2 The mixed contract**

The idea behind the mixed contract is that a multimodal transport is not a contract *sui generis*, but rather a chain of contracts or a mixed contract, which is composed of unimodal transport forms whose regimes are, therefore, still applicable. Thus, this mixed contract approach admits that the different stages of the transport have the

---

<sup>44</sup> See M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 2.3.2.1.3.; W Driscoll and PB Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 *Tulane Law Review* 193, 198-199.

<sup>45</sup> *Quantum Corporation Inc. and Others v Plane Trucking Ltd. and Another* [2002] 2 *Lloyd's Rep* 25. See paragraph 2.5.1.2.

distinct features of certain unimodal contracts which are regulated by their own provisions, such as laws governing carriage by sea, road, rail, air or inland waterway. This mixed approach is, in essence, identical to the network system of liability,<sup>46</sup> which is currently widespread in the multimodal transport contracts. Since the current legal system of multimodal regimes adopts the network system of liability, the multimodal contract for the carriage of goods is generally considered to be a mixed contract.<sup>47</sup> Furthermore, the Rotterdam Rules, which are recently adopted, also took the same approach.<sup>48</sup>

This theoretical approach has the advantage of avoiding differences in liability with respect to cargo that is being transported in the same way. For the cargo interests, it might, in fact, seem strange to see different liability regimes being applied to the damage of goods that were damaged in the same way on the same part of the journey. Although the damage occurred in the same accident, the liability would differ, for example, a unimodal transport convention would be applicable to one part of the cargo, while the multimodal convention would be applicable to the other part.

### **2.3.3 The absorbed contract**

Under the absorbed contract, the main mode of the contract, which is predominant, determines which regime applies to the contract as a whole, whereas the other subordinate modes of the contract are absorbed into the main element as it were.<sup>49</sup> This approach is more focused on the situations where a contract of carriage primarily relies on one specific mode of transport, which also includes another minor, subordinate mode of transport. Therefore, it allows the main mode of transport to

---

<sup>46</sup> For more information about types of liability system, see paragraph 5.2.

<sup>47</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 2.2.5; *Quantum Corporation Inc. and Others v Plane Trucking Ltd. and Another* [2002] 2 Lloyd's Rep 25, at 33, where Mance LJ states that "Thus far, therefore, I see both attraction and force in a conclusion that article 1 may be read as applying CMR to the international road carriage element of a 'mixed' or 'multimodal' contract providing for two different means of carriage."

<sup>48</sup> Article 26 of the Rotterdam Rules. See paragraph 6.6.

<sup>49</sup> See M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 2.3.2.1.1.

absorb the less significant mode of transport which precedes and follows the main carriage. This may apply to the situations where there is a multimodal transport which includes a main carriage by sea and preceding or subsequent carriages by road or rail.<sup>50</sup>

However, this absorbed contract approach could also apply to unimodal contract of carriage. Article 18.4 of the Montreal Convention clearly states that this unimodal convention also applies to where, for example, the road carriage takes place for the purpose of loading, delivery or transshipment in the performance of a contract for carriage by air.<sup>51</sup> Thus, the operations of pick-up and delivery of goods are regarded as being of minor importance compared to the main mode of the unimodal contract, consequently being absorbed into the unimodal contract. Therefore, this theory will not be enough to explain the nature of the multimodal transport contract.

## 2.4 Distinction between similar terms

The term ‘multimodal transport’ also used to be called ‘combined transport’ or ‘through transport’ or ‘intermodal transport, or ‘door-to-door transport’. It is common to see references to those different terms. The terms are used interchangeably and describe a continuous shipment which moves in two or more modes of transport.<sup>52</sup> This linguistic usage may lead to confusion and uncertainty. Here, one of the questions that may arise is whether this variety of terms is analytically important and they are categorised differently or not.<sup>53</sup> Some authorities consider them synonyms of multimodal transport<sup>54</sup>, but some other authorities pointed out that those terms

---

<sup>50</sup> The CASE 1 illustrated above would be one of the examples. See paragraph 1.1.

<sup>51</sup> See paragraph 2.5.1.1.

<sup>52</sup> W Driscoll, ‘The Convention on International Multimodal Transport: A Status Report’ (1978) 9 *JMLC* 441, 441; M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 1.2.

<sup>53</sup> DR Thomas, ‘Multimodality and Through Transport – Linguistics, Concepts and Categories’, paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011), 1.

<sup>54</sup> Hoeks mentioned that multimodal carriage is not the only term and combined carriage, intermodal carriage, multimodalism and intermodalism are used in legal literature. But she regarded these terms as synonyms of multimodal carriage for her work. See M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010),

have distinguished concepts themselves<sup>55</sup> and the confusion in language stems partly from the need to cover different ideas and variations in commercial or geographical usage.<sup>56</sup>

Here, the terms ‘multimodal transport’, ‘combined transport’ and ‘intermodal transport’ are believed to have different degrees of meaning by those who show a preference for one or the other. As a result, it is necessary to be careful when using these expressions.

### 2.4.1 Combined transport

As mentioned earlier, the ICC Uniform Rules for a Combined Transport Document 1975 provide that “combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country.”<sup>57</sup>

It is confusing because the definition is very similar to that of multimodal transport. Here it seems that the name is not so significant, but rather the historical background. Historically, the term ‘combined transport’ was widely used in the past, but multimodal transport has become a more modern term since the international legislative efforts, i.e. the MT Convention and the UNCTAD/ICC Rules, were made.<sup>58</sup> Thus, although the terms ‘combined transport’ or ‘combined transport operator (CTO)’ or ‘combined transport document’ were the common expressions in the past, the terms ‘multimodal transport’ or ‘multimodal transport operator’ have been given preference over the term combined transport because the MT Convention has used the term multimodal transport, which may at least imply the international

---

para 1.2.

<sup>55</sup> Several similar expressions used in multimodal transport are defined and explained by the UNECE and UNCTAD, see the documents TRANS/WP.24/2000/1 and UNCTAD/SDD/MT/7 (28 April 1995), 17-18. See also JM Alcántara, ‘The new regime and multimodal transport’ [2002] 3 LMCLQ 399, 400; DA Glass, *Freight forwarding and multimodal transport contracts* (2nd ed, Informa, 2012), paras 1.7-1.10.

<sup>56</sup> DA Glass, *Ibid*, para 1.7.

<sup>57</sup> Rules 2(a) of the ICC Rules 1975.

<sup>58</sup> The more modern reference is to multimodal transport which reflects the influence of the MT Convention. See DA Glass, *Ibid*, para 1.7 and R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 1.2.

consensus on this matter.<sup>59</sup>

However, the term ‘combined transport’ has also been used for the European railway industry, referring to bimodal road/rail transport, without any reference to the carrier’s liability.<sup>60</sup> Here, one thing is worth mentioning as to the transition of usage from combined transport to multimodal transport. Since the replacement of the ICC Uniform Rules for a ‘Combined Transport’ Document 1975 with the UNCTAD/ICC Rules for ‘Multimodal Transport’ Documents 1992, it seems that this has allowed the European transport industry to use the term “combined transport” to mean road/rail combinations only.<sup>61</sup> Following that, the UNECE has defined combined transport as “intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and/or final legs carried out by road are as short as possible.”<sup>62</sup>

#### **2.4.2 Through transport**

The expression of through transport is also used as an alternative to multimodal transport or combined transport. Although through transport and multimodal transport are conceptually similar, the recent authority suggested that there is a distinction.<sup>63</sup>

Generally, through transport may be used to describe a contract of carriage which is on a port-to-port basis, but involving two or more sea legs. Scrutton<sup>64</sup> also described it as “a contract for the carriage of goods from one place to another in separate stages, of which at least one stage is a conventional sea transit.” This would happen in a situation where there are two or more separate, fragmented sea voyages and the carrier contracts to carry on a port-to-port basis and issues a transport document which covers the entire carriage. Here, the carrier exercises a right of

---

<sup>59</sup> R De Wit, *Ibid.*

<sup>60</sup> UNCTAD/SDD/MT/7 (28 April 1995), para. 64.

<sup>61</sup> *Ibid.*, para. 65.

<sup>62</sup> UNECE, TRANS/WP.24/2000/1, 4.

<sup>63</sup> Thomas compared and distinguished the terms ‘multimodal transport’ and ‘through transport’, and provided their conceptual differences. See DR Thomas, ‘Multimodality and Through Transport – Linguistics, Concepts and Categories’, paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011).

<sup>64</sup> B Eder, et al, (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell, 2011), 17-001.

transshipment and also exercises a right to subcontract out any part of the contractual undertaking.

The main distinction here is that through transport is carried out on a port-to-port basis and involves two or more sea legs whereas multimodal transport is conducted on a door-to-door basis and involves two or more different modes of transport.<sup>65</sup>

### **2.4.3 Intermodal transport**

Intermodal transport has been defined as “the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes.”<sup>66</sup> This expression has been widely used particularly within Europe and the United States of America. Under the intermodal transport, goods are carried from door to door in the same intermodal transport unit, usually a container or piggyback trailers, etc. Here emphasis should be on the same loading unit. Unlike multimodal transport, intermodal transport concerns with the particularity that the cargo is not loaded or unloaded or handled when switching from one transport mode to the other.

However, this might not be the case for the transport of goods by air and sea carriage. Where there is a combination of air and sea modes in international transport, containers are usually unstuffed at a port and the goods then packaged for the air transport.

### **2.4.4 Door-to-door transport**

Door-to-door transport has also been widely used to refer to a carriage of goods from an inland place outside the port of loading to another inland place outside the port of discharge. Although it normally consists of more than one mode of transport, for

---

<sup>65</sup> DR Thomas, ‘Multimodality and Through Transport – Linguistics, Concepts and Categories’, paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011), 8.

<sup>66</sup> UNECE, TRANS/WP.24/2000/1, 4. Here, the term ‘intermodality’ has also been defined to describe a system of transport whereby two or more modes of transport are used to transport the same loading unit or truck in an integrated manner, without loading or unloading, in a door to door transport chain.

instance by road and sea or railway and sea, it does not have to be multimodal. Door-to-door may involve road transportation only. Furthermore, door-to-door transport does not necessarily require a single contract, transport document and one responsible party for the entire transit.<sup>67</sup>

## **2.5 Current legal framework for multimodal transport**

The second section of this chapter will now consider the overview of current regimes for multimodal transport and sketch most of the different types of rules that may be applied in the field of multimodal transport. As mentioned earlier, much of the international trade is now carried out on a door-to-door basis, under one contract and with one responsible party and this multimodal transport has played an important role in international trade. However, the current legal framework governing multimodal transport fails to appropriately reflect these developments. When it comes to the current multimodal regimes, it is admittedly true that there is currently no international uniform regime in force to govern liability for loss, damage or delay arising from multimodal transport. Instead, the current legal framework consists of a complex formation of international unimodal transport conventions designed to regulate carriage by sea, air, road, rail and inland waterway respectively, various regional/sub-regional agreements, national laws and standard form contracts.<sup>68</sup>

This section will mainly focus on the background and scope of application of the current legal framework for multimodal transport. To start with, the general background to the regimes will be needed in order to provide an overall picture. Second of all, the scope of application is also absolutely critical, because if we have a problem in practice, the first thing we are going to ask is whether a set of rules applies to the problem and, if so, which one would apply. However, some other issues such as limitation of liability and time for suit will be discussed in the relevant

---

<sup>67</sup> JM Alcántara, 'The new regime and multimodal transport' [2002] 3 LMCLQ 399, 400.

<sup>68</sup> For more details about the complicated current legal framework, see the UNCTAD Report on 'Implementation of Multimodal Transport Rules - Comparative Table', UNCTAD/SDTE/TLB/2/Add.1 (2001), which provides the summarised contents of existing international unimodal conventions, and regional, sub-regional and national multimodal laws and regulations.

parts of the thesis.<sup>69</sup>

### **2.5.1 International conventions applicable to unimodal transport**

A multimodal transport operation would be made up of a number of unimodal stages of transport, such as air, road, rail, sea or inland waterway. Each of these is usually governed by a mandatory international convention or national law.

Carriage of goods by air has been subject mainly to the Warsaw Convention 1929<sup>70</sup> and its various amending instruments (the so-called “Warsaw System”), but it is now largely superseded by the Montreal Convention 1999<sup>71</sup>. Carriage of goods by road is generally governed by the CMR<sup>72</sup>. Carriage of goods by rail is subject to the COTIF-CIM,<sup>73</sup> which is known as the CIM, drafted as an appendix to a framework convention called COTIF. Carriage of goods by inland waterway is the subject of the CMNI.<sup>74</sup> Carriage of goods by sea is subject to the Hague Rules,<sup>75</sup> Hague-Visby Rules<sup>76</sup> or the Hamburg Rules.<sup>77</sup>

Thus, different liability rules based on international unimodal conventions establishing different mandatory liability regimes for each mode may apply to each leg of multimodal transport. Here, the question may arise as to whether the unimodal

---

<sup>69</sup> For limitation of liability, see paragraphs 3.3.2.1 and 5.3.1 and for time for suit, see paragraphs 3.3.2.2 and 5.3.2.

<sup>70</sup> Convention for the Unification of Certain Rules Relating to International Carriage by air, 1929 (Warsaw Convention), was signed at Warsaw on 12 October 1929 and entered into force on 13 February 1933.

<sup>71</sup> Convention for the Unification of Certain Rules for the International Carriage by air, 1999 (Montreal Convention), was adopted on 28 May 1999 and entered into force on 4 November 2003.

<sup>72</sup> Convention on the Contract for International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (CMR), was adopted on 19 May 1956 and entered into force on 2 July 1961.

<sup>73</sup> Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Protocol of Modification of 3 June 1999 to its Appendix B, containing Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) (COTIF-CIM).

<sup>74</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (CMNI), was adopted in 2000 and entered into force on 1 April 2005.

<sup>75</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), was signed at Brussels on 25 August 1924 and entered into force on 2 June 1931.

<sup>76</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby Rules) was adopted at Brussels on 23 February 1968 and entered into force on 23 June 1977.

<sup>77</sup> United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) was signed at Hamburg on 31 March 1978 and entered into force on 1 November 1992.

conventions could indeed apply to the international unimodal stage of a multimodal transport contract. Thus, if goods are damaged on the international road, air, or sea leg of a multimodal transport, the question may arise as to which rules apply. This will depend on the scope of application of each unimodal instrument, which is necessary to be considered. Some conventions intend to provide clarity on the exact scope of the convention when a multimodal transport contract is at stake, whereas some conventions do not contain a clear wording.<sup>78</sup>

Furthermore, some of these unimodal conventions also extend their scope of application into multimodal transport to a certain extent. Thus, some conventions may apply to not only the unimodal stage of a multimodal transport, but also the entire journey of multimodal transport. Therefore, one of the questions that may arise is the extent to which these international conventions applicable to unimodal transport would also apply to multimodal transport.

### **2.5.1.1 Carriage of goods by air**

#### 2.5.1.1.1 Background

The carriage of goods by air has been regulated by international uniform law for many years. The first international instrument governing air carriage was the Warsaw Convention, which was signed in 1929. Since its entry into force, this regulation has undergone many changes. It was amended by several protocols and a separate convention.<sup>79</sup>

However, the Warsaw Convention is now largely superseded by the Montreal

---

<sup>78</sup> M Hoeks, 'Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL Draft instrument' (2008) 10 *European Transport Law* 257, 259.

<sup>79</sup> The Warsaw Convention 1929 was amended by the Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 (Hague Protocol) and supplemented by the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (Guadalajara Convention) and amended again by the Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971 (Guatemala City Protocol) and Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol, signed at Montreal on 25 September 1975 (Montreal Protocols).

Convention.<sup>80</sup> The earlier Conventions on carriage by air were codified, modified and updated in the Montreal Convention and article 55 of the Montreal Convention provides that its provisions shall prevail over any rules which apply to international carriage by air between States Parties to that Convention by virtue of those States commonly being party to the previous instruments. Thus, the following research will be based on the Montreal Convention.

#### 2.5.1.1.2 Scope of application

The Montreal Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.<sup>81</sup> The term ‘international carriage’ is defined specifically as any carriage in which, according to the agreement between the parties, the place of departure and the place of destination are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State.<sup>82</sup>

#### **Multimodal scope of application**

However, the Montreal Convention contains very specific provisions on multimodal transport in relation to their scope of application. For the scope of application, although article 1 of the Montreal Convention provides the relevant provisions, the provisions on multimodal carriage are in article 38.1 and article 18.4. Article 38.1 of the Montreal Convention provides that, in case of multimodal carriage performed partly by air and partly by any other modes of transport, the Convention only applies to international carriage by air. Therefore, this air carriage Convention does not apply to the whole of the multimodal contract, but will apply to the air leg of a multimodal transport contract. This adopts so-called the network system<sup>83</sup> and accordingly an international air leg in a multimodal transport contract will always be governed by the provisions of one of the air carriage Conventions.

---

<sup>80</sup> There are now 103 Parties to the Convention (as of May 2013), which reflects genuinely worldwide coverage. The complete list of signatories is available through the International Civil Aviation Organization at [http://www.icao.int/secretariat/legal/List of Parties/Mtl99\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf).

<sup>81</sup> Article 1.1 of the Montreal Convention.

<sup>82</sup> Article 1.2 of the Montreal Convention.

<sup>83</sup> For more information about network system, see paragraph 5.2.2.

#### **Two limits of article 18.4**

However, article 18.4 provides two limits, extending the period of carriage by air. First, “if the carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, then any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.” Second, “if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.” Therefore, if an air carrier agrees to perform a stage outside the airport, and it is unclear where the loss or damage occurred, it is presumed, subject to proof of the contrary, to have occurred during the carriage by air.<sup>84</sup> It is true that this presumption could be rebutted if, for example, a cargo was stolen during the road stage. However, if the cause of loss or damage is not localised, the rules of the Montreal Convention could apply to other modes of transport. The rationale behind this provision is to extend the scope of the Montreal Convention in cases of non-localised loss, but only in cases where the air carriage is supplemented by carriage by another mode.<sup>85</sup>

For instance, this kind of carriage normally involves delivering cargo to a consignee from an airport of destination, or collecting cargo from a consignor and taking it to an airport of departure, or transporting cargo between two airports for the purpose of transshipment. Here one question may arise as to whether the length of the road stage is a factor in deciding whether it is performed incidental to a contract for air carriage or not. However, even if a journey between New York City and Newtown, Pennsylvania was a long enough, it was held that the journey was incidental. In *Commercial Union v Alitalia*,<sup>86</sup> a crated machine was sent by air from Italy to New York and then by road to a point in Pennsylvania, where the crate was opened and serious damage discovered. The claimant argued that the Warsaw Convention applied in view of article 18.3<sup>87</sup> since land transport was performed incidental to a contract for air carriage, whereas Alitalia argued that here the road phase was not incidental,

---

<sup>84</sup> M Clarke and D Yates, *Contracts of Carriage by Land and Air* (Informa, 2008), para 3-108.

<sup>85</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 5.3.3.3.

<sup>86</sup> *Commercial Union Ins. Co. v Alitalia Airlines, S.p.A.* 347 F.3d 448(2 Cir., 2003).

<sup>87</sup> The provision is essentially the same as article 18.4 of the Montreal Convention.

and that being so, the case was that of multimodal transport subject to article 31,<sup>88</sup> according to which the air Convention was confined to the air phase to New York. Cardamone, Circuit Judge stated that “we recognise that a journey between New York City and Newtown, Pennsylvania may seem like a long one to be incidental. However, the expansive distances often involved in international shipment make relative the concept of ‘minimum importance.’ The reality that airlines operate more frequently out of major cities than rural areas makes it likely that ground transit of minimum importance for purpose of delivery could, in some contexts, be quite far. Indeed, distance is nowhere a factor in any of the cases we have found addressing this issue.”<sup>89</sup> A road or rail phase before or after the air phase is to be expected, but what counts most is the contract and what the air carrier has promised to do. In the contract in question carriage began when the goods were picked up in Italy and ended on delivery in Pennsylvania.<sup>90</sup>

### **2.5.1.2 Carriage of goods by road**

#### 2.5.1.2.1 Background

Carriage of goods by road plays an essential role in the field of multimodal transport and it plays a part in almost all contracts of multimodal carriage. Carriage by road is often used for the transport of goods from and to major hubs such as ports, train stations or airports. Following the recognition of “the desirability of standardising the conditions governing the contract for the international carriage of goods by road”<sup>91</sup>, the CMR was adopted on 19 May 1956 and started to regulate international road carriage. The parties to the CMR are largely within Europe and the near and Middle East.<sup>92</sup>

---

<sup>88</sup> The provision is the same as article 38 of the Montreal Convention, which provides that in case of multimodal carriage performed partly by air and partly by any other modes of transport, the provisions of this Convention apply only to the carriage by air.

<sup>89</sup> *Commercial Union Ins. Co. v Alitalia Airlines, S.p.A.* 347 F.3d 448(2 Cir., 2003), 468.

<sup>90</sup> M Clarke and D Yates, *Contracts of Carriage by Land and Air* (Informa, 2008), para 3-109.1.

<sup>91</sup> See the Preamble to the CMR.

<sup>92</sup> There are now 55 Parties to the CMR (as of May 2013). For more details, see UN Treaties at <http://treaties.un.org>.

#### 2.5.1.2.2 Scope of application

The main provision on scope of application of the CMR can be found in article 1,<sup>93</sup> which states that if international carriage is to or from a contracting state, the CMR applies to ‘every contract for the carriage of goods by road.’ Here, article 1 of the CMR does not literally demand that the whole voyage has to be made exclusively by road, or even predominantly by road, just that it has to have a road leg.<sup>94</sup> While article 1 of the CMR does not provide a clear and satisfied wording, article 2 mentions multimodal transport.

Regarding the multimodal scope, the explicit provision on multimodal scope of application can be found in article 2.1. Article 2.1 provides that “where a road vehicle containing goods is carried over part of the journey by sea, rail, inland waterways or air, and the goods are not unloaded from the vehicle, i.e. roll-on/roll-off (Ro-Ro) transport, the CMR shall, nevertheless, apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport...” It also provides that if there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention. Thus, if any loss, damage or delay occurs during the carriage by other means of transport, but due to the act or omission of the road carrier or if the loss is not localised, then the CMR would apply to the entire multimodal carriage.

However, since the CMR does not contain the clear wording, one of the

---

<sup>93</sup> Article 1.1 of the CMR provides that “This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.”

<sup>94</sup> Note by the Secretariat, Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – General remarks on the sphere of application of the draft instrument, UNCITRAL WG, 11th Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003), para 115.

questions that may arise is whether the CMR could apply to the road leg of a larger multimodal transport contract. Regarding this issue, the positions of the countries are different. In *Quantum*<sup>95</sup>, a decision by the English Court of Appeal, it was held that the CMR applied to a road leg in the UK in circumstances where the contract covered more than one mode of carriage. In that case, goods had been carried by plane from Singapore to Paris to then be transported by road and as a roll-on/roll-off to Dublin. The court concluded that this last leg of the transport was ruled by the CMR. However, a recent German case<sup>96</sup> suggested that the CMR should be construed relatively narrowly and article 1.1 be interpreted as ‘carriage of goods by road only’ and article 2 was to be understood as an exception to this rule. In that case, goods had been carried by plane from Tokyo to Rotterdam and by road from Rotterdam to Mönchengladbach (Germany), the court held that the CMR did not apply to the road haulage. Therefore, the conflict positions still exist and it will depend on the decision of each country. Here, it is worth noting that the Rotterdam Rules seem to follow the decision by the English Court of Appeal and provide that in the case of multimodal transport the Rotterdam Rules allow the CMR to apply to a road leg of a multimodal transport, when certain conditions in article 26 are met.

### **2.5.1.3 Carriage of goods by rail**

#### **2.5.1.3.1 Background**

The COTIF-CIM deals with international carriage of goods by rail. The first rail Convention was signed at Bern on 14<sup>th</sup> October 1890 and entered into force on 1<sup>st</sup> January 1893. Since 1985 when the Intergovernmental Organisation for International Carriage by Rail (OTIF) was established, international rail carriage is covered by the Convention on the Intergovernmental Organisation for International Carriage by Rail (COTIF). The latest version of COTIF is called the Protocol of Vilnius<sup>97</sup>, signed on 3 June 1999 and entered into force on 1 July 2006.

The COTIF consists of two main sections, one section contains general rules on

---

<sup>95</sup> *Quantum Corporation Inc. and Others v Plane Trucking Ltd. and Another* [2002] 2 Lloyd’s Rep 25.

<sup>96</sup> The Supreme Court of Germany 17 July 2008 (I ZR 181/05).

<sup>97</sup> The Protocol was named after the Lithuanian city where the Fifth General Assembly of the OTIF was held and it contains an in-depth revision of the COTIF and all its appendices.

the organisation and powers of the intergovernmental organisation called OTIF, rules on the interpretation and application of the Convention, amicable solution of disputes, etc and the other section contains several appendices, including CIM<sup>98</sup> in Appendix B. It is largely a European Convention like the CMR, as most of the Parties to the organisation are European countries, but also some North African and Middle East countries have joined the organisation.<sup>99</sup>

#### 2.5.1.3.2 Scope of application

The scope of application of the CIM is determined by article 1.1, which states that “These Uniform Rules shall apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage.” Article 1.2 provides that the Rules also apply if the parties to the contract of carriage by rail agree that the contract is subject to the CIM, even if only the State where the place of taking in charge of goods or the State where the designated place of delivery is situated in a Member State.

Article 1.3 of the CIM provides that “when international carriage being the subject of a single contract includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply.” Article 1.4 of the CIM further provides that “when international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in article 24.1 of the Convention.” The lists of services are then provided by individual countries to OTIF.<sup>100</sup>

---

<sup>98</sup> Uniform Rules Concerning the Contract for International Carriage of Goods by Rail.

<sup>99</sup> Now there are 47 Member States to the COTIF 1999 (as of May 2013). See [http://www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/02\\_COTIF\\_99/Prot-1999-ratifications\\_01\\_05\\_2013.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_01_05_2013.pdf).

<sup>100</sup> According to the website of the Intergovernmental Organisation for International Carriage by Rail (OTIF), the lines listed are for Belgium Zeebrugge-Harwich; for Italy Civitavecchia-Golfo Aranci, Villa S. Giovanni-Messina and Reggio Calabria-Messina; for the United Kingdom Harwich-Zeebrugge and Liverpool (Seaforth)-Dublin. See [www.otif.org](http://www.otif.org).

## **2.5.1.4 Carriage of goods by inland waterway**

### 2.5.1.4.1 Background

Until 2000 when the CMNI was adopted, there was no unified legal regime for transport of goods by inland waterways. This Convention provides a uniform set of rules for international contractual responsibilities in inland navigation carriage and has been ratified by 15 Countries.<sup>101</sup>

### 2.5.1.4.2 Scope of application

The scope of application of the CMNI covers from port of loading to port of discharge.<sup>102</sup> However, pursuant to article 2.2, if sea transport and inland waterway transport are carried out by the same vessel, the CMNI applies to the entire transport except where a marine bill of lading has been issued or the distance travelled by sea is greater than that travelled by inland waterway.

## **2.5.1.5 Carriage of goods by sea**

### 2.5.1.5.1 Background

Currently, there are several international maritime conventions governing carriage of goods by sea, i.e. the Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules 1978. Furthermore, the Rotterdam Rules 2008<sup>103</sup> have recently been adopted, but are not in force yet. Although the Hamburg Rules are currently in force in 34 countries,<sup>104</sup> the Hague Rules or Hague-Visby Rules are presently in force in most of the world's shipping nations.<sup>105</sup> However, the Hague and Hague-Visby Rules

---

<sup>101</sup>There are now 15 Parties to the CMNI (as of May 2013) and they are also European members. See [http://www.unece.org/trans/main/sc3/sc3\\_cmni\\_legalinst.html](http://www.unece.org/trans/main/sc3/sc3_cmni_legalinst.html).

<sup>102</sup> Article 2.1 of the CMNI.

<sup>103</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, 11 December 2008) (the Rotterdam Rules).

<sup>104</sup> As of 1 April 2013, the Hamburg Rules have been ratified by 34 states, but they are considered to have failed to gain much support among major maritime nations. See paragraph 4.2.2.3.1.

<sup>105</sup> The United Kingdom has adopted the Hague-Visby Rules. The Rules are attached as a schedule to the Carriage of Goods by Sea Act 1971 and became effective in the UK on 23 June 1977. Currently more than 70 States are party to the Hague Rules and 30 States are party to the Hague-Visby Rules. See <<http://www.comitemaritime.org/Status-of-Ratification-of-Maritime-Conventions/0,2769,16932>,

do not have any multimodal scope of application, whereas the Hamburg Rules and the Rotterdam Rules<sup>106</sup> extended their scope of application to other modes of transport.

#### 2.5.1.5.2 Scope of application

##### **The Hague and Hague-Visby Rules**

The Hague and Hague-Visby Rules do not mention the possibility of multimodal carriage nor do they extend their scope of application beyond international carriage by sea under a bill of lading. The basic formula for application of the Hague and Hague-Visby Rules focuses on the document covering the carriage contract rather than on the contract of carriage itself, which is the basis for application of the Hamburg Rules and Rotterdam Rules. The Hague and Hague-Visby Rules are applicable “only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea”.<sup>107</sup> More importantly, they only apply to “the period from the time when the goods are loaded on the ship to the time when they are discharged from the ship,”<sup>108</sup> so-called ‘tackle to tackle’ period.<sup>109</sup>

Here, one of the questions that may arise is whether the Hague or Hague-Visby Rules apply to a sea stage of a multimodal transport. According to Devlin J in *Pyrene v Scindia*<sup>110</sup>, it is possible that the Hague or Hague-Visby Rules may apply to a sea stage of a larger multimodal transport contract. In *Pyrene v Scindia*, a consignment of fire tenders had been delivered alongside the vessel for shipment. While one of the tenders was being lifted aboard by the ship’s tackle it fell back onto the dockside and was seriously damaged. The remaining tenders were loaded safely and the bill of lading which was eventually issued made no reference to the damaged tender. When the carrier sought to limit his liability under Art IV rule 5 of the Hague Rules, the

---

00.html.> accessed 1 April 2013.

<sup>106</sup> More detailed research on the Rotterdam Rules will follow later in Chapter 6.

<sup>107</sup> Article I(b) of the Hague and Hague-Visby Rules.

<sup>108</sup> Article I(e) of the Hague and Hague-Visby Rules.

<sup>109</sup> Tackle to tackle has traditionally meant the period between the moment when the ship’s tackle is hooked on at the loading port and the moment when the ship’s tackle is unhooked at discharge. If a shore tackle is used, that moment traditionally occurs when goods cross the ship’s rail.

<sup>110</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402.

shipper argued that he was unable to do so because the carriage of the damaged tender was not ‘covered by a bill of lading’. Devlin J held that the important factor was whether the parties, in contracting, envisaged the issue of a bill of lading and not whether one was in fact actually issued. He also mentioned with regard to the scope of the Hague Rules that “I think that they attach to a contract or part of a contract. I say ‘part of a contract’ because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the rules is that which, to use the words in the definition of ‘contract of carriage’ in article 1 (b), ‘relates to the carriage of goods by sea’.”<sup>111</sup> He further stated that “the operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of article 1 (e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a period of inland transport.”<sup>112</sup>

Furthermore, Bingham J confirmed this point of view in *Mayhew Foods v Overseas Containers Ltd*<sup>113</sup>, saying that “as Mr. Justice Devlin pointed out in *Pyrene v. Scindia*, the rights and liabilities under the Hague-Visby Rules attach to a contract or part of a contract.”<sup>114</sup>

### **The Hamburg Rules**

On the other hand, the Hamburg Rules provide a specific reference to multimodal transport. First, the Hamburg Rules are applicable to ‘all contracts of carriage by sea’,<sup>115</sup> if they comply with certain requirements. For the scope of application of the Rules, contract of carriage by sea is defined in article 1.6 to mean “any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the

---

<sup>111</sup> *Ibid*, 415.

<sup>112</sup> *Ibid*, 416.

<sup>113</sup> [1984] 1 Lloyd’s Rep 317.

<sup>114</sup> *Ibid*, 320.

<sup>115</sup> Article 2.1 of the Hamburg Rules.

purposes of the Rules only in so far as it relates to the carriage by sea.”

Here, the second part of this paragraph explicitly states that the Hamburg Rules apply to situations where the carriage by sea is part of a larger multimodal contract. Therefore, the Hamburg Rules recognised the reality of multimodal or door-to-door transport and they acknowledge that a contract of carriage by sea can also involve carriage by some other modes of transport while still remaining a contract of carriage by sea. When a sea carriage is one of the parts of a larger multimodal contract, the only consequence of incorporating other modes of transport in the contract is that the Rules do not apply to the whole of the contract but are limited to the international sea stage. This is underlined by article 4.1 of the Hamburg Rules which states that “the responsibility of the carrier for the goods under the Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the at the port of discharge.” Thus, it is clear that the Hamburg Rules do not apply to the whole of the multimodal contract, but can apply to the sea leg of a multimodal transport contract.

## **2.5.2 Regional/Sub-regional multimodal solutions**

The lack of a widely acceptable uniform legal framework for multimodal transport had resulted in several countries having to resort to regional, sub-regional solutions.<sup>116</sup> There are several regional/sub-regional agreements for multimodal transport in some regional/sub-regional areas and some countries which enacted multimodal transport regulations.

Here, it is worth noting that those regional/sub-regional and national liability regimes are likely to contain substantive elements of the MT Convention<sup>117</sup> and/or the UNCTAD/ICC Rules.<sup>118</sup>

### **2.5.2.1 Andean Community**

---

<sup>116</sup> For further general information about the diverse regional and sub-regional regimes, see the UNCTAD Report on ‘Implementation of Multimodal Transport Rules - Comparative Table’, UNCTAD/SDTE/TLB/2/Add.1 (2001).

<sup>117</sup> See paragraph 4.2.2.

<sup>118</sup> See paragraph 4.3.2.

#### 2.5.2.1.1 Background

The Andean Community (CAN) is a sub-regional organisation of four countries<sup>119</sup> in South America established in 1969 and the purpose of the CAN is to achieve “more rapid, better balanced and more autonomous development through Andean, South American and Latin American integration.”<sup>120</sup>

Multimodal transport in the CAN is governed by the Decisions 331 of 1993 and 393 of 1996 (the Decision)<sup>121</sup> and it provides for essential provisions relating to definitions, scope of application, multimodal transport document, responsibility of the MTO and the shipper, limitation of liability, time-bar, jurisdiction, and so on. Moreover, Decision 477 of 2000 was also approved in order to update the legislation concerning International Customs Transit and bring it into line with the multimodal transport provisions.

Here, it is worth mentioning that these Decisions are mainly based on the MT Convention 1980 and the UNCTAD/ICC Rules 1992.

#### 2.5.2.1.2 Scope of application

First of all, the scope of application issue starts with article 2 of the Decision which states that the Decision applies to an international multimodal transport contract, if the place of taking in charge or delivery of the goods by the MTO, as stipulated in the MT contract, is located in a Member State of the CAN. Article 2 further notes that it is applicable not only to all MTOs operating between Member States but also to MTOs operating to or from a Member State. Then, article 1 of the Decision provides for the definition of the term “multimodal transport contract.”<sup>122</sup>

---

<sup>119</sup> The Member States of the Andean Community are Bolivia, Colombia, Ecuador, Peru and five associate Member States: Chile, Argentina, Brazil, Paraguay and Uruguay. The associate members are allowed to attend meetings of the CAN as observers but, they do not have the right to vote in the meeting.

<sup>120</sup> See the introduction of the CAN, available at <http://www.comunidadandina.org/ingles/who.htm>.

<sup>121</sup> The Decision 331 of 4 March 1993 as modified by the Decision 393 of 9 July 1996: ‘International Multimodal Transport’. Available at <http://www.comunidadandina.org/ingles/normativa/D331e.htm>. See also see the UNCTAD Report on ‘Implementation of Multimodal Transport Rules - Comparative Table’, UNCTAD/SDTE/TLB/2/Add.1 (2001), 6-9.

<sup>122</sup> Article 1 of the Decision defines ‘Multimodal Transportation Contract’ as ‘the contract by virtue of which a multimodal transportation operator binds itself, in writing and upon reception of a shipment fee, to carry out the multimodal transportation of merchandise.’

In case of localised loss, the limits of the MTO's liability are to be determined by reference to the provisions of the applicable international convention which provide a higher limit of liability.<sup>123</sup>

### **2.5.2.2 MERCOSUR**

#### **2.5.2.2.1 Background**

MERCOSUR<sup>124</sup> is a sub-regional trade organisation among Argentina, Brazil, Paraguay and Uruguay founded in 1991 by the Treaty of Asunción. With a view to harmonising the multimodal transport rules and regulations within the sub-region, MERCOSUR established the 'Partial Agreement for the Facilitation of Multimodal Transport of Goods (the Partial Agreement)' in 27 April 1995. The Partial Agreement aims at facilitating multimodal transport within Member States. However, as the title implies that it is a sort of partial agreement, the Partial Agreement is not mandatory and will only apply if specific reference to the Partial Agreement is made in the MT contract.<sup>125</sup>

#### **2.5.2.2.2 Scope of application**

Article 2 of the Partial Agreement provides that it applies to contracts for multimodal transport of goods, provided that the place of taking in charge of the goods by the MTO or the place of their delivery is located in a Member State. Then, the relevant definitions are provided in article 1, which is based on those of the MT Convention. In case of localised loss, only the limits of the MTO's liability will be determined in accordance with the provisions of the applicable international convention or mandatory national law.<sup>126</sup>

### **2.5.2.3 ALADI**

---

<sup>123</sup> This is the same provision as article 19 of the MT Convention.

<sup>124</sup> Mercado Comun del Sur.

<sup>125</sup> Article 4 of the Partial Agreement states that "The provisions of the Agreement, will only apply if a specific reference to the Agreement is made in the MT contract."

<sup>126</sup> Article 15 of the Partial Agreement.

#### 2.5.2.3.1 Background

ALADI<sup>127</sup> is the largest Latin American trade association for integration of 12 Latin American countries based on the Montevideo Treaty of 1980. The Member States of ALADI are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

ALADI approved the “Agreement on International Multimodal Transport (the Agreement)” in November 1996. The Member States of ALADI in which the Agreement is to apply are those of the Andean Community and MERCOSUR as well as Chile, Cuba, Mexico and Venezuela. However, the Agreement has not yet entered into force<sup>128</sup> and it is not clear yet whether the multimodal regime in ALADI could achieve uniformity in multimodal law within South America.

#### 2.5.2.3.2 Scope of application

The Agreement applies to contracts of international multimodal transport whenever the place of taking in charge or delivery of the goods by the MTO, as provided for in the MT contract, is located in a country signatory to the Agreement.<sup>129</sup> However, the provisions of the Agreement shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions applicable to unimodal transport.<sup>130</sup> In addition, in case of localised loss, only the limits of liability of the MTO is to be determined by reference to the provisions of the applicable international convention or mandatory national law governing the particular stage of multimodal transport during which the loss or damage occurred.<sup>131</sup> The provisions of limitation of liability and time for suit are based on the UNCTAD/ICC Rules.

#### 2.5.2.4 ASEAN

---

<sup>127</sup> Asociacion Latinoamericana de Integracion (Latin American Integration Association).

<sup>128</sup> The Agreement requires notification by six signatory States of their readiness to be bound by it in order to enter into force. So far, three States have subscribed to the Agreement: Bolivia, Peru and Venezuela.

<sup>129</sup> Article 2 of the Agreement.

<sup>130</sup> Article 3 of the Agreement.

<sup>131</sup> Article 15 of the Agreement.

#### 2.5.2.4.1 Background

ASEAN<sup>132</sup> is an Association of Southeast Asian Nations which is a geopolitical and economic organisation of countries located in Southeast Asia, created in 1967. Its current members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

The members of the ASEAN recognise that international multimodal transport is a means of facilitating the expansion of international trade and the need to stimulate the development of efficient multimodal transport services, as well as the desirability of adopting certain rules relating to the carriage of goods under international multimodal transport contracts.<sup>133</sup> Following that, they enacted the “ASEAN Framework Agreement on Multimodal Transport 2005 (the ASEAN Agreement)”,<sup>134</sup> which is mainly based on the MT Convention and the UNCTAD/ICC Rules.

#### 2.5.2.4.2 Scope of application

Article 2<sup>135</sup> provides for mandatory application of the ASEAN Agreement and states that it applies to all MTOs under the register of each competent national body and all contracts of multimodal transport, if the place for the taking in charge or delivery of the goods is located in a Member Country. In case of localised loss, only the limit of the MTO’s liability is to be determined by reference to the provisions of the applicable international convention or mandatory law, which provide another limit of liability.<sup>136</sup> Thus, this is slightly different from the MT Convention in that it is not necessarily a higher one. The provisions of limitation of liability and time for suit are based on the UNCTAD/ICC Rules.

---

<sup>132</sup> Association of Southeast Asian Nations (ASEAN).

<sup>133</sup> In the preamble of the ASEAN Framework Agreement on Multimodal Transport.

<sup>134</sup> The full text is available at <http://www.aseansec.org/17877.pdf>.

<sup>135</sup> Article 2 of the ASEAN Agreement provides that this Agreement shall apply to: (a) all MTOs under the register of each competent national body; and (b) all contracts of multimodal transport for the purpose of settling civil claims, if; (i) The place of taking in charge of the goods by the MTO as provided for in the MT contract is located in a Member Country, or (ii) The place for delivery of the goods by the MTO as provided for in the MT contract is located in a Member Country.

<sup>136</sup> Article 17 of the ASEAN Agreement.

### **2.5.3 National multimodal solutions**

Upon the failure of an international multimodal convention, several countries took into account possible solutions. This is especially recognised when trying to determine the legal liability regime applicable to a multimodal contract in situations involving non-localised loss. For these situations, several countries have tried to find solutions, incorporating some provisions in their national legislation. Examples are the Netherlands, Germany, India, South Korea and those countries that have ratified the MT Convention.<sup>137</sup> However, covering them all would be impractical, thus, only the national regulations existing in the Netherlands, Germany, India and South Korea will be discussed. The Dutch system contains the first national statutory regulation of multimodal transport and the German system has merged the regulations concerning several different transport modes in one uniform set of rules. The Indian system provides a whole set of rules for multimodal transport and the Korean system was created recently with an interesting provision on limitation of liability.

#### **2.5.3.1 THE NETHERLANDS**

##### **2.5.3.1.1 Background**

Dutch transport law is governed by Book 8 of the Dutch Civil Code (DCC)<sup>138</sup> and articles 8:40 to 8:52 of the DCC provide some special provisions dealing with the contract of multimodal transport. Among these provisions, articles 8:40 to 8:43 are considered the core provisions on multimodal transport<sup>139</sup>, and the rest of the provisions are more concerned about a multimodal (or combined) transport document. In addition, the provision on time bar can also be found in article 1722 under the ‘Title 8.20 Prescription and time limits’.

---

<sup>137</sup> For more details about existing national multimodal laws and regulations, see the UNCTAD Report on ‘Implementation of Multimodal Transport Rules - Comparative Table’, UNCTAD/SDTE/TLB/2/Add.1 (2001), summarizing the information contained in document UNCTAD/SDTE/TLB/2 (27 June 2001).

<sup>138</sup> For an English translation, see <http://www.dutchcivillaw.com/civilcodegeneral.htm>.

<sup>139</sup> See the DCC, Article 8:40 Definition of a ‘contract of multimodal (combined) carriage of goods’, Article 8:41 Law applicable to a contract of multimodal (combined) carriage, Article 8:42 Liability of the MTO (CTO) and Article 8:43 Maximum indemnity.

#### 2.5.3.1.2 Scope of application

In the first instance, the DCC applies to the contract of multimodal transport. The DCC provides for the definition of multimodal transport contract, which means multimodal transport contract is the contract of carriage whereby the MTO undertakes, under one single contract, to perform the transport partly by sea, inland waterway, road, railway, air, pipeline or by any other mode of transport.<sup>140</sup> This definition well represents the essential elements of the multimodal transport contract, which is established in the MT Convention. Thus, the multimodal provisions of the DCC apply when the parties conclude a contract of carriage involving more than two modes of transport under one single contract. The DCC adopts a network system of liability providing that in a contract of multimodal carriage of goods, each part of the carriage is governed by the judicial rules applicable to that part.<sup>141</sup> However, in case of non-localised loss,<sup>142</sup> the DCC provides that the liability of the MTO will be determined by the rules governing the mode of transport which impose the highest level of liability on the operator.<sup>143</sup>

### 2.5.3.2 GERMANY

#### 2.5.3.2.1 Background

German transport law is governed by Book 4 of the German Commercial Code (Handelsgesetzbuch: HGB) and sections 452 to 452(d) especially provide for provisions on multimodal transport under the title “Third sub-chapter Carriage Using Various Modes of Transport”.<sup>144</sup> However, this was not the case until 1 July 1998 when the HGB was substantially reformed, introducing a completely new set of rules replacing the previous ones on the freight business, forwarding business and

---

<sup>140</sup> Article 8:40 of the DCC states that “A contract of multimodal carriage of goods is the contract of carriage whereby the carrier (MTO) engages himself under one single contract towards the consignor to perform the transport in part by sea, inland waterway, road, railway, air, pipeline or by means of any other mode of transport.”

<sup>141</sup> Article 8:41 of the DCC.

<sup>142</sup> Article 8:43 of the DCC.

<sup>143</sup> Further discussion will follow later in paragraph 5.3.1.4.

<sup>144</sup> See Book 4 (Commercial Contracts) of the German Commercial Code (HGB), as amended by the Act of 25 June 1998 to Reform the Law on Freight, Forwarding and Warehousing (Transport Law Reform Act), as amended. For an English translation, see [http://www.transportrecht.org/dokumente/HGBIV\\_engl\\_.pdf](http://www.transportrecht.org/dokumente/HGBIV_engl_.pdf).

warehousing business, and newly introduced sections on multimodal transport for the first time in German legislative history.<sup>145</sup>

The new provisions of Book 4 apply to all modes of transport<sup>146</sup> with the exception of carriage by sea<sup>147</sup> and apply equally whenever the goods are carried “over land, on inland waterways or by aircraft”.<sup>148</sup>

It seems that there is no change to maritime transport law as the new provisions only deal with road, rail, inland waterway and air transport, however, it should be noted that they also introduced provisions on multimodal transport of goods which includes a sea carriage.<sup>149</sup>

#### 2.5.3.2.2 Scope of application

First of all, the title of the third sub-chapter represents that the HGB will apply to a carriage using various modes of transport and section 452<sup>150</sup> states that it applies to carriage of goods performed by various modes of transport on the basis of a single contract of carriage.

The HGB also adopts the network system. Section 452 makes the general provisions of the first sub-chapter governing the contract of carriage applicable to multimodal transport in case of non-localised loss,<sup>151</sup> unless international

---

<sup>145</sup> See the Report by the UNCTAD Secretariat, ‘Implementation of Multimodal Transport Rule’, UNCTAD/SDTE/TLB/2 (2001), para 198; M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), para 10.4.2. See also the article ‘Recent changes in German transport law and their effect on maritime law’, available at <[http://www.maritimeadvocate.com/developments/recent\\_changes\\_in\\_german\\_transport\\_law\\_and\\_their\\_effect\\_on\\_maritime\\_law.htm](http://www.maritimeadvocate.com/developments/recent_changes_in_german_transport_law_and_their_effect_on_maritime_law.htm)>, accessed 1 April 2013.

<sup>146</sup> Previously there was no harmonization and different rules and regulations governed each separate mode of transport.

<sup>147</sup> Maritime transport is governed by Book 5 (Maritime Commerce) of the HGB.

<sup>148</sup> Section 407 (Contract of Carriage) of the HGB.

<sup>149</sup> Section 452 of the HGB.

<sup>150</sup> Section 452 (Contract of carriage involving various modes of transport) of the HGB provides that “If carriage of goods is performed by various modes of transport on the basis of a single contract of carriage, and if, had separate contracts been concluded between the parties for each part of the carriage which involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of the first sub-chapter shall apply to the contract, unless the following special provisions or applicable international conventions provide otherwise. This also applies if part of the carriage is performed by sea.”

<sup>151</sup> Further discussion on limitation of liability in case of non-localised loss will follow later in paragraph 5.3.1.5.

conventions provide otherwise, and section 452a<sup>152</sup> states that, in cases where the place that loss or damage occurred can be established, liability of the carrier is determined by the law applicable to the leg in which the loss or damage occurred. Thus, the extensive provisions of the first sub-chapter dealing with freight business or performance of contracts of carriage should also be considered.

### **2.5.3.3 INDIA**

#### **2.5.3.3.1 Background**

The Multimodal Transportation of Goods Act entered into force in India in 1993 and was amended thereafter by the Act called “the Multimodal Transportation of Goods (Amendment) Act 2000 (The MT Act 2000).<sup>153</sup> It is quite special because the MT Act 2000 provides a uniform set of rules governing multimodal transport.

The MT Act 2000 is divided into five chapters under the headings; Chapter 1 ‘Preliminary’, Chapter 2 ‘Regulation of multimodal transportation’, Chapter 3 ‘Multimodal transport document’, Chapter 4 ‘Responsibilities and liabilities of the multimodal transport operator’, Chapter 5 ‘Miscellaneous aspects’. However, it is worth mentioning that the provisions of the Act are mainly derived from the MT Convention and the UNCTAD/ICC Rules.

#### **2.5.3.3.2 Scope of application**

First, in its preamble, the MT Act 2000 explicitly expresses that it provides for “the regulation of the multimodal transportation of goods, from any place in India to a place outside India, on the basis of a multimodal transport contract and for matters connected therewith or incidental thereto.” Then the MT Act 2000 provides the definition of the terms “multimodal transportation”<sup>154</sup> and “multimodal transport

---

<sup>152</sup> Section 452a (Known place of damage) of the HGB provides that “If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific leg of the carriage, the liability of the carrier shall, contrary to the provisions of the first sub-chapter, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this leg of carriage. The burden of proving that the loss, damage or event which caused delay in delivery occurred on a particular leg of carriage is borne by the person alleging this.”

<sup>153</sup> Act No.44 of 2000.

<sup>154</sup> Section 2 (k) provides that ‘multimodal transportation’ means carriage of goods by at least two different modes of transport under a multimodal transport contract, from the place of acceptance of the

contract.”<sup>155</sup> Consequently, the Act applies to the contract of multimodal transportation for export trade in India. The Act adopts modified uniform system,<sup>156</sup> and provisions of the Act seems to govern the liability of the MTO both in cases of localised and non-localised loss, since section 15 makes only the limits of liability of the MTO subject to the relevant law applicable to the stage of transport in case of localised loss.

#### **2.5.3.4 SOUTH KOREA**

##### **2.5.3.4.1 Background**

Korean maritime law is codified in the Maritime Law section (Book V) in the Korean Commercial Code (KCC). A new provision on multimodal transport was enacted on 3 August 2007 and the new article 816<sup>157</sup> provides for the liability of the multimodal transport operator. Here, it should be mentioned that article 816 is located under the Maritime Law section (Book V) and it applies only to the multimodal transport including a sea carriage.

##### **2.5.3.4.2 Scope of application**

The KCC adopts the network system of liability and states that if the place where the accident occurred is identified, liability of the carrier is determined by the law applicable to the particular stage where the loss or damage occurred. The KCC further provides for the unique provision in case of non-localised loss and it states that where the loss cannot be localised to a particular stage of the carriage, the applicable law will be decided by the main stage of carriage, which will be decided

---

goods in India to a place of delivery of the goods outside India.

<sup>155</sup> Section 2 (l) provides that ‘multimodal transport contract’ means a contract under which a multimodal transport operator undertakes to perform or procure the performance of multimodal transportation against payment of freight.

<sup>156</sup> For more information about uniform or modified uniform system, see paragraphs 5.2.1 and 5.2.3.

<sup>157</sup> Article 816 (Liability of Multimodal Transport Operator) of the KCC provides that;

“(1) When the carriage which the carrier undertakes includes coverage other than the maritime transportation, the carrier is liable according to the law applicable for the place where the damage occurred. (2) When the place where the damage occurred is not known or the place where the damage might have occurred is not identified due to the nature of the transportation, the carrier is liable according to the law applicable for the place where the coverage is the longest. In case that the transportation coverage is the same or where the longest coverage cannot be identified, the law applicable will be for the place the highest transportation fee is charged.”

based on the distance of the coverage. The KCC seems to try to provide at least some reason for choosing a particular limit, nevertheless there are some concerns as well.<sup>158</sup>

Given the fact that the KCC provides only one provision for multimodal transport, it seems that the KCC did not try to regulate the whole legal issues relating to multimodal transport, but set out the minimum criteria, which is applicable to multimodal transport, allowing the existing transport law to be applicable to a given situation and filling the legal gap in multimodal transport operation.

## **2.6 Summary and conclusion**

The transport of goods involving more than two different modes of transport is considered as multimodal transport. Although the appropriate concept, definition and language of multimodal transport have not been settled yet because of the failure to agree an international multimodal convention which is widely accepted, it may be suggested that a multimodal transport contract means a contract of carriage whereby a multimodal carrier or MTO, who acts as a principal and assumes responsibility for the performance of the contract, undertakes to perform or procure the carriage of goods by at least two different modes of transport from a place where the goods are taken in charge in one country to a place designated for delivery in a different country. Therefore, the important concepts of multimodal transport cover the carriage of goods by at least two different modes of transport on the basis of one multimodal transport contract under the responsibility of a single transport operator.

However, several phrases, such as ‘multimodal transport’, ‘combined transport’, ‘intermodal transport’ and ‘through transport’ have been used interchangeably and loosely. It was pointed out that those terms have distinguished concepts themselves and the confusion in language stems partly from the need to cover different ideas and variations in commercial or geographical usage. The term ‘multimodal transport’ has become a more modern term and would be the best expression to describe the carriage of goods by at least two different modes of transport on the basis of one

---

<sup>158</sup> Further discussion on limitation of liability will follow later in paragraph 5.3.1.6.

multimodal transport contract under the responsibility of a single transport operator.

Much of the international transport of goods is now carried out on a multimodal basis and this multimodal transport has played an important role in international trade. However, the current legal framework governing multimodal transport fails to appropriately reflect these developments. First of all there is currently no international uniform regime in force to govern liability for loss, damage or delay arising from multimodal transport. Instead, the current legal framework consists of a complex formation of international unimodal transport conventions designed to regulate carriage by sea, air, road, rail and inland waterway respectively, various regional/sub-regional agreements, national laws and standard form contracts. This is, indeed, a sorry state of affairs, which requires a uniform set of rules to govern multimodal transport liability. Therefore, the following chapter will focus on the reasons why we need an international multimodal regime.



# **CHAPTER 3 THE NEED FOR AN INTERNATIONAL MULTIMODAL REGIME**

## **3.1 Introduction**

In chapter 2, the general nature of multimodal transport and the current legal framework for multimodal transport have been considered in order to explore general aspects of multimodal transport.

This chapter will find out the reasons for or desirability of a multimodal regime in order to examine whether an international regulation for multimodal transport is necessary or not. The first section of this chapter will consider the practical aspects, i.e. the substantial growth in container or door-to-door transport, and the second section will focus on the legal aspects or problems arising from the current legal framework for multimodal transport. In particular, the terms ‘muddles’ and ‘uncertainty’ have been chosen in order to highlight the problems of the current fragmented and complex system, creating legal uncertainty.

## **3.2 Practical aspects: The growth in container transport**

### **3.2.1 The advent of containerisation**

To begin with, much of the international transport of goods is carried on a multimodal basis and the prevalence of multimodal transport springs from the advent of containerisation. A road haulier named Sea-Land appears to have started the container revolution as early as 1956 when it provided a containership service between New York and Puerto Rico thereby stimulating other operators to follow it.<sup>159</sup> By the end of the 20th century containers were carrying over 95 per cent of

---

<sup>159</sup> A Donovan, ‘Intermodal Transportation in Historical Perspective’ (2000) 27 Transportation Law

general cargoes moving between the continents and the percentage of other cargoes carried in containers was increasing as well.<sup>160</sup>

The advent of the container in the 1960s was one of the most important developments in the transport industry during the last century. Goods stowed in a container could be more readily carried by different means of transport, such as ships, trains, road vehicles or aircraft, from a place in one country to a final place in another country, without handling the goods themselves in changing modes. This container revolution considerably contributed to the emergence of multimodal transport. The introduction of the container provided a high level of standardisation in cargo handling process and helped overcome many of the technical difficulties concerning the transshipment of goods. At the same time they reduced losses caused by congestion, delay and pilferage at ports. Thus, the development of the container led to smooth door-to-door transport or multimodal transport.<sup>161</sup>

### **3.2.2 Cargo unitisation**

Since the 1960s, transport services were transformed by the development of unit load devices, such as container, roll-on/roll-off and cargo pallets to facilitate the handling of goods and the transferring between modes. This development, in particular, enabled the link between sea and land modes of carriage and facilitated the ability of various kinds of operators to provide multimodal transport services. Forwarders and sea carriers were naturally at the forefront of this development.<sup>162</sup> Furthermore, the more recent interest in expanding into the provision of wider-based logistics services has particularly involved both of these types of participants and has in turn been facilitated by developments associated with, in particular, the container revolution.<sup>163</sup>

### **3.2.3 The volume of traffic**

---

Journal 317, 317-318.

<sup>160</sup> Ibid.

<sup>161</sup> I Carr, *International Trade Law* (4<sup>th</sup> edn, Routledge-Cavendish, 2010), 401.

<sup>162</sup> DA Glass, *Freight forwarding and multimodal transport contracts* (2nd edn, Informa, 2012), para 1.1.

<sup>163</sup> Ibid.

The emergence of the container technology and of the multimodal transport concept has facilitated a growing international trade. The data on the development of containerised traffic can provide some highly significant indications. According to the report by the UNCTAD<sup>164</sup>, over the last few decades, there has been an exponential growth in containerised transport and it is expected to continue well into the future. The world port container throughput, which is the number of movements taking place in ports, grew from zero in 1965 to about 515.7 million moves in 2008, which is a remarkable increase.<sup>165</sup>

Further evidence of the popularity of multimodal transport is the emergence and increase of container terminals everywhere<sup>166</sup> and the fact that container ships have been getting bigger. The early container ship in 1956 could only carry 500-800 TEU.<sup>167</sup> But the so-called 'Post Panamax' container ships, carrying 4,000-5,000 TEU, appeared in 1990s and in 2013 'Triple E' container ships, carrying 18,000 TEU, will be launched soon.<sup>168</sup>

### 3.2.4 The benefit of multimodal transport

The principal purpose of multimodal transport is to move goods to the destination on time, in good condition and at as low a price as possible. Thus, in order to facilitate the transfer of goods, it provides for the continuous care and responsibility of a single operator during the entire process. Accordingly, some benefits, *inter alia*, can be explained here.<sup>169</sup>

Firstly, multimodal transport utilises the inherent advantages of each mode involved, creating synergies and efficiencies not otherwise attainable. The service

---

<sup>164</sup> See the Report by the UNCTAD secretariat, Multimodal transport: the feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1 (2003), para. 6.

<sup>165</sup> UNCTAD, Review of Maritime Transport 2010, 95-96.

<sup>166</sup> For the examples, see M Hoeks, Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods (Kluwer Law International, 2010), para 1.1.1. (fn 11).

<sup>167</sup> The Twenty-foot Equivalent Unit (TEU) is a unit of container often used to describe the capacity of container ships.

<sup>168</sup> W Kremer, 'How much bigger can container ships get?' (BBC News Magazine, 19 February 2013) <<http://www.bbc.co.uk/news/magazine-21432226>>, accessed 4 March 2013.

<sup>169</sup> Y Hayuth, *Intermodality: concept and practice* (Lloyd's of London, 1987), 14 and 64; The paper for UNESCAP Training Module 'Multimodal Transport Operations' provides a good summary of advantages of multimodal transport. Available at <<http://www.unescap.org/ttdw/capbuild/module-multimodal-transport-operations.pdf>> accessed 1 February 2013.

provided is different from and superior to that available from each mode alone. Carriers involved in multimodal transport seek to provide a complete, seamless door to door service from origin to destination. Carriers whose services have historically been restricted to one mode of transport are transforming into large multimodal companies.<sup>170</sup> Multimodal transport also minimises the loss and the risk of loss of or damage to the goods as multimodal carrier maintains his own communication links and coordinates on-carriage seamlessly at transshipment points. Multimodal transport also provides faster transit of goods so that it reduces the disadvantages of long distance between the origin of the goods and the consumer. Thanks to the features of multimodal transport, the burden of issuing multiple documentation and other formalities connected with each segmented leg of the transport chain is reduced to a minimum. Obviously, these advantages attribute to the savings in costs and this is usually reflected in the freight rates as well as in the cost of cargo insurance.

Once again, given the feature of multimodal transport, the shipper needs to deal only with the multimodal carrier in all matters relating to the transport of the goods, including any settlement of cargo claims in cases of loss of, damage to goods or delay in delivery. Lastly, those advantages of multimodal transport will help to reduce the cost of exports and improve the competitive position in the international market.

### **3.3 Legal aspects: Muddles and uncertainty in the current regime**

As seen above, due to the advent of containerisation and cargo unitisation, multimodal transport has been popular these days. This popularity of multimodal transport in commercial area and the benefit of multimodal transport would be one of the reasons for an international multimodal regime.

The second section of this chapter will explore another reason why we need a unified international multimodal regime. Having looked at the different types of the current multimodal regimes in Chapter 2, it will become clear that there are many intrinsic legal problems arising from multimodal transport. Therefore, the following

---

<sup>170</sup> PS Dempsey, 'The law of Intermodal Transportation' (2000) 27 Transportation Law Journal 367, 370.

section will now focus on the problems in the current legal framework.

### **3.3.1 Fragmented and complex system**

Needless to say that, the first problem would arise from the situation in which there is no single international multimodal regime, but the melange of complicated different systems governing multimodal transport. In cases of loss of, damage to the goods or delay in delivery during international multimodal transport, cargo claims are brought by cargo interests against carriers and the cargo interests may have to come to the above fragmented and complex current regimes, finding out which one applies and how to apply it correctly. As has been explored, the current legal framework for multimodal transport consists of a complex formation of international unimodal transport conventions, various regional/sub-regional agreements, national laws and standard form contracts.

First, the current system includes several unimodal transport conventions such as the Hague, Hague-Visby or Hamburg Rules, Montreal Convention, CMR, COTIF-CIM and CMNI. Those conventions are mandatory as between the Member States to the Convention and they are designed to regulate unimodal transport, i.e. carriage by sea, air, road, rail and inland waterway respectively. Thus, if a contract falls within the scope of application of any unimodal conventions, then the relevant convention applies compulsorily to the contract. However, it is worth noting that while the air convention and sea convention have truly worldwide coverage, the road, rail and inland waterway convention are largely a European Convention as most of the Parties to the conventions are within Europe. Therefore, it is almost true that there is no international convention to govern carriage by road, rail and inland waterway in Asia, Australia, Africa and the Americas.

Second, there are some regional agreements for multimodal transport in Latin America and Asia. Most of the agreements seem to be only voluntary, not applying mandatorily. They will be subject to other international conventions which means that the provisions of the agreement shall only take effect to the extent that they are not contrary to the mandatory provisions of other international conventions applicable to the multimodal or unimodal transport contract.

Third, there are again some countries having a kind of multimodal provisions in

their national legislation. However, most of the countries only enacted some provisions for multimodal transport in order to fill the legal gap arising from the current network system.<sup>171</sup> For instance, where there is a situation involving non-localised loss or damage to the goods, it is difficult to determine the applicable law under unimodal conventions which do not deal with the non-localised issue. Thus, some countries tried to incorporate some principles in their national rules.

However, the proliferation of regional, sub-regional and national solutions further adds to the complexity and these separate legal regimes have produced a rather fragmented approach to the legal issues. Furthermore, in order to identify the applicable liability regime which governs the claim, it is frequently necessary to determine whether a mandatory international unimodal convention is applicable. If not, we may ask what other solutions would apply to the claim. Those obstacles faced by a cargo interest are unnecessarily complicated.

### **3.3.2 Application of various different rules**

Another major problem with the current legal framework is that there are various different rules even on the same subject matter and more seriously they proceed without any reference to each other.<sup>172</sup> Therefore, the situation of those various different rules which are incompatible with each other is another problem in the current legal framework for multimodal transport. This conflict between those different provisions would lead to uncertainty and increased legal cost.<sup>173</sup>

De Wit<sup>174</sup> also pointed out that the vast differences between the rules governing the different transport modes would be the greatest shortcomings of transport law. There are, for instance, different grounds of liability, different limitations of liability, different documents, different time bars. The drawbacks would become glaringly obvious especially when attempts are made to combine different transport modes and,

---

<sup>171</sup> For example, see articles 8:40 to 8:43 of the Dutch Civil Code; sections 452 to 452 (d) of the German Commercial Code (HGB); and article 816 of the Korean Commercial Code. See paragraphs 2.5.3.1, 2.5.3.2 and 2.5.3.4.

<sup>172</sup> H Carl, 'Future developments in the regulatory aspects of international multimodal transport of goods' IUMI Conference Berlin (12-16 September 1999), 4.

<sup>173</sup> A Diamond, 'The Rotterdam Rules' [2009] 4 LMCLQ 445, 457; A Diamond, 'The next sea carriage Convention?' [2008] LMCLQ 135, 145.

<sup>174</sup> R De Wit, *Multimodal Transport- Carrier liability and Documentation* (LLP, 1995), para 1.6.

inevitably, their different legal regimes into a single transport operation governed by a single contract.<sup>175</sup>

Here, it is difficult to point out all the liability provisions of the various international unimodal conventions, regional/sub-regional regimes, national laws which currently regulate multimodal transport. However, useful comparisons can be made between the limitation of liability and time for suit provisions of such regimes since those provisions can be used to highlight the differences of the regimes, exploring the maximum liability of the relevant carriers and the longest period of time that cargo interest might want. Thus, this section will analyse the various approaches on some of the key issues, *inter alia*, the limitation of liability and time for suit in order to provide a good example of the fragmented systems and will focus on the diversity of those approaches taken by different regimes for multimodal transport.

### **3.3.2.1 Rules on limitation of liability**

#### **3.3.2.1.1 Comparison**

Regarding the rules on limitation of liability, the limits of liability vary significantly between the different regimes depending on types of transport and range from the highest 19 SDR<sup>176</sup> to the lowest 2 SDR. The Montreal Convention provides the highest limit<sup>177</sup>. The limit of liability of the Montreal Convention has been revised from the old limit of 17 SDR per kilogramme to 19 SDR per kilogramme.<sup>178</sup> This

---

<sup>175</sup> De Wit, *Ibid.*

<sup>176</sup> Special Drawing Right. The SDR is an international reserve asset, created by the International Monetary Fund (IMF) in 1969 to supplement its member countries' official reserves. The currency value of the SDR is determined by summing the values in U.S. dollars, based on market exchange rates, of a basket of major currencies (the U.S. dollar, Euro, Japanese yen, and pound sterling). The SDR provides, within the various Conventions, a reference unit of account which has been considered more stable than gold or the reference to a single currency. The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every five years. The value of the SDR can be found daily on the webpage of the IMF and is also reported in the financial sections of some newspapers.

<sup>177</sup> See article 22 of the Montreal Convention on 'Limits of liability in relation to delay, baggage and cargo'.

<sup>178</sup> Article 24 of the Montreal Convention provides that the limits of liability are to be reviewed by the International Civil Aviation Organisation (ICAO) at five-year intervals by reference to an inflation factor corresponding to the accumulated rate of inflation since the date of entry into force of the Convention. In accordance with Article 24, the ICAO recently undertook such a review, which resulted in a proposal to increase the limits of liability.

new limit applied from 30 December 2009. The COTIF-CIM provides that compensation shall not exceed 17 SDR per kilogram<sup>179</sup>, which is the second highest. The CMR<sup>180</sup> and HGB<sup>181</sup> also provide a general limit on the amount of compensation payable, i.e. 8.33 SDR per kilogram. The limit in the Rotterdam Rules is 875 SDR per package or unit, or 3 SDR per kilogram.<sup>182</sup> The Hamburg Rules provides the limit of 835 SDR per package or unit, or 2.5 SDR per kilogram, whereas the Hague-Visby Rules and CMNI states that the limitation of liability is 2 SDR per kilogram or 666.67 SDR per package or other shipping unit.<sup>183</sup> The CAN,<sup>184</sup> ALADI,<sup>185</sup> ASEAN,<sup>186</sup> MT Act 2000<sup>187</sup> follow rule 6.1 of the UNCTAD/ICC Rules, which states that the liability of the multimodal carrier is limited to 666.67 SDR per package or unit, or 2 SDR per kilogram, whichever is the higher, and if the multimodal transport does not include carriage by sea or by inland waterways, the liability of the multimodal carrier is limited to 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.<sup>188</sup>

The MERCOSUR has a special provision and it does not provide a uniform limitation rule for the multimodal carrier's liability.<sup>189</sup> The Partial Agreement (MERCOSUR) provides that, unless the nature and value of the goods have been declared by the consignor and inserted in the MT document, the multimodal carrier shall in no event be liable for loss of, or damage to, the goods in an amount exceeding the following: a) Argentina: 400 Argentine gold pesos per package, or 10 Argentine gold pesos per kilogram, whichever is the higher; b) Brazil, Paraguay and Uruguay: 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher. In case of localised loss, article 15 states that only the limits of the multimodal carrier's liability will be determined in accordance with the provisions of the applicable international convention or

---

<sup>179</sup> Article 30 of the COTIF-CIM.

<sup>180</sup> Article 23.3 of the CMR.

<sup>181</sup> Section 431 of the HGB.

<sup>182</sup> Article 59 of the Rotterdam Rules.

<sup>183</sup> Article 20.1 of the CMNI; Article IV, rule 5(a) of the Hague-Visby Rules.

<sup>184</sup> Article 13 of the Decision (CAN).

<sup>185</sup> Articles 12 and 14 of the Agreement (ALADI).

<sup>186</sup> Articles 14 and 16 of the ASEAN Agreement.

<sup>187</sup> Section 14 of the MT Act 2000.

<sup>188</sup> See paragraph 4.3.2.2.

<sup>189</sup> Article 13 and annex 1 to the Partial Agreement (MERCOSUR).

mandatory national law. Furthermore, the DCC provides that where loss or damage occurs during a multimodal transport and the stage of transport at which the loss or damage occurred cannot be established, then the liability of the carrier will be determined by the rules applicable to the part of the transport which impose the highest level of liability.

#### 3.3.2.1.2 Why do they differ?

Here, one of the questions that may arise is why it should be so very different and what the policy reason for that is. In cases of unimodal transport, each unimodal convention has its own distinctive rules on limitation of liability. These differences can be analysed using a concentration of risks involved, value of the goods carried, and incidence of loss approaches.<sup>190</sup> Limits of liability are lowest where there is the highest concentration of cargo value aboard one vessel in relation to its loss experience. Thus, it only seems reasonable that the liability limits should be set lower for a F-type Post Panamax container ship carrying 4,400 containers than for a truck carrying one. If the Hague-Visby limits governing carriage by sea were changed to the limits contained in the Montreal Convention, a ship accident might put an ocean carrier out of business.<sup>191</sup> It is, therefore, reasonable to set lower limits where a high concentration of risk is involved. The better loss record of the airlines compared to other carriers would also account for the higher liability limit contained in the Montreal Convention.<sup>192</sup> In addition, transport of goods with more expensive value would also result in higher limit of liability in the air convention. Given the diverse levels of limitation of liability, it is extremely difficult to set an appropriate level of limits for multimodal transport.<sup>193</sup>

#### 3.3.2.2 Rules on time for suit

---

<sup>190</sup> TK Chenal, 'Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules' (1978) 20 Arizona Law Review 953, 970.

<sup>191</sup> However, this may not always be the case, because the shipowner may be able to limit the claim by reference to the tonnage of the ship and the shipowner would presumably have liability insurance.

<sup>192</sup> TK Chenal, *Ibid*, 970 (fn 114).

<sup>193</sup> See paragraph 5.3.1.

### 3.3.2.2.1 Comparison

Secondly, with regard to the rules on time for suit, the time limits also vary significantly between the different regimes depending on types of transport and range from the longest 3 years to the shortest 9 months. The Montreal Convention<sup>194</sup>, the Hamburg Rules<sup>195</sup> and Rotterdam Rules<sup>196</sup> provide that any action should be brought within two years. The period of limitation for an action fixed by the CMR<sup>197</sup> and HGB<sup>198</sup> is normally one year, while it is three years in the case of wilful misconduct. The COTIF-CIM also provides that the period of limitation for an action shall be one year in most cases<sup>199</sup> but two years in particular cases.<sup>200</sup> The Hague Rules, Hague-Visby Rules,<sup>201</sup> CMNI<sup>202</sup> and MERCOSUR<sup>203</sup> provide that all actions shall be time-barred after one year.

By contrast, the CAN<sup>204</sup>, ALADI<sup>205</sup>, ASEAN Agreement<sup>206</sup> and MT Act 2000<sup>207</sup> provide that a period of 9 months is allowed for instituting any action relating to multimodal transport which is similar to that of the UNCTAD/ICC Rules. The DCC also has a relevant provision. Once the stage where the loss or damage occurred has been identified, provisions on time bar of the applicable law will govern the situation. However, if the loss or damage is not localised, then articles 8:42 and 8:43 do not provide for the solution<sup>208</sup>, but paragraph 2 of article 1722<sup>209</sup> apply to the time bar

---

<sup>194</sup> Article 35 of the Montreal Convention.

<sup>195</sup> Article 20.1 of the Hamburg Rules.

<sup>196</sup> Article 62.1 of the Rotterdam Rules.

<sup>197</sup> Article 32 of the CMR.

<sup>198</sup> Section 452b (2) and 439 (1) of the HGB.

<sup>199</sup> Article 48 of the COTIF-CIM.

<sup>200</sup> Those particular cases are listed in article 48.2; a) to recover a cash on delivery payment collected by the carrier from the consignee; b) to recover the proceeds of a sale effected by the carrier; c) for loss or damage resulting from an act or omission done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; d) based on one of the contracts of carriage prior to the reconsignment.

<sup>201</sup> Article III, rule 6 of the Hague Rules and Hague-Visby Rules.

<sup>202</sup> Article 24.1 of the CMNI.

<sup>203</sup> Article 22 of the Partial Agreement (MERCOSUR).

<sup>204</sup> Article 22 of the Decision (CAN).

<sup>205</sup> Article 30 of the Agreement (ALADI).

<sup>206</sup> Article 23 of the ASEAN Agreement.

<sup>207</sup> Section 24 of the MT Act 2000.

<sup>208</sup> That is because articles 8:42 and 8:43 only deal with the liability issues of the multimodal carrier.

<sup>209</sup> Article 1722 (2) provides that “If, in a contract of combined carriage of goods, the person instituting the action does not know where the fact giving rise to the action has occurred, that relevant provision regarding prescription or lapse of time is applied which is most favourable to him.”

issue in case of non-localised loss, providing for the period of time for suit which is most favourable to the claimant. That time limit can be the longest period of time for suit among the rules applicable to various modes of transport.

#### 3.3.2.2.2 Why do they differ?

Suppose that there is a multimodal transport including a sea leg followed by a road leg. Here, the possible time bar will be between 3 years and 9 months. In this case, cargo interests want to remain with the longer time limit, while carriers want to insist on the shorter one. Here, one of the questions that may arise is again why it should be so different and what the policy reason for that is. Apart from the regional/sub-regional regimes based on the UNCTAD/ICC Rules designed to govern multimodal transport only, it seems that more recently the time bar is moving to a longer limit. For example, it is one year in the 1924 Hague Rules, 1956 CMR and 1968 Hague-Visby Rules and recently it is moving to two years in the 1978 Hamburg Rules, 1999 Montreal and 2008 Rotterdam Rules. It seems that the time bar is getting more generous as time goes by. This may be the general trend in the unimodal transport of goods.

However, when looking at the rules of regional/sub-regional regimes in Latin America and Asia, they went down to 9 months. Here, one should keep in mind that there are distinctions between unimodal transport and multimodal transport. One of the significant differences is that in multimodal transport there are many subcontractors involved, which in turn there will be a main claim between main parties to the contract and second claims between the multimodal carrier and the responsible subcontractors. Thus, the time limit of 9 months was adopted to ensure that the multimodal carrier would have sufficient opportunities to institute recourse actions against the subcontractor.<sup>210</sup>

### 3.3.3 Uncertainty and unpredictability

#### 3.3.3.1 Why certainty is important

---

<sup>210</sup> For more information about the time limit of 9 months, see paragraph 5.3.2.2.

Before moving to the uncertainty issue, it is necessary to have a better understanding of what certainty means in the area of commercial law. When parties to commercial contracts enter into a contract, if the terms of the contract are uncertain or incomplete, the parties cannot reach an agreement. If they are not able to agree on key issues, such as liability, limits of liability, governing law or freight, this may cause the entire contract to fail. Thus, contracting parties try to identify applicable rules that will apply to their contracts in order to use the relevant rules for shaping their contract. There might be a mandatory international convention or mandatory national rules or standard forms of contract. Nowadays the parties can easily identify default rules that will apply to their contracts and they can choose to draft around many of them by setting out their obligations, whilst at the same time remembering that the terms of the contract are not contrary to any mandatory rules. By framing their liabilities or settlement rules, they can assess their risks in advance.<sup>211</sup> For instance, when they agree to the terms on limitation of liability, the parties know how much they are responsible for in cases of loss or damage to goods, being able to assess their scope of liabilities in advance and insuring their risks at reasonable cost. Furthermore, if they know the applicable rules in advance, they can also add certainty and predictability to the contracts by inserting special provisions in order to make the terms clear.

### **3.3.3.2 Uncertainty in the current system**

This section is now to consider an uncertainty and unpredictability issue in the current system. It is true that the current multimodal regime presents “a picture of far greater uncertainty and confusion”,<sup>212</sup> especially compared to the legal regime for other unimodal forms of carriage. The situation of various different regimes and different rules has brought about uncertainty and unpredictability. The lack of coherence among those different regimes is an impediment to any cargo interests and carriers because legal uncertainty may exist.

The parties to the contracts may not be able to complete the terms of the

---

<sup>211</sup> CR Calleros, ‘Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?’, 7, <[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=charles\\_calleros](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=charles_calleros)> accessed 15 September 2012.

<sup>212</sup> A Diamond, ‘The United Nations Convention on International Multimodal Transport of Goods 1980’, in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 51.

contracts in advance and will remain incomplete for the future. They just need to do their best by setting out alternatives for several possible cases. In particular, the fact that every stage of the multimodal route was traditionally governed by a different set of international conventions and national laws exposed cargo interests to substantial uncertainty with respect to the applicable laws.<sup>213</sup> The problem for cargo interests in this situation is that it is impossible to predict before transit begins which liability rules will be applicable in the event of the goods suffering loss or damage. Applicable liability regimes vary depending on the stage of transport where loss or damage occurred. Thus, liability cannot be assessed in advance. Assessing the risks the cargo is exposed to is vital for their insurers. However, as a result of this, cargo insurers and P & I insurers cannot estimate properly the risk exposures accompanying the contract of carriage, increasing insurance costs.<sup>214</sup>

In addition, where loss or damage is non-localised, the cargo interests may not be able to identify the right carrier who is responsible for the loss, resulting in the legal process being long drawn out. Therefore, in practice cargo interests may have to protect their claims by filing a lawsuit against all the parties involved in the transport until the actual stage of loss or damage is finally established. This is obviously not cost-effective.

### **3.3.4 Non-localised loss and liability gaps**

#### **3.3.4.1 Non-localised loss**

Loss can be non-localised when the particular stage of carriage where the loss of or damage to the goods occurred cannot be identified. This non-localised loss is a typical problem in multimodal transport. It was pointed out that up to 80 per cent of claims occurrences are not known loss or damage,<sup>215</sup> and a high percentage of cargo

---

<sup>213</sup> K Nasser, 'The Multimodal Convention' (1988) 19(2) JMLC, 233.

<sup>214</sup> Here, most P & I Clubs provide liability cover up to limits on the basis of the Hague-Visby Rules. For example, Proviso (i) to Rule 25 xiii of Steamship Mutual P & I Club. Insurance aspects in multimodal transport will be dealt with in Chapter 8.

<sup>215</sup> MG Graham, 'The economic and commercial implications of the multimodal conventions', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), F6.

damage is non-localised.<sup>216</sup> As the current legal system for multimodal transport is more likely to be a network system of liability,<sup>217</sup> every stage of a multimodal transport is governed by the applicable law. The applicable law may provide for a convention, such as the Montreal Convention, Hague-Visby Rules, CMR, COTIF-CIM or CMNI, or national legislation. However, for the applicable law to apply, firstly it is always necessary to find out at which stage the loss or damage occurred. Then, according to the identified stage of multimodal transport, the relevant applicable law will deal with the problem.

Here, the question arises as to what if the loss or damage cannot be localised or the loss was progressive, which rules will apply. This problem arose with the use of containers. Once cargo is loaded into a container box, the container is sealed and it usually remains sealed until it reaches its final destination. One of the problems is the fact that it is almost impossible to determine where and when the loss or damage occurred. In many cases, the time and place of loss or damage remain unknown or are determined by surveyors through guess-work.<sup>218</sup> Given the fact that different mandatory transport regimes govern different modes of transport, if cargo interests cannot establish at which stage the loss or damage occurred, they would be struggling to determine the applicable law and subsequently they cannot predict, *inter alia*, the liability of the parties, the amounts of compensation entitled to receive, the time period for suit. While a pure network system does not provide the solution to it, there may be a liability gap between the application of the unimodal transport conventions.

#### **3.3.4.2 Liability gaps**

Liability gaps happen when goods are not in the sphere of any of the applicable regimes at the time when the loss, damage or delay occurred. This particular problem arises when the time and place of occurrence is the point in time and space where one unimodal regime ends and another begins, i.e. usually the operations of loading and unloading.

---

<sup>216</sup> E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), A14.

<sup>217</sup> For more information about the network system of liability, see paragraph 5.2.2.

<sup>218</sup> S Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32 ICLQ 120, 121.

This can even happen just on one mode of transport. For example, if there are goods going from A to B and then they are going to be transhipped at B and going on to C. But the important question is whether that contract is a multimodal or through bill contract which takes from A to C, in which case there is a coverage right the way through,<sup>219</sup> or there are two separate contracts from A to B and from B to C respectively, in which case the Hague-Visby Rules may apply. In latter case the application stops on goods being discharged, and they sit in port until they put on the next vessel and only when they are loaded on the next vessel, the Hague-Visby Rules apply again.<sup>220</sup> Thus, we have a gap in the middle here when the goods are in port. It is, therefore, very important that the parties have provisions to deal with that gap. They well may say that the Hague-Visby Rules apply even after discharge, but if they did not say then there is a gap.

### **3.3.5 Recourse actions**

#### **3.3.5.1 Multimodal carrier's recourse action**

Once the parties have established the location of the loss or damage, there might be another hurdle for the multimodal carrier. This recourse action is a problem which a multimodal carrier may encounter when they wish to recover from their subcontractors money which they have had to pay cargo interests as compensation for loss or damage under the contract. However, the multimodal carrier had to pay compensation to cargo interests for their loss or damage according to the terms of the multimodal transport contract and may not be able to recover the compensation amount from the subcontractor actually responsible for the loss or damage because his right of recourse against his subcontractors will invariably be governed by the relevant unimodal regime. The multimodal carrier may be able to recover from its

---

<sup>219</sup> *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317.

<sup>220</sup> *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595, where transhipment during the sea leg is envisaged by the parties as constituting two separate contracts each covered by its own separate bill. In such circumstances, the carrier may exclude his liability under the Hague or Hague-Visby Rules for the on-carriage. Thus in this case, the carrier was entitled to rely on the contractual clause excluding liability during the period when the goods were stored on the dock since the Hague Rules did not apply to this period.

subcontractor, even if a unimodal regime applies. However there may be the difficulty of non-localised loss and some other practical problems which will be discussed below.

### **3.3.5.2 Practical problems of recourse actions**

#### **3.3.5.2.1 Differences between the amounts of money paid and recovered**

The first concern arises regarding the amount of money paid to cargo interests and the amount of money recovered from sub-contracting parties. This could be a major problem, especially when the particular stage of transport where the loss of or damage to the goods occurred cannot be identified. This is because in case of non-localised loss, the multimodal carrier had to pay compensation to cargo interests for the loss according to the terms of the multimodal transport contract or any of applicable multimodal regimes and then the multimodal carrier would be struggling to find the stage of transport at which the loss or damage occurred in order to determine the applicable law. Even if they succeed in determining the stage and the applicable rule, in most cases, there will be a discrepancy between the relevant rules. For instance, where the multimodal transport includes carriage by air, road, sea and if the loss or damage cannot be localised, the Dutch Civil Code (DCC)<sup>221</sup> provides that the liability of the carrier will be determined by the rules applicable to the part of the transport which impose “the highest level of liability”. In this case the multimodal carrier would pay compensation to cargo interests according to the law applicable to carriage by air, i.e. 19 SDR per kg of the Montreal Convention, while the multimodal carrier may recover less money from the responsible sub-contracting party because it would be 2 SDR per kg under the Hague-Visby Rules if it was found at a later stage that the loss actually occurred during the sea carriage, or may never recover the money if the multimodal carrier cannot find where the loss occurred.

#### **3.3.5.2.2 Recourse action is not possible**

Another significant problem is that, in some cases, the multimodal carrier does not have a recourse action at all. For instance, if there is a multimodal transport including

---

<sup>221</sup> Article 8:43, paragraph 1 of the DCC. See paragraph 2.5.3.1.

carriage by sea which is governed by the Hague or Hague-Visby Rules and if the loss occurred during the sea leg, the multimodal carrier will attempt to bring a recourse action against a sea carrier who has caused the loss of or damage to the goods. However, the multimodal carrier may fail because the sea carrier can successfully rely on, *inter alia*, the exception of error in navigation or management of the ship,<sup>222</sup> and of fire.<sup>223</sup>

#### 3.3.5.2.3 Claims in tort

Where the multimodal carrier has been held liable to cargo interests for loss or damage to goods and wants to pursue a recourse action against one of the other parties involved in the multimodal transport, the first thing that the multimodal carrier has to do is to identify whether they have a right of action. This right of action can arise in contract, tort or bailment. However, the legal position under tort or bailment may be more complex.

Although in many legal systems, the multimodal carrier may also try and institute an action in tort against his sub-contracting parties, the chances of success would not be guaranteed.<sup>224</sup> In the case of the tort of negligence, a multimodal carrier has to establish a good cause of action against the subcontractors and has to show that they had either legal ownership of or a possessory title to the property at the time when the damage occurred.<sup>225</sup> In *Transcontainer Express v Custodian Security*<sup>226</sup> the multimodal carrier was held to be liable to cargo interests for loss to goods but could not successfully pursue a recourse action in contract, tort or bailment. The multimodal carrier (Transcontainer Express) did not have a contract with CS (Custodian Security) and pursued his claim in tort and bailment. It was held that CS had failed to take reasonable care of the goods and that this had resulted in the loss of goods (brandy). However, because the multimodal carrier had never actually owned the brandy, he still had to establish a good cause of action against CS in the tort of negligence. To do this, the multimodal carrier had to show that they had a possessory title at the date of the theft. They could not do so and, therefore, they could not

---

<sup>222</sup> Article IV, rule 2(a) of the Hague and Hague-Visby Rules.

<sup>223</sup> Article IV, rule 2(b) of the Hague and Hague-Visby Rules.

<sup>224</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 10.14.

<sup>225</sup> *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785

<sup>226</sup> [1988] 1 Lloyd's Rep. 128.

recover their loss from CS.

In *The Starsin*,<sup>227</sup> the cargo owners, with the exception of one party, were also unable to show when they acquired title to the goods and so were unable to show that they were the owners of the goods consigned to them when the damage occurred and the cause of action arose. Accordingly, the owners were not liable in tort to those cargo owners.

### 3.3.6 Alternative action in tort

Normally, cargo interests can claim for breach of the multimodal contract, but occasionally, it may be brought on some other basis of personal liability such as tort or bailment. The most obvious situation is when the cargo interests wish to sue the particular performing or actual carriers who had custody of the goods when the goods were damaged or lost. These performing or actual carriers are not in privity of contract with the cargo interests, because they only have a contractual relationship with the multimodal carrier and are separated by a main multimodal contract which governs the relationship between cargo interests and multimodal carriers. The cargo interests cannot sue the performing or actual carriers for breach of contract in the absence of a contract between them and the cargo interests, therefore, frame their claim in the alternative action in tort.

The difference in the style of the cause of action can be significant to the purpose of the claim, particularly in the amount of compensation payable. Actions for breach of contract are resolved in accordance with the terms of the agreement between the parties, which often include rules on liability or limitations of liability. An action in tort is not so limited since it is not based on agreement but on civil liability imposed by law. Thus, it may be advantageous to the cargo interest to sue in tort rather than in contract. However, this alternative might allow the cargo interest to circumvent the effects of the multimodal rules which it has undertaken to respect. Such a consequence is an abuse of process against the multimodal carrier and all those who work for it.<sup>228</sup>

---

<sup>227</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571.

<sup>228</sup> HM Kindred and MR Brooks, *Multimodal Transport Rules* (Kluwer Law International, 1997), 134-135.

Consequently, in practice, there may be a Himalaya clause in the multimodal contract which extends the benefit of any exceptions, limitation, and so on in that contract to any subcontractors.<sup>229</sup>

### **3.3.7 Overlaps: Conflict of laws**

Problems also arise when two different regimes apply to the same claim simultaneously. As seen above,<sup>230</sup> some of the unimodal conventions extend their scope of application into multimodal transport to a certain extent, so it is clear that the potential conflict may arise in the field of multimodal transport contracts.

The CMR, for example, which relates to international carriage by road, may continue to apply during carriage by rail, inland waterway or sea when the road vehicle, on which the goods remain loaded, is carried in such a way.<sup>231</sup> The COTIF-CIM relating to international carriage by rail may continue to apply both to domestic carriage by road or inland waterway and to transnational carriage by sea or inland waterway on designated services.<sup>232</sup> The Montreal Convention on international carriage by air continues to apply during carriage by any other mode at an airport and apply rebuttable presumptions that loss or damage occurred during the carriage by air. In cases of carriage by other modes performed outside an airport, the Montreal Convention provides that it shall apply to any carriage by land or sea if the carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, or if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage.<sup>233</sup>

Furthermore, the Rotterdam Rules also extend the scope of application to the other modes of transport, and the situation would be more serious.<sup>234</sup>

---

<sup>229</sup> *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571.

<sup>230</sup> See paragraphs 2.5.1.1. to 2.5.1.5.

<sup>231</sup> See article 2.1 of the CMR.

<sup>232</sup> See articles 1.3 and 1.4 of the COTIF-CIM.

<sup>233</sup> See articles 38.1 and 18.4 of the Montreal Convention.

<sup>234</sup> See articles 26 and 82 of the Rotterdam Rules.

### **3.4 Summary and conclusion**

This chapter has looked at the reasons for an international multimodal regime in order to examine whether a uniform set of rules for multimodal transport is necessary or not. There are sufficient reasons for that from the practical aspects and legal aspects.

Firstly, a substantial growth in container or door-to-door transport could be considered. Over the last few decades, much of the international transport of goods is carried on a multimodal basis, and due to the advent of containerisation and cargo unitisation, multimodal transport has been very popular. This popularity of multimodal transport in the commercial area would be one of the reasons for an international multimodal regime.

Second of all, the legal problems arising from the current legal framework for multimodal transport could be another aspect for the reason. The situation of muddles and uncertainty in the field of multimodal transport will definitely justify the reasons for an international multimodal regime. Having explored the current legal framework for multimodal transport, which consists of a complex formation of international unimodal conventions, various regional/sub-regional agreements, national laws and standard form contracts, it will become clear that there are many intrinsic legal problems arising from multimodal transport. There are various different rules even on the same subject matter and, more seriously, they proceed without any reference to each other. Therefore, the situation of those various different rules which are incompatible with each other is a problem in the current legal framework for multimodal transport. This conflict between those different provisions would lead to uncertainty and increased legal cost. Furthermore, the issue of non-localised loss is a typical problem in multimodal transport. There is another difficulty which a multimodal carrier may encounter when they wish to recover from their subcontractors money which they have had to pay cargo interests as compensation for loss or damage under the contract. Last but not least, problems also arise when two different regimes apply to the same claim simultaneously. Therefore, it is necessary to find a solution through a uniform multimodal regime which would work internationally.

# CHAPTER 4 PAST ATTEMPTS FOR INTERNATIONAL MULTIMODAL SOLUTIONS

## 4.1 Introduction

The international carriage of goods is governed by several international conventions applicable to unimodal transport and it was noticed that each unimodal regime designed to govern a single mode of transport, which is only part of the multimodal transport, applying its own different rules. In the past, in most cases, the use of other transport modes for that single mode of carriage is only incidental and involves a different and separate liability regime or some unimodal conventions extend, in exceptional circumstances, their scope of application to other stage of transport to a certain extent in order to cover this incidental part of the carriage.<sup>235</sup> Therefore, at that time uniformity of laws in international transport but only on a modal basis was thought to suffice the aim of facilitating international trade.<sup>236</sup>

However, as seen in Chapter 3, this notion has been changed since the introduction of container revolution and the increase in door-to-door transport, which greatly facilitated international carriage of goods, proving that it made it possible to transfer cargo “quickly, safely and cheaply”<sup>237</sup> from one mode of transport to another.<sup>238</sup> Unfortunately, these developments created many legal problems, especially in regard to the laws governing the carriage in general.<sup>239</sup> Among others, the application of several international unimodal conventions to different stages of multimodal transport resulted in uncertainty as the applicable regime can only be identified when it is clear during which stage of transport the loss of or damage to the goods occurred. Here, when the loss or damage cannot be localised, the situation

---

<sup>235</sup> For instance, article 18.4 of the Montreal Convention, article 2.1 of the CMR, article 1.4 of the COTIF-CIM and article 2.2 of the CMNI. For more details, see paragraph 2.5.1.

<sup>236</sup> K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC, 232.

<sup>237</sup> *Ibid*, 233.

<sup>238</sup> For more information about the background of multimodal transport, see paragraph 3.2.

<sup>239</sup> For more information about the problems arising from multimodal transport, see paragraph 3.3.

would get worse. This problem of uncertainty could be a serious impediment to further development in the international transport of goods.<sup>240</sup>

Following the fact that the development of multimodal transport has become increasingly important and this unimodal regime was proven to be inadequate to resolve the complicated problems arising from multimodal transport, it could be desirable to have an international instrument applicable to multimodal transport. A simple and straightforward uniform regime for multimodal transport would be of great assistance to the industry as a whole, especially in the interests of legal certainty.<sup>241</sup> In addition, it was also pointed out that shippers and consignees often prefer to have a harmonised international framework for multimodal transport, which provides for multimodal carrier, who arranges for the transport of goods from door to door and assumes responsibility throughout the entire journey, irrespective of whether this is also the party that actually carries out the different stages of the transport.<sup>242</sup>

There is currently no international uniform regime in force governing liability for loss, damage or delay arising from multimodal transport. However, having recognised that the existence of an appropriate legal framework for multimodal transport at the international level was essential, there have been several attempts to find an international multimodal transport convention,<sup>243</sup> which have so far failed. Therefore, it is crucial to look at the questions why it failed and what we need to do in order to find something that would work internationally. In this regard, this chapter will especially scrutinize the reasons why the TCM<sup>244</sup> Draft Convention failed to draw enough support to be adopted and the reasons why the MT Convention did not attract sufficient ratifications to enter into force.

Pending the entry into force of the MT Convention, another attempt for international solution was made, this time it was not a convention but a model rule for multimodal transport documents, i.e. the UNCTAD/ICC Rules. The

---

<sup>240</sup> K Nasser, 'The Multimodal Convention' (1988) 19(2) JMLC, 233.

<sup>241</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 27-29.

<sup>242</sup> Report by the UNCTAD Secretariat, 'Development of Multimodal Transport and Logistics Services', TD/B/COM.3/EM.20/2 (15 July 2003), para 3.

<sup>243</sup> Since 1930s there have been two attempts to formulate an international multimodal convention, i.e. TCM Draft Convention and MT Convention. The detailed research will follow below.

<sup>244</sup> Transport Combine de Merchandises.

UNCTAD/ICC Rules have been widely used and consequently, the gap left by the absence of an international multimodal convention has been filled with contractual regimes as an interim solution. The second section of this chapter will examine this interim contractual solution.

## 4.2 Multimodal international conventions – Past attempts

Firstly, it does not seem entirely clear when the first efforts were made to achieve international uniformity in the field of multimodal transport liability. UNCTAD Reports<sup>245</sup> and some scholars<sup>246</sup> state that the first attempt to develop an international multimodal convention dates back to the 1930s, when the International Institute for the Unification of Private Law (UNIDROIT) started the relevant work which finally produced a “draft convention on the international combined transport of goods (UNIDROIT draft)” in 1963. However, other scholars<sup>247</sup> pointed out that the efforts made by the UNIDROIT and CMI<sup>248</sup> in the late 1960s, producing the TCM Draft Convention would be more considered as the starting point of the formal negotiating history of an international multimodal convention. Thus, this section will discuss the TCM Draft Convention first.

---

<sup>245</sup> See Report by the UNCTAD Secretariat, ‘Implementation of Multimodal Transport Rule’, UNCTAD/SDTE/TLB/2 (2001), para 16; and ‘Preparation of a Preliminary Draft of a convention on International Intermodal Transport’, UNCTAD Document TD/B/AC.15/2 (1973), 3.

<sup>246</sup> S Zomora, ‘Carrier Liability For Damage or Loss to Cargo in International Transport’ (1975) 23 American Journal of Comparative Law 391, 392; A Xerri, ‘Combined Transport: A new attempt at unification’ (1980) II Uniform Law Review 138, 140; M Faghfour, ‘International Regulation of Liability for Multimodal Transport – In search of Uniformity’ (2006) 5(1) WMU Journal of Maritime Affairs 95, 96.

<sup>247</sup> W Driscoll, ‘The Convention on International Multimodal Transport: A Status Report’ (1978) 9 JMLC 441, 442; W Driscoll and PB Larsen, ‘The Convention on International Multimodal Transport of Goods’ (1982) 57 Tulane Law Review 193, 196; K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 234-235; C Hancock, ‘Multimodal transport under the Convention’, in Chapter 2 of DR Thomas, *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 35-36; Especially, Messey noted that the history of TCM Draft Convention also related to the conclusion of the CMR Convention in 1956, when at that time the question of liability for multimodal transports had already arisen and the CMR attempted to deal with them. See EA Massey, ‘Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM’ (1972) 3 JMLC 725, 727.

<sup>248</sup> Comité Maritime International.

## 4.2.1 TCM Draft Convention

### 4.2.1.1 Background<sup>249</sup>

The history of TCM Draft Convention begins with the UNIDROIT draft. Subsequently, in 1965 the CMI began a study on the maritime aspects of multimodal transport and in 1969 produced and adopted a “Draft Convention on Combined Transport”, known as the “Tokyo Rules”. Here, the UNIDROIT draft considered the principles of the 1956 CMR in respect of multimodal transport, whereas the Tokyo Rules based on the 1924 Hague Rules, focused on maritime aspects of multimodal transport. As a result, it was thought that there should only be one set of rules for multimodal transport, the UNIDROIT draft and the Tokyo Rules were combined into one text, known as the “Rome Draft” in 1970 under the auspices of the United Nations Economic Commission for Europe (UNECE). The “Rome Draft” was further prepared by a joint committee of the UNECE and the Inter-Governmental Maritime Consultative Organization (IMCO)<sup>250</sup> during 1970 and 1971, and the “TCM” Draft was finalised.

However, the TCM Draft never went beyond the drafting stage. Consequently, the UN/IMCO Container Conference, which was to finalize the TCM Draft in 1972, recommended that the UNCTAD undertake further studies on various aspects of combined transport including its economic implications.<sup>251</sup>

Although the TCM Draft ended in failure, it has contributed to the contents of the standard bills of lading such as BIMCO’s COMBICONBILL and of the “Uniform Rules for a Combined Transport Document” of the ICC. Furthermore, the TCM Draft

---

<sup>249</sup> For a general background of the TCM Draft Convention, see EA Massey, ‘Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM’ (1972) 3 JMLC 725, 727-728; W Driscoll, ‘The Convention on International Multimodal Transport: A Status Report’ (1978) 9 JMLC 441, 442; A Xerri, ‘Combined Transport: A new attempt at unification’ (1980) II Uniform Law Review 138, 140-141; W Driscoll and PB Larsen, ‘The Convention on International Multimodal Transport of Goods’ (1982) 57 Tulane Law Review 193, 196; Report by the UNCTAD Secretariat, ‘Implementation of Multimodal Transport Rule’, UNCTAD/SDTE/TLB/2 (2001), paras 16-17; M Faghfour, ‘International Regulation of Liability for Multimodal Transport – In search of Uniformity’ (2006) 5(1) WMU Journal of Maritime Affairs 95, 96-97.

<sup>250</sup> The name was changed in 1982 to International Maritime Organization (IMO).

<sup>251</sup> See ‘UN/IMCO Conference on International Container Traffic’, UN/IMCO Conference Document E/CONF.59/47, 1971, Annex 1, Resolution No.7.

became the basis for the development of the MT Convention.

#### **4.2.1.2 Reasons for the failure of the TCM Draft Convention**

The TCM Draft Convention never went beyond the proposal stage and was never adopted. Here, it is absolutely essential to examine the reasons why it failed in order to find the international multimodal solutions that would work internationally.

##### **4.2.1.2.1 Voluntary nature**

First, its application was voluntary, so that shippers and carriers would have to agree contractually to apply the TCM. The voluntary network liability scheme with a special rule for non-localised loss was already a real practice in many contractual forms used by freight forwarders, thus, this principal feature of the TCM Draft Convention was not considered to be worthy as an international convention. Because it does not have any mandatory application, there is no necessity to “elevate it to the level of an international convention.”<sup>252</sup> For these reasons, it was thought that it did not fulfil the traditional function of an international convention.<sup>253</sup> This was the probably decisive weak point. One would wonder “what purpose it would serve to transform a legal text containing such a rule into an international convention”,<sup>254</sup> because this kind of rule would not make it any more than an application of the general rules of the law of contract, i.e. binding upon contracting parties.

##### **4.2.1.2.2 Network system of liability**

Second, the TCM Draft Convention used a “network system” of liability under which the TCM limit of liability would only apply if the damage could not be identified on a particular stage of the carriage. This is because if loss or damage is localised in a particular mode, the limits of the existing unimodal transport convention would apply. This liability system was strongly opposed by Australia, Canada and the USA during the UN/IMCO meetings. In particular, the United States found this network system

---

<sup>252</sup> EA Massey, ‘Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM’ (1972) 3 JMLC 725, 757; See also K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 235-236.

<sup>253</sup> A Xerri, ‘Combined Transport: A new attempt at unification’ (1980) II Uniform Law Review 138, 142.

<sup>254</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 2.190.

of liability very unsatisfactory<sup>255</sup> and even expressed doubts as to whether the TCM Draft Convention will ever be signed by the USA.<sup>256</sup>

Although in its final version, the TCM included an alternative set of liability articles and countries were to choose either a network system or uniform system, it was not enough to meet the strong objections.<sup>257</sup>

Efforts to preserve those principles of existing unimodal transport conventions would make the international multimodal convention too weak to achieve the objectives of uniformity and efficiency in multimodal transport.

#### 4.2.1.2.3 Failure to simplify

Third, it was noticed that given continued applicability of the various unimodal convention, the application of the TCM Draft Convention would add another regime to the international transport area. Furthermore, this would also be the addition of another document to the already mandatory existing ones. Therefore, it would seem clear that the TCM Draft Convention does not contribute to any simplification.<sup>258</sup>

#### 4.2.1.2.4 Lack of support by the airline industry

Last, another reason for the failure of the TCM Draft Convention would be the fact that the airline industry had not been sufficiently consulted.<sup>259</sup> The land transport and the ocean transport interests had been involved in the series of meetings, but the airlines had never really been consulted in preparing the Draft Convention. Although, at the later stage, some airline industry did send observers to the meeting, their posture was negative.<sup>260</sup>

---

<sup>255</sup> The USA, the country where the container was first put into operation and which is one of the largest shipping countries, submitted written comments to the UN/IMCO Meeting proposing the elimination of the 'network principle'. EA Massey, 'Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM' (1972) 3 JMLC 725, 744.

<sup>256</sup> DM Sassoon, 'Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons' (1972) 2 JMLC 759, 762.

<sup>257</sup> Articles 9(2) and 9A(3) of the TCM Draft Convention. See also EA Massey, 'Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM' (1972) 3 JMLC 725, 745-746.

<sup>258</sup> K Nasser, 'The Multimodal Convention' (1988) 19(2) JMLC 231, 236.

<sup>259</sup> C Hancock, 'Multimodal transport under the Convention', in Chapter 2 of DR Thomas, *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 36; EA Massey, 'Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM' (1972) 3 JMLC 725, 728-729.

<sup>260</sup> The International Civil Aviation Organisation (ICAO) and International Air Transport Association

## 4.2.2 United Nations Convention on International Multimodal Transport of Goods 1980 (MT Convention)

### 4.2.2.1 Background<sup>261</sup>

The history of the MT Convention starts with the failure of the TCM Draft Convention. The UN/IMCO Container Conference, which was to finalize the TCM Draft in 1972, did little more than to recommend that further studies be carried out on several aspects of multimodal transport by the UNCTAD.<sup>262</sup> Upon the request, the UNCTAD followed up the works on multimodal transport, setting up Intergovernmental Preparatory Group (IPG) in 1973. The IPG spent seven years and held six sessions between 1973 and 1979.<sup>263</sup> Following the seven years of extensive deliberations, the draft MT Convention was finally completed in the sixth session of the IPG held from 21 February to 9 March 1979. The Diplomatic Conference was held in Geneva from 12 to 30 November 1979 and from 8 to 24 May 1980 to consider the draft MT Convention. On 24 May 1980, the Conference adopted the

---

(IATA) expressed several objections to the TCM and made it clear that the airline industry did not want to be involved in this new Convention, arguing that the TCM would create irreconcilable conflicts with the Warsaw Convention. Massey, *Ibid*, 728-729.

<sup>261</sup> For a general background of the MT Convention, see W Driscoll, 'The Convention on International Multimodal Transport: A Status Report' (1978) 9 JMLC 441, 447-457 (especially for details of the sessions of the UNCTAD's Intergovernmental Preparatory Group (IPG)); GF Fitzgerald, 'The Proposed Convention on International Multimodal Transport of Goods: A Progress Report' (1979) 17 The Canadian Yearbook of International Law 247, 248-250 (for history of the development of the MT Convention); E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), paras A5-A14; A Xerri, 'Combined Transport: A new attempt at unification' (1980) II Uniform Law Review 138, 144-145; W Driscoll and PB Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 Tulane Law Review 193, 199-206; S Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32 ICLQ 120, 121-124; M Faghfour, 'International Regulation of Liability for Multimodal Transport – In search of Uniformity' (2006) 5(1) WMU Journal of Maritime Affairs 95, 97 (just for a brief history of the MT Convention).

<sup>262</sup> See UNCTAD Document TD/MT/CONF.5, Annex 2, July 1979, Resolution 1734 of the Economic and Social Council (ECOSOC), 10 January 1973. By Resolution 1734, the ECOSOC endorsed the recommendations of the UN/IMCO conference and requested that the UNCTAD Trade and Development Board (TDB) establish Intergovernmental Preparatory Group (IPG) for the elaboration of a draft convention on international multimodal transport.

<sup>263</sup> For a detailed description of the works carried out during the first four sessions of the IPG, see W Driscoll, 'The Convention on International Multimodal Transport: A Status Report' (1978) 9 JMLC 441, 447-457.

Convention on International Multimodal Transport,<sup>264</sup> which was opened for signature until 31 August 1981. The MT Convention is to enter into force 12 months after ratification by the governments of 30 states. However, over the last 32 years, only 11 states have ratified the MT Convention so far<sup>265</sup> and it became obvious that the MT Convention failed to attract sufficient ratifications to enter into force. However, its provisions have significantly influenced the type of legislation regarding multimodal transport enacted in several regional/sub-regional or countries.<sup>266</sup> Thus, although it has never entered into force, it would nevertheless be important to look at the main features of the MT Convention and in particular the reasons why it failed and what sorts of issues we need to consider in order to find the international multimodal solutions that would work internationally.

The MT Convention attempted to address the possible issues which could be raised in multimodal transport, including the liability of the Multimodal Transport Operator (MTO), problems of documentation, recourse actions and relationship with other conventions and so on. Key features of the MT Convention will be explored below before moving onto the reasons for the failure of the MT Convention.

#### **4.2.2.2 Key features of the MT Convention**

##### **4.2.2.2.1 Uniform system of liability**

Firstly, the choice between so-called uniform and network system<sup>267</sup> was one of the massive issues since the preparation of the MT Convention. Under the uniform system, it is simply to apply the same liability rules to both localised and unlocalised damage. Article 16 establishes a uniform basis of liability,<sup>268</sup> while in cases of localised damage, the ordinary limits of liability in article 18 are replaced by the higher limit contained in any international convention or mandatory national law

---

<sup>264</sup> See UN Document TD/MT/CONF/16.

<sup>265</sup> Burundi, Chile, Georgia, Lebanon, Liberia, Malawi, Mexico, Morocco, Norway, Rwanda, Senegal, Venezuela and Zambia have so far joined the MT Convention.

<sup>266</sup> See Report by the UNCTAD Secretariat, 'Implementation of Multimodal Transport Rule', UNCTAD/SDTE/TLB/2 (2001), 18-53; see also UNCTAD Report on 'Implementation of Multimodal Transport Rules - Comparative Table', UNCTAD/SDTE/TLB/2/Add.1 (2001), which provides the summarised contents of regional, sub-regional and national multimodal laws and regulations.

<sup>267</sup> For more information about uniform and network system, see paragraphs 5.2.1 and 5.2.2.

<sup>268</sup> Article 16(1) of the MT Convention.

covering the relevant stage of the multimodal transport.

#### 4.2.2.2.2 Definitions of the terms

The MT Convention provides several detailed definitions of multimodal transport, multimodal transport operator and multimodal transport contract, etc.<sup>269</sup> It envisages the issuance of one transport document and one responsible party to cover the whole period during which the carrier is ‘in charge’ of the goods, i.e. from the time they take the goods in charge until the time of delivery.<sup>270</sup> Thus, the MT Convention tried to establish the concept and nature of multimodal transport contract.

#### 4.2.2.2.3 Scope of application

The MT Convention applies to all contracts of multimodal transport within the geographical points of contract specified in article 2.<sup>271</sup> While it recognises the right of the consignee to choose between multimodal and segmented transport, its provisions are to apply mandatorily to all contracts of multimodal transport.<sup>272</sup> Here, Nasser<sup>273</sup> pointed out that the MT convention applies only to “true” multimodal carriage under a single contract of carriage. For example, if one mode of the transport is merely for the purpose of pick-up and delivery of cargo to be transported under a unimodal contract of carriage, the MT Convention does not apply.<sup>274</sup> This fact is of importance for the acceptance of the Convention since it helps to alleviate concerns that the MT Convention is incompatible with the Warsaw Convention because of the mandatory application of the Warsaw Convention<sup>275</sup> and documentary incompatibility, i.e. air waybill versus multimodal transport document.<sup>276</sup>

---

<sup>269</sup> Article 1 of the MT Convention.

<sup>270</sup> Article 14 of the MT Convention.

<sup>271</sup> Article 2 (Scope of application ) provides that ‘The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or (b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.

<sup>272</sup> Article 3 of the MT Convention.

<sup>273</sup> K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 238.

<sup>274</sup> Article 1.1 of the MT Convention.

<sup>275</sup> Article 18.3 of the Warsaw Convention is similar to article 18.4 of the Montreal Convention. See paragraph 2.5.1.1.

<sup>276</sup> W Driscoll and PB Larsen, ‘The Convention on International Multimodal Transport of Goods’

#### 4.2.2.2.4 Limitation of liability

Regarding the limit of liability, the MTO's liability is to be limited to an amount not exceeding 920 units of account per package or other shipping unit, or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. However, if the multimodal transport does not, according to the contract, include carriage by sea or by inland waterway, the limitation amount increases to 8.33 units of account per kilogram of gross weight.<sup>277</sup> The MT Convention also provides a special rule for localised damage.<sup>278</sup> Accordingly, in cases of localised loss or damage, the limits of liability are to be determined by reference to any applicable international convention or mandatory national law which provides a higher limit of liability than that of the MT Convention.<sup>279</sup>

Therefore, it seems that what the MT Convention attempts to do is to provide a floor, not a ceiling, which will uniformly apply in the absence of any higher limit.<sup>280</sup>

#### 4.2.2.3 Reasons for the failure of the MT Convention

Since the adoption of the MT Convention, more than 30 years have passed and only eleven states have ratified it so far. It could be said that the Convention failed to obtain sufficient international acceptance and has not entered into force.

The failure of the Convention to attract wide international support may be attributed to a number of factors and this section will examine those reasons why the MT Convention did not attract sufficient ratifications to enter into force. This critical examination of those reasons will be useful in an analysis of the questions we need to address in order to find something that would work internationally.

##### 4.2.2.3.1 Close link with the Hamburg Rules

One of the underlying reasons for the lack of support was considered to be the close link with the Hamburg Rules. The MT Convention cannot sensibly be considered

---

(1982) 57 Tulane Law Review 193, 216.

<sup>277</sup> Articles 18.1 and 18.3 of the MT Convention.

<sup>278</sup> Article 19 of the MT Convention.

<sup>279</sup> Further discussion on limitation of liability will follow later in paragraphs 4.2.2.3.2 and 5.3.1.2.

<sup>280</sup> A Diamond, 'Legal Aspects of the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), C23; K Nasser, 'The Multimodal Convention' (1988) 19(2) JMLC 231, 240.

except in conjunction with the Hamburg Rules.<sup>281</sup> From a general point of view, the MT Convention follows the Hamburg Rules. It is true that the adoption of the Hamburg Rules affected in many ways the preparatory work on the MT Convention.<sup>282</sup> The Hamburg Rules were also drafted under the auspices of the UN, and many of their substantive provisions are incorporated directly into the MT Convention. One of the examples is the main rules on liability in article 16 of the MT Convention and in article 5 of the Hamburg Rules. This close link with the Hamburg Rules certainly could have the merits in terms of bringing together a harmonisation in the field of transport law.<sup>283</sup> However, it should also be noted that, at the same time, it links the success of the MT Convention to ratification of the Hamburg Rules. Here, the question arises as to why it is important that the MT Convention and the Hamburg Rules are viewed as related conventions. This is because the Hamburg Rules are considered to have failed to gain much support among major maritime nations.<sup>284</sup> The Hamburg Rules were adopted on 31 March 1978 and entered into force on 1 November 1992.<sup>285</sup> It was widely believed that the adoption of the Hamburg Rules would result in a substantial restructuring of the legal relationship between the shipper and the carrier.<sup>286</sup> Thus, carriers and insurance underwriters strongly oppose the Hamburg Rules while cargo interests generally support them.

---

<sup>281</sup> A Diamond, 'The United Nations Convention on International Multimodal Transport of Goods 1980', in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 52.

<sup>282</sup> Although most of the preparatory work took place before the adoption of the Hamburg Rules, the first four of the six sessions were mainly devoted to the review of the economic and social implications of multimodalism. Furthermore, many of the participants were also involved in the work on the Hamburg Rules, the Hamburg Rules were in fact also used by all groups as a model for the MT Convention. E Selvig, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), A12-A13.

<sup>283</sup> A Xerri, 'Combined Transport: A new attempt at unification' (1980) II Uniform Law Review 138, 145.

<sup>284</sup> As of 1 April 2013, the Hamburg Rules have been ratified by 34 states, i.e. Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syria, Tunisia, Uganda, Tanzania, Zambia.

<sup>285</sup> In accordance with article 30(1) of the Hamburg Rules, the Hamburg Rules entered into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

<sup>286</sup> K Nasseri, 'The Multimodal Convention' (1988) 19(2) JMLC 231, 243.

#### 4.2.2.3.2 High limitation of liability

As seen above<sup>287</sup>, the usual limit is 920 SDR per package or 2.75 SDR per kilogram, whichever is the higher. The limit would seem a high one as compared with other transport conventions. This mixed limitation system derives from the Hague-Visby Rules. However, the new amount is approximately 38 percent higher than that of the Hague-Visby Rules, while it is some 10 percent higher than that of the Hamburg Rules.<sup>288</sup> Furthermore, for packages weighing less than 48 kilograms it is higher than the Montreal Convention and for packages under 54 kilograms it is higher than COTIF-CIM, and for packages under 110 kilograms it is higher than the CMR.<sup>289</sup> This must have been the huge burden on the multimodal carrier, which resulted in objections by the carrier interests.

Here, one of the questions that may very well arise is why the MT Convention did not adopt the limit of the Hamburg Rules<sup>290</sup> and chose the higher limit of liability. Diamond<sup>291</sup> thought that the MT Convention might try to put an end to the tradition that lower recoveries are made for transport by sea than for other modes of transport. He also expressed his opinion that having regard to the ability of the shipper under article 18, paragraph 2(a)<sup>292</sup> to “enumerate” the packages stuffed in a container, it is likely that the great majority of claims will be settled on the basis of the value of the goods and that the limit of liability will comparatively seldom apply. In addition, the fact that it has been the absence of a regular subsequent review of those limits, coupled with the progressive inflation of all currencies would be another reason. Especially the fact that article 39 of the MT Convention provides that a two-thirds

---

<sup>287</sup> See paragraph 4.2.2.2.4.

<sup>288</sup> The limit in the Hague-Visby Rules is 666.67 SDR per package or 2 SDR per kilogram, whereas the limit in the Hamburg Rules is 835 SDR per package or 2.5 SDR per kilogram, whichever is the higher.

<sup>289</sup> The limit in the Montreal Convention is 19 SDR per kilogram and the limit in the COTIF-CIM is 17 SDR per kilogram, whereas it is 8.33 SDR under the CMR. For comparison of the limits, see paragraph 3.3.2.1.1.

<sup>290</sup> Diamond expressed that it is somewhat curious given the close link with the Hamburg Rules. A Diamond, ‘Legal Aspects of the Convention’, paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), C23.

<sup>291</sup> Diamond, *Ibid*, C23-C24.

<sup>292</sup> Article 18, paragraph 2(a) of the MT Convention states that “where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit.”

majority of contracting states is necessary for revising the limits of liability would probably tend to discourage frequent amendments.

#### 4.2.2.3.3 Uncertainty regarding limitation

Another problem is that for, e.g. insurers, it is difficult to predict beforehand, having difficulties in fixing the premium.<sup>293</sup> Here, Diamond<sup>294</sup> states that those provisions on limitation of liability are “difficult, unsatisfactory, and somewhat complex”. This seems to be true, because there are four categories of limitation under the MT Convention applicable to the contract. First, the usual limit of 920 SDR per package or 2.75 SDR per kilogram<sup>295</sup>; second, the limit of 8.33 SDR per kilogram, when the contract does not include carriage by sea or by inland waterway<sup>296</sup>; third, the fixed limit agreed by the parties<sup>297</sup>; fourth, the higher limit by any applicable international convention or mandatory national law, in case of localised loss or damage.<sup>298</sup>

It seems unlikely that the above provisions provide legal certainty in that they do not set out a predictable limit of liability based on a uniform figure which can be readily applied in practice. Especially the fourth limit under article 19 would be more remarkable aspect to affect the failure of the Convention. According to article 19, if the place where the loss or damage occurred is known or can be established and if that stage of the transit is governed by an applicable international convention or mandatory national law that provides a higher limit of liability, then the limit set out in such convention or national law shall prevail. However, big concern arises because of the words “mandatory national law”. It would seem that a contracting state is not bound to apply the limits of liability set out in the MT Convention to particular stages of international multimodal transport. It seems that for localised loss or damage a contracting state is permitted to pass mandatory national laws that set higher limits than those set out in the MT Convention. Here Diamond<sup>299</sup> pointed out

---

<sup>293</sup> S Mankabady, ‘The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions’ (1983) 32 ICLQ 120, 131.

<sup>294</sup> A Diamond, ‘The United Nations Convention on International Multimodal Transport of Goods 1980’, in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 57.

<sup>295</sup> Article 18.1 of the MT Convention.

<sup>296</sup> Article 18.3 of the MT Convention.

<sup>297</sup> Article 18.6 of the MT Convention.

<sup>298</sup> Article 19 of the MT Convention.

<sup>299</sup> A Diamond, ‘The United Nations Convention on International Multimodal Transport of Goods

that this would “make considerable inroads” into the main objectives of the MT Convention which is surely to set out uniform rules for international multimodal transport. It would seem that under the MT Convention the parties to the contract would not readily be able to ascertain in advance what would be the maximum liability of the multimodal carrier.

Here, Nasser<sup>300</sup> stated that as the MT Convention sets out a minimum level or floor to the liability of the multimodal carrier, it guarantees that the shipper will never recover less than the limits of the MT Convention, if he is not at fault. However, it is not always the case where, for example, if two relevant states are parties to the Hague-Visby-Rules but only one of them is a party to the MT Convention, then the applicable limit may have to be reduced to the limit set out in the Hague-Visby Rules.<sup>301</sup>

#### 4.2.2.3.4 Large number of ratifications required

Since the adoption of the MT Convention, it has been ratified by only eleven countries. Given the fact that ratification by 30 states is required,<sup>302</sup> the prospects for its entry into force seem to be quite bleak. The number of 30 is relatively very high compared to 20 states for the Hamburg Rules and the Rotterdam Rules. Moreover, it was said that in the USA and other developed countries, the MT Convention has largely been ignored.<sup>303</sup> Here, Nasser<sup>304</sup> pointed out that given the large number of

---

1980’, in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 59; A Diamond, ‘Legal Aspects of the Convention’, paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), C16.

<sup>300</sup> K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 240.

<sup>301</sup> Article 38 of the MT Convention provides that “If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.”

<sup>302</sup> It was discussed at the final stage of the Conference whether the MT Convention’s entry into force should be easy to accomplish or, alternatively whether its entry into force should depend upon adoption by a substantial number of states having a substantial amount of trade. The Group of 77 favoured the first alternative and wanted entry into force to require a fairly low number of states. Consequently according to the proposal of the Group of 77, the entry into force formula based upon a straight number of states than proposed by the Group of 77. See W Driscoll and PB Larsen, ‘The Convention on International Multimodal Transport of Goods’ (1982) 57 Tulane Law Review 193, 243.

<sup>303</sup> K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 244.

<sup>304</sup> Nasser, *Ibid*, 252-253.

ratifications required for entry into force, the USA might want to await the actions of other nations before adopting the MT Convention, and claimed that it seems incongruous for the USA, one of the most developed and progressive countries in the world, to engage in wait-and-see approach before finding it appropriate to act on its own behalf. Although, it might have been possible if had the USA adopted the MT Convention, there were too many ratification required. Given the fact that only few states have ratified the MT Convention and there is no indication of increased future ratifications, it failed to attract enough support.

#### 4.2.2.3.5 Lack of awareness and uncertainty

In regard to the failure of the MT Convention, there was an interesting large scale survey conducted by the UNCTAD secretariat.<sup>305</sup> It was carried out through the industry and governments concerning the questions of the feasibility of establishing a new international legal instrument for multimodal transport. Apart from the issues mentioned above, the respondents to the UNCTAD questionnaire highlighted a number of issues as giving rise to limited support for the MT Convention, including the lack of awareness and uncertainty on the part of the shippers as to the benefits of the Convention. A considerable number of respondents indicated that lack of information or awareness particularly on the part of cargo interests and their representatives, coupled with uncertainty about the benefits of the liability regime were crucial in generating only limited support for ratification of the MT Convention.<sup>306</sup>

#### 4.2.2.3.6 Opposition by the shipping industry

According to the UNCTAD survey, it was pointed out that there was strong resistance from the shipping industry, resulting in adverse lobbying by it.<sup>307</sup>

Given the increased liability due to uniform system and higher limitation of liability, the carrier interests might have felt that they do not want to face their increased responsibility. Furthermore, in respect of the liability, the deletion of the

---

<sup>305</sup> See Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003).

<sup>306</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), 12.

<sup>307</sup> Ibid.

exemption of carrier's liability for error in navigation or management of the ship might not be acceptable to the shipping industry.

### **4.3 Multimodal contractual provisions –Interim solution**

Over the years, several attempts have been made to draft a set of uniform rules to regulate liability arising from international multimodal transport, however, none of these has brought about international uniformity. Consequently, the gap left by the absence of an international multimodal convention has been filled with contractual regimes as an interim solution. In this section, those interim contractual solutions will be discussed.

#### **4.3.1 ICC Rules 1975**

##### **4.3.1.1 Background**

The first model rule for the regulation of multimodal transport was the International Chamber of Commerce (ICC)'s Uniform Rules for a Combined Transport Document 1975 (ICC Rules 1975). Upon the failure of the TCM Draft Convention, the ICC Rules were created and revised in 1975, on the basis of the Tokyo Rules and the TCM Draft Convention, because no international convention then existed to regulate multimodal transport. However, unlike the unimodal conventions, they were only established as model contract terms. The ICC Rules 1975 operate by voluntary incorporation by the multimodal carrier into its standard trading terms. In practice, they were accepted as the appropriate standard for the model combined transport bills of lading such as the COMBIDOC Combined Transport Document issued by BIMCO in 1977 and the FIATA Combined Transport Bill of Lading.<sup>308</sup>

##### **4.3.1.2 Key features of the ICC Rules**

The ICC Rules adopt the same principles as the TCM Draft Convention. First, the

---

<sup>308</sup> Those bills are outdated and replaced by the MULTIDOC 95 and FIATA Multimodal Transport Bill of Lading respectively. See paragraphs 4.3.3.2 and 4.3.3.3.

ICC Rules are voluntary, and are given effect by their incorporation in the contract concluded for the performance or the procurement for performance of combined transport of goods as evidenced by the combined transport document.<sup>309</sup> The ICC Rules recognised the role of the multimodal carrier also known as a freight forwarder. This is because the multimodal carrier or the freight forwarder acting as a principal may perform the carriage by personally providing the specific modes of transport, or may subcontract all or parts of the carriage to different unimodal carriers who can complete each leg of the transport separately. Thus, the ICC Rules cover “the performance and/or procurement of performance of combined transport of goods”.<sup>310</sup> For this reason, under the ICC Rules, the multimodal carrier accepts the liability for ensuring the performance of the combined transport as required by the contract as well as the liability for the acts and omissions of his agents or servants, when they are acting within the scope of their employment and any other person whose services he uses for the performance of the contract.<sup>311</sup>

Second, the ICC Rules adopted the network system of liability. Therefore, if the loss can be localised, the ICC Rules 1975 refer to the unimodal convention or national law governing the stage of the transport where the loss occurred.<sup>312</sup> Thus, the extent of the multimodal operator’s liability for localised loss has to be determined by the mandatory unimodal convention or appropriate national law. However, where the loss of or damage to the goods cannot be localised, the ICC Rules 1975 had to set their own limit on the multimodal carrier’s liability. This was established at the rate of 30 Poincaré gold francs<sup>313</sup> per kg of the goods, unless a higher value was declared by the shipper.<sup>314</sup>

#### **4.3.2 UNCTAD/ICC Rules for Multimodal Documents 1992**

---

<sup>309</sup> Rule 1 of the ICC Rules 1975.

<sup>310</sup> See Rule 1 and Rule 2 (especially the definition of ‘combined transport document’) of the ICC rules 1975.

<sup>311</sup> Rule 5 of the ICC Rules 1975.

<sup>312</sup> Rule 13 of the ICC Rules 1975.

<sup>313</sup> Approximately 2 SDR/kg is the conversion of 30 Poincaré gold francs.

<sup>314</sup> Rule 11 of the ICC Rules 1975.

#### **4.3.2.1 Background**

Upon the failure of the MT Convention to attract more support among governments, the UNCTAD began to look for other ways to forward its objectives, including the promotion of uniform and equitable provisions concerning the liability of multimodal transport operators.<sup>315</sup> The UNCTAD/ICC Rules 1992 were the result of a cooperative arrangement between an intergovernmental body and the industry, as an interim solution. Following a request from the UNCTAD Committee of Shipping, a joint Working Group of UNCTAD and ICC was established to elaborate model provisions for multimodal transport documents on the basis of international conventions in force and existing standard form documents.

The joint Working Group completed the preparation of the UNCTAD/ICC Rules in 1991. The Rules entered into force on 1 January 1992.<sup>316</sup> In addition, the ICC Rules were subsequently withdrawn on entry into force of the UNCTAD/ICC Rules 1992.<sup>317</sup>

#### **4.3.2.2 Key features of the UNCTAD/ICC Rules**

The UNCTAD/ICC Rules share many important characteristics of the MT Convention including that of the MTO's liability. However, there is also a discrepancy between them. An important feature distinguishing the Rules from the MT Convention is the fact that the Rules provide for a network system with regards to limitation of liability and, similar to the Hague or Hague-Visby Rules, allow "nautical fault and fire" exemptions in case of loss during carriage involving a sea leg.<sup>318</sup> For the limitation of liability, the UNCTAD/ICC Rules provides that, unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the MT document, the MTO shall not be liable for any loss of, or damage to, the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit, or 2 SDR per kilogram,

---

<sup>315</sup> See the preamble to the MT Convention 1980.

<sup>316</sup> The Rules replaced the previous ICC Rules for Combined Transport Document 1975, which were based on the 'Tokyo Rules' and the 'TCM' Draft Convention. See UNCTAD/ICC Rules for Multimodal Transport Documents, Publication No. 481, 1992.

<sup>317</sup> However, the ICC Rules 1975 remain in commercial usage on old forms of transport documents.

<sup>318</sup> Rule 5.4 of the UNCTAD/ICC Rules.

whichever is the higher.<sup>319</sup> However, the Rules further provide that if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO is limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.<sup>320</sup> Regarding the time for suit, the time limit has been set at 9 months.<sup>321</sup> Here, the reason why the time limit of 9 months was adopted is to ensure that the MTO would have adequate opportunities to institute recourse actions against the performing carrier.<sup>322</sup>

However, it must be noted that the UNCTAD/ICC Rules are contractual in nature and do not have the “force of law”. They apply only if they are incorporated into a contract of carriage. Therefore, the Rules are subject to any applicable mandatory international or national law applicable to the multimodal transport contract.<sup>323</sup> Moreover, if multimodal carriers wish to incorporate the UNCTAD/ICC Rules into their contracts, they would need to add specific further clauses to deal with matters such as “optional stowage, routeing, freight and charges, liens, both to blame collision, general average, jurisdiction, arbitration and applicable law.”<sup>324</sup>

The UNCTAD/ICC Rules have received considerable support from the transport industry. They have been incorporated in widely used multimodal transport documents such as the FIATA Bill of Lading (FBL) 1992 and the MULTIDOC 95 of the BIMCO.

### **4.3.3 Standard forms of contract**

#### **4.3.3.1 BIMCO<sup>325</sup>'s COMBICONBILL**

---

<sup>319</sup> Rule 6.1 of the UNCTAD/ICC Rules.

<sup>320</sup> Rule 6.3 of the UNCTAD/ICC Rules.

<sup>321</sup> Rule 10 of the UNCTAD/ICC Rules.

<sup>322</sup> Further discussion on time for suit will follow later in paragraphs 5.3.2.

<sup>323</sup> Rule 13 of the UNCTAD/ICC Rules.

<sup>324</sup> N Gaskell, R Asariotis and Y Baatz, *Bills of Lading: Law and Contracts* (Informa, 2000), para 9.23.

<sup>325</sup> The Baltic and International Maritime Council (BIMCO) is “an independent international shipping association, representing ship-owners controlling around 65 percent of the world’s tonnage and members in more than 120 countries drawn from a broad range of stakeholders having a vested interest in the shipping industry, including managers, brokers and agents. The association’s main objective is to protect its global membership through the provision of quality information and advice,

#### 4.3.3.1.1 Background

COMBICONBILL is a Combined Transport Bill of Lading adopted by BIMCO in January 1971, followed by the revision in 1995.<sup>326</sup> COMBICONBILL adopts the so-called network system of liability and, therefore, the document accepts the underlying basis of liability set out in the several mandatory unimodal conventions or national laws which could be applicable to each leg of the multimodal transport when it is known at which stage of transport the loss or damage occurred.

COMBICONBILL is based on the Hague-Visby Rules, which are widely accepted for the carriage of goods by sea. There is, therefore, no specific need for the carrier to make prior consultation with the relevant P & I Club in each individual case to obtain its prior approval that cover will be provided when contracting on the COMBICONBILL. However, this would change if the Rotterdam Rules were ratified.

#### 4.3.3.1.2 Key features of the COMBICONBILL

The title of the COMBICONBILL is ‘Combined Transport Bill of Lading, Revised 1995’ and the heading refers to combined transport. Although the COMBICONBILL does not provide any direct definitions for combined transport, combined transport document, combined transport operator, it provides that the carrier is liable for loss of or damage to the goods occurring between the time when they receive the goods into their charge and the time of delivery.<sup>327</sup> COMBICONBILL is mainly designed for a combined transport (multimodal transport). However, clause 1 makes it clear that the provisions of the COMBICONBILL shall apply whether the combined transport involves one or several modes of transport. Accordingly, the document can also be used in port-to-port transport.

With regard to the liability and compensation, clause 11 contains special provisions for liability and compensation and it aims at those situations where the loss or damage is localised. Accordingly, clause 11(1) provides that in cases of

---

and while promoting fair business practices, to facilitate harmonisation and standardization of commercial shipping practices and contracts.” [https://www.bimco.org/en/About/About\\_BIMCO.aspx](https://www.bimco.org/en/About/About_BIMCO.aspx).

<sup>326</sup> The sample copy of COMBICONBILL and the explanatory notes to it are provided on BIMCO’s official website: [https://www.bimco.org/Chartering/BIMCO\\_Documents/Bills\\_of\\_Lading/COMBICONBILL.aspx](https://www.bimco.org/Chartering/BIMCO_Documents/Bills_of_Lading/COMBICONBILL.aspx).

<sup>327</sup> Clause 9 (1) of the COMBICONBILL.

localised loss, the liability of the carrier will be determined by reference to any applicable international convention or mandatory national law. Clause 11(2) ensures that, in the event no such international convention or national law applies for the carriage of goods by sea, the Hague-Visby Rules shall apply. This might be useful in those situations where there may be no such mandatory rules applicable.

Regarding the time for suit, a period of nine months<sup>328</sup> was provided for in order to give the carrier sufficient time to initiate possible recourse actions against sub-carriers given the fact that most unimodal conventions such as the Hague and Hague-Visby Rules, CMR and COTIF-CIM operate with a time bar of twelve months.

#### **4.3.3.2 BIMCO's MULTIDOC 95**

##### 4.3.3.2.1 Background

MULTIDOC 95 is a multimodal transport bill of lading, issued by the BIMCO, subject to the UNCTAD/ICC Rules.<sup>329</sup> The title of the MULTIDOC 95 is 'Multimodal Transport Bill of Lading', which implies that it is intended to be used for multimodal transport. Clause 2 of MULTIDOC 95 provides that "multimodal transport contract means a single contract for the carriage of goods by at least two different modes of transport" and that "multimodal transport operator (MTO) means the person named on the face hereof who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier." Since the UNCTAD/ICC Rules form the basis of the MULTIDOC 95, the concepts of multimodal transport of both are very much the same. MULTIDOC 95 also adopts the so-called network system in terms of limits of liability when the stage of transport where loss or damage occurred is known.

##### 4.3.3.2.2 Key features of the MULTIDOC 95

MULTIDOC 95 is also mainly designed for multimodal transport. However, the

---

<sup>328</sup> This was eleven months in the previous edition of the COMBICONBILL, but in line with the MULTIDOC 95, it was decided to cut the time bar to only nine months to allow the carrier sufficient time, i.e. three months, during which he may himself lodge a counter claim against any sub-carrier without being ousted by the time bar.

<sup>329</sup> The sample copy of MULTIDOC 95 and the explanatory notes to it are provided on BIMCO's official website: [https://www.bimco.org/Chartering/BIMCO\\_Documents/Bills\\_of\\_Lading/MULTIDOC95.aspx](https://www.bimco.org/Chartering/BIMCO_Documents/Bills_of_Lading/MULTIDOC95.aspx).

provisions of the MULTIDOC 95 shall apply whether there is a unimodal or a multimodal transport contract involving one or several modes of transport.<sup>330</sup> Therefore, the MULTIDOC 95 can be used not only for multimodal transport but also for port-to-port transport, for instance, to cover situations when a transport which was originally intended to be performed as a multimodal transport may turn out to be performed as a single transport mode only.

As the MULTIDOC 95 is based on the UNCTAD/ICC Rules, the provisions relating to the liability of the carrier, limitation of liability, time for suit, and so on are the same as those of the Rules.<sup>331</sup> For instance, clause 12(a) follows the limits of liability as set out in the Hague-Visby Rules, i.e. 666.67 SDR per package or 2 SDR per kilogramme whichever is the higher, but if the contract does not include carriage of goods by sea or by inland waterways, then the liability of the MTO is limited to an amount not exceeding 8.33 SDR per kilogramme.

Moreover, clause 12(d) clearly restates the network approach that when the loss or damage occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory law would have provided another limit of liability, then the limit of liability shall be determined by reference to the provisions of such convention or mandatory law. Regarding the time for suit, a period of nine months was provided.<sup>332</sup>

### **4.3.3.3 FIATA<sup>333</sup> Bill of Lading (FBL)**

#### **4.3.3.3.1 Background**

The title of the FBL is “Negotiable FIATA Multimodal Transport Bill of Lading” and it implies that the FBL is a document for multimodal transport. The FBL is mainly used for multimodal transport, but clause 1 provides that notwithstanding the heading

---

<sup>330</sup> Clause 1 of the MULTIDOC 95.

<sup>331</sup> See paragraph 4.3.2.2.

<sup>332</sup> Further discussion on time for suit will follow later in paragraphs 5.3.2.2.

<sup>333</sup> International Federation of Freight Forwarders Associations (FIATA), in French ‘Fédération Internationale des Associations de Transitaires et Assimilés’, was founded in Vienna, Austria on 31 May 1926. FIATA is “the largest non-governmental organisation in the field of transportation and its influence is truly worldwide. FIATA represents today an industry covering approximately 40,000 forwarding and logistics firms in 150 countries. FIATA has consultative status with the Economic and Social Council (ECOSOC) of the United Nations (inter alia ECE, ESCAP, ESCWA), the UNCTAD, and the UNCITRAL.” <<http://www.fiata.com>.>

“FIATA Multimodal Transport Bill of Lading (FBL)”, these conditions also apply if only one mode of transport is used. The FBL is a multimodal transport bill of lading issued subject to the UNCTAD/ICC Rules, which is widely used across the world for multimodal transport. FIATA has created several documents and forms to establish a uniform standard for use by freight forwarders worldwide and provides the FBL for multimodal transport.

#### 4.3.3.3.2 Key features of the FBL

The FBL defines “Freight Forwarder” to mean the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.

When it comes to the liability of the carrier, clause 6.2 provides that the Freight Forwarder is liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in their charge, unless the Freight Forwarder proves that no fault or neglect of their own, their servants or agents or any other person on whose services they rely for the performance of the contract, has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL. Clause 6.5 further states that when the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events,<sup>334</sup> it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events.

Regarding the limitation of liability and time for suit, they are the same as those of the UNCTAD/ICC Rules.<sup>335</sup>

---

<sup>334</sup> Clause 6.5 of FBL provides the following circumstances: a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge; b) insufficiency or defective condition of the packaging or marks and/or numbers; c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant; d) inherent vice of the goods; e) strike, lockout, stoppage or restraint of labour.

<sup>335</sup> For more information about the UNCTAD/ICC Rules, see paragraph 4.3.2.2.

## **4.3.4 Limits to contractual solutions**

### **4.3.4.1 Lack of legal force**

As mentioned above, the ICC Rules, UNCTAD/ICC Rules and standard forms are contractual in nature and do not have the “force of law.” They apply only if they are incorporated into a contract of carriage. Therefore, those Rules are subject to any applicable mandatory international or national laws applicable to the multimodal transport contract.<sup>336</sup> If those Rules conflict with any mandatory laws which have the force of law, they must definitely yield to such mandatory international conventions<sup>337</sup> or national laws. Therefore, those Rules must allow for existing unimodal rules established by international convention in countries where they are applied. Even where they do not operate, there is likely to be mandatory national law that does impact on the performance of particular stages of the multimodal transport.<sup>338</sup>

Because those Rules have the force only of contract and not of law, the fact of their incorporation in the multimodal transport contract will not of itself confer on the multimodal transport the characteristics of a document of title at common law, though it might be evidence of a custom having that effect, if it became sufficiently widespread.<sup>339</sup>

### **4.3.4.2 Certain level of uniformity, but not enough**

Shippers and carriers would have to agree contractually to apply the UNCTAD/ICC Rules. Under the fragmented and complex situation of the current multimodal regimes, the contractual model rules may well work to serve certain level of uniformity in the field of multimodal transport. However, because it does not have any mandatory application, there will inevitably be limits to this function. Even if those contractual rules apply to the multimodal transport contracts, there are still a number of mandatory unimodal conventions and national laws which will prevail

---

<sup>336</sup> This is explicitly recognised in Rule 13 of the UNCTAD/ICC Rules.

<sup>337</sup> For example, the Hague-Visby Rules, CMR, COTIF-CIM or Montreal Convention.

<sup>338</sup> HM Kindred and MR Brooks, *Multimodal Transport Rules* (Kluwer Law International, 1997), 35-36.

<sup>339</sup> G Treitel and FMB Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011), 8-089. The issue of document of title is further discussed in paragraph 4.3.5.

over the contractual rules. These multiple layers of various applicable regimes would still lead to uncertainty. Therefore, an international convention with mandatory application rather than contractual rules would be the best solution to the current situation of multimodal transport.

### **4.3.5 The legal function of multimodal transport documents**

The legal function of multimodal transport documents is particularly important in international trade. When sellers deliver goods to multimodal carriers, buyers would accept making a payment in exchange for a more sophisticated document than a mere receipt.<sup>340</sup> Here when goods are delivered to the multimodal carriers, the risks during transit will rest upon buyers and they would require a transport document which confers the power to sue the carrier when something went wrong. It is also important that where buyers wish to sell the goods during transit, they would need the transport document which can facilitate the transfer of the right to claim delivery and to sue the carrier. Therefore, it is necessary to look at the legal function of multimodal transport documents which seems different from conventional bills of lading.

#### **4.3.5.1 The distinct features of multimodal transport documents**

As already seen above,<sup>341</sup> where goods are carried by more than one mode of transport, multimodal transport documents, such as a ‘Negotiable combined transport bill of lading’<sup>342</sup>, ‘Negotiable multimodal transport bill of lading’<sup>343</sup>, or ‘Negotiable FIATA Multimodal bill of lading’<sup>344</sup> will be typically used. These documents all envisage the carriage of goods by more than one mode of transport and are issued by multimodal carriers. Furthermore, these documents all state that the goods have been

---

<sup>340</sup> M Ozdel, ‘Multimodal transport documents in international sale of goods’ (2012) 23(7) *International Company and Commercial Law Review* 238, 238; M Ozdel, ‘Multimodal Transport Documents in International Sale of Goods’, paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Multimodal Transport Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011), 1.

<sup>341</sup> Paragraph 4.3.3.

<sup>342</sup> BIMCO’s COMBICONBILL. See paragraph 4.3.3.1.

<sup>343</sup> BIMCO’s MULTIDOC 95. See paragraph 4.3.3.2.

<sup>344</sup> See paragraph 4.3.3.3.

received on that date on which the documents are issued, rather than state that the goods have been shipped. Therefore, the question may certainly arise as to whether the named consignee or the endorsee of such multimodal transport documents has a right to the delivery of the goods as against the carrier or to sue the carrier when the goods are lost or damaged.

#### **4.3.5.2 Multimodal transport document as a document of title**

The first question may arise as to whether the multimodal transport documents are documents of title. In *Lickbarrow v Mason*,<sup>345</sup> the court recognised the customary use of transferable bills of lading and described these documents as ‘document of title’ at common law. Thus, the court established that the transfer of such documents to third parties, such as buyers and banks, was to be taken as a transfer of the right to obtain actual possession of the goods covered by that document.<sup>346</sup> In view of these effects, the phrase ‘document of title’ clearly implies the function of transferability.<sup>347</sup> However, a bill of lading stating goods to have been received for shipment was not recognised as a document of title at common law prior to COGSA 1992.<sup>348</sup>

#### **4.3.5.3 Multimodal transport documents under COGSA 1992<sup>349</sup>**

Now the focus will be on COGSA 1992 in order to examine whether multimodal transport documents have documents of title and can confer the right to claim delivery of the goods on the receivers, or to transfer these rights to third parties. This Act facilitates the transfer of contractual rights and liabilities under the transport documents listed therein to the respective cargo receivers as if they were original parties to the contract of carriage. It seems clear that the lawful holder of a multimodal bill of lading which states that the goods have been received for

---

<sup>345</sup> (1794) 5 TR 683.

<sup>346</sup> *Lickbarrow v Mason* (1794) 5 TR 683, 685-686; C Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), para 2.3; MG Bridge (ed), *Benjamin's sale of goods* (8th edn, Sweet & Maxwell, 2010), para 18-007; B Eder, et al, (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell, 2011), 17-015.

<sup>347</sup> C Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), para 2.3; MG Bridge (ed), *Benjamin's sale of goods* (8th edn, Sweet & Maxwell, 2010), para 18-007.

<sup>348</sup> C Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), para 2.44; B Eder, et al, (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell, 2011), 17-015.

<sup>349</sup> Carriage of Goods by Sea Act 1992.

shipment has a contractual right to delivery of the goods as against the carrier.<sup>350</sup> Although the Act does not mention multimodal transport documents, section 1(2)(b) of COGSA 1992 makes it clear that references in the Act to bills of lading will include bills of lading stating that the goods have been received for shipment. Therefore, the received for shipment bills of lading could be considered as a bill of lading for the purposes of COGSA 1992. Thus, many different types of multimodal transport documents would come within the sphere of COGSA 1992 and, as a result, this would bring more certainty to multimodal bills of lading which can operate as a port-to-port or a multimodal transport bill of lading.

#### **4.3.5.4 Negotiable or non-negotiable transport documents**

Most multimodal transport documents<sup>351</sup> are based on the UNCTAD/ICC Rules 1992<sup>352</sup> and the Rules provide for the issue of a multimodal transport document in either negotiable or non-negotiable form.<sup>353</sup> If the document is issued in negotiable form, it has some of the characteristics of a bill of lading. Thus, the Rules envisage the transfer of such a document, evidently by delivery if it is made out to the bearer and by endorsement and delivery if it is made out to order.<sup>354</sup> However, the document is issued in a non-negotiable form, it resembles a sea way bill in that delivery is to be made to the person named in it upon proof of his identity, without any requirement of surrender of the document.

## **4.4 Summary and conclusion**

Knowing that we have appropriate reasons for an international multimodal convention, it would be desirable to have an international instrument applicable to multimodal transport. A simple and straightforward uniform regime for multimodal transport would be of great assistance to the industry as a whole, especially in the

---

<sup>350</sup> C Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel, 2009), para 2.47.

<sup>351</sup> Among those standard forms of contract, MULTIDOC 95 and FIATA bill of lading are subject to the UNCTAD/ICC Rules, whereas COMBICONBILL is based on the Hague-Visby Rules.

<sup>352</sup> See paragraph 4.3.2.

<sup>353</sup> Rule 2.6 of the UNCTAD/ICC Rules.

<sup>354</sup> Rule 4.3 (a), (b) of the UNCTAD/ICC Rules.

interests of legal certainty. However, it should be noted that there have been several attempts to find an international multimodal transport convention, which have so far failed. Here, what is more important is the questions of why it failed and what we need to do in order to find something that would work internationally.

Possible reasons why the TCM Draft Convention failed to draw enough support in order to be adopted may be suggested, such as its network system of liability, the voluntary nature, and the lack of support by the airline industry. The reasons why the MT Convention did not attract sufficient ratifications to enter into force may also be offered. First, there was a close link with the Hamburg Rules, which were considered to have failed to gain much support among major maritime nations. Second, the high limitation of liability which is 920 SDR per package or 2.75 SDR per kilogram whichever is the higher was considered as a high one as compared with other transport conventions. Third, there was an uncertainty issue regarding limitation, especially because the MT Convention allowed mandatory national laws to apply. Fourth, large numbers of ratifications were required. The number of 30 is relatively high compared to 20 states for the Hamburg Rules and the Rotterdam Rules. Fifth, it was pointed out that there was a lack of awareness and uncertainty on the part of the shippers as to the benefits of the Convention. Sixth, there was strong opposition by the shipping industry because the increased liability and limits must have been a huge burden on the carrier.

However, pending the entry into force of the MT Convention, another attempt for an international solution was made, i.e. the UNCTAD/ICC Rules, which are not a convention but a model rule for multimodal transport documents. Although the UNCTAD/ICC Rules and standard forms have been widely used, but they are contractual in nature and do not have the force of law. Therefore, we are still waiting for an international mandatory instrument applicable to multimodal transport.

# CHAPTER 5 POSSIBLE WAYS FORWARD

## 5.1 Introduction

In Chapter 4, it was noted that there is still no international uniform regime in force governing liability for loss, damage or delay arising from multimodal transport. However, having recognised that the current legal framework for multimodal transport is so fragmented and complex that the existence of an appropriate legal regime at the international level is essential,<sup>355</sup> this chapter will consider the possible ways forward for an international multimodal transport solution.

One of the initial and central issues for deciding on a possible international regime for multimodal transport liability would be how best to approach the matter. Here, the first question is which type of liability regime should be adopted in a possible international multimodal regime. The second question is how to deal with specific issues arising from multimodal transport, such as limitation of liability, time for suit, recourse action, non-localised loss and conflict of laws, and so on.

## 5.2 Possible types of liability regimes

One of the key questions and possibly the single most important issue for discussion is which type of liability system should be adopted in any possible international instrument to govern multimodal transport. Essentially there are three possible options, i.e. uniform, network and modified/limited liability system.<sup>356</sup> In this

---

<sup>355</sup> One might ask the question whether it would matter if we did nothing. What would happen if we just leave everybody to have freedom of contract without having any international multimodal regulations. However, in this case, the fragmentation and complexity may still exist because of existing unimodal transport conventions, which could apply mandatorily to the cases. If one goes even further saying that we should not have unimodal conventions as well, leaving it all to freedom of contract. This might be one of the ideal solutions, but it seems highly impractical.

<sup>356</sup> For more information about three possible types of liability regimes, see M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer

section the overview of those three options is explored, especially focusing on the advantages and disadvantages of each approach.

## 5.2.1 Uniform system

### 5.2.1.1 Principle

In a uniform liability system, the same rules apply irrespective of the unimodal stage of transport during which loss, damage or delay occurs. There is no difference between cases where loss can or cannot be localised. As this uniform system provides a uniform set of rules, the applicable liability rules are predictable from the outset, which is the crucial point in terms of legal certainty and predictability.<sup>357</sup>

Given the fact that the objective of any new international multimodal convention is to harmonise or unify the existing laws in the field of multimodal transport and to provide legal certainty or predictability, this uniform system would undisputedly be the best option for this objective. It is also worth noting that a large scale survey conducted by the UNCTAD secretariat,<sup>358</sup> which was carried out through the industry and governments concerning the questions of the feasibility of establishing a new international legal instrument for multimodal transport, pointed

---

Law International, 2010), 20-25; C Hancock, 'Multimodal transport under the Convention' in Chapter 2 of DR Thomas, *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 39-42; EC, The Final Report of June 2009, TREN/CC/01-2005/LOT1/Legal assistance activities, 54-58; The report of the UNCITRAL Secretariat, 'Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Relation with other conventions', UNCITRAL WG, 18th Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006), paras 14-16; Erasmus University Rotterdam, 'Working Paper on Intermodal Liability', Competitive and Sustainable Growth Programme (2004), 18-22; Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 44-59; UNCITRAL Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] - General remarks on the sphere of application of the draft instrument', UNCITRAL WG, 11th Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003), paras 128 and 145; CMI paper, Issues of Transport Law: 'Door-to-Door Transport', Yearbook 2000, available at [http://www.comitemaritime.org/singapore/issue/issue\\_door.html](http://www.comitemaritime.org/singapore/issue/issue_door.html); R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), paras 2.145-2.170; A Diamond, 'Legal Aspects of the Convention', paper delivered at the Multimodal Transport - The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), C18-C21.

<sup>357</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 45-46.

<sup>358</sup> See Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003).

out that 48 % of all respondents expressed support for a uniform liability system.<sup>359</sup>

### 5.2.1.2 Advantages

The distinct advantage of this type of liability system is its simplicity and transparency, as the applicable liability rules are predictable from the outset and do not depend on identifying the particular stage where loss or damage occurs.<sup>360</sup>

Therefore, there will be no concern in cases where the loss or damage cannot be localised or the loss was progressive through the journey. Moreover, the scope of application problems accompanying the existing unimodal conventions like the CMR, where one has to contend the application of the CMR in the current network system<sup>361</sup> would disappear. This is of particular benefit from the point of view of the cargo interests such as consignors or consignees, as a carrier's liability against cargo interests would be uniform throughout a multimodal transport and would not vary depending on whether the loss can be identified in a particular mode of transport. It was suggested that a uniform system would reduce friction costs considerably. In addition, it is said that an international uniform regime regulating multimodal transport would produce further harmonisation in transport law as a whole.<sup>362</sup>

### 5.2.1.3 Disadvantages

In view of the continued existence of diverse unimodal liability regimes with different rules on incidence and extent of a carrier's liability, two main concerns may arise from the point of view of a multimodal carrier.

First, there is a concern that a carrier's liability exposure would increase in comparison with the current situation. If uniform rules applied irrespective of the

---

<sup>359</sup> See the responses to UNCTAD questionnaire, *Ibid*, p 26.

<sup>360</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 45-46.

<sup>361</sup> There are conflicting views regarding the application of the CMR in a multimodal transport context. For instance, in the *Quantum Corporation Inc. and Others v Plane Trucking Ltd. And Another* [2002] 2 Lloyd's Rep case, a decision by the English Court of Appeal, it was held that the CMR applied to a road leg in circumstances where the contract covered more than one mode of carriage, whereas in the recent German case, the Supreme Court of Germany 17 July 2008 (I ZR 181/05), the court held that the CMR did not apply to the road haulage, suggesting that the CMR should be construed relatively narrowly and article 1.1 be interpreted as 'carriage of goods by road only' and article 2 was to be understood as an exception to this rule. See paragraph 2.5.1.2.

<sup>362</sup> Erasmus University Rotterdam, 'Working Paper on Intermodal Liability', Competitive and Sustainable Growth Programme (2004), 19.

mode of transport during which loss occurs, a carrier would no longer be able to take advantage of potentially less onerous liability rules, which may otherwise apply to the particular mode of transport during which loss occurs. Secondly, there is a concern arising from the commercial practice of subcontracting with unimodal carriers for parts of the performance of a multimodal transport contract. A contracting multimodal carrier would be liable to the cargo claimant under uniform rules, but would wish to seek recourse against any responsible unimodal subcontracting actual or performing carrier. In any such recourse action, a unimodal carrier would continue to be able to rely on any applicable unimodal liability rules, which, in some cases, may be less onerous. Therefore, there is a concern that the rules applying to a multimodal carrier are at variance with the unimodal liability rules applying to a subcontracting actual or performing carrier, causing a mismatch between the multimodal carrier's liability to the cargo interests and the actual or performing carrier's liability to the multimodal carrier for the same loss of or damage to the goods.<sup>363</sup>

A more serious hindrance is the fact that if a uniform convention is to properly coexist with the unimodal transport conventions, an adjustment of the scope of application provisions of the unimodal conventions is also required. It is necessary to make clear that the scope of these conventions is restricted to a contract for a certain unimodal carriage and that they do not apply to the unimodal stage which is part of a multimodal transport contract.<sup>364</sup>

## **5.2.2 Network system**

### **5.2.2.1 Principle**

The opposite of the uniform system is the network liability system, which can be said to combine different liability regimes together, considering multimodal journey as a “sum of unimodal journeys”.<sup>365</sup> This network system provides an infrastructure

---

<sup>363</sup> R Clarke, ‘Cargo Liability Regimes’, Prepared for the OECD Maritime Transport Committee (January 2001), 41.

<sup>364</sup> Report by the UNCITRAL Secretariat, ‘Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – Proposal by the Netherlands on the application door-to-door of the instrument’, UNCITRAL WG, 12th Sess., UN Doc. A/CN.9/WG.III/WP.33 (2003), 6.

<sup>365</sup> EC, The Final Report of June 2009, TREN/CC/01-2005/LOT1/Legal assistance activities, 54.

where each of the unimodal liability systems governing a particular mode of transport coexists with the others.<sup>366</sup> In this system the applicable liability rules depend on the identification of the particular unimodal stage in multimodal transport where the loss or damage occurred, i.e. different rules apply depending on the unimodal stage of transport during which the loss or damage occurred. Thus, different regimes apply to the separate parts of the multimodal journey as if the parties concerned had drawn up separate contracts for each of them.

To a large extent, the current international legal framework governing multimodal transport contracts can be described as a network system by default.<sup>367</sup> In view of the fact that there is no applicable international instrument for multimodal transport, liability varies according to the stage of transport where a particular loss or damage can be attributed and any relevant international or national unimodal liability rules. Here, for those cases where a loss or damage cannot be localised, standard form contracts typically provide “fall-back” rules on terms which tend to be favourable to the carrier.<sup>368</sup>

#### **5.2.2.2 Advantages**

The main advantage of the network system is that by its automatic adaptation to the relevant mode of transport it does not interfere with any of the existing unimodal regimes, applying rules that are specifically designed for the specific mode of transport. A better reason for the network system is the synchronicity of recourse actions, which means that the multimodal carrier’s liability to the consignor or consignee should not exceed his right of recourse against the actual carrier.<sup>369</sup> It is certainly true that the chances that the same set of rules apply to a multimodal carrier’s recourse action against one of his responsible unimodal subcontracting carriers as are applicable on the action the shipper has taken against the multimodal

---

<sup>366</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 2.145.

<sup>367</sup> Report by the UNCTAD Secretariat, ‘Multimodal transport: the feasibility of an international legal instrument’, UNCTAD/SDTE/TLB/2003/1 (2003), para 50.

<sup>368</sup> For instance, multimodal transport documents such as the FIATA Bill of Lading (FBL) 1992 and the BIMCO’s MULTIDOC 95 incorporate the UNCTAD/ICC Rules 1992 that are based on the limitation and defences provisions of the Hague-Visby Rules, which would apply to the benefit of the carrier. See paragraph 4.3.3.

<sup>369</sup> TK Chenal, ‘Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules’ (1978) 20 *Arizona Law Review* 953, 970; EA Massey, ‘Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM’ (1972) 3 *JMLC* 725, 747.

carrier are better under the network system than under a uniform system.<sup>370</sup> In addition, the network system would tend to avoid or at any rate vastly diminish the problem of the “conflict of conventions” and the marshalling of competing statutes.<sup>371</sup> Diamond also pointed out the solution which is most easily applied to eliminate the importance of the somewhat arid and almost metaphysical question whether a particular carriage is to be regarded as having the characteristics of “multimodal” or “unimodal” transport.<sup>372</sup> Another benefit of the network system might be its flexibility. When a unimodal convention is being revised in respect to its content, the network approach conforms itself seamlessly.<sup>373</sup>

### 5.2.2.3 Disadvantages

The pure network system of liability presents enormous problems and disadvantages to the extent that in many situations it is practically impossible to apply with any reasonable result.<sup>374</sup> The disadvantage of the network approach, particularly for transport users, is that applicable liability rules, as well as the incidence and extent of a carrier’s liability are not predictable, but vary from case to case. Therefore, this places an extra burden on cargo claimants in the form of increased insurance premiums and ultimately higher costs of legal proceedings and administration.<sup>375</sup> Simply it can be said that as long as the network principle is applied, the objective of harmonisation, predictability cannot be reached.

Another problem is that under the network system in order for the liability rules which govern a particular stage of transport where the loss or damage occurred to apply, it must be clear that this loss or damage has occurred on that stage of the transport, but attribution of liability to a certain mode of transport is not always

---

<sup>370</sup> However, this is not always the case as exceptions do occur, especially in cases where one of the subcontractors only performs national road carriage, e.g. in the CMR states. In a situation like this the multimodal carrier would be liable according to the CMR, while the subcontractor can only be addressed on the basis of national regulation. See Erasmus University Rotterdam, ‘Working Paper on Intermodal Liability’, Competitive and Sustainable Growth Programme (2004), 20.

<sup>371</sup> A Diamond, ‘Legal Aspects of the Convention’, paper delivered at the Multimodal Transport - The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), C18.

<sup>372</sup> Ibid.

<sup>373</sup> Erasmus University Rotterdam, ‘Working Paper on Intermodal Liability’, Competitive and Sustainable Growth Programme (2004), 20.

<sup>374</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 2.146.

<sup>375</sup> Report by the UNCTAD Secretariat, ‘Multimodal transport: the feasibility of an international legal instrument’, UNCTAD/SDTE/TLB/2003/1 (2003), para 51.

possible. Where the loss or damage cannot be localised or where the loss or damage was progressive over the multimodal transport, the network system could not work properly. Thus, alternative liability system, by contractual provisions, is needed in cases of non-localised loss. There is also the question of liability gaps which are left by the network system, especially between the different modes of transport.<sup>376</sup> For example, if the cargo is lost or damaged during its storage in the port, although the loss or damage is indeed localised, but does not necessarily fall within the scope of application of any of the unimodal transport conventions.<sup>377</sup> In cases where there are multiple causes regarding the loss or damage, or causes that have occurred on different parts of the multimodal transport, the network system may not work.

### **5.2.3 Modified/Limited system**

#### **5.2.3.1 Principle**

A compromise between these two systems also exists and is known as the modified/limited system. This seems a more practical modern system. Such a system essentially seeks to provide a middle-way between a uniform and a network system, considering those advantages and disadvantages of each system. Various arrangements such as a modified uniform system or modified network system are possible, making a system more uniform or more network-like.

In a modified/limited liability system, some rules apply irrespective of the unimodal stage of transport where the loss or damage occurs, while the application of other rules depends on the unimodal stage of transport where it occurs.<sup>378</sup> In this system, as the name already suggests, some provisions are uniform and some depend upon the mode of transport where the loss originated. One of the key categories is the

---

<sup>376</sup> Report by the UNCITRAL Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – Proposal by the Netherlands on the application door-to-door of the instrument', UNCITRAL WG, 12th Sess., UN Doc. A/CN.9/WG.III/WP.33 (2003), 5; R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 2.150.

<sup>377</sup> *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595, where the carrier was entitled to rely on the contractual clause excluding liability during the period when the goods were stored on the dock since the Hague Rules did not apply to this period. See also *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317. For more information about liability gaps, see paragraph 3.3.4.2.

<sup>378</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 52-53.

limitation of liability which can cause a lot of problems because these limits tend to vary greatly from transport mode to mode.<sup>379</sup> Thus, both the MT Convention<sup>380</sup> and the UNCTAD/ICC Rules<sup>381</sup> operate a modified/limited system under which in cases of localised loss only the monetary limits of liability may be determined by reference to mandatory unimodal regimes. Both regimes have clearly influenced regional, sub-regional and national laws, which have been adopted over recent years.<sup>382</sup>

### **5.2.3.2 Advantages**

The potential advantage of this approach is that it may effectively provide a workable consensus, taking into account conflicting views and interests.<sup>383</sup> One of the possible ways in a modified/limited system is the system where controversial issues, for example, the limitation of liability or time-bar, are based on the network system while still giving legal certainty by providing the rest of the regulations with a uniform validity. More importantly, such a modified/limited system usually provides that, where loss is non-localised, liability is determined by a fall-back uniform rule. Thus, these systems offer a solution to the liability gap.

### **5.2.3.3 Disadvantages**

The disadvantage of a modified/limited system is that application of its provisions may be excessively complex. It may also fail to appeal widely, as it may provide neither the full benefits of a uniform system, nor fully alleviates the concerns of

---

<sup>379</sup> See paragraph 3.3.2.1.

<sup>380</sup> Under article 19 of the 1980 MT Convention, the liability of the multimodal carrier is uniform for both localised and non-localised loss, but, in cases of localised loss the limits of liability are determined by reference to any applicable international Convention or mandatory national law which provides a higher limit of liability than that of the 1980 MT Convention. The limits of liability set out in the 1980 MT Convention are 2.75 SDR per kg or 920 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of liability of 8.33 per kg has been adopted.

<sup>381</sup> Under rule 6.4 of the UNCTAD/ICC Rules, the limits of liability are, in cases of localised loss, determined by reference to any applicable international Convention or mandatory national law, which would have provided another limit of liability, had a contract been made separately for that particular stage of transport. The limits of liability set out in the UNCTAD/ICC Rules correspond to those in the Hague-Visby Rules, 2 SDR per kg or 666.67 SDR per package, but for contracts, which do not include carriage of good by sea or inland waterway, the CMR limit of 8.33 per kg has been adopted.

<sup>382</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), para 54.

<sup>383</sup> *Ibid*, para 53.

those who favour a network-system,<sup>384</sup> but it does entail almost all of the disadvantages to both systems, like the necessity to adapt the existing unimodal conventions.<sup>385</sup> Hancock also pointed out that although the limited network system provides a solution to the ‘liability gap’ between the application of the unimodal conventions, it does not assist if loss occurs gradually over the journey and if the carrier is left without recourse and it also does not mitigate the ‘dangers of unpredictability’.<sup>386</sup>

#### 5.2.4 Proposed system

In principle, an international uniform convention would be ideal. However, the uniform liability system, while potentially best suited to the needs of the transport user, tends to meet with the resistance of the transport industry on account of the recourse difficulties. Any debate considering the adoption of a uniform liability system would need to seek to address potentially conflicting interests by formulating mutually acceptable rules on liability and limitation of liability.<sup>387</sup> An international convention involves a large number of parties, each of which is rightly worried about its own interests. As a result, such a uniform approach may attempt to address all of the “ifs” and “buts”,<sup>388</sup> leading to an undesired complex framework. As the 1980 MT Convention illustrates, getting all the interests in the same direction on this subject is exceptionally difficult, and even if agreement could be reached, the ratification of the convention would be very difficult. It is admittedly said that given all the time and efforts several organisations have made on these attempts, it may be difficult to accept a uniform system of liability.

---

<sup>384</sup> Report by the UNCTAD Secretariat, ‘Multimodal transport: the feasibility of an international legal instrument’, UNCTAD/SDTE/TLB/2003/1 (2003), para 53.

<sup>385</sup> Erasmus University Rotterdam, ‘Working Paper on Intermodal Liability’, Competitive and Sustainable Growth Programme (2004), 21.

<sup>386</sup> C Hancock, ‘Multimodal transport under the Convention’ in Chapter 2 of DR Thomas, *A new convention for the carriage of goods by sea: the Rotterdam Rules: an analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Witney: Lawtext Pub, 2009), 41.

<sup>387</sup> Report by the UNCTAD Secretariat, ‘Multimodal transport: the feasibility of an international legal instrument’, UNCTAD/SDTE/TLB/2003/1 (2003), paras 48.

<sup>388</sup> Erasmus University Rotterdam, ‘Working Paper on Intermodal Liability’, Competitive and Sustainable Growth Programme (2004), 20.

As regards to the network system, the current regime is more like the network system, in which there are muddles and uncertainty as mentioned in Chapter 3.<sup>389</sup> Since the current network system is regarded as being so fragmented and complicated that it is not satisfactory and cost-effective, this may not be the best option. However, if the network system is the possible solution, then there are two further issues to consider. For a network based system to function properly it would be advisable to avoid confusion concerning the application of the relevant regimes by inserting an adjustment to the scope of application provisions in each unimodal convention in order to clarify that such a convention applies to a certain mode of transport and not to a certain type of contract.<sup>390</sup> Second, multimodal scope of some of the unimodal conventions should be eliminated in order to avoid any conflict of laws issue.

Modified/limited system would be the best possible solution. The UNCTAD/ICC Rules and MT Convention are good examples, because the key features of them are widely used in standard forms of contract and regional, sub-regional or national rules. Thus, an international multimodal regime devised in this way based on this modified/limited system might certainly be one of the more realistic options in the struggle to bring harmony in the field of the intermodal multimodal transport of goods. Provisions concerning the largest impediments to reaching consensus when preparing a new international multimodal regime such as limitation of liability can be based more on the network principle so that agreement on these issues is no longer strictly necessary for such a regime to be ratified.

### **5.3 Possible solutions to specific multimodal problems**

In the first section of this chapter, the possible types of liability regime have been explored thoroughly in order to find which type of liability system should be adopted in a possible international multimodal regime. The following section will now focus more on possible solutions to key substantive features of a possible international

---

<sup>389</sup> See paragraph 3.3.

<sup>390</sup> Erasmus University Rotterdam, 'Working Paper on Intermodal Liability', Competitive and Sustainable Growth Programme (2004), 21.

multimodal regime. Here, covering all of those substantive features of multimodal regime would be impractical and beyond the scope of this thesis. Therefore, only selected substantive features of specific multimodal problems, which are most important and significantly relevant to the current research, will be reviewed.

### 5.3.1 Limitation of liability

One of the most significant issues that need to be considered in multimodal transport is the issue of limitation of liability. Although there is a traditional trend that this limitation of liability is dealt with at a relatively late stage during the negotiations for any international convention, this paper will consider this central issue first given the high level of importance.

When it comes to the limitation of liability, one might well argue that, in principle, there should not be any limitation of liability at all. However, in general, most of the parties concerned in transport industries accept and support the need for limitation of liability. It is true that almost all transport rules, whether they are international conventions or national rules, currently provide for the specific level of limitation of liability, although the relevant levels vary quite significantly.<sup>391</sup>

Among those in favour of the limitation of liability, there are two different positions regarding the level at which liability should be set. Those involved in the maritime transport and freight forwarding industry advocate the lower limits of liability, such as the Hague-Visby Rules limits of 2 SDR per kg or 666.67 SDR per package as appropriate, whereas those representing shippers' interests support the higher limits than the Hague-Visby Rules limits.<sup>392</sup> Even cargo interests also tend to question the need for the limitation of liability and advocate a system whereby the cargo claimant would be compensated in full for loss of or damage to goods. The limitation of liability issue is, therefore, a highly contentious and major one,<sup>393</sup> which is more deserving of careful examination.

---

<sup>391</sup> See paragraph 3.3.2.1.

<sup>392</sup> Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), paras 68-77.

<sup>393</sup> *Ibid*, para 76; HM Kindred and MR Brooks, *Multimodal Transport Rules* (Kluwer Law International, 1997), 33.

### 5.3.1.1 No limitation of liability

The first question that may arise is whether the limitation of liability is indeed necessary or not. In fact, the need for the limitation of liability has been questioned by cargo interests, claiming that in case of loss of or damage to the goods, full compensation for the loss should be provided. This approach of no limitation of liability seems to be very favourable to cargo interests themselves, yet it might not be true. Here, it is worth discussing the main reasons for the limitation of liability, which will be followed below.

The primary purpose of provisions on limitation of liability would be to ensure predictability and certainty<sup>394</sup>, and to provide for a proper allocation of risk between the carrier and cargo interests.<sup>395</sup> The great advantage of limitation is that it is easier for the carriers to calculate what a potential liability is and of course the insurers to do so. Such provisions were also to regulate the relationship between the two commercial parties in order to entitle each of them to obtain a benefit.

If there was no benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and especially where such goods were in containers, the carrier would have no knowledge regarding their contents, thus, potentially exposing the carrier to very high and unexpected risks. Here, it is likely that instead of the carrier taking the risks itself, they would take out P&I insurance and the P&I calls would then be higher.<sup>396</sup> As a direct result of the potential or actual liability being greater if there is no such limitation of liability, the carrier would charge increased freight rates in order to cover the higher calls. By allowing for a limitation of the carrier's liability, this allocation of risk would allow the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. However, one might be concerned that the aim of an

---

<sup>394</sup> Report of the Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March – 4 April 2003), UN Doc. A/CN.9/526 (2003), para. 258.

<sup>395</sup> Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), para. 163.

<sup>396</sup> If there is no benefit of limitation of liability, the other thing that carriers could do is to pay higher insurance premiums and then charge increased freight rates to cover those premiums. Because what is more likely is that they would not self-insure they would take out an insurance, but with the higher costs. Thus, the carrier would pay the insurance and they would leave it to the insurers to deal with how much the actual calls are.

appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but it would not so limit too many claims in order to be treated as an element of the overall balance in the liability regime.

With this justification of provisions on the limitation of liability and the fact that the concept of limitation of liability provided for transport conventions, such as the Hague, Hague-Visby Rules, Hamburg Rules or Rotterdam Rules have proven to be satisfactory,<sup>397</sup> the following possible solutions will be presented on the assumption that limitation of liability is necessary.

### **5.3.1.2 Uniform dual system with high limits**

This modified/limited uniform approach was taken by the 1980 MT Convention. Regarding the limit of liability, the multimodal carrier's liability is to be limited to an amount not exceeding 920 units of account per package or other shipping unit, or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. However, if the multimodal transport does not, according to the contract, include carriage by sea or by inland waterway, the limitation amount increases to 8.33 units of account per kilogram of gross weight.<sup>398</sup> The reasoning was that when multimodal carriage includes a sea leg, this leg is almost always the major leg, and, therefore, it would be appropriate to apply the limits of the maritime conventions.<sup>399</sup> However, the MT Convention provides for exception rules in case of localised loss. Accordingly, in cases of localised loss the limits of liability are to be determined by reference to any applicable international convention or mandatory national law which provides a higher limit of liability than that of the MT Convention.<sup>400</sup>

---

<sup>397</sup> What has to be very clear here is the distinction between the principle of limitation of liability and the amount of those limits. Although the concept of limitation of liability has been satisfactory, the amount is not. Because what is crystal clear is that the amount in the Hague Rules are clearly no longer satisfactory and that is why we had the Visby Protocol. One of the major reasons for the Visby Protocol was because the limits were far too low. The US still has the Hague Rules limits of US\$ 500 which are considered to be very low. The Hamburg Rules and Rotterdam Rules still adopt limits but higher one. See also paragraph 3.3.2.1.

<sup>398</sup> Article 18.1 and 18.3 of the MT Convention.

<sup>399</sup> At that time, the limits of the Hamburg Rules were considered, although a ten percent increase was made over the Hamburg Rules limits in the end. W Driscoll and PB Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 Tulane Law Review 193, 237-238.

<sup>400</sup> Article 19 of the MT Convention.

In this option, although it provides an innovative uniform dual system, there are a couple of concerns which need to be addressed. Firstly, the limits would seem high when compared with other transport conventions<sup>401</sup> and although it was suggested more than 30 years ago, it was even higher than that of the Rotterdam Rules, which is the latest attempt.<sup>402</sup> This would be a huge burden on the multimodal carrier, which would result in objections by the carrier interests.

However, great concern arises because of the words “mandatory national law”. It appears unlikely that accepting diverse national rules provides legal certainty in that this does not set out a predictable limit of liability based on a uniform figure which can be readily applied in practice. It would seem that a contracting state is not bound to apply the limits of liability set out in this option to particular stages of international multimodal transport. It seems that for localised loss or damage, a contracting state is permitted to pass mandatory national laws that set higher limits than those listed in the MT Convention. Thus, in order to provide legal certainty, national rules need to be excluded.

### **5.3.1.3 Dual system with maritime limits**

This modified/limited uniform option was taken by the UNCTAD/ICC Rules and has been widely used in practice. This approach basically provides for a network system with regards to limitation of liability. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the multimodal carrier’s liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law. However, the application of mandatory national law needs to be considered in order to pursue legal certainty and predictability, because the acceptance of diverse national rules does not provide legal certainty.

For any other cases, i.e. non-localised loss or damage, this option provides that,

---

<sup>401</sup> See paragraph 4.2.2.3.2.

<sup>402</sup> The Rotterdam Rules was adopted in 2008 and provides for the limits of 875 SDR per package or 3 SDR per kilogram.

unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the multimodal carrier and inserted in the MT document, the multimodal carrier shall not be liable for any loss of, or damage to, the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit, or 2 SDR per kilogram, whichever is the higher.<sup>403</sup> However, the Rules further provide that if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal carrier is limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.<sup>404</sup> This dual system is the same as that of the MT Convention and working properly in the current practice. However, the limits were set out 20 years ago and the amount of the limits needs to be considered. Here, the limits of the Rotterdam Rules may be more appropriate.

This might be justified by the argument that whenever multimodal carriage includes a sea leg, this leg is almost always the major leg and this tends to considerably outweigh the other modes of transport from an economical point of view.<sup>405</sup> Therefore, it would be appropriate to apply the limits of the maritime Conventions, such as the Hague or Hague-Visby, Hamburg Rules or Rotterdam Rules.

#### **5.3.1.4 Network system plus the highest limit for non-localised loss**

This modified/limited network approach was adopted by the Dutch Civil Code (DCC).<sup>406</sup> This option primarily provides a network system of liability. The DCC especially states that every stage of a multimodal transport is governed by the applicable law.<sup>407</sup> Accordingly, when the loss of, or damage to the goods occurred, firstly it is always necessary to find out at which stage the loss or damage occurred. Then, according to the identified stage of multimodal transport, the relevant applicable law will deal with the problem.

---

<sup>403</sup> Rule 6.1 of the UNCTAD/ICC Rules.

<sup>404</sup> Rule 6.3 of the UNCTAD/ICC Rules.

<sup>405</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 12.5; W Driscoll and PB Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 *Tulane Law Review* 193, 237.

<sup>406</sup> For more information about the DCC, see paragraph 2.5.3.1.

<sup>407</sup> Article 8:41 of the DCC (Law applicable to a contract of multimodal carriage) provides that "In the event of a contract of multimodal (combined) carriage, each part of the transport shall be governed by the rules of law applicable to that part."

However, the question then arises as to what if the loss or damage cannot be localised or the loss was progressive, which rules would apply. While a pure network system does not provide the solution to it, the DCC provides the relevant provisions on non-localised loss. According to articles 8:42<sup>408</sup> and 8:43<sup>409</sup>, where loss or damage occurs during a multimodal transport and the stage of transport where the loss or damage occurred cannot be established, then the liability of the carrier will be determined by the rules applicable to the part of the transport which impose “the highest level of liability”. Thus, if the multimodal contract includes carriage by air, the highest limits of the air rules will apply. This would seem more favourable to the shipper.

However, this may bring about the burden of proof issue. If one is a claimant claiming against the carrier, then he would be quite delighted and would always say that he did not know where the damage occurred because he knows only too well that if it cannot be established where the damage occurred, it will be the highest level of liability. Thus, in effect, the burden of proof shifts to the carrier. This has certain consequences in that it is not only more favourable to the shipper in terms of them recovering a higher amount, but it also means that the burden of proof actually shifts to the carrier.

### **5.3.1.5 Network system plus the CMR limit for non-localised loss**

This modified/limited network option was taken by the German Commercial Code (HGB).<sup>410</sup> This approach also adopts the network system. Section 452a of the HGB<sup>411</sup> states that, in cases where the place that loss or damage occurred can be

---

<sup>408</sup> Article 8:42 (Liability of the MTO), paragraph 1 of the DCC provides that “When the multimodal (combined) carrier does not deliver the goods without delay at the place of destination in the condition in which he has received them, and it has not been established where the event occurred that has caused the loss, damage or delay, then the carrier is liable for the damage resulting therefrom, unless he proves that he is not liable for any of the parts of the transport where the loss, damage or delay may have occurred.”

<sup>409</sup> Article 8:43, paragraph 1 of the DCC provides that “If the multimodal carrier is liable for damage caused by damage, total or partial loss, delay or any other event causing damage to the goods, and it has not been established where the event occurred that has lead thereto, then his liability is determined according to the rules of law applicable to the part or parts of the transport where that event may have occurred and from which results the highest amount of damages.”

<sup>410</sup> For more information about the HGB, see paragraph 2.5.3.2.

<sup>411</sup> Section 452a (Known place of damage) of the HGB provides that “If it has been established that the loss, damage or event which caused delay in delivery occurred on a specific leg of the carriage, the

established, liability of the carrier is determined by the law applicable to the leg in which the loss or damage occurred.

Section 452 makes the general provisions of the first sub-chapter governing the contract of carriage applicable to multimodal transport in case of non-localised loss, unless international conventions provide otherwise, and Section 431 provides for a maximum amount of liability and states that the carrier's liability for loss of or damage to the goods is limited to an amount of 8.33 SDR per kilogram of gross weight of the goods lost or damaged,<sup>412</sup> and the carrier's liability for delay in delivery is limited to an amount equal to three times the freight.<sup>413</sup> However, these amounts may be modified by an agreement reached after detailed negotiations.<sup>414</sup> This CMR limit of 8.33 SDR is widely used as a compromise between carrier and cargo interests, thus, this limit is also worth considering.

#### **5.3.1.6 Network plus the main mode limit for non-localised loss**

The Korean Commercial Code (KCC)<sup>415</sup> is an attempt to achieve some sense of middle ground, or at least some reason for choosing a particular limit rather than simply randomly saying what is to be the lowest or highest. This modified/limited network approach is taken by the KCC.<sup>416</sup> The KCC adopts the network system of liability and states that if the place where the accident occurred is identified, liability of the carrier is determined by the law applicable to the particular stage where the loss or damage occurred.

The KCC further provides for a unique solution in case of non-localised loss and it states that where the loss cannot be localised to a particular stage of the carriage, the applicable law will be decided by the main stage of carriage, which will be decided based on the distance of the coverage. Therefore, in case of non-localised loss, the carrier is liable for loss of or damage to the goods in accordance with the

---

liability of the carrier shall, contrary to the provisions of the first sub-chapter, be determined in accordance with the legal provisions which would apply to a contract of carriage covering this leg of carriage. The burden of proving that the loss, damage or event which caused delay in delivery occurred on a particular leg of carriage is borne by the person alleging this.”

<sup>412</sup> Section 431 (1) and (2) of the HGB.

<sup>413</sup> Section 431 (3) of the HGB.

<sup>414</sup> Section 449 (2) of the HGB provides for provision on ‘contractual modifications’.

<sup>415</sup> For more information about the KCC, see paragraph 2.5.3.4.

<sup>416</sup> See IH Kim and SR Choi, ‘Korean Maritime Law Update: 2010’ (2011) 42 JMLC 421, 433-436.

law applicable to the leg which is the longest among other legs of transport in terms of transport distance. Accordingly, if the distance of transport by sea is longer than that by air, the law applicable for the sea transport is applicable to the case. However, because the limitation of liability in the air transport is 19 SDR as opposed to 2 SDR in the sea transport, where the contract for the transport involves an air leg and if the distance for the sea leg is longer than that of the air leg, the difference in terms of the limitation amount is quite large. This might cause opposition from the maritime interests. In order to bridge this gap, the KCC adopted a special provision to fix the limitation amount without leaving it to the law applicable in the separate leg. For example, where the air leg is the longest as regards the transport distance, the limitation amount for the carrier to invoke is modified as being 8.33SDR per kg.

However, when deciding which one is the main stage of transport, it might be said that the carriage which is the longest is “predominantly” one in one important regard. But this criterion is only one of the factors and that was not the only factor in point. There might be other factors such as associated cost, duration and, more importantly perhaps risk, i.e. where loss or damage was most likely to occur. Those factors are of greater significance.<sup>417</sup> De Wit<sup>418</sup> also pointed out that the risk to which the goods are exposed in any given stage does not depend upon its length, but rather upon its nature, and the goods are exposed to the greatest risk during handling, not during the actual carriage.

Another point is that one may not be in favour of these complications. It makes it so difficult to settle the case. If we have disagreements about which one is the longest, carriers are trying to insist the low limitation regime, whereas cargo interests want the high limitation regime. So the parties have to decide or may have to go to court or arbitration over the question which is the longest mode. Thus, these further complexities would just make the position more difficult. Moreover, there may be more difficult situations where the parties could not agree with which one is the longest. In this case a fall-back provision might be needed to solve this problem. However, this again makes the position more complicated and this complexity will not be welcomed. Nevertheless, an attempt to reach some middle ground, or at least a

---

<sup>417</sup> M Clarke and D Yates, *Contracts of Carriage by Land and Air* (Informa, 2008), para 1.20.

<sup>418</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 9.64 (fn 297).

reason for choosing a particular limit would be worth considering.

### 5.3.1.7 Declaration of higher value

Apart from the package/unit or weight-based limitation, a shipper may avoid this limited liability either by declaring the value of the goods and including that declaration in the contract particulars, or by separately agreeing with the carrier on a higher limitation amount. The effect is usually taken as being to raise the limit to the amount declared, subject to that value being proved.<sup>419</sup> Those provisions have been included in some international regimes.<sup>420</sup> Therefore, one might argue that this approach might be one of the solutions.

However, although the Hague Rules, Hague-Visby Rules, Hamburg Rules and Rotterdam Rules allow the right to declare a higher value, shippers would not exercise that right in practice.<sup>421</sup> It is presumably true that the higher amount would be favourable to the shippers who want to recover as much compensation as possible in cases of loss, damage or delay. However this does not look satisfactory and this is not often used for avoiding specific limited liabilities. The first reason for this is that, in order to rely on the higher amount, the shippers must acquire agreement from the carrier. It would seem from the wording that a specific declaration for the purpose is required and it is not sufficient that the carrier is aware of the value from other sources. Here, the carrier must also assent to the higher amount, in the sense that they must have the opportunity of either rejecting the risk or charging higher freight. The second reason is that when a shipper declares a higher value, the carrier, once they agree to accept the risk, would charge a higher freight rate, which is known as an 'ad valorem' charge, to cover the increased risk that they must bear. It would often lead to a higher freight charge, so that it could affect the carrier's P & I insurance or TT insurance.<sup>422</sup> From the shipper's point of view, the third reason is that when a shipper declares a higher value, the carrier would charge a higher freight rate and this

---

<sup>419</sup> When the declaration is embodied in the bill of lading, it shall not be binding or conclusive on the carrier, but shall be prima facie evidence. See, for example, article IV, rule 5(f) of the Hague-Visby Rules.

<sup>420</sup> See article IV, rule 5 of the Hague Rules, article IV, rule 5(a) of the Hague-Visby Rules, articles 6.4 and 15.1(o) of the Hamburg Rules, and article 59.1 of the Rotterdam Rules.

<sup>421</sup> MF Sturley, et al, *The Rotterdam Rules* (Sweet & Maxwell, 2010), 5-231; G Treitel and FMB Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011), 9-246.

<sup>422</sup> Further discussion on insurance aspects in multimodal transport will follow later in Chapter 8.

charge would be almost inevitably higher than the premium under a cargo insurance policy.<sup>423</sup> Therefore, the shipper may prefer cargo insurance to a declaration of higher value.

### **5.3.1.8 Proposed limitation solution**

Having considered several possible solutions, it might be possible to suggest the best solution accordingly. The combination of the approaches by the UNCTAD/ICC Rules, the Korean Commercial Code and the Rotterdam Rules might be suggested.

Firstly, the Korean system may provide at least some reason for choosing a particular limit rather than simply randomly saying what is to be the lowest or highest and this has a sort of middle ground. Second of all, the limits in the UNCTAD/ICC Rules are widely used in practice and it may be worth preserving this popularity of the Rules. Thirdly, the amount of limitation should be reviewed as time goes by and the latest update of the limits under the Rotterdam Rules would be necessary to be considered. Here, the limits of the Rotterdam Rules are provided, because they may reflect the recent consensus of international bodies. Fourth, it might be justified by the argument that whenever multimodal carriage includes a sea leg, or whenever multimodal carriage includes an air leg, this sea or air leg is almost always the major leg and this tends to considerably outweigh the other mode of transports from an economical point of view.

Therefore, first, the new approach would allow the parties to choose the main mode of transport of which limitation rules will accordingly apply to the case. If there is no agreement or disagreement as to the main mode, then the fall-back provision will apply. Here, the similar provision as the UNCTAD/ICC Rules will be provided. Thus, the following solution may be suggested.

Unless the parties agree on the main mode of transport whose limits of liability apply, the multimodal carrier shall not be liable for any loss, damage or delay in delivery in an amount exceeding the equivalent of 875 SDR per package or unit, or 3 SDR per kilogram, whichever is the higher. However, if the multimodal transport does not, according to the contract, include carriage of goods by sea or

---

<sup>423</sup> MF Sturley, et al, *The Rotterdam Rules* (Sweet & Maxwell, 2010), 5-231.

by inland waterways, the liability of the multimodal carrier is limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

### **5.3.2 Time for suit**

Another feature that needs to be considered in multimodal transport is the issue of time for suit. As seen earlier, the time limits vary significantly between the different regimes depending on types of transport and range from the longest, 3 years to the shortest, 9 months.<sup>424</sup> For instance, if there is a multimodal transport including a sea leg followed by a road leg, the possible time bar will be between 3 years and 9 months. In this case, cargo interests want to stick to the longer time limit, while carriers want to insist on the shorter one. Therefore, it is necessary to look at possible ways to solve the time limit problem.

#### **5.3.2.1 Do we need a time bar?**

It would be worth considering at the outset what the reason for having a time bar is and whether it is a good thing to have a time bar. In fact, in all those transport Conventions<sup>425</sup>, there are time bars and, indeed, one often finds time bars agreed contractually, even if there is no convention or even if there is a convention. That would indicate that the parties to the contract think that it is a good idea to have a time bar. Another reason would be that carriers or shippers cannot be expected to concentrate on one claim for a long period of time, and they must know promptly what claims or disputes they may be subjected to, especially during the time when the events are still “reasonably fresh in the memory and on the record”<sup>426</sup> and then sort them out as soon as possible. The carrier must be able to “clear his books”.<sup>427</sup>

---

<sup>424</sup> For more information about different time bars, see paragraph 3.3.2.2.

<sup>425</sup> See Article III, rule 6 of the Hague-Visby Rules; Article 20 of the Hamburg Rules; Article 25 of the Multimodal Convention; Article 32 of the CMR; Article 47 of the COTIF-CIM; Article 24 of the CMNI; Article 29 of the Warsaw Convention; Article 35 of the Montreal Convention.

<sup>426</sup> G Treitel and FMB Reynolds, *Carver on Bills of Lading* (3<sup>rd</sup> edn, Sweet & Maxwell, 2011), para 9-179.

<sup>427</sup> *The Captain Gregos* [1990] 1 Lloyd's Rep. 310, at 315 per Bingham L.J.

### 5.3.2.2 Time limit of 9 months

When looking at the rules of regional/sub-regional regimes in Latin America and Asia, they provide for a 9 months time-bar for multimodal transport. In fact this limit is based on the UNCTAD/ICC Rules.

Here, the reason why the time limit of 9 months was adopted is to ensure that the multimodal transport operator would have sufficient opportunities to institute recourse actions against the subcontractor. In multimodal transport there are many subcontractors involved, as a result of which there will be a main claim between the main parties to the contract and second claims between multimodal carriers and the responsible subcontractors. Thus, to cite an example, where there is a multimodal transport including a sea leg followed by rail and road leg, if loss or damage to goods occurred during the sea leg, the multimodal carrier or more likely his P & I club has to settle the claim by cargo interests within 9 months and then recover the money spent by instituting recourse actions against the subcontractors within 1 year, e.g. under the Hague Rules. Therefore, the multimodal carrier could have at least 3 months time for recourse actions.

#### 5.3.2.2.1 Is the time limit of nine months reasonable?

One of the questions that may arise is whether a 9 month contractual time bar contained in a freight forwarding contract satisfies the test of reasonableness under the Unfair Contract Terms Act 1977 (UCTA). Here, it should be noted that although UCTA does not apply to contracts for the carriage of goods by sea,<sup>428</sup> it applies to multimodal transport contract and the British International Freight Association (BIFA) Conditions were drafted with an eye to the UCTA 1977.<sup>429</sup>

In *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd*<sup>430</sup>, the Court of

---

<sup>428</sup> This is because in the context of carriage of goods by sea, the Hague-Visby Rules are recognised in English law and provide certain basic rights and obligation on the parties which are non-derogable. The Hague-Visby Rules are attached as a schedule to the Carriage of Goods by Sea Act 1971 and became effective in the UK on 23 June 1977.

<sup>429</sup> DA Glass, *Freight forwarding and multimodal transport contracts* (2<sup>nd</sup> edn, Informa, 2012), para 2.2.

<sup>430</sup> [2003] EWCA Civ 570. Contrast the decision of the High Court of Singapore in *Press Automation Technology v Trans-Link Exhibition Forwarding* [2003] 1 SLR 712, which held that the nine-month limitation clause under cl 30 of the Singapore Freight Forwarders Association (SFFA) Standard

Appeal held that 9 months was a reasonable time limit for a claim for loss of or damage to goods in transit. It was held that the loss or damage could be ascertained on delivery and nine months was ample time for the customer to decide whether to bring suit. The limit was necessary to enable the freight forwarder to claim within the 12 month time limit which applied to many contracts of carriage.<sup>431</sup>

Where a similar nine-month period of limitation under cl 30(B) of the BIFA standard trading conditions arose for consideration under similar albeit not identical factual circumstances, a similar view was reached. The Court of Appeal in *Röhlig (UK) Ltd v Rock Unique Ltd*<sup>432</sup> upheld the reasonableness of the nine-month time limit contained in the BIFA standard trading conditions 2005 and found that it operated to bar the customer's claims against the freight forwarder, even in circumstances where the customer may not have reasonably been able to discover its cause of action before the time-bar expired.

#### 5.3.2.2.2 Relationship with the Hague-Visby Rules

In *Röhlig (UK) Ltd v Rock Unique Ltd*,<sup>433</sup> the court also observed that since the bills of lading were multimodal transport documents, the Hague or Hague-Visby Rules and the 12-month time-limit under those Rules were of no application. The claim did not concern carriage by sea. It is, however, an open question whether the Hague or Hague-Visby Rules would override the nine months limitation where the claim clearly arose during sea carriage. Putting it another way, the questions may arise in relation to time bars where there is any shorter time bar than that of the 1 year time bar given in the Hague or Hague-Visby Rules, whether that shorter time bar is null and void under article III, rule 8. In point of fact, this is seeking to lessen the carrier's liability. It seems that if the Hague or Hague-Visby Rules apply mandatorily to the case, those mandatory rules prevail over the contractual terms and if there are any inconsistency between them, the mandatory Hague or Hague-Visby Rules would override any inconsistent contractual provisions.

---

Trading Conditions (1986) failed to satisfy the requirements of reasonableness prescribed by the Unfair Contract Terms Act (UCTA). The judge found that Trans-Link had failed to show that it was necessary for them to have a nine-month time bar.

<sup>431</sup> *Ibid*, para 23.

<sup>432</sup> [2011] EWCA Civ 18.

<sup>433</sup> [2011] EWCA Civ 18.

### **5.3.2.3 Longer limit**

Aside from the regional/sub-regional regimes based on the UNCTAD/ICC Rules designed to govern multimodal transport only, it seems that more recently the time bar is moving to a longer limit. For example, it is one year in the 1924 Hague Rules, 1956 CMR and 1968 Hague-Visby Rules and recently it is moving to two years in the 1978 Hamburg Rules, 1999 Montreal and 2008 Rotterdam Rules. It seems that the time bar is getting more lenient as time goes by. This may be the general trend in the transport conventions.

However, one question might arise as to why there is a general trend that the time limit is becoming more generous. One may still be curious about what the point of that is. Part of the reason may be because it is more favourable to the cargo interests and the recent approach in the Hamburg and Rotterdam Rules was to be more favourable to them. However, it should be noted that there is a clear difference between the nature of unimodal transport and multimodal transport, and the longer time limits would not help multimodal carriers to take recourse actions within a reasonable time.

### **5.3.2.4 Shorter limit**

In view of better communications in recent years, it would be unnecessary to extend the time limit. It is much easier to give an instruction for a claim, it can be done by email instantaneously and we do not have to wait for a letter any more. Even if we still may have to wait for letters when people are sending documentation, quite lot of that now could be scanned and sent by email as well. One might well say that we do not need longer time limits. The whole point is to be efficient and for the times to come quickly, so we can get the evidence and it can be dealt with in a very efficient modern systems computerised, not hanging around for years. Particularly because we have indemnity claims there is a big reason for being efficient to getting through them because we may have to pass them on, otherwise they would be waiting around for years. Therefore, there would be no point in increasing the time limit so much. As

pointed out in *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd*,<sup>434</sup> even nine months would be enough for claimants to decide whether to bring a suit or not. Thus, possible time limit should not be in favour of the longer time bar because a good, quick and efficient system is necessary in the context of multimodal cargo claims handling.

However, there might be a concern about a shorter limit. Because when one question was to ask what is normal, it is likely that normal for a very long time seems to be 1 year.<sup>435</sup> The last possible solution would be a shorter time bar than those in unimodal conventions, but which would be very unlikely to be appealing to cargo interests.

### **5.3.3 Recourse actions**

Most of the multimodal regimes do not attempt in general to regulate the issue of recourse actions between the multimodal carrier and his sub-contracting or performing carriers. It is true that the multimodal regime generally does not deal with the legal position between the shipper and sub-contracting carriers of the multimodal carrier, such as road/sea/air carriers, terminal operators, stevedores and others, all of whom may be engaged by the multimodal carrier to carry out duties incidental to the performance of a multimodal transport contract.<sup>436</sup> This is because sub-contractors of the multimodal carrier may be subject to different regimes which are categorised as unimodal rather than multimodal in character and may be governed by the relevant unimodal regimes. That is why the MT Convention, not other multimodal regimes, has only one provision dealing with recourse actions in article 25 entitled “limitation of actions”, which will be discussed below.

#### **5.3.3.1 Time limit for recourse actions**

---

<sup>434</sup> [2003] EWCA Civ 570, at para 23.

<sup>435</sup> See paragraph 3.3.2.2.

<sup>436</sup> A Diamond, ‘The United Nations Convention on International Multimodal Transport of Goods 1980’, in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 60-61. However, the effect of the multimodal regimes would not be strictly limited to regulating the liabilities of the parties to a multimodal transport contract.

#### 5.3.3.1.1 Recourse actions provision under MT Convention

In order to interact with the unimodal regimes, it is important for the multimodal carrier to receive early notice of claims against him so that he may in turn have the opportunity to claim against the subcontracting carriers within the time bars established by the many unimodal regimes. Article 25.1 of the MT Convention provides for a two year time bar for bringing suit. However, to accommodate the multimodal carrier's recourse claims against his subcontractors, the multimodal carrier may bring a recourse action for indemnity after the two-year period established by the MT Convention, provided that other international conventions do not bar such an action and if instituted within the time allowed by the law of the State where proceedings are instituted, but that the time allowed shall not be less than 90 days from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the actions against himself.<sup>437</sup>

However, as Diamond<sup>438</sup> and De Wit<sup>439</sup> pointed out, it would be uncertain to what extent article 25.4 will in practice prove effective because it is more likely that the provisions applying between the multimodal carrier and his sub-contracting performing parties will be governed by a unimodal and not a multimodal legal regime. If the new multimodal regime attempts to regulate the time limit for recourse actions, it is likely that the extended time for bringing suit would be defeated by the time limits appearing in any applicable international unimodal conventions,<sup>440</sup> unless the unimodal conventions provide for indemnity provisions. Therefore, the multimodal carrier could encounter difficulty in bringing recourse actions against sub-contracting performing carriers unless the periods of limitation in the new multimodal regime and those in the underlying unimodal conventions are appropriately considered.<sup>441</sup>

---

<sup>437</sup> Article 25.4 of the MT Convention. This rule was in fact modelled on article III, rule 6 *bis* of the Hague-Visby Rules.

<sup>438</sup> A Diamond, 'The United Nations Convention on International Multimodal Transport of Goods 1980', in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 61.

<sup>439</sup> R De Wit, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995), para 10.16.

<sup>440</sup> Most of mandatory international unimodal conventions provide for a shorter limitation period. See paragraph 3.3.2.2.

<sup>441</sup> GF Fitzgerald, 'The Proposed Convention on International Multimodal Transport of Goods: A Progress Report' (1979) 17 *The Canadian Yearbook of International Law* 247, 265.

#### 5.3.3.1.2 Indemnity provisions in unimodal conventions

One might well argue that there are no more worries about the recourse actions period because the Hague-Visby, Hamburg and Rotterdam Rules all provide for indemnity action, while the Hague Rules do not.<sup>442</sup>

For instance, article III, rule 6 *bis* of the Hague-Visby Rules<sup>443</sup> provides that “an action for indemnity against a third person may be brought even after the expiration of the one year time limit, if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself”. The effect of this provision is to give more time for a recourse action under another contract governed by the Hague-Visby Rules, which could otherwise become barred at the same time as the main action<sup>444</sup>.

The CMR also provides for the relevant provisions. Article 37 provides that a carrier, who has paid compensation in compliance with the provisions of the CMR, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of the claim, from the other carriers who have taken part in the carriage and article 39.4 also provides that the one year time limit shall apply to claims between carriers. However, this only applies between road carriers. Article 50 of the COTIF-CIM also provides the similar provisions that a carrier who has paid compensation pursuant to these Uniform Rules (CIM) shall have a right of recourse against the carriers who have taken part in the carriage. However, this also only applies to rail carriers.

#### 5.3.3.1.3 Shorter time bar than those in unimodal conventions

The above mentioned problems may stem from the fact that the time bar governing the relationship between the multimodal carrier and the sub-contracting performing party is shorter than the time limit governing the relationship between the

---

<sup>442</sup> See article III, rule 6 *bis* of the Hague-Visby Rules, article 20.5 of the Hamburg Rules and article 64 of the Rotterdam Rules.

<sup>443</sup> This was added by the Visby Protocol and, thus, it does not appear in the Hague Rules.

<sup>444</sup> G Treitel and FMB Reynolds, *Carver on Bills of Lading* (3<sup>rd</sup> edn, Sweet & Maxwell, 2011), para 9-191.

multimodal carrier and the cargo interests. However, if it is the other way round, then obviously there will be no problem and the multimodal carrier will have the chance to institute a recourse action. Therefore, in the absence of any legal provision protecting the multimodal carrier's recourse possibilities, a shorter period than the time limit which applies under mandatory law to the performing carriers needs to be considered. Thus, a time limit of nine months would be one of the possible solutions.

### **5.3.4 Non-localised loss and liability gap**

This non-localised loss is a typical problem in multimodal transport. While a pure network system does not provide the solution to it, there may be a liability gap between the application of the unimodal transport conventions. The uniform system provides a perfect solution for non-localised loss. In this system, there is no difference between cases where loss can or cannot be localised. Therefore, there will be no concern in cases of where the loss cannot be localised or the loss was progressive through the journey or possible gaps were left. However, as discussed earlier,<sup>445</sup> the pure network and pure uniform systems are not recommended and hence modified system, especially modified uniform system in case of non-localised loss, would be desirable. While the modified uniform system could provide a possible solution to non-localised loss or liability gap, it should be carefully tailor-made as seen in the issue of limitation of liability.

The fundamental principle under the possible multimodal regime should be that the basic liability rules of the regime apply irrespective of whether the place of the loss of or damage to the goods is identified or not and whether there are any liability gaps left. Then the possible regime might provide a special provision on limitation of liability which is the most controversial issue.<sup>446</sup>

### **5.3.5 Conflict of laws**

---

<sup>445</sup> See paragraph 5.2.4.

<sup>446</sup> For more details about possible solutions to limitation of liability in multimodal transport, see paragraph 5.3.1.

Multimodal contract can be regarded as a contract *sui generis* which is not made up of a series of unimodal contracts, or a form of mixed contract which is composed of unimodal transport forms whose regimes are, therefore, still applicable.<sup>447</sup> It may be argued that under the *sui generis* contract, a potential conflict with unimodal conventions is not a real issue. However, as discussed earlier, the potential conflict may exist.<sup>448</sup> Having looked at those potential overlaps, one issue might arise as to the question of precedence and possible solutions in these situations. Since it is not quite clear that when two different regimes apply to the same claim the application of one regime might lead to a different result from that which would have been brought about by the application of the other regime, it is, therefore, necessary to determine which of them should apply to the relevant claim. For the question of precedence and possible solutions, it is necessary to look at the provisions of the Vienna Convention and the conflict of conventions provisions in other conventions.

### **5.3.5.1 The Vienna Convention on the Law of Treaties (Vienna Convention)<sup>449</sup>**

#### 5.3.5.1.1 The application of the Vienna Convention

The question about how to deal with the potential conflicts, in general, can be answered by the Vienna Convention on the Law of Treaties. Article 30 of the Vienna Convention can be of help in relation to the conflicts that may occur between the carriage conventions when the contract of carriage concerns multimodal transport. This article deals with the application of successive treaties relating to the same subject-matter and, in particular, articles 30.2, 30.3 and 30.4 are the most relevant ones because these provisions provide the guidelines to be used in case of actual conflict. Article 30.2 states that “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” This paragraph recognises the right of treaty drafters to determine its relation with other treaties by means of a so-called ‘conflict of

---

<sup>447</sup> For the theories on the nature of the multimodal transport contract, see paragraph 2.3.

<sup>448</sup> See paragraph 3.3.7. Depending on the scope of each unimodal convention, it may apply to the unimodal stage of a multimodal transport contract. See also paragraph 2.5.1.

<sup>449</sup> Vienna Convention on the Law of Treaties (Vienna Convention) was done at Vienna on 23 May 1969 and entered into force on 27 January 1980.

conventions' provision. Article 30.3 of the Vienna Convention provides that "when all the parties to the earlier treaty are parties also to the later treaty" relating to the same subject matter, "the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty." This paragraph codifies the *lex posterior derogate legi priori* rule, as this article 30.3 states that a later law prevails over an inconsistent prior one. Article 30.4 further provides that when the parties to the later treaty do not include all parties to the earlier one, the same rule applies as between States Parties to both treaties, but as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations. This paragraph regulates precedence in conflict situations where not all parties to the earlier convention are party to the later regime, which is the most likely situation in the current transport conventions.

#### 5.3.5.1.2 Several questions which may be addressed

Here, the first question may arise concerning the words 'relating to the same subject matter'. Firstly, it would seem that the expression should be construed strictly so that it would not cover cases 'where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty.'<sup>450</sup> In such cases, the question may involve the consideration of the maxim *generalia specialibus non derogant*.<sup>451</sup> However, the real question is whether the unimodal and multimodal carriage conventions relate to the same subject matter. One might argue that the carriage conventions may not all concern the same subject matter so that conflicts between the unimodal transport conventions and multimodal transport convention dealing with carriage by different modes would be excluded from the scope of article 30 of the Vienna Convention. For instance, one thing that should be noted for the Hague and Hague-Visby Rules is the simplicity of their documentary approach to the scope of application, which means that if there is no bill of lading, there will be no convention applicability. The other unimodal conventions use either a contractual or a trade approach. The CMR, COTIF-CIM and CMNI all apply to contracts of carriage which are intended to govern the specific mode of transport, whereas the Montreal and Warsaw

---

<sup>450</sup> IM Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, Manchester University Press, 1984), 98; Official Records, Second Session, 91st meeting (Waldock), A/CONF.39/C.1/SR.91, para 41.

<sup>451</sup> This means that 'general things do not derogate from special things'.

Conventions apply to actual carriage by air.

As Hoeks<sup>452</sup> claimed, it is debatable, but as the carriage conventions all regulate international carriage contracts, i.e. the underlying rules on liability of carrier, and they all have the same purpose of providing a uniform set of rules regarding contracts of carriage, it could, therefore, be said that their subject matters are, as a whole, quite similar. Here, the basic principle regarding the same subject matter was suggested by the International Law Commission, and the test of whether two treaties deal with the same subject matter can be resolved through the test of ‘whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another.’<sup>453</sup> This ‘affecting’ might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way. Therefore, if the liability of multimodal carrier under the multimodal convention influences the obligations and liability of the carrier under the unimodal conventions, it could be said that they relate to the same subject matter for the purpose of the Vienna Convention.

Another question is whether which one is decisive in determining which treaty is the earlier and which the later. The possible date would be the date of adoption, the date of ratification or accession or the date of entry into force. The majority view is that the critical date for the determination of the time-point is that of the date of the adoption of the treaty and not, for example, its ratification or entry into force, whereas a minority opinion supports the date of the entry into force or drawing this from the intention of the parties.<sup>454</sup> It seems that the relevant date is that of the adoption of the treaty since adoption of the treaty could express the new legislative intention.<sup>455</sup> Adoption is the formal act by which the form and content of a proposed treaty text are established and the adoption of the text of a treaty, in general, takes place through the expression of the consent of the states participating in the treaty-making process. Furthermore, if it is not based on the date of adoption, there would be serious confusions. For instance, it is almost impossible to predict when the treaty

---

<sup>452</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), 307.

<sup>453</sup> Report of the Study Group of the International Law Commission, A/CN.4/L.682 (2006), para. 254.

<sup>454</sup> Report of the Study Group of the International Law Commission, A/CN.4/L.682 (2006), para. 232.

<sup>455</sup> IM Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, Manchester University Press, 1984), 68; Official Records, Second Session, 91st meeting (Waldock), A/CONF.39/C.1/SR.91, para 39.

will enter into force. For some treaties, it has taken 7 years to enter into force, or for some, more than 10 years.<sup>456</sup> Therefore, the date of adoption would provide the best certainty and predictability. In this regard, the majority view seems correct. This assumption was also supported during the meetings at the United Nations Conference on the Law of Treaties.<sup>457</sup>

Moreover, as in general the Vienna Convention applies in a non-retroactive way, i.e. only to treaties which are concluded by States after the entry into force of the Vienna Convention<sup>458</sup>, it is questionable whether the scope of application is so limited or not. However, article 30 does no more than reiterate those rules of general international law,<sup>459</sup> and largely codifies “the approaches of general law that existed anterior to the Convention and that continue to provide the rationale and the perspective from which those conventional provisions are applied.”<sup>460</sup>

However, there are some further problems with regard to the application of the rules. First, not all of the countries have ratified the Vienna Convention<sup>461</sup> and second, there might be several situations falling outside the scope of article 30. For instance, it is not applicable where there are no common treaties between two states, i.e. there is one state party to the earlier treaty, while the other state is party to the later one. This is very common in transport contracts as there might be a situation where there is a conflict between the Hague-Visby Rules and the CMR and A state is only a party to the Hague-Visby rules, not to the CMR, and B state is a party to the CMR and the Hamburg Rules.

Here, one might think that provisions about how to deal with possible conflicts might be left to the rules of the Vienna Convention, rather than including them into a multimodal transport convention. This is because the rule seems to be clear: If both parties are party to an applicable unimodal convention and the multimodal

---

<sup>456</sup> For example, the Hague Rules was adopted on 25 August 1924 and entered into force on 2 June 1931, taking 7 years, whereas the Hamburg Rules was adopted on 31 March 1978 and entered into force on 1 November 1992, taking 14 years.

<sup>457</sup> Official Records, Second Session, 91st meeting (Waldock), A/CONF.39/C.1/SR.91, para 39.

<sup>458</sup> Article 4 of the Vienna Convention.

<sup>459</sup> M Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010), 306.

<sup>460</sup> Report of the Study Group of the International Law Commission, A/CN.4/L.682 (2006), para. 118.

<sup>461</sup> There are now 113 Parties to the Vienna Convention (as of May 2013). For more details, see UN Treaties at <http://treaties.un.org>.

convention, the latter convention applies, because it occurred later.<sup>462</sup> If both are party to the applicable unimodal convention, but only one is party to the multimodal convention, only the unimodal convention can apply. However, the reason why the problem cannot be left to the Vienna Convention is simply that it cannot be guaranteed that all states who might ratify or accede to the multimodal transport convention are in fact parties to the Vienna Convention. Therefore, it would be safer to include provisions regulating possible conflicts in the multimodal convention itself. Given the uncertainty and problems raised by the Vienna Convention, the drafters of some of the transport conventions decided to regulate matters of precedence as they see fit. Those attempts resulted in creating conflict of conventions provisions for which article 30.2 of the Vienna Convention allows flexibility.

### **5.3.5.2 Conflict of conventions provisions**

#### **5.3.5.2.1 Article 55 of the Montreal Convention**

Article 55 of the Montreal Convention is specifically designed to clarify the hierarchy in international law governing carriage by air. Article 55 provides for provision on the relationship with other Warsaw Convention instruments and it states that the Montreal Convention shall prevail over any of the Warsaw instruments which apply to international carriage by air. However, this article is rather limited and is not enough to resolve the issue of conflict of conventions.

#### **5.3.5.2.2 Articles 30 of the MT Convention and 25 of the Hamburg Rules**

As article 30 of the MT Convention and article 25 of the Hamburg Rules are very similar,<sup>463</sup> this section will focus on those in the MT Convention only.

In the first instance, the MT Convention provides for the pick-up and delivery clause in article 1 which is regarded to be of particular importance in relation to air carriers and the Warsaw and Montreal Convention.

---

<sup>462</sup> The background reason for article 30.2 of the Vienna Convention is that in case both parties are parties to both conventions, they can be taken to have amended the earlier convention by the later.

<sup>463</sup> This is because the MT Convention and Hamburg Rules were drafted by the United Nations with the same time frame and were meant to complement each other.

Article 30.4 of the MT Convention deals with the relation to the CMR and CIM Convention and provides that the carriage of goods in accordance with the article 2 of the CMR,<sup>464</sup> or articles 1.3 and 1.4 of CIM,<sup>465</sup> shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1.1 of the MT Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods. Therefore, any possible conflicts arising between article 2 of the CMR or articles 1.3 and 1.4 of the CIM and the MT Convention are resolved by this rule. This article does not give precedence to certain incompatible rules, it would rather exclude certain specific types of multimodal carriage, such as the roll-on, roll-off carriage of article 2 of the CMR from the scope of application of the MT Convention.

Article 38<sup>466</sup> of the MT Convention is intended to provide some guidance as to how such conflicts are to be resolved. This provision is apparently modelled on article 30 of the Vienna Convention and leaves open a considerable area of potential conflict as discussed above,<sup>467</sup> especially where no rules are applicable to regulate the priority to be given to one Convention as opposed to another.<sup>468</sup>

#### 5.3.5.2.3 Articles 82 and 26 of the Rotterdam Rules.

The Rotterdam Rules also provide specific provisions to prevent from colliding with the existing unimodal transport regimes. Article 82 of the Rotterdam Rules gives precedence to other unimodal conventions applicable to carriage by air, road, rail or inland waterways, to the extent that they apply to the multimodal transport discussed in paragraphs 2.5.1.1 to 2.5.1.4.

Furthermore, article 26 states that certain provisions<sup>469</sup> of the Rotterdam Rules

---

<sup>464</sup> See paragraph 2.5.1.2.

<sup>465</sup> See paragraph 2.5.1.3.

<sup>466</sup> Article 38 of the MT Convention provides that “If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.”

<sup>467</sup> See paragraph 5.3.5.1.

<sup>468</sup> A Diamond, ‘The United Nations Convention on International Multimodal Transport of Goods 1980’, in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997), 65.

<sup>469</sup> Provisions on carrier’s liability, limitation of liability and time for suit. See article 26 of the

may not apply before loading and after discharge where there is another international convention that applies to those stages of the carriage. Further discussion will follow later in Chapter 6.<sup>470</sup>

## 5.4 Summary and conclusions

Having considered possible types of liability and possible solutions to the specific problems, the best way forward may be suggested as follows.

A modified/limited system would be the best possible solution. The UNCTAD/ICC Rules and MT Convention are good examples, because the key features of them are widely used in standard forms of contract and regional, sub-regional or national rules. Thus, an international multimodal regime devised in this way based on this modified/limited system might certainly be one of the more realistic options in the struggle to bring harmony in the field of intermodal multimodal transport of goods.

In terms of the limitation of liability, the following solution may be suggested. Unless the parties agree on the main mode of transport whose limits of liability apply, the multimodal carrier shall not be liable for any loss, damage or delay in delivery in an amount exceeding the equivalent of 875 SDR per package or unit, or 3 SDR per kilogram, whichever is the higher. However, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal carrier is limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

Regarding time for suit, due to the practical reasons for recourse actions, the time limit of 9 months may be suggested. This is because it is to ensure that the multimodal carrier would have sufficient opportunities to institute recourse actions against its subcontractors.

In regard to non-localised loss or liability gaps, the modified uniform system provides a perfect solution for non-localised loss. In this system, there is no difference between cases where loss can or cannot be localised. Therefore, there will

---

Rotterdam Rules.

<sup>470</sup> See paragraphs 6.6 and 6.7.

be no concern in cases of where the loss or damage cannot be localised or the loss was progressive through the journey or possible gaps were left.

Lastly, in terms of the conflict of laws, the approach taken by the Rotterdam Rules may be suggested. Thus, if there are any potential conflicts, then any applicable mandatory unimodal conventions, not national laws, will apply to some extent.

However, it should be noted that there may be the ideal solution and the practical solution. Although there might be an ideal solution, sometimes it would be, but in actuality, it might be better to go for a more practical one.

# CHAPTER 6 THE ROTTERDAM RULES AS A MODIFIED NETWORK SYSTEM

## 6.1 Introduction

In Chapter 5, the possible ways forward for an international multimodal transport solution have been considered. It was accordingly suggested that the best type of liability regime for a possible international convention for multimodal transport would be a modified network or modified uniform system. Furthermore, the best solutions to key substantive features of a possible international multimodal regime were also provided. Here, it is worth noting that one should also look at the whole picture of a possible international regime in order to find out whether the suggested type of liability system and each solution of the key substantive features could work well in practice. Thus, Chapter 6 and Chapter 7 will analyse two possible multimodal regimes, i.e. the Rotterdam Rules as a modified network system and the modified uniform system based on the EU Draft Regime,<sup>471</sup> which were recently introduced.

On 11 December 2008, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules)<sup>472</sup> was adopted and will enter into force twelve months after the twentieth state ratifies, accepts, approves or accedes to the Rotterdam Rules. The Convention is intended to modernise and harmonise the rules that govern the international carriage of goods involving a sea leg, thereby enhancing legal certainty, improving efficiency and commercial predictability in the international carriage of goods because the current host of international maritime regimes do not achieve the desired goal of international uniformity and they do not adequately take into account developing

---

<sup>471</sup> See Chapter 7.

<sup>472</sup> The Rotterdam Rules (or ‘the Convention’) were opened for signature at a signing ceremony in Rotterdam on 23 September 2009. 24 countries have signed and 2 countries (Spain and Togo) have ratified the Convention to date (as of 1 April 2013). The Convention will enter into force one year after the twentieth ratification. The main text of the Rotterdam Rules is available at [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/09-85608\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf).

transport practice, such as containerisation, multimodal transport contracts and the use of electronic transport documents.<sup>473</sup>

In order to achieve uniformity, the states adopting the Convention are obliged to denounce earlier conventions on the international carriage of goods by sea, i.e. the Hague Rules, Hague-Visby Rules and the Hamburg Rules.<sup>474</sup> Moreover, the Convention extends its scope of application to the carriage by other modes of transport including a sea leg, using sea carriage as a base-line for extending to a multimodal service, therefore, “rewriting maritime and multimodal transports into one single Convention.”<sup>475</sup> However, it seems clear that the Convention primarily deals with sea carriage and the multimodal carriage is only additional and optional.<sup>476</sup> Nevertheless, if the Rotterdam Rules come into force, they may provide the transport industry with a uniform legal instrument governing carrier liability in multimodal transport with a sea leg. It is, therefore, necessary to discuss the question whether the maritime plus approach of the Rotterdam Rules provides a sufficiently effective solution to the problems arising from multimodal transport involving a sea leg. This Chapter will focus on those provisions of the Convention in accordance with the specific multimodal problems discussed in paragraph 3.3.<sup>477</sup>

## 6.2 Scope of application of the Convention

The scope of application is absolutely critical, because if we have a problem in

---

<sup>473</sup> For the philosophy of the Rotterdam Rules, see MF Sturley, ‘Transport law for the twenty-first century: An introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules’ in Chapter 1 of DR Thomas (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009); DR Thomas, ‘The Emergence and application of the Rotterdam Rules’, in Chapter 1 of DR Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd’s List, 2010); Sturley, MF, et al, *The Rotterdam Rules* (Sweet & Maxwell, 2010), 1-21.

<sup>474</sup> Article 89 of the Rotterdam Rules.

<sup>475</sup> JM Alcántara, ‘The new regime and multimodal transport’ [2002] 3 LMCLQ 399, 399. This unimodal plus approach may be another solution to the problems of multimodal transport, however, the multimodal scope under the Rotterdam Rules will inevitably be limited. See paragraph 6.2.2.

<sup>476</sup> Article 1.1 states that a contract may provide for other carriage by other modes of transport. Because the term ‘may’ allows carriage by any other mode of transport, the contract could or could not cover a multimodal transport. See paragraph 6.2.2.3.

<sup>477</sup> Due to the limited space given this Chapter will only deal with those provisions of the Convention regarding scope of application, liability of carrier, limitation of liability, time for suit, non-localised loss and conflict of laws.

practice, the first thing we should ask is whether a set of rules applies to the problem and, if so, which one would apply. Therefore, the legal force of all provisions of the Convention will be relying on the certain conditions of applicability.

The Convention provides at the outset<sup>478</sup> that it applies to ‘contracts of carriage’, provided that certain conditions relating to several matters set out in articles 5 to 7 are achieved. The substantive provisions on the scope of application are found in articles 5 to 7 and the validity of contractual terms providing mandatory nature and limits of the Convention is expressed in articles 79 to 81. Clarification on what each of the terms in the provisions means is found in a long list of definitions and the important ones are articles 1.1 to 1.4, all connected with the scope of application and volume contracts.

## **6.2.1 General scope of application**

### **6.2.1.1 Contract of carriage**

The scope issue starts with article 5.1 which provides that the Convention applies to ‘contracts of carriage’. For the scope of application of the Convention, contract of carriage is defined in article 1.1 to mean “a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage”.

When it comes to defining the scope of application, the Working Group III at UNCITRAL<sup>479</sup> considered three main approaches to the scope of application question.<sup>480</sup> As the application of the Convention depends on the conclusion of a

---

<sup>478</sup> Article 5.1 of the Rotterdam Rules.

<sup>479</sup> United Nations Commission on International Trade Law.

<sup>480</sup> It was suggested that there were three possible theoretical approaches to defining the scope of application of the draft instrument, i.e. 1) the documentary approach, 2) the contractual approach and 3) the trade approach. The first one referred to the possibility of basing application of the Convention on the use of a particular transport document. The second focussed on what type of contract had been concluded between the parties and the third on what type of trade was intended by the contract of carriage. See the Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004), UN Doc. A/CN.9/572 (2004), paras 83-86. These approaches were first discussed at the Seminar on ‘Freedom of Contract and Carriage of Goods’, held in London on 20-21 February 2004, the report of which is available at <<http://folk.uio.no/erikro/WWW/cog/Report.pdf>>, accessed 1 December 2012.

contract of carriage, the Convention seems to follow a contractual approach rather than a documentary approach, which has been adopted in the Hague Rules and Hague-Visby Rules, requiring the issuance of a bill of lading or a similar document of title<sup>481</sup>, or a trade approach, under which the Convention would have applied only to contracts in the liner trade.

However, one of the questions that may arise is what happens if the contract does provide for carriage by sea, but in fact, it is never carried by sea as the goods were carried by some other mode in breach of contract. Here, Staniland<sup>482</sup>, Berlingieri<sup>483</sup> and Sturley<sup>484</sup> agree that the Convention would apply even though the carriage of goods has not actually been carried by sea. This would be very odd because there was no actual sea carriage. There could, however, be another situation where it just provides an option for sea carriage in the contract of carriage, but no actual sea carriage may occur. Here, both Staniland<sup>485</sup> and Berlingieri<sup>486</sup> mention that the Convention does not apply where the contract just provides an option for sea carriage and no sea carriage takes place.

This is because the Convention adopts a contractual approach and, therefore, it is necessary to look at contract of carriage itself, not actual carriage. A logical answer in these cases might be that it is irrelevant whether or not the actual carriage was by sea and that an option for sea carriage is not sufficient to satisfy the requirement that “the contract shall provide for carriage by sea”. Since the key to the application of the Convention should be the contract of carriage and not the actual carriage of the goods, the views of above scholars and the view of the majority of the Working

---

<sup>481</sup> Article 1(b) of the Hague and Hague-Visby Rules.

<sup>482</sup> H Staniland, Chapter 2 of *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), at para 5.02. Staniland says that “if the Rotterdam Rules provide for sea carriage, they would, of course, apply to a failure or refusal to carry the goods by sea, even though there was no actual sea carriage.”

<sup>483</sup> See, F Berlingieri, ‘A review of some recent analyses of the Rotterdam Rules’ (2009) *IL DIRITTO MARITTIMO*, 994.

<sup>484</sup> MF Sturley, ‘Scope of Application’ in Chapter 2 of A Von Ziegler, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010), 41-43. Sturley states that the focus should be on the contract rather than the performance.

<sup>485</sup> H Staniland, Chapter 2 of *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), para 5-02. He points out that it could be said that the contract ‘may provide’ for sea carriage, not ‘shall provide’ for sea carriage.

<sup>486</sup> See, F Berlingieri, ‘A review of some recent analyses of the Rotterdam Rules’ (2009) *IL DIRITTO MARITTIMO*, 994.

Group<sup>487</sup> seem to be right. Here, Diamond<sup>488</sup> disagrees with the statement that the Convention does not apply even where the goods are, in fact, carried in whole or in part by sea, and claims that if goods were actually carried by sea, this ought to bring the carriage within the scope of the so-called ‘sea carriage Convention’. Although his argument seems to be understandable, there ought to be a contract of carriage and it is irrelevant whether or not the actual carriage was by sea. Yet, if there was a contract that contains an option or liberty to carry the goods by sea, this could be deemed to be a contract of carriage provided that the goods are actually carried by sea.<sup>489</sup>

### 6.2.1.2 The geographical scope

As to the geographical scope of the Convention, it is necessary to return to article 5.1. The Convention is intended to apply only to international carriage. As the Convention is maritime plus by nature, it is appropriate that in multimodal transport operations involving a sea leg both the overall carriage and the sea carriage must be international. Therefore, it may be said that the Convention requires double internationality for its application. The one and same sea carriage must be international. In other words, two separate national sea carriages in two different states under the same contract of carriage do not suffice. There is, of course, no hindrance for contracting states to extend the application of the Convention to national carriage or to extend the application of the Convention otherwise on national legislative basis.

The geographical scope has also to do with the fact that there must be a sensible linkage with a Contracting State. The place of receipt, the port of loading, the place of delivery or the port of discharge must be located in a Contracting State. However, it is obvious from the phrase “any one of the following places” that only one such location would be needed. Here, Staniland<sup>490</sup> points out that as the chapeau of article

---

<sup>487</sup> Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17), para 24. “It was observed that the basic assumption of the Working Group had been that the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods”.

<sup>488</sup> A Diamond, ‘The Rotterdam Rules’ [2009] 4 LMCLQ 445, 452.

<sup>489</sup> Diamond says that it would not be surprising if it were held that, where the contract contained an option to carry by sea and that option was exercised so that part of the carriage was actually by sea, the contract is to be read as though the contract provided for that part of the carriage to be by sea. *Ibid.*

<sup>490</sup> H Staniland, Chapter 2 of *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), para 5-08.

5.1 refers only to the “following places”, he raises a question as to whether a place includes a port, saying “if the draftsman had used the phrase ‘following places or ports’, it would have been more clear.” However, the main point here is the place of receipt or the place of delivery may be inland and not a port. Yet, it seems perfectly clear that a port is one of the places as it states “any one of the following places”. Thus, it appears that there is little point in arguing about that issue.

Moreover, unlike the Hague-Visby Rules<sup>491</sup>, the intention is that the Convention should apply by statute both to outward cargoes from a Contracting State and also to inward cargoes to a Contracting State.

### **6.2.1.3 Specific exclusions**

Having considered whether the Convention applies to a particular contract of carriage, the reference in article 5 does not suffice without necessary further specifications found in article 6. Without repeating the exact wording of this article, the main message is to exclude those transactions that should not be subject to the mandatory law.<sup>492</sup> Article 1.3 and 1.4 define liner transportation and non-liner transportation, important for understanding the scope issue. These definitions, again, are necessary for the proper understanding of article 6.

Legislatively, liner transportation was clarified in article 6.1, considering that liner transportation was automatically included by the general definition of contract of carriage read together with article 5.1. Thus, the specific situations in liner carriage that would not, however, fall under the Convention are to be charterparties used in liner transportation and other contracts for the use of a ship or of any space thereon used in liner transportation. For example, slot charters and space charters on a liner ship in liner trade would fall outside the Convention.

As a general rule, non-liner transportation seems outside the Convention according to article 6.2. However, when there is no charter party or other contract

---

He says that if the draftsman meant ‘place’ to include ‘port’, he could easily have used the phrase ‘following places or ports’ and wonders why the draftsman unevenly employed his words, so that ‘place’ also – and inconsistently – means ‘port’.

<sup>491</sup> Article X of the Hague-Visby Rules. The Rules will apply if any one of a number of triggers listed below is fired; where the bill of lading is issued in a Contracting State; or the carriage is from a port in a Contracting State; or where the bill of lading provides that the Rules or legislation of any State giving effect to them are to govern the contract.

<sup>492</sup> See article 6 of the Rotterdam Rules.

between the parties for the use of a ship or of any space thereon, and when a transport document or an electronic transport record is issued, the Rotterdam Rules nevertheless apply to non-liner transportation. Here, it seems that the Rotterdam Rules may frequently apply even to non-liner transportation. For example, there is non-liner transportation for carrying goods, e.g. oil. The buyer arranges a charterparty with the shipowner and the shipowner then issues a bill of lading to the buyer who is also the shipper. It is clear here that the Rotterdam Rules do not apply to the bill of lading between the shipper, also the charterer and shipowner. However, once the bill is assigned to a third party, the position will change.<sup>493</sup> When the shipper transfers their bill of lading to the receiver, the Rotterdam Rules do apply, because there is no charterparty between the receiver and the shipowner. What is more likely is that the normal situations would be that there is the receiver claiming for the loss of or damage to the goods rather than the shipper.<sup>494</sup>

#### **6.2.1.4 Volume contracts**

##### 6.2.1.4.1 The concept of volume contracts

This is a new and controversial provision of the Rotterdam Rules.<sup>495</sup> Volume contracts appear to be quite similar to service contracts in the US,<sup>496</sup> which allow the

---

<sup>493</sup> JF Wilson, *Carriage of Goods by Sea* (7th edn, Pearson, 2010), 174.

<sup>494</sup> Of course that is not always the case, but that will be the huge majority of cases of the subrogating cargo insurance.

<sup>495</sup> DR Thomas, 'The Emergence and application of the Rotterdam Rules', in Chapter 1 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), 16; DR Thomas, 'An analysis of the liability regime of carriers and maritime performing' in Chapter 3 of Thomas, DR (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 84; J Alcantara, et al, 'Particular concerns with regard to the Rotterdam Rules' (Apr 2010), 8, available at <[http://www.comitemaritime.org/Uploads/Rotterdam\\_Rules/Particular\\_concerns-Rotterdam\\_Rules.pdf](http://www.comitemaritime.org/Uploads/Rotterdam_Rules/Particular_concerns-Rotterdam_Rules.pdf)>, accessed 15 September 2012. See also PK Mukherjee and AB Bal, 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 19-23, <[http://www.rotterdamrules2009.com/cms/uploads/Def\\_tekst\\_Abhinayan\\_Basu\\_Bal\\_-\\_Volume\\_Contract\\_Final.pdf](http://www.rotterdamrules2009.com/cms/uploads/Def_tekst_Abhinayan_Basu_Bal_-_Volume_Contract_Final.pdf)>, accessed 15 September 2012.

<sup>496</sup> At the twelfth session of the Working Group III meetings, the United States delegation made a proposal regarding the so-called 'Ocean Liner Service Agreement (OSLA)', which is known as 'service contracts' and suggested that it be included within the scope of the Rotterdam Rules, but that in respect of such agreements certain provisions of the Rotterdam Rules be made non-mandatory. See the report by the UNCITRAL Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]-Proposal by the United States of America', UN Doc. A/CN.9/WG.III/WP.34

parties to the contract to enter into mutually negotiated agreements, subject to certain conditions to derogate from the terms of the Rotterdam Rules, regardless of whether such derogation increases or decreases the carrier's obligations. The volume contract is broadly defined in article 1.2 that "volume contract means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum, or a certain range." Article 80 provides that if a contract can be characterised as a volume contract, the parties may, subject to the conditions set out in this article, derogate from the provisions of the Convention by lessening the rights, obligations and liabilities imposed by the Rotterdam Rules on carriers or shippers. Then article 80 further contains minimum requirements that the carrier must meet in order to have a contract qualify as a volume contract.<sup>497</sup> The articles not subject to derogation are article 14, which requires a carrier to make and keep ship seaworthy etc., article 29, which covers a shipper's duty to provide information to the carrier, article 32, which applies to shipments of dangerous goods, and article 63, which denies a carrier whose reckless conduct has caused a loss the right to limit liability.

#### 6.2.1.4.2 Several issues of volume contracts

Firstly, the concept of volume contracts seems a very broad and it may include any contract for more than one shipment in any period of time and, for example, a contract to ship ten packages over a period of two years. As expressed in the Working Group III sessions, approximately 90 per cent of the liner trade might be encompassed by volume contracts, leaving only 10 per cent to be fully regulated by the Rotterdam Rules.<sup>498</sup>

---

(2003), paras 18-29.

<sup>497</sup> Article 80.2 of the Rotterdam Rules provides that "A derogation pursuant to paragraph 1 of this article is binding only when:

- (a) The volume contract contains a prominent statement that it derogates from this Convention;
- (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
- (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article;
- (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

<sup>498</sup> . See the report by the UNCITRAL Secretariat, 'Comments from the UNCTAD Secretariat on

Here, one of the biggest concerns is that volume contracts may be utilised by carriers as a means of avoiding a regulatory solution under the Rotterdam Rules. Volume contracts would typically contain provisions by which a shipper obtains reduced rates in return for a guaranteed volume of cargo over a specified period of time. These contracts could frequently contain special terms for allocating cargo loss and damage, according to article 80 of the Rotterdam Rules. Therefore, carriers may seduce shippers to enter into volume contracts by offering a contract with minimal liability conditions against a lower freight rate than would have been valid for a normal shipment under normal liability conditions. If carriers succeed in reducing their liability under volume contracts as the standard way of doing business, they could transfer greater cargo liabilities to shippers and their cargo insurers. Furthermore, it should be noted that the reduced freight rates generated by volume contracts would be offset by higher insurance rates.<sup>499</sup>

This may be detrimental to the interests of small shippers and open up the possibility of abuse by their carriers.<sup>500</sup> It was also pointed out that there might be an ultimate situation where the volume contracts in the Rotterdam Rules would foster a return to the situation prevailing in the pre-Hague era for small shippers.<sup>501</sup> There were strenuous efforts to ensure that volume contracts can only have a derogating effect when freely and voluntarily entered into.<sup>502</sup> However, in practice, creative carriers would use contractual forms that arguably comply with the Rotterdam Rules, but without any real means of negotiation. The fear of abuse by carriers seems transparent and was aired in the debates of the Working Party.<sup>503</sup> A typical

---

Freedom of Contract', UN Doc. A/CN.9/WG.III/WP.46 (2005), paras 5 and 12; Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para 209.

<sup>499</sup> PK Mukherjee and AB Bal, 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 19. See also Chapter 8 on Insurance and multimodal transport.

<sup>500</sup> PK Mukherjee and AB Bal, 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 19.

<sup>501</sup> The report by the UNCITRAL Secretariat, 'Draft convention on contracts for the international carriage of goods wholly or partly by sea - Compilation of comments by Governments and intergovernmental organizations', UNCITRAL 41<sup>st</sup> session (New York, 16 June - 3 July 2008), UN Doc. A/CN.9/658 (2008), para 9.

<sup>502</sup> Article 80.2 of the Rotterdam Rules.

<sup>503</sup> DR Thomas, 'An analysis of the liability regime of carriers and maritime performing parties', in Chapter 3 of DR Thomas, *A new convention for the carriage of goods by sea: the Rotterdam Rules*

multimodal container shipment would be a volume contract and, thus, subject to the freedom of contract which may lead to complex contractual arrangements.

Consequently, the derogation from the Rotterdam Rules would effectively destroy the balance between the interests of shippers and carriers that the Convention attempt to preserve. Therefore, it may be questioned why the principles set out in the Rotterdam Rules do not enjoy a fuller role in the operation of the new Convention, allowing the parties to escape the legal framework established by the Convention.

## **6.2.2 The multimodal scope of application**

### **6.2.2.1 Desirability of a multimodal regime**

It is worth mentioning that the Working Group at UNCITRAL was originally mandated to consider port-to-port transport operations. However, it had liberty to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations and to recommend an extension of its mandate.<sup>504</sup> At its ninth session, the Working Group considered whether the scope of application should be restricted to port-to-port transport operations or whether it should employ the door-to-door concept.

Despite strong objections, it suggested an extension of its original mandate in order to consider door-to-door transport.<sup>505</sup> Then, the UNCITRAL Commission approved this assumption, subject to further consideration of the scope of application after the Working Group had considered the substantive provisions of the Convention and come to a more complete understanding of how they might function in the door-to-door context.<sup>506</sup> It would be desirable to extend the scope of the Convention in order to respond to the new realities of international transport, i.e. the growth in door-to-door containerised transport in the liner trade. Given that there has been an

---

(Lawtext Pub, 2009), 88.

<sup>504</sup> Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), para 345.

<sup>505</sup> Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), UN Doc. A/CN.9/510 (2002), paras 26-32.

<sup>506</sup> Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), para 224.

exponential growth in containerized transport<sup>507</sup> and container liner operators carry approximately 50 percent of their containers on a multimodal basis,<sup>508</sup> this door-to-door concept seems to be inevitable.

#### **6.2.2.2 Wholly or Partly by Sea**

The full title of the Rotterdam Rules is the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. This title, together with the definition of ‘contract of carriage’ in the Convention, is crucial in distinguishing it from the notion under the previous maritime conventions, such as the Hague-Visby Rules which are limited to only sea carriage. The notion under the Convention is that it would apply where the performance of a contract of carriage involved carriage wholly by sea and also carriage partly by sea coupled with some other modes. The definition, especially the latter sentence, of contract of carriage would supplement the term “wholly or partly by sea” in the full title of the Convention.

If the phrase “or partly” had been omitted from the title of the Convention, then the Convention would, of course, have been limited, at least in terms of the title of the Convention, to contracts involving sea carriage exclusively.

#### **6.2.2.3 Unimodal or multimodal**

The Convention may operate as a maritime multimodal convention and may operate as a unimodal convention. While a contract “shall” provide for a sea leg in the carriage which is essential, it “may” provide for other carriage by other modes of transport. Since the term “may” in the definition of contracts of carriage allows carriage by any other mode of transport<sup>509</sup>, the Convention’s scope of application can be unimodal if contract of carriage provides only for sea carriage, or multimodal if the same contract of carriage also covers transport preceding or subsequent to carriage by sea.

---

<sup>507</sup> Report by the UNCTAD Secretariat, *Multimodal transport: the feasibility of an international legal instrument*, UNCTAD/SDTE/TLB/2003/1 (2003), para 6. See paragraph 3.2.3.

<sup>508</sup> UNCITRAL Note by the Secretariat, *Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – General remarks on the sphere of application of the draft instrument*, UNCITRAL, 11<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003), para 25.

<sup>509</sup> H Staniland, Chapter 2 of *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), para 5-03.

#### 6.2.2.4 The ‘maritime plus’ multimodal convention

There is an important specification in the scope of application, whereby a sea leg can be combined with other modes of transport. The sea carriage is an absolute requirement, but other modes not, even if they were possible. This reflects a maritime plus approach, which is always a sea leg, but other modes of transport can be added on.

The Convention does not qualify as a “fully-fledged” multimodal convention. It can be described as operating as a “maritime plus”<sup>510</sup> multimodal, a “wet multimodal”<sup>511</sup>, a “transmaritime multimodal”<sup>512</sup> and a “maritime multimodal”<sup>513</sup> convention.

The Convention applies to multimodal transport operations involving at least a sea leg rather than to carriage performed by any possible combination of transport modes. Therefore, it is merely a “maritime plus” multimodal convention that extends its application to the current practice of transport by other modes which precede or are subsequent to the sea carriage.<sup>514</sup> It is not multimodal enough as it does not apply to transport performed by any possible combination of transport modes. In this sense, many are of the view that the Rotterdam Rules is only a maritime plus and not truly multimodal in the wider sense of that term.<sup>515</sup>

However, this Convention takes into account the commercial reality that the

---

<sup>510</sup> UNCITRAL Working Group employs the term ‘a multimodal convention for intercontinental maritime transport (‘maritime plus’)’ and the term ‘maritime plus’ has been widely used during the sessions, see the Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para 224. See also Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – General remarks on the sphere of application of the draft instrument, Note by the Secretariat, UNCITRAL, 11<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003), para 8.

<sup>511</sup> J Alcántara, ‘The new regime and multimodal transport’ [2002] 3 LMCLQ 399, 402. T Nikaki also uses the terminology ‘wet multimodal’, see T Nikaki, ‘Conflicting Laws in ‘Wet’ Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]’ (2006) 37(4) JMLC 521; T Nikaki, ‘The UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]: multimodal at last or still all at sea?’ (2005) Sep JBL 647.

<sup>512</sup> P Delebecque, ‘The UNCITRAL Draft Instrument on the Carriage of Goods by Sea’ [2003] CMI Yearbook 208, at p. 227 introduces the term ‘transmaritime multimodal’.

<sup>513</sup> H Staniland, Chapter 2 of *The Rotterdam Rules: A Practical Annotation* (Informa, 2009), para 5-01.

<sup>514</sup> Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para 224.

<sup>515</sup> PK Mukherjee and O Bokareva, ‘Multimodal maritime plus: some European perspectives on law and policy’ (2010) 16 JIML 221, 226; T Nikaki, ‘The UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]: multimodal at last or still all at sea?’ (2005) Sep JBL 647, 656-657.

maritime carriage of goods is frequently preceded or followed by land carriage.<sup>516</sup> This is recognition of the fact that nowadays the carriage of goods by sea, especially in the liner trade of containerised cargo, is to a great extent carried on a door-to-door basis, irrespective of the length of the sea leg as compared to the land leg. In any event, in worldwide trade, the sea leg normally represents by far the longest leg of the door-to-door carriage and this explains why the Convention has a maritime flavour.<sup>517</sup>

#### **6.2.2.5 Special Rules to avoid conflict with other conventions**

Although the scope of application of the Convention extends to door-to-door transport operations, the decision to cover 'door-to-door' transport will give rise to a potential conflict between the Convention and other carriage Conventions. Thus, if a contract does provide for part of the carriage to be by sea and part by road, rail, air or inland waterways, the possibility of conflict arises between the Convention and the other transport conventions. Thus, this extension of the scope of application leads to a further necessity to deal with possible conflicts with other transport conventions by introducing specific provisions such as article 26 and article 82. A more detailed discussion will follow later.<sup>518</sup>

### **6.3 Liability of carrier under the Convention**

#### **6.3.1 Whether one party is responsible**

One of the key features in the notion of multimodal transport is the fact that the shipper could pursue his claim against one responsible party throughout the entire transport rather than against the several unimodal carriers involved. Thus, it is necessary to look at whether the Convention could provide for a continuing responsibility of the carrier throughout the entire transport.

---

<sup>516</sup> Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para 224.

<sup>517</sup> F Berlingieri, 'A review of some recent analyses of the Rotterdam Rules' (2009) *IL DIRITTO MARITTIMO*, 994.

<sup>518</sup> See paragraphs 6.6 and 6.7.

### **6.3.1.1 Period of responsibility of the carrier**

Chapters 4, 5 and 6 provide for a base-line liability of the carrier throughout the period of carriage. Accordingly, this basis of liability would apply to the contracting carrier whether or not the damage occurs at sea or whilst the cargo is being carried by some other mode of transport. Article 12.1 defines the period of responsibility of the carrier as beginning when the goods are received and ending when they are delivered. Thus, the period of carrier's responsibility would cover the whole journey of multimodal transport.

However, for the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, effectively allowing the carrier the possibility of limiting his responsibility by contractually defining the time and location of receipt and delivery.<sup>519</sup> Thus, a carrier may contractually limit the period of responsibility to tackle-to-tackle. In addition, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee.<sup>520</sup> Therefore, it could be said that the carrier may not be responsible for the entire transport and may only be responsible during the period of responsibility as contractually defined, for parts of multimodal transport, and for some of the carrier's functions.

## **6.3.2 Obligations and liability of the carrier**

### **6.3.2.1 Key points about the Rotterdam Rules**

The Convention maintains the familiar fault-based regime of the Hague and Hague-Visby Rules. The Convention also uses some of the language to be found in those Rules, even to the extent of retaining most of the familiar list or catalogue of exceptions. However, the structure of the Convention is very different and one should keep in mind not to attempt to construe the Convention by reference to the Hague and Hague-Visby Rules.

---

<sup>519</sup> Article 12.3 of the Rotterdam Rules.

<sup>520</sup> Article 13.2 of the Rotterdam Rules.

There are several main changes.<sup>521</sup> First, the Hague-Visby Rules define ‘carriage of goods’ as covering “the period from the time when the goods are loaded on to the time when they are discharged from the ship”.<sup>522</sup> This causes difficulty and it is a benefit of the Convention that, by virtue of Article 12, the period of responsibility of the carrier for the goods begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered. Secondly, the Hague-Visby Rules impose no express obligation on the carrier as regards delivery of the goods. The Convention imposes a general obligation.<sup>523</sup> Thirdly, there is a change to the obligation which would require the carrier to exercise due diligence to make the ship seaworthy. This has been extended. Under the Rotterdam Rules<sup>524</sup> the carrier would be obliged to exercise due diligence, not just “before and at the beginning of the voyage”, but also “during” the voyage<sup>525</sup> and to “make” and “keep”<sup>526</sup> the ship seaworthy. The carrier will, therefore, be under a continuing duty before and throughout the voyage to exercise due diligence. Fourthly, the exception of nautical fault would be abolished. There would be no exception of “act neglect or default in the navigation or management of the ship”<sup>527</sup>. In addition, there are new, more detailed provisions on the incidence of the burden of proof than are to be found in previous cargo liability regimes.

The overall effect of these changes would be to shift radically the balance of risk from cargo interests to the carrier.

### **6.3.2.2 Obligations of the carrier**

The carrier has three categories of principal obligations under the Rotterdam Rules. First, the carrier has the obligation to carry the goods to the place of destination and

---

<sup>521</sup> See A Diamond, ‘The Rotterdam Rules’ [2009] 4 LMCLQ, 461-491.

<sup>522</sup> Article I (e) of the Hague and Hague-Visby Rules. This is so-called ‘tackle to tackle’ application.

<sup>523</sup> Articles 11 and 13.1 of the Rotterdam Rules say ‘deliver’ the goods.

<sup>524</sup> Article 14 of the Rotterdam Rules.

<sup>525</sup> Article III, rule 1 of the Hague and Hague-Visby Rules only sets out that the carrier shall be bound ‘before and at the beginning’ of the voyage to exercise due diligence.

<sup>526</sup> Article III, rule 1(c) of the Hague and Hague-Visby Rules requires only to ‘make’ the holds fit and safe.

<sup>527</sup> Article IV, rule 2(a) of the Hague and Hague-Visby Rules.

deliver them to the consignee.<sup>528</sup> Second, the carrier shall properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods during the period of its responsibility.<sup>529</sup> Third, the carrier is bound, before and during the voyage by sea, to exercise due diligence to make and keep the ship seaworthy; to properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and to make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.<sup>530</sup> Here, the third obligation goes beyond the Hague and Hague-Visby Rules in that the duty is a continuing one.

### **6.3.2.3 Liability of the carrier**

#### **6.3.2.3.1 Basis of liability**

Chapter 5 of the Convention provides for ‘Liability of the carrier for loss, damage or delay’. Article 17 on ‘Basis of liability’ provides that the carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier’s responsibility. Article 17 further states that the carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person.

The carrier is basically liable for loss of or damage to the goods and delay in delivery. Article 17.1 sets out a general rule on liability of the carrier and is supplemented by a list of excepted perils in Article 17.3.

#### **6.3.2.3.2 List of excepted perils**

Article 17.3 provides that the carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following

---

<sup>528</sup> Article 11 of the Rotterdam Rules.

<sup>529</sup> Article 13 of the Rotterdam Rules.

<sup>530</sup> Article 14 of the Rotterdam Rules.

events or circumstances caused or contributed to the loss, damage, or delay.<sup>531</sup>

Article 17.3 lists a number of “excepted perils” which, subject to some textual changes, correspond to article IV, rule 2(b)-(q) of the Hague and Hague-Visby Rules. However, the changes brought by the Rotterdam Rules have been substantial. There is no exception of “Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship” in the Rotterdam Rules. The abolition of the exception of negligence in the navigation of the ship will have the effect of depriving the carrier of any defence to the great majority of cargo claims caused by major casualties at sea, collisions with fixed objects. These tend to be the type of case which gives rise to the largest accumulation of cargo claims. There may, however, be a few cases where a carrier may be able to resist liability on the ground that a collision was wholly due to the fault of the other vessel.<sup>532</sup>

Article 17.3(i) and (o) set out some new exceptions to liability, which are not contained in the Hague-Visby Rules. Article 17.3(i) and (o) need to be considered in context with Article 13.2, 15 and 16, the provisions which would provide the carrier with certain new rights.

#### 6.3.2.3.3 Liability for delay

Article 21 on ‘Delay’ provides that delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed. This article is modelled on the provision in the Hamburg Rules.<sup>533</sup> However, there are some doubts as to the effect those words were intended to produce. While article 21 contains a definition of “delay in delivery” and, thus, governs how those words are to be interpreted, there is no provision exempting the carrier from liability for loss from delay falling outside that definition. Loss due to

---

<sup>531</sup> It is followed by a list of excepted perils. See article 17.3 (a)-(o) of the Rotterdam Rules.

<sup>532</sup> The abolition of the exception of nautical fault will have a significant impact on the balance of risk. In the future, under the Rotterdam Rules, there will be fewer cases where carriers and their insurers are able to contest liability and their efforts may have to be directed more to dealing with quantum and limitation.

<sup>533</sup> There is no relevant provision in the Hague and Hague-Visby Rules, while article 5.1 of the Hamburg Rules renders the carrier ‘liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery...’ and article 5.2 continues to provide a definition of ‘delay in delivery’.

delay can be sustained whereby the carrier negligently or intentionally fails to prosecute the voyage with reasonable diligence and, thus, commits a breach of its specific obligation under article 13 “properly and carefully” to carry and deliver the goods to their destination.<sup>534</sup>

### **6.3.3 Obligations and Liability of the shipper**

The Rotterdam Rules set out in a systematic fashion and in considerable detail the obligations of the shipper to the carrier. Chapter 7 of the Convention provides for ‘obligations of the shipper to the carrier’. The substance is not quite special but the manner in which it is expressed is a considerable improvement on previous liability regimes.

Article 27 obliges the shipper to deliver the goods ready for carriage in such condition that they will withstand the intended carriage. Article 28 requires the carrier and the shipper to respond to requests from each other for information and instructions. Article 29 imposes an obligation on the shipper to provide to the carrier in a timely manner such information and documents relating to the goods that are not otherwise reasonably available to the carrier and are necessary for the proper handling and carriage of the goods. Article 31 requires the shipper to provide in a timely manner accurate information for the compilation of the contract particulars and the issuance of the transport documents. It also provides that the shipper is deemed to guarantee the accuracy of the information and that the shipper will indemnify the carrier against any loss resulting from inaccuracy. Article 32 contains special rules on dangerous goods. If the shipper does not inform the carrier of the dangerous nature of the goods and the carrier does not otherwise have prior knowledge of their dangerous nature, the shipper is liable to the carrier for all loss resulting from the failure to inform the carrier.

## **6.4 Limitation of liability**

### **6.4.1 Basis of limitation of liability**

---

<sup>534</sup> For more information about the types of loss caused by delay, see paragraph 6.4.2.

The Working Group first considered the primary purpose of provisions on limitation of liability and the need for the limitation system. With the justification of provisions on limitation of liability<sup>535</sup> and the fact that the concept of limitation of liability provided for in transport conventions, such as the Hague, Hague-Visby Rules, Hamburg Rules have proven to be satisfactory, the Rotterdam Rules provide for rules on the limitation of liability<sup>536</sup>.

#### **6.4.1.1 Claims subject to limitation**

The scope of application of the limits of liability has been widened in the Rotterdam Rules. While in fact under the Hague-Visby Rules it covers loss of or damage to or in connection with the goods<sup>537</sup> and under the Hamburg Rules loss of or damage to the goods<sup>538</sup>, article 59 of the Rotterdam Rules covers generally breaches of the carrier's obligations under the Convention. Furthermore, the obligation that has been breached must relate to the goods, since the limits are referred to as the goods "that are the subject of the claim or dispute".<sup>539</sup>

This is a deliberate change from the provision of the earlier international conventions and was considered to be an improvement with greater clarity.<sup>540</sup> The rationale for those changes was that the phrase deleted had caused considerable uncertainty and a lack of uniformity in interpretation and, in particular, whether or not it had been intended to include cases of misdelivery and misinformation regarding the goods.<sup>541</sup> It is obvious that this new wording will have the effect of widening the scope of the claims which are subject to limitation.

#### **6.4.1.2 Limitation amounts**

The limits that under the Hague-Visby Rules are 666.67 SDR per package or unit and

---

<sup>535</sup> For the purpose and justification of limitation of liability, see paragraph 5.3.1.1.

<sup>536</sup> Chapter 12 of the Convention deals exclusively with limits of liability.

<sup>537</sup> Article IV, rule 5(a) of the Hague-Visby Rules.

<sup>538</sup> Article 6.1(a) of the Hamburg Rules.

<sup>539</sup> Article 59.1 of the Rotterdam Rules.

<sup>540</sup> Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), para 152.

<sup>541</sup> Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008), para 189.

2 SDR per kilogram,<sup>542</sup> have been increased in the Hamburg Rules to 835 SDR and 2.5 SDR respectively and have been further increased in the Rotterdam Rules to 875 SDR and 3 SDR.<sup>543</sup> At earlier points in the Working Group's deliberations, the Working Group avoided making decisions about the limitation amount in the earlier stages of deliberations and there was general agreement that the final amount of the limitation on liability should be considered as an element of the overall balance in the liability regime provided in the Convention.<sup>544</sup>

#### **6.4.1.3 The container clause**

In regard to the container clause, there is a minor amendment to make it clear that, when goods are carried “in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle”, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units”.<sup>545</sup>

#### **6.4.1.4 Exceptions to limitation**

The limits provided in the Convention do not apply when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability specified in article 59.1 has been agreed upon between the carrier and the shipper.

The provision for a declaration of higher value cargoes is in the Hague-Visby Rules<sup>546</sup> and is reinstated in the Convention.<sup>547</sup> Moreover, the Convention permits the parties to agree upon higher limits of liability than those specified like other international maritime conventions.<sup>548</sup>

---

<sup>542</sup> Article IV, rule 5(a) of the Hague-Visby Rules.

<sup>543</sup> For the limitation amounts in other conventions, see 3.3.2.2.

<sup>544</sup> Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), para 162.

<sup>545</sup> Under article IV, rule 5(c) of the Hague-Visby Rules, enumeration was relevant only when goods were carried ‘in or on a container, pallet, or similar article of transport used to consolidate goods’.

<sup>546</sup> Article IV, rule 5(a) of the Hague-Visby Rules; ‘unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading...’.

<sup>547</sup> Article 59.1 of the Rotterdam Rules.

<sup>548</sup> See article IV, rule 5(g) of the Hague-Visby Rules and article 6.4 of the Hamburg Rules.

## 6.4.2 Limits of liability for loss caused by delay

Article 60 provides for a limit of liability for loss due to delay. Under article 60 compensation for loss of or damage to the goods due to delay “shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59.1 may not exceed the limit that would be established pursuant to article 59.1 in respect of the total loss of the goods concerned”.

Here, article 60 only covers the liability for economic loss caused by delay. In fact, the Working Group was invited to consider the various types of loss that might be caused by delay in delivery of goods and how each category would be dealt with under the draft convention.<sup>549</sup> Essentially, loss caused by delay was said to fall under three categories. The first category was physical damage or loss of goods.<sup>550</sup> The second one was economic loss sustained by the consignee due to a decrease in the market value of the goods between the time of their expected delivery and the time of their actual delivery. The third category was pure economic loss sustained by the consignee.<sup>551</sup>

The first category of damage caused by delay was clearly outside the scope of article 60, as it was covered by article 22 on the calculation of compensation for physical loss of the goods. The third category of loss, i.e. pure economic loss, was said to fall clearly under draft article 60. However, as regards the second category, i.e. loss of market value, the situation was said to be unclear. The Working Group concurred with that analysis and with the need for making it clear that article 60 was only concerned with pure economic (consequential) loss and that decline in the good’s market value was a type of loss that should be covered by article 22.<sup>552</sup>

---

<sup>549</sup> Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), paras 183-184.

<sup>550</sup> For example, of perishable goods, such as fruits or vegetables.

<sup>551</sup> For example, where an industrial plant could not operate because components and parts of an essential machine were delivered late.

<sup>552</sup> Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), para 184.

### 6.4.3 Loss of the benefit of limitation of liability

The provisions for the loss of the carrier's right to limit its liability are dealt with in article 61. Article 61 is divided into two sub-paragraphs, regulating the conditions for the loss of the right to limitation related to loss of or damage to goods under article 59 and that related to loss caused by delay in delivery under article 60.<sup>553</sup> These provisions in the Rotterdam Rules are almost identical to those of the Hague-Visby Rules, the Hamburg Rules. However, under the Rotterdam rules, reference is made to "a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result."<sup>554</sup> Here, the requirements that it has to be a 'personal' act or omission of the person claiming the benefit, and that it has to be done with the knowledge that 'such loss' would result, would make it more difficult for a claimant to deprive the carrier of the limitation benefit.<sup>555</sup> It was suggested that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules.<sup>556</sup> It was also stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage.<sup>557</sup>

Another difference exists between the provisions of the Hague-Visby Rules and the Hamburg Rules and the provision in the Rotterdam Rules. While in the Hague-Visby Rules and the Hamburg Rules reference is made to an act or omission of the carrier, thereby giving rise to conflicting views as to whether the acts or omissions of the servants or agents of the carrier might be relevant, in the Rotterdam Rules, reference is made to a personal act or omission of the person claiming the right to limit. 'Act or omission' has been reinforced by the addition of the word 'personal' and it is, therefore, even less likely that misconduct by an agent or employee would

---

<sup>553</sup> Y Si and P Guo, 'Limits of Liability' in Chapter 12 of Von Ziegler, A, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010), para 12.4.1.

<sup>554</sup> Article 61 of the Rotterdam Rules.

<sup>555</sup> MA Huybrechts, 'Package limitation as an essential feature of the modern maritime transport treaties: a critical analysis', in Chapter 7 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), paras 7.78-7.83.

<sup>556</sup> Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002), UN Doc. A/CN.9/525 (2002), para 88.

<sup>557</sup> Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para 261.

be sufficient.

#### **6.4.4 Amendment mechanism**

During the Working Group's deliberations in 2004, a provision for a specific amendment procedure was made for the rapid amendment of limitation amounts in the draft convention.<sup>558</sup> The Working Group requested the Secretariat at its thirteenth session to prepare a specific amendment procedure for the rapid amendment of limitation amounts and various drafts<sup>559</sup> were produced. However, the draft article was eventually deleted at a late stage in the deliberations of the Working Group.<sup>560</sup>

Although the draft article, intended to be a specific amendment procedure to be followed only with respect to the amendment of the limitation on liability of the carrier, was deleted, the Rotterdam Rules provide for a general rule for revision and amendment in article 95. The Convention, therefore, provides a useful mechanism for amending the limitation amounts without having to reopen the full negotiations of the Convention. Article 95 of the Convention provides that upon request from not less than one third of the Contracting States to the Convention, the depositary shall circulate any proposal to amend the limitation amount and convene a conference of the Contracting States to consider the proposed amendments.

### **6.5 Time for suit**

In all those transport Conventions<sup>561</sup> there are time bars and indeed one often finds time bars agreed contractually, even if there is no convention or even if there is a

---

<sup>558</sup> Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), UN Doc. A/CN.9/552 (2004), para. 40.

<sup>559</sup> The Working Group had two texts of draft article 104: that prepared by the Secretariat and inserted into the text of the draft convention in A/CN.9/WG.III/WP.56, and that proposed as a revised version set out in paragraph 9 of A/CN.9/WG.III/WP.77.

<sup>560</sup> Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008), para. 197.

<sup>561</sup> See Article III, rule 6 of the Hague-Visby Rules; Article 20 of the Hamburg Rules; Article 25 of the Multimodal Convention; Article 32 of the CMR; Article 47 of the COTIF-CIM; Article 24 of the CMNI; Article 29 of the Warsaw Convention; Article 35 of the Montreal Convention.

convention.<sup>562</sup> The Rotterdam Rules also have provisions on time bar in article 62.

### **6.5.1 Key points about the Rotterdam Rules**

The notion of the provision on the time for suit in the Rotterdam Rules is more likely to favour the claimant rather than the defendant. The scope of application of time for suit in the Rotterdam Rules is wider, since it covers any action in respect of claims or disputes arising from a breach of an obligation under the Convention. The time limit is also extended to two years in the Convention, which is similar to the Hamburg Rules, while there is a one year time limit in the Hague-Visby Rules.

There is a special provision in respect of the time-barred claim. Article 62.3 provides that one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party. Furthermore, another special provision has been added in the Rotterdam Rules in terms of the actions against the person identified as carrier pursuant to article 37.2. All of the key points are to be dealt with in more detail.

### **6.5.2 Scope of application of time for suit**

#### **6.5.2.1 Notice of claim**

Article 23 of the Convention provides for a provision on notice in case of loss, damage or delay, which is not in the same provision as the time bar. Under the Convention, the period for giving notice is extended from three to seven days and the expression “working days” is added to clarify the problem under the Hague-Visby Rules.<sup>563</sup>

#### **6.5.2.2 Both court and arbitration proceedings**

Article 62.1 clearly states that the Convention refers to both court and arbitration proceedings. This was not the case under the Hague and Hague-Visby Rules, where

---

<sup>562</sup> For the reason for having a time bar, see paragraph 5.3.2.1.

<sup>563</sup> Under the Hague-Visby Rules, the expression ‘three days’ was not clear whether it means ‘three calendar days’ or ‘working days’ and without qualification it would appear to mean three consecutive calendar days. However, what if the third day falls on a holiday when notice cannot be given? In *Pristam v S.Russel & Sons Ltd* [1973] Q.B. 366, it was suggested, in such a case, notice given on the next working day is timely.

there is a rather different expression “suit is brought”. Although the English courts had interpreted it to refer to both court and arbitration proceedings,<sup>564</sup> under the United States law “suit” in section 3(6) of the United States Carriage of Goods by Sea Act, 1936, which reproduces Article III, rule 6 of the Hague Rules, was restricted to court proceedings and did not extend to arbitration.<sup>565</sup>

Therefore, article 62 of the Rotterdam Rules resolves this conflict interpretation so that it would contribute to uniformity.

### **6.5.2.3 Period of time for suit**

The Rotterdam Rules<sup>566</sup> provides a two-year time bar for filing suit.<sup>567</sup> The period after which an action is time-barred under the Convention is twice as long as that under the Hague and the Hague-Visby Rules,<sup>568</sup> but similar to the Hamburg Rules.<sup>569</sup> This would be a welcome change for the claimants as they, formerly subject to the Hague and Hague-Visby Rules, will have twice the time under the Rotterdam Rules and seek to gather evidence in support of their claim, but not for the carriers.

Although, there is a general trend that the time limit is becoming more lenient, it is not clear what the point of that is and even if it is necessary in modern times. The whole point is to be efficient and for the times to come quickly, so we can get the evidence and it can be dealt with in a very efficient system, not waiting around for years.<sup>570</sup>

### **6.5.2.4 Claims or disputes arising from a breach of an obligation**

Article 62.1 states that the scope of application covers any proceedings regarding claims or disputes arising from a breach of an obligation under the Convention. Therefore, under the Rotterdam Rules it applies both to any action of the shipper or consignee against the carrier or any maritime performing party and to any action of

---

<sup>564</sup> *The Merak* [1964] 2 Lloyd’s Rep 622.

<sup>565</sup> *Mauritius Oil Refineries Ltd v Stolt-Nielsen Nederlands BV (The Stolt Sydness)* [1997] 1 Lloyd’s Rep 273.

<sup>566</sup> Article 62.1 of the Rotterdam Rules.

<sup>567</sup> For the period of time for suit in other conventions, see 3.3.2.2.

<sup>568</sup> Article III, rule 6 of the Hague and Hague-Visby Rules.

<sup>569</sup> Article 20 of the Hamburg Rules.

<sup>570</sup> For the arguments about a longer time limit or a shorter time limit, see paragraphs 5.3.2.3 and 5.3.2.4.

the carrier or any maritime performing party against the shipper, documentary shipper, controlling party or consignee.

In fact, the Working Group discussed at its eleventh session whether the time limit should apply only to any action against the carrier or the maritime performing party, or should also extend to any action made against shippers.<sup>571</sup> During the deliberations of the Working Group, there had been some arguments for<sup>572</sup> and against<sup>573</sup> restricting the scope of application of time for suit to claims made against the carrier and the maritime performing party.

The Working Group considered both arguments and eventually agreed that the Convention should cover claims against both the carrier and the performing party as well as claims against the shipper.

### **6.5.3 Time-barred claim**

Article 62.3 provides that one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party, even if the two-year time bar has expired. This is a special provision regulated only by the Rotterdam Rules. This provision implies that one party can still make use of a time-barred claim as a defence in order to obtain a set-off in a claim made by another party to the contract. In the deliberations of the time limit, there have been some discussions with regard to the nature and effect of a limitation period. It was said that while “in some legal systems the expiry of a limitation period typically extinguished the right to which the limitation period related, in other legal systems a limitation period only deprived the entitled party of the possibility to enforce its right through court action. Some legal systems applied both rules, depending on the nature of the claim, some

---

<sup>571</sup> See the Report of the Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March – 4 April 2003), UN Doc. A/CN.9/526 (2003), para 166.

<sup>572</sup> It was suggested that the Convention covers claims against the carrier and the maritime performing party, with the time for suit for all other claims being left to national law. It was also pointed out that potential claims against shippers might require extensive investigation, needing longer than cargo claims to be properly prepared. See the Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), para 123.

<sup>573</sup> Against such restriction, it was suggested that the scope should, ‘in the interests of predictability and equal treatment of all parties to a contract of carriage’, cover claims against both carriers and shippers. *Ibid*, para 124.

being extinguished, while others became unenforceable.”<sup>574</sup>

Although there was some support for adopting a rule to the effect that the claimant’s rights would be extinguished by the limitation period, the prevailing view was that it should only affect the enforceability of the claimant’s right and not extinguish it.<sup>575</sup>

However, there is some concern about its effect of the provision that the party whose claim was time-barred should nevertheless retain the possibility of set-off. Whilst such an action may not be extinguished, it still cannot be enforced, it is, therefore, not clear how article 62.3 of the Rotterdam Rules will work in practice.<sup>576</sup>

#### **6.5.4 Extension of time for suit**

The two-year time bar shall not be subject to suspension or interruption, but the person against which a claim is made can, at any time within the time period, extend the limit by a declaration to the claimant. Further extensions can be made by other declarations.

The provisions on the extension of the limitation period are practically the same as that of the Hague-Visby Rules and Hamburg Rules. However, a difference may exist in respect of the suspension or interruption of the period because nothing is said in the Hague-Visby Rules and Hamburg Rules. Therefore, suspension and interruption of the limitation period is expressly excluded in the Rotterdam Rules, while under the Hague-Visby Rules and Hamburg Rules, the possible application of national law is allowed.

#### **6.5.5 Action for indemnity**

Article 64 provides for a special extension of the time period with regard to recourse

---

<sup>574</sup> See the Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), para 129.

<sup>575</sup> *Ibid*, paras 130-131.

<sup>576</sup> J Alcantara, et al, ‘Particular concerns with regard to the Rotterdam Rules’ (Apr 2010), 5, available at <[http://www.comitemaritime.org/Uploads/Rotterdam Rules/Particular concerns-Rotterdam Rules.pdf](http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Particular%20concerns-Rotterdam%20Rules.pdf)> , accessed 15 September 2012.

action. This is similar to those existing in both the Hague-Visby Rules<sup>577</sup> and Hamburg Rules.<sup>578</sup> This provision was added to overcome the problem experienced by carriers who sub-contract all or part of the carriage and remain primarily liable to the claimants for the performance of the contract. If a claim is made or suit is commenced against such a carrier at the last minute, this leaves him with little or no time within which to protect his right of recourse to his sub-contracting carrier. Where a cargo insurer pays under an insurance contract and then exercises its subrogated rights against the carrier under the bill of lading, that is not an indemnity claim but a claim under the usual two-year time bar.<sup>579</sup>

An action for an indemnity may be instituted after the expiration of the two-year time bar by a person held liable if the indemnity action is instituted within the later of the time allowed by the applicable law in the jurisdiction where proceedings are instituted; or ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

Here, one of the questions that may arise is what the wording “person held liable” actually means. According to article 64, it refers to the party seeking the indemnity as the “person held liable”. Thus, it would appear to mean that the “person held liable” cannot institute the action for indemnity in circumstances where there has been no finding or declaration of liability at that time. One author pointed out that this wording is obviously inconsistent with the actual situation.<sup>580</sup>

### **6.5.6 Action against the person identified as the carrier**

This provision is a special provision added in the Rotterdam Rules in terms of the actions against the person identified as carrier pursuant to article 37.2. According to article 65 in such case the action may be instituted after the expiration of the two-

---

<sup>577</sup> Article 3, rule 6 *bis* of the Hague-Visby Rules.

<sup>578</sup> Article 20.5 of the Hamburg Rules.

<sup>579</sup> In *Bellina Maritime SA v. Menorah Insurance Co Ltd* [2002] 2 Lloyd’s Rep 575, it was held that the insurers’ subrogated rights under the bill of lading were governed by Article III rule 6 of the Hague-Visby Rules.

<sup>580</sup> See J Alcantara, et al, ‘Particular concerns with regard to the Rotterdam Rules’ (Apr 2010), 5, available at <[http://www.comitemaritime.org/Uploads/Rotterdam\\_Rules/Particular\\_concerns-Rotterdam\\_Rules.pdf](http://www.comitemaritime.org/Uploads/Rotterdam_Rules/Particular_concerns-Rotterdam_Rules.pdf)>, accessed 15 September 2012.

year time bar within the later of the time allowed by the applicable law in the jurisdiction where proceedings are instituted; or ninety days commencing from the day when the carrier has been identified.

## **6.6 The Carriage before loading and after discharge (Article 26)**

### **6.6.1 Introduction**

As already noted, the Convention is to regulate contracts of carriage by sea in which the carrier agrees to extend its services also to the carriage by other modes that precedes and follows carriage by sea.<sup>581</sup> However, the extension of the scope of application of the Convention to door-to-door transport operations will give rise to a potential conflict between the Convention and any mandatorily applicable unimodal transport Conventions. Therefore, if a contract provides for the carriage by sea combined with carriage by road, rail, air or inland waterways, possible conflicts may arise between the Convention and, respectively, CMR, COTIF-CIM, Montreal Convention or CMNI as well as local or regional laws. Such potential conflicts are currently mitigated by multimodal contractual provisions<sup>582</sup> and standard forms of contract<sup>583</sup> which adopt a network approach. The Rotterdam Rules adopt a limited network system and contain article 26<sup>584</sup> on the regime during ‘carriage preceding or

---

<sup>581</sup> See the definition of a ‘contract of carriage’ in article 1.1. See also article 5.1 on the general scope of application of the Convention and article 12.1 on the period of responsibility of the carrier.

<sup>582</sup> The UNCTAD/ICC Rules for Multimodal Transport Documents 1992, which adopt a network approach with respect to limitation of liability, have been widely accepted across the trade. See UNCITRAL Secretariat, Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Relation with other conventions, UNCITRAL WG, 18th Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006), at para 15; Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), at para 232.

<sup>583</sup> For example, BIMCO’s COMBICONBILL and MULTIDOC 95 bills of lading have terms providing for multimodal transport, especially with regard to limitation of liability. See paragraph 4.3.3.

<sup>584</sup> Article 26 (Carriage preceding or subsequent to sea carriage) provides;

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance

subsequent to sea carriage’ and article 82<sup>585</sup> on conflicts with ‘international conventions governing the carriage of goods by other modes of transport’ in order to deal with this conflict problem.

## **6.6.2 Modified network solution**

In terms of resolving the conflicts between conventions in the field of multimodal transport, there has been a debate between the ‘uniform system’ and the ‘network system’. However, given the considerations of the advantages and disadvantages of each<sup>586</sup>, in most legislative attempts so far, a ‘modified’ network system has been adopted.<sup>587</sup> Following much discussion of the relative merits of a network or uniform system, the UNCITRAL Working Group adopted a modified network system.<sup>588</sup> Here, article 26 provides for a ‘network solution’ to the problem of conflicts between the Convention and other international instrument.

## **6.6.3 The analysis of article 26**

### **6.6.3.1 Solely before loading or after discharge**

Article 26 provides that if it can be shown that the loss or damage occurred on a non-

---

causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

<sup>585</sup> The more general provision, article 82, relating to conflicts with other conventions will be considered later.

<sup>586</sup> For the advantages and disadvantages of the types of liability system, see paragraph 5.2.

<sup>587</sup> For instance, the United Nations Convention on International Multimodal Transport of Goods, 1980 (MT Convention) provides for uniform rules on liability, but network approach on limitation of liability.

<sup>588</sup> Hancock pointed out that although the limited/modified network system provides a solution to the ‘liability gap’ between the application of the unimodal conventions, it does not assist if loss occurs gradually over the journey and if the carrier is left without recourse and it also does not mitigate the ‘dangers of unpredictability’. See C Hancock, ‘Multimodal transport under the Convention’, in Chapter 2 of DR Thomas (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 41-42.

sea leg, certain provisions relating to liability, limitation and time for suit of any international instrument for that leg of transport will prevail over those of the Convention. Here, the time when the event has occurred needs to be considered. For article 26 to apply, the loss of, or damage to the goods or the event or circumstance causing a delay must be “solely” before their loading onto or after their discharge from the ship. For the purposes of this provision, it is necessary that all such time precedes loading or follows discharge, but the Convention will apply to the sea leg<sup>589</sup>. One of the questions at issue is what if the loss or damage is not localised,<sup>590</sup> or what if the loss or damage occurred at different stages or was progressive, for instance, a loss or damage started before loading and worsened thereafter or started on board the ship and worsened after discharge. However, in this case, article 26, which allows certain provisions relating to liability, limitation and time for suit of any international instrument, does not apply.<sup>591</sup> Therefore, in case of non-localised or progressive loss, the Rotterdam Rules will govern the contract of carriage. Article 26 applies only to a localised loss which occurred solely before loading and after discharge. It seems that the Rotterdam Rules set out to govern as many contracts as possible, by requiring for the alternative unimodal regime to apply, that the loss or damage be localised.<sup>592</sup> Otherwise, the Rotterdam Rules continue to govern. This is critical in that the vast majority of cargo damage in container transport is non-localised.<sup>593</sup>

### **6.6.3.2 International instrument**

The Convention is to yield only to other international instruments. Here, one of the questions that may arise is what kind of agreements fall within the meaning of the term “international instrument”. Diamond<sup>594</sup> stated that the term “instrument” is

---

<sup>589</sup> However, this is subject to what is said in article 82, which will be considered later.

<sup>590</sup> Where it cannot be proved where the loss or damage occurred.

<sup>591</sup> F Berlingieri, ‘Multimodal Aspects of the Rotterdam Rules’, Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 6. Here, Diamond also commented that when the loss was progressive or is non-localised, two instruments may both apply causing conflicting results, and he did not think such conflicts will be resolved in spite of article 26. See, A Diamond, ‘The Rotterdam Rules’ [2009] 4 LMCLQ 445, 456.

<sup>592</sup> R De Wit, ‘Minimal music: Multimodal transport including a maritime leg under the Rotterdam Rules’, in Chapter 5 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd’s List, 2010), paras 5.17-5.19.

<sup>593</sup> See paragraph 3.3.4.1.

<sup>594</sup> A Diamond, ‘The Rotterdam Rules’ [2009] 4 LMCLQ 445, 456.

potentially regarded as more than “convention”. This question was raised at the twenty-first session of the UNCITRAL Working Group and it was clarified that the different use of terms “international instrument” in article 26 and “international convention” in article 82 was intentional and, therefore, the term “international instrument” would embrace a regulation developed by a regional economic organisation.<sup>595</sup>

Concern was raised regarding how the Convention would deal with future transport conventions and it was decided that the terms of such future conventions also prevail over those of Convention pursuant to article 26,<sup>596</sup> while article 82 refers only to conventions already in force at the time the Convention enters into force.

### **6.6.3.3 No extension to national laws**

During the sessions of the UNCITRAL Working Group the suggestion was made to extend the scope of article 26 also to national laws,<sup>597</sup> but the inclusion of the reference to mandatory national law was finally rejected.

Following the failure to extend article 26 to national laws, concern was raised with regard to the limitation of liability. It has been stated that in several jurisdictions, for example, the CMR limit has been adopted for national road carriage and that the application of the Convention could significantly reduce the recovery of the claimant in case of loss or damage during the road leg of a door-to-door carriage.<sup>598</sup>

---

<sup>595</sup> See MF Sturley, et al, *The Rotterdam Rules* (Sweet & Maxwell, 2010), paras 4.022-4.023; Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008), at para 84.

<sup>596</sup> Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), at para 248.

<sup>597</sup> The suggestion stemmed from option 2 of a series of options put forward in a proposal by Canada. UNCITRAL Secretariat, Preliminary Draft Instrument on the Carriage of Goods by Sea (Proposal by Canada), UNCITRAL WG, 10<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.23 (2002); Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002), UN Doc. A/CN.9/525 (2002), para 25. For the discussion, see Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), paras. 245-263; Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007), UN Doc. A/CN.9/621 (2007), paras 187-193; Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 (A/63/17), paras 93-96.

<sup>598</sup> While it cannot be denied that the CMR limit per kilogram is much higher than the corresponding Rotterdam Rules limit, it must be pointed out that in case of packages of relatively light weight the Convention package limit would be significantly higher than the CMR limit per kilogram. For example, for a package of 50 kilograms the CMR limit is 450 SDR and the Rotterdam Rules package limit is 875 SDR. See, F Berlingieri, ‘A review of some recent analyses of the Rotterdam Rules’

Here, it is worth pointing out the reason why the reference in article 26 to national laws was excluded. It would, in fact, have adversely affected uniformity to a very high degree,<sup>599</sup> since it would have allowed Contracting States at any time to enact new laws governing carriage by modes of transport other than carriage by sea that would prevail over the Rotterdam Rules and, what is worse, that would not be easily known by other States.

It was also said that the inclusion of a reference to mandatory national law would have greatly ‘detracted from the uniformity and predictability’ of the Convention as a whole. Furthermore, it would have created uncertainty for both shippers and carriers in terms of determining which liability regime would govern their activities.<sup>600</sup>

#### **6.6.3.4 Hypothetical contract**

For article 26 to apply, the three conditions enumerated in article 26 (a) to (c) of the Rotterdam Rules should be met. First, it requires a so-called hypothetical contract that the other international instrument “would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to the goods or the event or circumstance causing a delay occurred.”<sup>601</sup>

For example, where the goods have been unloaded from the ship and the goods are damaged during the stage of the road carriage, the CMR regime will apply, if a separate contract had been made between carrier and cargo interest in relation to that stage after discharge, that contract would have been governed by the CMR, and the loss can be shown to have occurred during the road transit after discharge.

#### **6.6.3.5 Only certain provisions to apply**

However, the Convention gives way only to provisions of other international

---

(2009) IL DIRITTO MARITTIMO, 959; F Berlingieri, ‘Multimodal Aspects of the Rotterdam Rules’, Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 5.

<sup>599</sup> F Berlingieri, ‘Multimodal Aspects of the Rotterdam Rules’, Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 4-5.

<sup>600</sup> See Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007), UN Doc. A/CN.9/621 (2007), para 188.

<sup>601</sup> Article 26 (a) of the Rotterdam Rules.

instrument relating to the carrier's liability, limitation of liability or time for suit<sup>602</sup> and only if those provisions cannot be departed from by the contract either at all or to the detriment of the shipper.<sup>603</sup> Here, the relevant provisions of the Convention that are affected by any provisions of the other transport conventions in respect of the carrier's liability, limitation of liability or time for suit will be considered below.

#### **6.6.4 The provisions of the Rotterdam Rules affected by article 26**

As previously noted, other international instruments could prevail over the Convention only to the extent that they contain provisions that are in conflict with those of the Convention in the areas specified in article 26. Therefore, it is necessary that, under a hypothetical contract, such other instrument would have been applicable if the shipper had made a separate and direct contract with the carrier and also the relevant provisions of such other instrument must be different from those of the Convention.

Here, an analysis of the provisions of the Convention that may be affected by any provisions of the other international instrument in respect of liability of the carrier, limitation of their liability and time for suit will be followed.

##### **6.6.4.1 The Convention and CMR**

###### **6.6.4.1.1 Liability of carrier**

First of all, article 15 on 'Goods that may become a danger' and article 32 on 'Special rules on dangerous goods' of the Convention do not prevail over article 22 of the CMR relating to 'dangerous goods'. Article 17 on 'Basis of liability' does not prevail over articles 17 and 18 of the CMR regarding 'liability of the carrier'. Article 21 on 'Delay' does not prevail over articles 19 and 20 of the CMR regarding 'delay'. Article 22 on 'Calculation of compensation' does not prevail over article 23 of the CMR relating to 'calculation of compensation'. Article 23 on 'Notice in case of loss, damage or delay' does not prevail over article 30 of the CMR relating to 'claims and actions.'

---

<sup>602</sup> Article 26 (b) of the Rotterdam Rules.

<sup>603</sup> Article 26 (c) of the Rotterdam Rules.

#### 6.6.4.1.2 Limitation of liability

Articles 59 on ‘Limits of liability’, 60 on ‘Limits of liability for loss caused by delay’ and 61 on ‘Loss of the benefit of limitation of liability’ do not prevail over articles 23 to 27 of the CMR relating to limit of liability. Therefore, the Convention limit of 3 SDR per kilogram or 875 SDR per package or other shipping unit, whichever is higher, does not apply and the CMR limit of 8.33 SDR per kilogram will apply.

#### 6.6.4.1.3 Time for suit

Article 62 on ‘Period of time for suit’ does not prevail over article 32 of the CMR regarding ‘the period of limitation for an action’. Thus, the one-year time limit of CMR will prevail over the two-year time bar of the Convention.

### **6.6.4.2 The Convention and COTIF-CIM**

#### 6.6.4.2.1 Liability of carrier

Article 15 on ‘Goods that may become a danger’ and article 32 on ‘Special rules of the Convention on dangerous goods’ do not prevail over article 9 on ‘Dangerous goods’ of COTIF-CIM. Article 17 on ‘Basis of liability’ does not prevail over articles 23-25 of COTIF-CIM relating to ‘Basis of liability’, ‘Liability in case of carriage of railway vehicles as goods’ and ‘Burden of proof’. Article 20 on ‘Joint and several liability’ does not prevail over article 27 of COTIF-CIM on ‘Substitute carrier’, however the scope of application of the Convention is wider since it applies to all maritime performing parties while article 27 of COTIF-CIM only applies to substitute or actual carriers. Article 21 on ‘Delay’ does not prevail over article 16 of COTIF-CIM on ‘Transit periods’. Article 23 on ‘Notice in case of loss, damage or delay’ does not prevail over article 44(2) on ‘Persons who may bring an action against the carrier’ of COTIF-CIM

#### 6.6.4.2.2 Limitation of liability

Articles 59 on ‘Limits of liability’, 60 on ‘Limits of liability for loss caused by delay’ and 61 on ‘Loss of the benefit of limitation of liability’ do not prevail over article 30 on ‘Compensation for loss’ and article 33 on ‘Compensation for exceeding the transit

period' of COTIF-CIM. Thus, the COTIF-CIM limit of 8.33 SDR per kilogram will prevail over the Convention limit of 3 SDR per kilogram or 875 SDR per package or other shipping unit.

#### 6.6.4.2.3 Time for suit

Article 62 on 'Period of time for suit' does not prevail over article 47 on 'Extinction of right of action' and article 48 on 'Limitation of actions' of COTIF-CIM. Thus, the one-year time limit of COTIF-CIM will prevail over the two-year time bar of the Convention.

### **6.6.4.3 The Convention and Montreal Convention**

#### 6.6.4.3.1 Liability of carrier

Article 17 on 'Basis of liability' does not prevail over article 18 on 'Damage to cargo' of the Montreal Convention. Article 21 on 'Delay' does not prevail over article 19 on 'Delay' of the Montreal Convention. Article 23 on 'Notice in case of loss, damage or delay' does not prevail over article 31 on 'Timely notice of complaints' of the Montreal Convention.

#### 6.6.4.3.2 Limitation of liability

Articles 59 on 'Limits of liability', 60 on 'Limits of liability for loss caused by delay' and 61 on 'Loss of the benefit of limitation of liability' do not prevail over articles 22 on 'Limits of liability in relation to delay, baggage and cargo' of the Montreal Convention. Therefore, the Montreal limit of 19 SDR per kilogram will prevail over the Convention limit of 3 SDR per kilogram or 875 SDR per package or other shipping unit.

#### 6.6.4.3.3 Time for suit

Article 62 on 'Period of time for suit' does not prevail over article 35 on 'Limitation of actions' of the Montreal Convention. However, this does not affect the Montreal time limit as the Montreal Convention also has a two-year time bar.

### **6.6.4.4 The Convention and CMNI**

#### 6.6.4.4.1 Liability of carrier

Article 15 on 'Goods that may become a danger' and article 32 on 'Special rules on dangerous goods' do not prevail over article 7 on 'Dangerous and polluting goods' of CMNI. Article 17 on 'Basis of liability' does not prevail over article 16 on 'Liability for loss', article 17 on 'Servants and agents', article 18 on 'Special exonerations from liability' and article 24 on 'Limitation of actions', article 25 on 'Nullity of contractual stipulations' of CMNI.

Article 20 on 'Joint and several liability' does not prevail over article 4 'Actual carrier' of CMNI, but the scope of application of the Convention is wider since it applies to all maritime performing parties while article 4 of CMNI only applies to substitute or actual carriers. Article 21 on 'Delay' does not prevail over article 5 'Delivery time' of CMNI. Article 22 on 'Calculation of compensation' does not prevail over article 19 on 'Calculation of compensation' of CMNI. Article 23 on 'Notice in case of loss, damage or delay' does not prevail over article 23 on 'Notice of damage' of CMNI.

#### 6.6.4.4.2 Limitation of liability

Articles 59 on 'Limits of liability', 60 on 'Limits of liability for loss caused by delay' and 61 on 'Loss of the benefit of limitation of liability' do not prevail over article 20 on 'Maximum limits of liability' and article 28 on 'Units of account' of CMNI. Thus, the CMNI limit of 2 SDR per kilogram or 666.67 SDR per package or other shipping unit will prevail over the Convention limit of 3 SDR per kilogram or 875 SDR per package or other shipping unit.

#### 6.6.4.4.3 Time for suit

Article 62 on 'Period of time for suit' does not prevail over article 24 on 'Limitation of actions', especially paragraphs 1-3 and 5, of CMNI. Thus, the one-year time limit of CMNI will prevail over the two-year time bar of the Convention.

Article 64 on 'Action for indemnity' does not prevail over article 24 (4) of CMNI relating to 'action for indemnity'.

#### **6.6.4.5 Demarcation difficulties**

Having looked at the provisions of the Rotterdam Rules that may be affected by any provisions of the other international instrument in respect of liability of the carrier, limitation of liability and time for suit, it seems very difficult to find out which provisions belong to these three categories. Most international instruments have titles or sub-titles which divide provisions of them depending on the characteristics of the provisions. However, under some international instruments, for example, provisions on limitation of liability are under the title of the liability of the carrier. Therefore, it may be difficult to clearly distinguish those provisions in respect of liability of the carrier, limitation of liability and time for suit from other provisions.

## **6.7 Conflicts with other conventions (Article 82)**

### **6.7.1 Background**

With a view to dealing with potential conflicts between the Convention and any other international unimodal conventions, the Convention also contains article 82<sup>604</sup> on conflicts with ‘international conventions governing the carriage of goods by other modes of transport’.

Over the sessions of the UNCITRAL Working Group on Transport Law, the issues on conflict of conventions were discussed in the eleventh<sup>605</sup>, twelfth<sup>606</sup>,

---

<sup>604</sup> Article 82 (International conventions governing the carriage of goods by other modes of transport) provides that; “Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage; (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship; (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.”

<sup>605</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003); See also report by the

eighteenth<sup>607</sup>, nineteenth<sup>608</sup>, twentieth<sup>609</sup>, and twenty-first<sup>610</sup> sessions. At the eleventh session, draft article 4.2.1 (now article 26) was considered and the Working Group asked the Secretariat to prepare “a conflict of convention provision for possible insertion into article 16 (Other conventions) of the draft instrument”<sup>611</sup> and accordingly the Secretariat drew up draft articles 89 and 90.<sup>612</sup> At the eighteenth session, it was suggested that draft article 27 (now article 26) was a satisfactory solution to the problem of any potential conflict between the Convention and other unimodal transport conventions and that the additional provisions in draft article 89 and 90 were unnecessary.<sup>613</sup> However, others suggested that the inclusion of such provisions could provide ‘added security of interpretation’ should the direct and unavoidable conflicts arise,<sup>614</sup> and that given the concerns with an obvious conflict with the Montreal Convention,<sup>615</sup> additional clarification of the draft convention

---

UNCITRAL Secretariat on ‘General remarks on the sphere of application of the draft instrument’, UNCITRAL WG, 11th Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003).

<sup>606</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), UN Doc. A/CN.9/544 (2003).

<sup>607</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006); See also report by the UNCITRAL Secretariat on ‘Relation with other conventions’, UNCITRAL WG, 18th Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006).

<sup>608</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007), UN Doc. A/CN.9/621 (2007).

<sup>609</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007).

<sup>610</sup> UNCITRAL, Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008).

<sup>611</sup> Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003), para. 250.

<sup>612</sup> See draft articles 89 and 90 in ‘Draft convention on the carriage of goods [wholly or partly] [by sea]’, UNCITRAL WG, 16<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.56 (2005).

<sup>613</sup> Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006), paras 225 and 230.

<sup>614</sup> *Ibid*, para. 225.

<sup>615</sup> In fact, the Montreal Convention is unique in its expansive inclusion of multimodal transport in its scope of application. Thus, a conflict between the Montreal Convention and the Rotterdam Rules would be inevitable in the case of air transport in the light of the provisions of article 18.4 of the Montreal Convention. However, this would have a minor impact as multimodal transport contracts seldom combine transport by sea with transport by air. It would be worth noting that although the combination of air and sea modes in international transport remains uncommon, air/sea services do exist. Take Port of Tanjung Pelepas as an example. In Southeast Asia, Malaysia’s Port of Tanjung Pelepas has been given a dedicated airport code by the International Air Transport Association as part of efforts to spur sea/air intermodal and trans-shipment business. It seems that containers are unstuffed at the port and the goods then packaged for air transport. See UNCTAD Secretariat, ‘Development of

could be undertaken to ensure that ‘there was no lingering conflict’ with the Montreal Convention.<sup>616</sup>

At the nineteenth session, the question was raised as to whether other unimodal transport conventions should be mentioned in that provision in order to ensure the avoidance of conflicts.<sup>617</sup> At the twentieth session, it was decided that there should be a somewhat broader provision, in consideration of a very specific area of possible conflict with respect to the CMR and COTIF-CIM, in particular regarding ferry traffic.<sup>618</sup> The Working Group approved then article 84 (now article 82) at its last session, held in January 2008.

### **6.7.2 Distinction between article 82 and article 26**

In order to establish a correct relation between article 82 and article 26, the distinction between such articles should be noted. Originally article 26 was conceived as a conflict of convention provision. However, after adopting the revised approach of the hypothetical contract formula, it was observed that article 26 was no longer a conflict of convention provision,<sup>619</sup> but rather as ‘the establishment of a network approach on the basis of a hypothetical contract’.<sup>620</sup> It should be noted that article 82 refers only to conventions already in force at the time the Rotterdam Rules come into force, whereas article 26 is not so limited.

With regard to the order in which articles 26 and 82 should be considered, it seems that article 26 should come first because it has been first adopted and article

---

Multimodal Transport and Logistics Services’, TD/B/COM.3/EM.20/2 (2003), 17.

<sup>616</sup> *Ibid*, para. 234.

<sup>617</sup> Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007), UN Doc. A/CN.9/621 (2007), paras 204-205.

<sup>618</sup> These specific conflict provisions would be intended to cover only the situation where other conventions may apply to carriage by sea.

<sup>619</sup> Hancock expressed the view that the real conflict provision is article 82 and article 26 now serves ‘the different purpose of dealing with the regime before loading and after discharge’. See C Hancock, ‘Multimodal transport under the Convention’, in Chapter 2 of DR Thomas (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 47. Van der Ziel also indicated the same opinion in ‘Multimodal aspects of the Rotterdam Rules’, *CMI Yearbook 2009*, at 305. See also UL Rasmussen, ‘Additional Provisions Relating to Particular Stages of Carriage’ in Chapter 6 of A Von Ziegler, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010), 144.

<sup>620</sup> Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008), para. 257.

82 has been adopted as a complement to article 26.<sup>621</sup> However, those articles should be read together.

### **6.7.3 The analysis of article 82**

#### **6.7.3.1 Conventions already in force only**

Article 82 provides that the relevant international conventions are those already in force at the time of the entry into force of the Rotterdam Rules, including any future amendments to such conventions. Thus, article 82 does not apply to any new convention which will come into force after the entry into force of the Convention.

#### **6.7.3.2 Scope of article 82**

Regarding the scope of article 82, one of the questions that may arise is whether all of the terms of the conventions which might conflict with the Convention are to prevail or whether it is only those terms which ‘regulate the liability of the carrier for loss of or damage to the goods’. Here, Berlingieri<sup>622</sup> stated that the description as conventions ‘that regulate the liability of the carrier for loss of or damage to the goods’ is not meant to restrict the scope of the article, but only to identify the general purpose of the conventions and added a comment that this interpretation is supported by the term “to the extent that” which was used subsequently in order to limit the scope of the article in respect of each convention. Hancock<sup>623</sup> also pointed out that given the purpose of article 82 to avoid any conflict, all of the terms of the conventions would apply and it may be said that “as a matter of language the words cited simply identify the type of conventions which is to be looked at.” Having looked at the list of the relevant international conventions, they all regulate the liability of the carrier for loss of or damage to the goods carried by sea, air, road, rail or inland waterway respectively. Accordingly, Berlingieri and Hancock seem to be

---

<sup>621</sup> Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), para. 232; Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), paras. 228-232.

<sup>622</sup> F Berlingieri, ‘Multimodal Aspects of the Rotterdam Rules’, Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 16.

<sup>623</sup> C Hancock, ‘Multimodal transport under the Convention’, in Chapter 2 of DR Thomas (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009), 48.

right and this only seems to identify the general purpose of the conventions.

Therefore, the effect of article 82 should be to ensure that where one of the relevant international conventions, i.e. Montreal, CMR, COTIF-CIM or CMNI, is applicable to any part of the carriage, then “this Convention is subordinated to all of the provisions of that other convention”<sup>624</sup> in case of any conflict.

### **6.7.3.3 Carriage of goods by air - article 82(a)**

Article 82(a) relates to “any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage.” The effect of this article is to allow the provisions of the conventions governing carriage of goods by air always to prevail over those of the Rotterdam Rules.

The relevant provisions are those of article 38.1 and 18.4 of the Montreal Convention. As discussed earlier,<sup>625</sup> pursuant to article 38.1 in case of combined carriage performed partly by air and partly by any other mode, the provisions of the Montreal Convention shall apply only to the carriage by air except as otherwise provided by article 18. The general rule set out in article 18.4 is that the period of the carriage by air does not extend to any carriage by land, sea or inland waterway performed outside the airport. However, there are two exceptions: the first is that in case of a carriage that takes place in the performance of a contract of carriage by air for the purpose of loading, delivery or transshipment, any damage is presumed to have occurred during the carriage by air; the second is that if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for carriage by air, the carriage by such other mode of transport is deemed to be carriage by air.

In reference to the first exception, as Berlingieri<sup>626</sup> stated, it cannot apply to a contract of carriage governed by the Rotterdam Rules, because in the case of a possible air leg<sup>627</sup> of such a contract, the sea leg cannot be considered a carriage that takes place in the performance of a contract of carriage by air for the purpose of loading, delivery or transshipment. In most cases, a road carriage takes place in the

---

<sup>624</sup> *Ibid.*

<sup>625</sup> See paragraph 2.5.1.1.

<sup>626</sup> F Berlingieri, ‘Multimodal Aspects of the Rotterdam Rules’, Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), 17.

<sup>627</sup> As discussed above, it is rather unlikely though.

performance of a contract of carriage by air for the purpose of loading, delivery or transshipment. Regarding the second, exception is instead conceivable in case the Rotterdam Rules carrier has undertaken to perform by air as a part of the multimodal carriage preceding or following the sea leg and in breach of such obligation employs a road or rail vehicle. However, knowing that the limit of the air conventions is the highest,<sup>628</sup> there would be no such a courageous carrier. Thus, what is more likely is that if the carrier needs to substitute carriage by another mode of transport for carriage by air, then they will give a notice to the consignor.

#### **6.7.3.4 Carriage of goods by road - article 82(b)**

Article 82(b) is relevant to any conventions governing the carriage of goods by road and especially refers to situations “to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship”, which is that in article 2 of the CMR<sup>629</sup>. The scope of article 82, therefore, is limited to the situation envisaged therein.

As discussed earlier,<sup>630</sup> article 2.1 of the CMR provides that where a road vehicle containing goods is carried on a ship or a rail car, the CMR applies to the entire transport operation, unless it is proved that the loss was not caused by the act or omission of the road carrier “but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport”. Thus, where loss is non-localised or occurs during a non-road leg but due to the fault of the road carrier, the CMR applies to the entire carriage including non-road legs.

This provision was made in the Convention in order to ensure that it does not conflict with the CMR in those very specific situations so as to ease the concerns of States Parties to those instruments regarding possible conflicts.<sup>631</sup>

---

<sup>628</sup> The limit under the Montreal Convention is 19 SDR. See paragraph 3.3.2.1.

<sup>629</sup> Specific reference to article 2 of the CMR has been made during the eighteenth sessions of the Working Group: Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), para. 221; general reference to the CMR has been made during the twentieth session: Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), paras. 230.

<sup>630</sup> See paragraph 2.5.1.2.

<sup>631</sup> Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), paras. 230.

### **6.7.3.5 Carriage of goods by rail - article 82(c)**

Article 82(c) relates to any convention governing the carriage of goods by rail “to the extent that such convention according to its provisions applies to the carriage of goods by sea as a supplement to the carriage by rail” and this is a reflection of the provisions of the COTIF-CIM.<sup>632</sup> Article 82(c) of the Rotterdam Rules makes implied reference to the COTIF-CIM with the words “to the extent that ... carriage of goods by sea as a supplement to the carriage by rail”, it must be assumed that the intention was to treat a contract of carriage by rail that includes a maritime leg, such as that covered by the COTIF-CIM, as coming under the definition of “contract of carriage” of article 1.1 of the Convention.

The condition required under article 82(c) and required under article 1.4 of the COTIF-CIM is that the carriage by sea be a supplement to the carriage by rail. The word “supplement” conveys the idea of something that is complementary to something else and could not exist independently.<sup>633</sup> Distance may, therefore, be a relevant feature for the qualification of the maritime leg as a supplement of the railroad leg.

The second condition, which is not specified in article 82(c) but in article 1.4 of the COTIF-CIM, is that the carriage by sea be performed on services included in the list of services referred to in article 24.1(b) of the COTIF.<sup>634</sup>

### **6.7.3.6 Carriage of goods by inland waterway - article 82(d)**

Article 82(d) refers to any convention governing the carriage of goods by inland waterway “to the extent that such convention according to its provisions applies to a carriage of goods without transshipment both by inland waterway and sea”. This is relevant to the provisions of the CMNI.<sup>635</sup> Article 2.2 of the CMNI provides that it

---

<sup>632</sup> See paragraph 2.5.1.3.

<sup>633</sup> For example, in a contract of carriage by rail from Paris to London the carriage of the railroad cargo vehicle on a ship across the Channel is a ‘supplement to the carriage by rail’ but in a door-to-door contract from Busan to Manchester via Southampton the carriage by sea from Busan to Southampton can hardly be qualified as a ‘supplement’ to the carriage by rail from Southampton to Manchester.

<sup>634</sup> According to the website of the Intergovernmental Organisation for International Carriage by Rail, the lines listed are for Belgium Zeebrugge-Harwich; for Italy Civitavecchia-Golfo Aranci, Villa S. Giovanni-Messina and Reggio Calabria-Messina; for the United Kingdom Harwich-Zeebrugge and Liverpool (Seaforth)-Dublin. See [www.otif.org](http://www.otif.org).

<sup>635</sup> See paragraph 2.5.1.4.

applies except where a marine bill of lading has been issued in accordance with the maritime law applicable or the distance travelled by sea is greater than that travelled by inland waterway.

The problem that arises with that provision relates to the notion of “marine bill of lading”. While, in fact, a transport document may be deemed to be equivalent to a “marine bill of lading”, it may be questionable whether the same conclusion holds true for a transport document covering a multimodal transport. It is thought, however, that this should be the case, because if the carriage by sea and inland waterway is made without transshipment, the document issued cannot but cover the whole carriage. Consequently, whenever a transport document is issued under the Rotterdam Rules, its provisions prevail over those of the CMNI. Therefore, a conflict between the two conventions is not conceivable.

## **6.8 Relationship with other earlier maritime conventions (Article 89)**

### **6.8.1 Introduction**

The Hague Rules, Hague-Visby Rules and Hamburg Rules are all relevant to the international carriage of goods by sea, and the Rotterdam Rules also cover the entire subject matter of the above conventions, which means that the operation of the Rotterdam Rules among its parties would not be compatible with the operation of other earlier conventions. Therefore, this issue had to be resolved.

### **6.8.2 Possible approaches to the solution**

#### **6.8.2.1 Where there is no indication**

The first question that may arise is what would be the position if there is no provision in the later convention, i.e. the Rotterdam Rules. When it comes to the incompatibility between the conventions on the same subject matter, article 30 of the

Vienna Convention on the Law of Treaties 1969<sup>636</sup> would provide the solution.

Article 30.3 of the Vienna Convention on ‘application of successive treaties relating to the same subject-matter,’ provides that “when all the parties to the earlier treaty are parties also to the later treaty” relating to the same subject matter, “the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.” Article 30.4 provides that when the parties to the later treaty do not include all parties to the earlier one, the same rule applies as between States Parties to both treaties, but as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.

### **6.8.2.2 Dual uniform legal regime**

This approach was adopted in article 55<sup>637</sup> of the Montreal Convention and is actually based on article 30 of the Vienna Convention. This approach does not require a formal denunciation of earlier treaties, but provides that the later treaty should prevail between States parties that are also parties to another convention on the same subject matter. It would benefit the situation where the carriers and shippers in a State that is party to the Convention trade with a number of contracting partners in States that had not yet become parties to the Convention, but were parties to another instrument on the same subject matter.

However, this dual uniform legal regime does not provide any certainty on the applicable law, corresponding to the new and previous treaties. This approach might also cause some difficulties, particularly, in those countries that provide for direct application of international conventions upon ratification. Here, the later treaty would automatically displace the earlier one, becoming a part of the national law.<sup>638</sup>

### **6.8.2.3 Denunciation of other earlier conventions**

This approach is based on article 99.3 and 99.6 of the United Nations Convention on

---

<sup>636</sup> See also paragraph 5.3.5.1.

<sup>637</sup> Article 55 (Relationship with other Warsaw Convention instruments) of the Montreal Convention provides as follows. This Convention shall prevail over any rules which apply to international carriage by air.

<sup>638</sup> Report by the UNCITRAL Secretariat on ‘Relation with other conventions’, UNCITRAL WG, 18th Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006), 3.

Contracts for the International Sale of Goods 1980 (CISG)<sup>639</sup> and article 31 of the Hamburg Rules<sup>640</sup>. This approach requires a State that intended to become a party to the later convention to denounce certain earlier treaties relating to the same subject matter, to which it might be a party.

The denunciation approach has the great advantage that it could provide maximum certainty on the applicable law, since once a State denounces the earlier treaty, the treaty would no longer have any force of law and it would contribute to the uniformity of applicable law on the same subject matter.<sup>641</sup>

### 6.8.3 Denunciation approach by the Convention

Article 89 of the Rotterdam Rules follows the denunciation approach and requires that a State which is a party to the Hague Rules, Hague-Visby Rules or Hamburg

---

<sup>639</sup> Article 99 provides; (3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the 1964 Hague Formation Convention and the 1964 Hague Sales Convention shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

<sup>640</sup> Article 31 (Denunciation of other conventions) of the Hamburg Rules provides;

1. Upon becoming a Contracting State to this Convention, any State party to the 1924 Convention must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.

3. The provisions of paragraphs 1 and 2 of this article apply correspondingly in respect of States parties to the 1924 Convention as modified by the 1968 Protocol.

4. Notwithstanding article 2 of this Convention, for the purposes of paragraph 1 of this article, a Contracting State may, if it deems it desirable, defer the denunciation of the 1924 Convention and of the 1924 Convention as modified by the 1968 Protocol for a maximum period of five years from the entry into force of this Convention. It will then notify the Government of Belgium of its intention. During this transitory period, it must apply to the Contracting States this Convention to the exclusion of any other one.

<sup>641</sup> Report by the UNCITRAL Secretariat on 'Relation with other conventions', UNCITRAL WG, 18th Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006), 3.

Rules must denounce those conventions at the same time as it ratifies, accepts, approves or accedes to the Rotterdam Rules. Article 89 mainly takes the same approach as article 31.1 of the Hamburg Rules<sup>642</sup> and the denunciation of previous conventions relating to international carriage of goods by sea had been made conditional upon the entry into force of the Convention in order to prevent any legal vacuum<sup>643</sup> from arising for States. However, one issue in 31.4 of the Hamburg Rules which allowed Contracting States to defer the denunciation of previous conventions for up to five years from the entry into force of the new convention, was not followed by the Convention.

## **6.9 Summary and conclusion**

The Rotterdam Rules is primarily designed to cover sea carriage but would also apply to multimodal contracts including a sea leg. The Rotterdam Rules take a “sea-change” approach towards efforts to regulate multimodal transport. Instead of seeking to develop a solution for contracts involving any combination of modes of carriage, the starting point of the Rotterdam Rules was the association with a particular mode. Thus, the Convention is not truly a multimodal legal regime, but a maritime plus multimodal convention. The liability provisions envisaged in the Rotterdam Rules may not, however, provide for responsibility of one contracting party throughout the multimodal transport, nor do they provide for uniform liability irrespective of the unimodal stage of transport where a loss, damage or delay occurs. A carrier, even if charging freight for a multimodal contract, would be able to act as agent only for certain parts of the contract, for instance, for land or air carriage ancillary to maritime carriage.

The Rotterdam Rules offer a modified network/uniform liability system combined with “a wide step back clause” regarding extended applicability of existing

---

<sup>642</sup> The extensive discussion can be found in Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), paras. 221-227. See also Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008), para. 268.

<sup>643</sup> A legal vacuum could be created when a State ratified the Convention and denounced any previous convention to which it was a party in accordance with article 89, but when the Convention had not yet come into force. See Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007), paras. 225-226.

unimodal regimes in multimodal transport.<sup>644</sup> They could offer a global uniform solution, but it is not a truly multimodal convention. Therefore, the solution proposed by the Rotterdam Rules in terms of multimodal transport does not effectively address the issues arising from modern multimodal transport. Given the nature of a modified network system, the Convention may give a way to existing international conventions governing the carriage of goods by other modes of transport that regulate the liability of the carrier for loss of or damage to the goods.<sup>645</sup> The problem is that the Rotterdam Rules would add to the existing complexity in so far as it creates another instrument which will have to operate alongside the existing legal regimes.<sup>646</sup>

Regardless of those limitations, the question at issue here is whether there are sufficient additional advantages in adopting the system of liability proposed in the Rotterdam Rules. It would seem clear that if the Rotterdam Rules come into force, they will provide the transport industry with a uniform set of rules governing carrier liability in both carriage of goods by sea and multimodal transport with a sea leg. The Convention also provides for a solution to the issue of non-localised loss. If it cannot be identified where the loss of or damage to the goods or event causing delay occurred, the Rotterdam Rules will apply as a default system. This is certainly a very important rule given the fact that a high percentage of container cargo damage is concealed. This problem of non-localised loss or damage has partly been solved by the contractual provisions based on the UNCTAD/ICC Rules, but those provisions are contractual in nature and will be subject to any mandatory national laws. Thus, a uniform fall back solution for non-localised loss or damage will certainly be one of the remarkable achievements of the Rotterdam Rules if they come into force.

Nevertheless, if the Rotterdam Rules do come into force, the Convention will be the first international mandatory regime governing multimodal transport and may serve as the “next best solution”<sup>647</sup> to the problems arising from international multimodal transport because it may provide a certain level of uniformity in the field

---

<sup>644</sup> E Eftestol-Wilhelmsson, ‘The Rotterdam Rules in a European multimodal context’ (2010) 16 JIML 274, 280.

<sup>645</sup> Articles 26 and 82 of the Rotterdam Rules.

<sup>646</sup> RM Goode, *Goode on commercial law* (4th edn, Penguin, 2010), 1185.

<sup>647</sup> See K Haak and M Hoeks, ‘Arrangements of International Transport in the Field of Conflicting Conventions’ (2004) 10 JIML 422.

of multimodal transport liability. Thus, the Rotterdam Rules, if successful, will provide rules impacting substantially on multimodal transport contracts at a global level.<sup>648</sup> That is why we have to monitor the progress of the Convention.

---

<sup>648</sup> DA Glass, 'Meddling in the multimodal muddle?-a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]' [2006] 3 LMCLQ 307, 308-309.

# CHAPTER 7 THE MODIFIED UNIFORM SYSTEM BASED ON THE EU DRAFT REGIME

## 7.1 Introduction

In Chapter 6, as one of the possible practical solutions, the Rotterdam Rules have been discussed as a modified network system and accordingly some restrictions were recognised when putting the Rules into the context of multimodal transport. In this Chapter, the European Union (EU)'s Draft Regime contained in Integrated Services in the Intermodal Chain (ISIC) Study on Intermodal<sup>649</sup> liability and documentation<sup>650</sup> will be examined as another possible solution to the problems of multimodal transport.

Here, it may be necessary to explore the reason why it is worth looking at the EU's approach. The EU is a unique economic and political partnership between 27 European countries.<sup>651</sup> It is admittedly true that the EU is emerging as a major world power in trade and commerce<sup>652</sup> and plays an important role in the development of EU law concerning trade, shipping and multimodal transport. The ISIC Study is part of an ongoing research project within the EU and given the important role of the EU

---

<sup>649</sup> The terms "intermodal" and "multimodal" have frequently been used interchangeably. Both intermodal and multimodal cover the situation where a transport is performed by more than two different modes of transport under one single contract. In this chapter the term "intermodal" will be used as does the EU draft regime.

<sup>650</sup> This was the project on "Integrated Services in the Intermodal Chain" (ISIC), prepared in 2005 by Prof. M.A. Clarke (St. John's College – University of Cambridge), Prof. R. Herber (University of Hamburg), Dr. F. Lorenzon (Institute of Maritime Law – University of Southampton) and Prof. J. Ramberg (University of Stockholm).

<sup>651</sup> The current Member States of the EU are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. See <[http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm)>, accessed on 15 Nov 2012.

<sup>652</sup> The EU has delivered half a century of peace, stability, and prosperity, helped raise living standards, launched a single European currency, and is progressively building a single Europe-wide market in which people, goods, services, and capital move among Member States as freely as within one country. See the basic information of the EU, [http://europa.eu/about-eu/basic-information/index\\_en.htm](http://europa.eu/about-eu/basic-information/index_en.htm).

in international trade, it is worth looking at the ongoing discussion on the liability of the carrier under a multimodal transport contract.

Although there is no multimodal regulation in force as yet, the EU has been trying to bring in an efficient multimodal transport regime. Questions regarding the liability of the carrier under a multimodal transport contract have been on the EU's agenda for several years, mainly as part of the work of the European Commission (EC) on developing an effective intermodal transport chain. Thus, different groups of independent legal experts have been engaged in the process of finding a solution, publishing several reports. The first section of this Chapter will briefly explore the three essential Final Reports published in 1999, 2005 and 2009 in order to better understand the EU's approach to the question of a possible regional legal regime for multimodal transport.

However, as the EU Draft Regime in the 2005 ISIC Study, in particular, provides for substantive provisions on carrier liability under multimodal transport and may offer an alternative in the international discussion on the regulation of international multimodal transport, the following section of this chapter will, therefore, have a close look at the EU Draft Regime in order to find out whether the Draft Regime provides a satisfactory solution to the muddles and uncertainty in the field of multimodal transport.

## **7.2 The background of the EU Draft Regime**

### **7.2.1 The 1999 Final Report**

The first group published its work on "Intermodal Transportation and Carrier Liability" in 1999<sup>653</sup>. The group started by discussing the problems associated with the lack of a uniform international regime governing liability for loss, damage or delay arising from multimodal transport and also looked at past attempts at unification briefly. Following that, the group provided comments on possible ways

---

<sup>653</sup> Final Report on Intermodal Transportation and Carrier Liability, which is the study co-funded by the European Commission, Director General for Transport, DGVII (June 1999).

forward, including the group's view on a possible future regional legal instrument. Although the group did not come to any firm conclusions on the content of such a regime, it might be true that they considered that a regional legal instrument would have advantages, in particular in resolving the questions of liability of the carrier arising from multimodal transport.

### **7.2.2 The 2005 ISIC Study on intermodal liability and documentation**

Where the first group left off, the second group of experts started its work within a project on "Integrated Services in the Intermodal Chain (ISIC)." In 2005, the group subsequently presented the final report on Intermodal Liability and Documentation<sup>654</sup> containing the EU Draft Regime which is a draft set of uniform liability rules for intermodal transport. The expert group was intended to propose a set of uniform multimodal liability rules which "concentrate the transit risk on one party and which provide for strict and full liability of the contracting carrier for all types of losses (loss, damage or delay) irrespective of the modal stage where a loss occurs and of the causes of such a loss."<sup>655</sup>

The EU Draft Regime provides for a substantive set of liability rules for intermodal transport and, therefore, an analysis of and comments on those provisions will be presented in this chapter, but just a brief introduction to it will follow here. This Draft Regime was considered as "both modern and radical".<sup>656</sup> The EU Draft Regime proposed strict liability in the sense that the transport integrator, or multimodal carrier, could not prove innocence but would be excused if the loss, damage or delay was caused by circumstances beyond its control. The proposed limitation of liability was 17 SDR per kilogram of gross weight, which at that time was the same as the highest monetary limit<sup>657</sup> found in the Montreal Convention<sup>658</sup>

---

<sup>654</sup> Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal Liability and Documentation (Southampton, 21 September 2005) ("The ISIC Study").

<sup>655</sup> *Ibid.*, 6.

<sup>656</sup> E Eftestol-Wilhelmsson, 'Part IV EU intermodal transport and carrier liability –content and context' (2007) *Scandinavian Institute of Maritime Law Yearbook* 133, 137.

<sup>657</sup> However, as the limitation of liability of the Montreal Convention recently increased to 19 SDR and this new limit applied from 30 December 2009, it may affect the provision of the EU Draft Regime. See also paragraph 3.3.2.1.

<sup>658</sup> Article 22 of the Montreal Convention.

and the COTIF-CIM.<sup>659</sup> This strict approach is, however, mitigated by the fact that the Draft Regime did not attempt to provide a mandatory regional legal instrument, but parties to the contract may agree to “opt out” and make other agreements. The EU Draft Regime sought to provide the cargo interests with a simple and predictable method of indemnification, irrespective of issues such as the transport integrator’s rights of recourse against sub-contractors.

### **7.2.3 The 2009 Final Report**

The 2005 ISIC Study was intended as a first draft of a European alternative for the regulation of multimodal transport and was recommended for being the basis for further discussion with all industries concerned to find a possible solution to the questions identified in the current practice of multimodal transport. The 2005 ISIC Study has been discussed extensively by the European Commission and all the industries concerned. On the basis of these discussions, the Freight Transport Logistic Action Plan was launched by the Commission in 2007. However, a difficulty for the EC has been not only to satisfy the stakeholders, but also achieve its own ideal solution for the multimodal transport chain. The EC, therefore, ordered a third group of legal experts to deal with the question.<sup>660</sup>

The latest report was published in June 2009 and is titled ‘Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests’ (The 2009 Final Report).<sup>661</sup> One of the interesting points in the 2009 Final Report is that it suggests a modified uniform liability system rather than the uniform liability system in the EU Draft Regime. The third group suggests a

---

<sup>659</sup> Article 30 of the COTIF-CIM.

<sup>660</sup> See, E Eftestol-Wilhelmsson, ‘The Rotterdam Rules in a European multimodal context’ (2010) 16 *JIML* 274, 279.

<sup>661</sup> This study has been carried out for the Directorate-General for Energy and Transport in the European Commission and expresses the opinion of Gomez-Acebo & Pombo, Abogados SCP. Available at <[http://ec.europa.eu/transport/strategies/studies/doc/2009\\_05\\_19\\_multimodal\\_transport\\_report.pdf](http://ec.europa.eu/transport/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf)>, accessed 15 September 2012.

uniform set of rules for all matters except as regards liability limits.<sup>662</sup> The liability limits will be based on an opt-out system, under which the parties are allowed to link their contract to any of the existing unimodal liability limits. In the absence of an express contractual agreement the rules of the “longest mode” apply<sup>663</sup> and in cases of disagreement as to which is the “longest mode”, the then highest carrier liability limit of 17 SDR per kg would apply. However, as the limitation of liability of the Montreal Convention recently increased to 19 SDR and this new limit applied from 30 December 2009, it may affect the proposal in the 2009 Final Report. Those suggestions in the 2009 Final Report will also be considered in the relevant parts of the EU Draft Regime.

### **7.3 The EU Draft Regime**

This EU Draft Regime was included in the 2005 ISIC Study Final Report and contains provisions, *inter alia*, on Definitions (Article 1), Scope of application (Article 2), Liability of the Transport Integrator (Article 8), Limitation of Liability (Articles 9-10), Limitation of actions (Article 14).<sup>664</sup>

#### **7.3.1 Scope of application**

##### **7.3.1.1 Contracts of transport**

For the scope of application, article 2 provides that the Draft Regime applies to all ‘contracts of transport’. Subsequently, contract of transport is defined in article 1.1(a) to mean “a contract whereby a Transport Integrator undertakes to perform or procure the transport of goods from a place in one country to a place in another country, whether or not through a third country, involving at least two different modes of

---

<sup>662</sup> The 2009 Final Report, 13-14.

<sup>663</sup> For instance, a multimodal transport journey, consisting of 60% of sea carriage, 30% of road carriage and 10% of rail carriage, would therefore trigger the application of the applicable international unimodal sea convention such as Hague, Hague-Visby or Hamburg Rules.

<sup>664</sup> The EU Draft Regime also contains provisions on Documentation (Articles 3-7), Dangerous Goods (Article 12), Notice of loss, damage or delay (Article 13), but these articles will not be considered here due to the limited space given.

transport, and to deliver the goods to the consignee.”

The Draft Regime is seen as a *sui generis* contract<sup>665</sup> which applies to contracts to perform or procure the carriage of goods by at least two different modes of transport.

This nature will differentiate it from other unimodal conventions, such as the CMR, COTIF-CIM, Hague-Visby Rules or Montreal Convention and the Draft Regime will not apply to the extent that a contract of transport is within the scope of the unimodal regimes.<sup>666</sup>

Here, the term ‘Transport Integrator was chosen in order to reflect the overall project of “Integrated Services in the Intermodal Chain” and just to distinguish the Draft Regime from other transport regimes.<sup>667</sup> However, there is no difference between the Transport Integrator and Multimodal Transport Operator (MTO) or Multimodal carrier because both terms mean any person who concludes a multimodal contract and assumes responsibility for the performance of the contract.<sup>668</sup>

### **7.3.1.2 The geographical scope**

The Draft Regime is intended to apply only to international multimodal transport within the EU and will not apply to domestic transport within the EU Member States.<sup>669</sup> The transport must be from a place in one country to a place in another country. The geographical scope has to do with the fact that there must be a linkage with a Member State of the EU. The place of taking in charge or the place of delivery must be located in a Member State of the EU.

---

<sup>665</sup> For more information about the *sui generis* contract, see paragraph 2.3.1.

<sup>666</sup> Nevertheless, there might be a problem of potential conflict as some of the unimodal conventions also apply to multimodal transport. See paragraphs 2.5.1.1 to 2.5.1.4.

<sup>667</sup> The ISIC Study, 16.

<sup>668</sup> The Transport Integrator is defined in article 1.1(f) of the Draft Regime to mean “any person who concludes a contract of transport and who acts as principal, not as agent or on behalf of the consignor and assumes responsibility for the performance of the contract of transport”, whereas the Multimodal Transport Operator is defined in article 1.2 of the MT Convention to mean “any person who concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.”

<sup>669</sup> See the definition of a contract of transport in article 1.1(a) of the Draft Regime.

Like the Rotterdam Rules<sup>670</sup>, the scope includes transports to and from the EU and the Draft Regime will apply not only to internal transactions but also to exports and imports to or from the EU.

### **7.3.1.3 The opt-out approach**

The Draft Regime provides an opt-out solution, which might be very controversial. Article 2 of the Draft Regime states that “The provisions of this Regime shall mandatorily apply to all contracts of transport... unless the parties to the contract have agreed that it shall not be governed by the Regime.”

Therefore, the Draft Regime provides for a default system the application of which is triggered unless the parties agree otherwise. Even if a system devised in such a way that would allow the parties to “opt-out” of it, this was intended to achieve widespread application as it should avoid the strong opposition the adoption of mandatory regimes would inevitably attract.<sup>671</sup> If the parties do not opt-out, they will be bound by the Draft Regime throughout the journey, apparently providing a certain level of uniformity and predictability.

However, as seen in the case of the TCM Draft Convention, the opt-out approach or non-mandatory method might not be the best solution to the current multimodal muddles, because it does not have any mandatory application. Thus, if one considers this Regime as an alternative in the international discussion on a multimodal transport regime, there will be no necessity to “elevate it to the level of an international convention.”<sup>672</sup> For these reasons, it will not fulfil the traditional function of an international convention.<sup>673</sup> One has to bear in mind that the main advantage of a mandatory international multimodal regime is that it creates uniformity and predictability.

Moreover, another question whether or not the Draft Regime is adopted will depend on the commercial bargaining power of the parties to the contract of transport. Given the increased liability of the carrier such as strict liability and high limitation

---

<sup>670</sup> Article 5.1 of the Rotterdam Rules.

<sup>671</sup> The ISIC Study, 11.

<sup>672</sup> EA Massey, ‘Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM’ (1972) 3 JMLC 725, 757; See also K Nasser, ‘The Multimodal Convention’ (1988) 19(2) JMLC 231, 235-236.

<sup>673</sup> A Xerri, ‘Combined Transport: A new attempt at unification’ (1980) II Uniform Law Review 138, 142.

amount, there will be strong opposition by carrier's interests and they will always wish to opt out of the Regime. Thus, it may also be necessary for the carriers to alleviate the increased liability.

### **7.3.2 Liability of the Transport Integrator**

#### **7.3.2.1 Strict liability**

One of the key features in the EU Draft Regime is that it offers a simple and strict regime of legal liability. Under the Draft Regime, the Transport Integrator is liable for total or partial loss of or damage to the goods occurring between the time they take over the goods and the time of delivery, as well as for any delay in delivery.<sup>674</sup> The reason for the strict liability is to facilitate claim settlements, especially when compared with liability for fault-based liability which often "encourages fruitless efforts to rebut the presumption."<sup>675</sup> The belief is that this system would save unnecessary litigation because the plaintiff and the Transport Integrator would not have to go to court to determine where and when the loss had occurred.<sup>676</sup> Moreover, it might be argued that under such a strict liability scheme, the shipper would not have to provide cargo insurance, thus, reducing insurance costs ultimately borne by the shipper.<sup>677</sup>

However, concerns may be raised regarding the strict liability. It should be noted that the current multimodal rules are based on fault-based liability. The liabilities under the UNCTAD/ICC Rules, the MT Convention and other standard forms such as FIATA B/L, MULTIDOC 95 are based on the carrier's fault, and that the burden of proof would rest on the carrier to prove that he had not been at fault in causing loss, damage, or delay.<sup>678</sup> This is the basic liability regime for multimodal transport at the moment. Moreover, it could be argued that strict liability would only

---

<sup>674</sup> Article 8.1 of the EU Draft Regime.

<sup>675</sup> The ISIC Study, 11.

<sup>676</sup> TK Chenal, 'Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules' (1978) 20 Arizona Law Review 953, 968.

<sup>677</sup> However, in light of the defences and limitation still available to the carrier which are discussed below, cargo interests would need to take out cargo insurance. Further discussion on insurance aspects in multimodal transport will follow later in Chapter 8.

<sup>678</sup> This is called "reversed burden of proof" and it is different from the Rotterdam Rules.

be used for extra-contractual claims based on hazardous activities where fault or negligence can be extremely hard to prove, obliging the operator to assume the high risks of his activity.<sup>679</sup> However, this is not always the case since the current transport conventions, such as the Montreal Convention, COTIF-CIM, CMR, do provide a strict system of liability with some exceptions to the liability.

Nevertheless, as the simple and strict system of liability could offer an efficient claim settlement system, this approach is worth considering.

### **7.3.2.2 Only defence?**

#### 7.3.2.2.1 Beyond the control

The EU Draft Regime imposes full and strict liability upon the Transport Integrator for any total or partial loss of the goods, or damage to the goods, or delay in delivery of the goods, unless and to the extent that it was caused by circumstances beyond the control of the Transport Integrator.<sup>680</sup> This is the only defence available to the Transport Integrator under the Draft Regime. There is no list of defences of which the Transport Integrator is to have the benefit and it just states that if there are any circumstances which the Transport Integrator could not avoid and be unable to prevent, then they are not liable.

However, although it is considered that the EU Draft Regime has full and strict liability, it seems that it is not as strict as the drafters intended in the sense that the Draft regime may have more defences than just one defence.

#### 7.3.2.2.2 Other possible defences

It appears that more defences could be used under the Draft Regime as long as those defences amount to circumstances beyond the control of the Transport Integrator. In the first instance, it would seem clear that those common law exceptions would be within this list of possible defences. In addition, defences in other transport regimes may be used for the Draft Regime. However, in such cases, the Transport Integrator would have the burden of establishing the defences.

---

<sup>679</sup> For instance, nuclear third party liability, liability for maritime oil pollution, etc. See The 2009 Final Report, 14.

<sup>680</sup> Article 8.4 of the EU Draft Regime.

### **Act of God**

This is one of the common law excepted perils and there seems no reason why the reasoning which will be applied under the Draft Regime should be different.

James L.J. in *Nugent v Smith*<sup>681</sup> provided the definition that “The Act of God is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him.” Therefore, first, the event must have occurred due to natural causes, independently of human action and second, it must have been an event which the carrier could not have avoided by precautions.<sup>682</sup> Thus, this can be used as one of the defences under the Draft Regime.

### **Queen’s enemies**

This exception refers to enemies of the sovereign of the carrier<sup>683</sup> and elsewhere the less specific term “Public enemies” is used.<sup>684</sup> This relates to “acts done by states or peoples with which the Sovereign may be at war, at any time during the carriage of goods.”<sup>685</sup> This type of exception will be beyond the control of the carrier. In this situation the carrier is obliged to be careful to avoid the acts of such enemies, but if they have been so, they will not be liable for any resulting loss or damage which occurred.

### **Inherent vice**

Another common law exception is that a carrier is not liable for loss or damage which has resulted from inherent quality, defect or vice of the goods carried. Obviously, the carrier is not able to control it in cases that there are goods which could not arrive at the destination in the condition in which they were received by the

---

<sup>681</sup> *Nugent v Smith* (1876) 1 CPD 423, at 444.

<sup>682</sup> G Treitel and FMB Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011), para 9-005; R Colinvaux, *Carver’s Carriage by Sea* (13th edn, Stevens & Sons, 1982), 11-14.

<sup>683</sup> *Russell v Niemann* (1864) 17 CBNS 163.

<sup>684</sup> For instance, article IV, rule 2 (f) of the Hague-Visby Rules.

<sup>685</sup> R Colinvaux, *Carver’s Carriage by Sea* (13th edn, Stevens & Sons, 1982), 14.

carrier due to their general nature or specific defects. Thus, if the condition of the cargo deteriorated “by its own want of power to bear the ordinary transit in a ship”,<sup>686</sup> then it can be one of the situations beyond the control of the carrier.

### **Defective packing**

This common law exception is an extension of the inherent vice exception. The carrier is not responsible for damage arising from the defective manner in which the goods are packed where it was the shipper’s duty to pack the goods appropriately. Thus, the carrier is not liable if damage resulted from any inherent defect of the cask delivered to him to be carried.<sup>687</sup> However, if the carrier is aware of the defective packing, this will not of itself prevent them relying on the exception because they may be under an obligation to take reasonable care of them in that state.<sup>688</sup>

### **Jettison**

One other exception is that the carrier may jettison goods in order to save the ship and the remainder of the goods. When this happens the law normally gives the owner of the goods jettisoned a right to contributions in General Average towards his loss from others whose property is saved.<sup>689</sup>

### **Act of public authority carried out in connection with the entry, exit or transit of the cargo**

This is the exception currently used under the transport conventions. The Warsaw and Montreal Convention<sup>690</sup> use the same phrase, and the Hague, Hague-Visby Rules<sup>691</sup> and Rotterdam Rules<sup>692</sup> have similar expression. This exception may cover quarantine restrictions, or interference by governments, public authorities, rulers, or people including detention, arrest, or seizure not directly attributable to the carrier.

---

<sup>686</sup> *The Barcore* [1896] P 294, at 297.

<sup>687</sup> *Hudson v Baxendale* (1857) 2 H & N 575.

<sup>688</sup> *Gould v SE & Chatham Ry* [1920] 2 KB 186.

<sup>689</sup> R Colinvaux, *Carver’s Carriage by Sea* (13th edn, Stevens & Sons, 1982), 14-19.

<sup>690</sup> Article 18.3 (d) of the Warsaw Convention and article 18.2 (d) of the Montreal Convention.

<sup>691</sup> Article IV, rule 2 (g) (h) of the Hague, Hague-Visby Rules.

<sup>692</sup> Article 17.3 (d) of the Rotterdam Rules.

### **Fault on the part of consignor or consignee**

If the carrier can establish that the loss, damage or delay was caused or contributed to by fault on the part of consignor or consignee, then the carrier will not be liable. Thus, where handling, loading stowage or unloading of the goods performed by or on behalf of the shipper, if loss or damage occurred due to the shipper's fault, then the carrier will be exonerated.

Here, one needs to remember that the Transport Integrator is not going to be doing a great deal of carriage itself, subcontracting a lot of this. Consequently, when we say beyond the control, presumably they cannot just say it was delegated to a subcontractor. Thus, it is always necessary to check whether it is completely beyond the control of the carrier.

### **7.3.3 Limitation of liability**

#### **7.3.3.1 The 2005 proposal**

The high monetary limit has been selected for the regime in order to avoid an inadequate monetary limit whenever integrated transport includes carriage by air or rail, while the increase from 2 SDR to 17 SDR is unlikely to be problematic as it will sometimes provide the Transport Integrator with a lower limit than the combined unit/per kilo limitation under the Hague-Visby Rules. For road carriers the 17 SDR limit is more than double the 8.33 SDR limit under CMR but the expectation is that the cargo interests are unlikely to commence legal proceedings as they will receive compensation based on the highest limits and they will know that unlimited liability is restricted to the very exceptional case of the personal fault of the Transport Integrator themselves under the Draft Regime.

However, there will be objection to high monetary limitation by current multimodal industry. When one looks at the differences of liability ceilings in the different transport modes, for example between 2 and 19 SDR, the choice of the upper ceiling seems too radical. This will eventually cause a strong objection especially from the shipping industry.

#### **7.3.3.2 The 2009 proposal**

While the 2005 experts think the highest monetary limit, the 2009 experts might think it is better to have a compromise in order for more people to accept it.

The 2009 experts suggested 3 ways of determining the limits of liability. First, the parties may expressly assign the liability limits of their multimodal transport contract to “one main transport mode”. Second, in the absence of such express assignment, the liability limits of the international unimodal convention corresponding to the “main mode” of the multimodal transport journey would apply by default. Here, the “main mode” of multimodal transport journey would be determined by the longest trajectory. Third, in cases of disagreements as to which is the “longest mode”, the presently highest carrier liability limit of 17 SDR/kg would apply.<sup>693</sup>

First of all, one may not be in favour of these complications. It makes it so difficult to settle the case. If the parties have disagreements about which one is the longest, and one of them is trying to prove that it is the low limitation regime, but if they are wrong on that, then it is the highest which is 17 SDR, being the air limit. There is such a vast difference in limits that it makes it very difficult to settle the case systematically. Consequently, we have to decide or may have to go to court or arbitration over the question which is the longest mode.<sup>694</sup> Therefore, it seems that these further complexities just make the position more and more difficult.

Second, if the fall-back position is 17 SDR, it may be that many sea carriers would say opt out. What is odd about going to the highest one, is that there might be a situation where neither air nor rail applies. For instance, there is a situation where in the absence of express rule, the rules of the longest mode apply and imagine that we have a situation where it is carried by road and then by sea and then a bit by inland waterway. Then if we cannot agree, we go 17 SDR, but how extraordinary because none of these is air or rail. It seems that a lot of sea carriers would opt out if it went to the highest.

Therefore, the proposed limitation solution in Chapter 5<sup>695</sup> is worth considering.

### **7.3.4 Non-localised loss and liability gap**

---

<sup>693</sup> The 2009 Final Report, 13-14.

<sup>694</sup> The Korean Commercial Code also adopts a similar approach. See paragraphs 2.5.3.4 and 5.3.1.6.

<sup>695</sup> See paragraph 5.3.1.7.

This non-localised loss is a typical problem in multimodal transport. While a pure network system does not provide the solution to it, there may be a liability gap between the applications of the unimodal transport conventions. However, the EU Draft Regime as a modified uniform system will provide a perfect solution for non-localised loss. In this system, there is no difference between cases where loss can or cannot be localised. Therefore, there will be no concern in cases of where the loss or damage cannot be localised or the loss was progressive through the journey or possible gaps were left.

### **7.3.5 Time for suit**

The EU Draft Regime provides for a 9 month time-bar, which is based on the UNCTAD/ICC Rules. We have already looked at the reason why the time limit of 9 months was adopted.<sup>696</sup> Briefly, it is to ensure that the multimodal transport operator would have sufficient opportunities to institute recourse actions against any subcontractors. In multimodal transport, there are many subcontractors involved, as a result of which there will be a main claim between the main parties to the contract and second claims between multimodal carriers and the responsible subcontractors. The whole point is to be efficient and for the times to come quickly, so we can obtain the evidence and it can be dealt with in a very efficient system, particularly because when we have indemnity claims, there is a significant reason for being efficient and getting through them because we may have to pass them on.

However, one might very well say it seems odd to make it 9 months because when one question is to ask what is normal, normal for a very long time seems to be a period of 1 year. Thus, 9 months might be a little on the stringent side and it would be very unlikely to be appealing to cargo interests. However, in a multimodal transport contract, a time limit of 9 months is widely used and this may be an appropriate option which works systematically in the context of multimodal transport, especially in case of recourse action.

---

<sup>696</sup> See paragraph 5.3.2.2.

### **7.3.6 Conflict of laws**

The EU Draft Regime does not provide for specific provisions on collision of conventions. Firstly, in order to provide the possibility of uniform integrated liability on the part of the Transport Integrator, the Draft Regime does not permit either party to invoke liability rules which are contained in special rules applicable to unimodal transport which is a stage in a multimodal movement, even if it is proved that the loss, damage or delay occurred on that stage.<sup>697</sup>

However, the potential conflicts with other existing international conventions governing unimodal transport may still exist. The CMR, for example, which relates to international carriage by road, may continue to apply during carriage by rail, inland waterway, sea or air when the road vehicle, on which the goods remain loaded, is carried in such a way.<sup>698</sup> The conflict may also arise with the Montreal Convention. In cases of carriage by other modes performed outside an airport, the Montreal Convention provides that it shall apply to any carriage by land or sea if the carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, or if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage.<sup>699</sup> In this case, there will be no conflict in terms of the limits of liability, but conflicts still exist with other provisions.

## **7.4 Summary and conclusions**

The EU Draft Regime was intended as a first draft of a non-mandatory European alternative for the regulation of multimodal transport with an opt-out opportunity providing a uniform liability system based on strict liability. However, a question raised recently in the 2009 Final Report as to whether the EU should adopt a wait and see approach and not hurry to adopt a regional regime that might be in conflict with the international regime. In the alternative, the EU could adopt its own liability

---

<sup>697</sup> The ISIC Study, 12.

<sup>698</sup> See article 2.1 of the CMR. See paragraph 2.4.1.2.

<sup>699</sup> Articles 38.1 and 18.4 of the Montreal Convention. See paragraph 2.4.1.1.

instrument on a temporary basis before an international solution was found.<sup>700</sup>

The EU Draft Regime provides a uniform system which would contribute to make agreements between the parties simpler and easily understandable which would facilitate claims settlements and Thus, contribute to reduce costs. However, this should be considered in line with an international regime, i.e. the Rotterdam Rules. In order for the EU Draft Regime to be one of the possible international multimodal solutions, it is necessary to elevate it to the international convention, by extending the geographical scope of the Regime and providing its mandatory application. If the Regime is to follow the simple and strict liability, then it is also necessary to alleviate the carrier's liability by providing a clear list of exceptions and a reasonable level of limitation of liability included in the proposed limitation solution.<sup>701</sup>

We have, so far, looked at two different approaches to an international multimodal solution. One is the Rotterdam Rules as a modified network system, the other is the EU Draft Regime as a modified uniform system. The former does not seem to be a true multimodal regime, only using sea carriage as a base-line for extending to a multimodal service, therefore, rewriting maritime and multimodal transports into one single Convention. In contrast, the EU Draft Regime seems to be a true multimodal regime, which would govern liability for loss of or damage to the goods or delay in delivery arising from multimodal transport. Here, one of the questions that may arise is whether the insurers would agree to cover the liability under the EU Draft Regime or the Rotterdam Rules. Would it be a greater liability? It will always be a genuine practical problem, in particular, as the EU Draft Regime provides for strict liability and the increased limitation of liability, the crucial question is whether, in practice, it is possible to obtain insurance for that increased liability. Thus, another question is to ask about what the insurers would think, or whether insurance would be available for the multimodal liability, which will follow in the next Chapter.

---

<sup>700</sup> PK Mukherjee and O Bokareva, 'Multimodal maritime plus: some European perspectives on law and policy' (2010) 16 JIML 221, 229.

<sup>701</sup> See paragraph 5.3.1.7.

# CHAPTER 8 INSURANCE AND MULTIMODAL TRANSPORT

## 8.1 Introduction

In previous chapters, the reasons why we need an international multimodal regime and some possible solutions to the multimodal problems as well as possible types of liability regime have been discussed. This international multimodal regime would, in principle, regulate the relationship between consignors or consignees<sup>702</sup> and multimodal carriers and in cases of cargo claims they are the parties who are involved in the claims and should be familiar with the applicable multimodal regimes. However, what is more likely is that the majority of claims and disputes relating to multimodal transport are not settled directly between the cargo interests and the carrier, but between the cargo insurers and the carrier's liability insurers.<sup>703</sup>

There have been conventional forms of cargo insurance and liability insurance. It is, however, necessary to keep in mind that multimodal transport might differ from the traditional forms in that the various modes of transport, i.e. carriage by sea, air, road, rail or inland waterway, are used and they provide a kind of bridge over which containers pass in the journey from door to door. The first section of this chapter will, therefore, explore the role of insurance in the context of multimodal transport, and the following section will focus on cargo insurance and liability insurance.

## 8.2 The role of insurance in multimodal transport

### 8.2.1 The function of insurance

---

<sup>702</sup> Most cargo claims would be brought by the receivers or their subrogated insurers.

<sup>703</sup> R Williams, 'The Rotterdam Rules: winners and losers' (2010) 16 JIML 191, 209.

The first question that may arise is what the role of insurance in the context of multimodal transport is. When goods move from a place in one country to a place in a different country, they are to a greater or lesser degree, exposed to various hazards of transit and they may not be delivered at all, be delivered short or be delivered damaged. It is worth noting that the primary function of insurance is not to prevent the happening of such losses but to indemnify the party whose goods are at risk so that they will suffer no financial loss if their goods are lost or damaged.<sup>704</sup> The primary purpose of cargo insurance is indemnification of claimants for the loss or damage to the goods.<sup>705</sup> Therefore, the parties pay a relatively small amount of money, which will be a “premium” for cargo insurance but usually a “call” to a P & I Club for liability insurance including the liability of cargo damage, and they, as the assured, will be given protection against a possible financial loss or series of losses.

## **8.2.2 Subrogation<sup>706</sup>**

Another question also arises as to the way insurers are involved in cargo claims arising from multimodal transport of goods, and what kind of right is given to the insurers in order to do this.

### **8.2.2.1 The nature of the right of subrogation**

The insurer’s right to take legal proceedings in the name of the assured against a third party who has caused loss of or damage to the goods is especially important in the area of insurance. On payment of the insurance money, the insurer is entitled to be subrogated to all the rights and remedies of the assured in respect of the interest insured insofar as they have indemnified the assured.

The nature of the right of subrogation is generally considered as having two

---

<sup>704</sup> J Isaacs, ‘Cargo Insurance in relation to Through Transport’, paper delivered at the Through Transport: problem areas, documentation and insurance seminar organised by Lloyd’s of London Press Ltd (The London Press Centre, 15-16 June 1978), 1.

<sup>705</sup> CE McDowell, ‘Containerization: Comments on Insurance and Liability’ (1971-72) 3 JMLC 503, 509.

<sup>706</sup> FD Rose, *Marine Insurance: Law and Practice* (2nd edn, Informa, 2012), paras 27.1-27.86; R Merkin, *Marine Insurance Legislation* (4th edn, Lloyd’s List, 2010), 108-113; J Dunt, *Marine Cargo Insurance* (Informa, 2009), paras 16.1-16.24; J Gilman, *Arnould’s law of marine insurance and average* (17th edn, Sweet & Maxwell, 2008), Chapter 31; J Lowry and P Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn, Hart Publishing, 2005), 287-303.

origins, one in common law, where it is seen as a matter of the implied terms of the contract,<sup>707</sup> and the other in equity, in the principle of unjust enrichment.<sup>708</sup> A recent case has emphasised the contractual basis of the right as an implied term of the contract.<sup>709</sup> However, as Merkin best described<sup>710</sup> the nature of the right of subrogation can be seen as being “in its origins an equitable doctrine, but is modified by terms implied into the contract of insurance”.

The right of subrogation may be conferred upon an insurer by the express terms of the policy, but this is not necessary for its operation. In practice, as an alternative to subrogation, the insurer invariably asks the assured, on payment of the insurance policy, to sign a letter of subrogation and retains the documents, including the bill of lading, in order to prosecute the rights subrogated to him.

The doctrine of subrogation is regarded as having two major functions.<sup>711</sup> First, to prevent the assured from being over-indemnified under the contract of insurance for the loss, or from recovering more than once for the same loss. Second, to facilitate “recoupment of the insurer” for the indemnity paid to the assured at the expense of the party responsible for causing the loss. Under the doctrine of subrogation the right to sue, for instance, the negligent multimodal carrier passes from the assured to the insurer on payment of the insurance money. The insurer is subrogated to all rights of the assured arising from contract or tort, for example the assured’s rights against the carrier under the contract of carriage. If the assured has already recovered damages from the third party, the insurer can claim from the assured the money received.<sup>712</sup>

### **8.2.2.2 Marine Insurance Act 1906**

The doctrine of subrogation is statutorily recognised in the context of marine

---

<sup>707</sup> *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1961] 1 Lloyd’s Rep 479; *Hobbs v Marlowe* [1978] AC 16, at 39.

<sup>708</sup> *Napier and Ettrick v Hunter* [1993] 1 Lloyd’s Rep 197.

<sup>709</sup> *Bee v Jenson* (No.2) [2008] Lloyd’s Rep IR 221, at 230 “there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract.”

<sup>710</sup> R Merkin, *Marine Insurance Legislation* (4th edn, Lloyd’s List, 2010), 110.

<sup>711</sup> FD Rose, *Marine Insurance: Law and Practice* (2nd edn, Informa, 2012), paras 27.1-27.8.

<sup>712</sup> See *In R Miller, Gibb & Co Ltd* [1957] 1 WLR 703 (subrogation to the Exports Credits Guarantee Department of the Board of Trade of right to the price, after having paid the seller); *H Cousins Ltd v D & C Carriers Ltd* [1971] 2 QB 230 (subrogation of interest after insurer had paid the assured).

insurance by the Marine Insurance Act 1906. Sections 79(1) and 79(2), which deal with subrogation, provide as follows:

(1) Where the insurer pays for a total loss either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

The insurer is subrogated to the assured's rights whether the loss is a total loss or a partial loss and in the case of a total loss the insurers are also entitled to take over the property in the goods. This is described as "salvage"<sup>713</sup>, which is the right of an insurer who has paid for a total loss, whether actual or constructive, to assert proprietary rights over whatever remains of the insured subject matter. Section 79(1) deals with subrogation and salvage and section 79(2) deals with the insurer's rights to subrogate on payment of a partial loss. The effect of these provisions is to apply similar rights of subrogation whether the claim is for a total loss or a partial loss.

### **8.2.3 Insurance involvement in multimodal transport**

Let us assume that the seller sold to the buyer two containers stuffed with 20,000 tablets which are to be transported from Seoul, Korea to Newcastle, UK under a CIP Newcastle contract of sale. The seller arranged a contract of multimodal transport with the Hanjin Shipping Company. The intended routing is by road from the warehouse in Seoul to Incheon (port), followed by ship from Incheon to Southampton and then from Southampton to Newcastle by road. Whilst the goods were in the UK, in the custody of the road carrier, they were stolen by his employees.

---

<sup>713</sup> This is to be distinguished from the right to claim a reward under maritime law, or by contract, especially Lloyd's Open Form.

The claim is paid under the seller's cargo insurance.<sup>714</sup> The cargo insurance company engages a lawyer, who proceeds against the multimodal carrier (Hanjin), who had assumed responsibility for the multimodal transport from Seoul to Newcastle. Hanjin informs its P & I Club, which then appoints a defence lawyer, who, at the same time, files a claim against the Freight Forwarder, who had assumed responsibility for the transport from Southampton to Newcastle. The Freight Forwarder informs its insurance company (TT Club) who appoints a defence lawyer, who files a claim against the road carrier, who has taken the trailer from Southampton to Newcastle. The Road carrier then informs their insurance company who appoints a defence lawyer.

Therefore, it can be seen that in the context of multimodal transport, there are two types of insurance involved; one is cargo insurance for cargo interests, the other is liability insurance for the multimodal carrier, freight forwarder and road carrier which will be explored in the following sections.

## **8.3 Cargo insurance for cargo interests**

### **8.3.1 Cargo insurance in general**

Cargo insurance has a long history. Although the first recorded cargo policies in England followed in 1555, the increase in trade in the 19<sup>th</sup> century influenced the further development of marine insurance law in England, as it exists today. Legal decisions affecting cargo insurance have been built up over this period and the body of law is codified in the Marine Insurance Act (MIA) 1906.<sup>715</sup> Therefore, a contract of cargo insurance depends on the MIA 1906, not only for the construction of the words used, but also for the determination of the legal rights and obligations of the

---

<sup>714</sup> Under a CIP contract of sale, the insurance is arranged by the seller, but the beneficiary is the buyer, who will be the most likely claimant. The risk is transferred to the buyer upon delivery of the goods to the carrier within the country of origin and the insurance policy will be assigned to the buyer. Thus, the receivers will usually have the right to claim the indemnity under that policy. See paragraph 7.3.2 regarding the Incoterms 2010 and Section 50 of the Marine Insurance Act 1906.

<sup>715</sup> J Dunt, *Marine Cargo Insurance* (Informa, 2009), paras 1.1-1.3; J Dunt, *International Cargo Insurance* (Informa, 2012), paras 1.5-1.6.

parties.

### 8.3.1.1 The cargo policy forms

The SG Form, which covered ship and goods, originated in the sixteenth century and had been widely used by Lloyd's and insurance companies. However, the SG Form needed considerable modification and revision<sup>716</sup> and, accordingly, a new policy form, known as the MAR Form, was adopted in 1982. It was a framework policy form and the substance of the cover had been moved into the Institute Cargo Clauses. Nevertheless, there remained much room for improvement in efficiency and professionalism in the London market.<sup>717</sup> In 2001, the London Market Principles' (LMP) Slip was introduced with a view to providing "a flexible but consistent insurance contract which provides a uniform common basis for the structure of the slip to be used in the London market whilst, at the same time, ensuring that the conditions of the contract were clearly identified and defined."<sup>718</sup> The Market Reform Contract (MRC) has now replaced the LMP Slip and has been adopted for all London market marine cargo business.

Cargo is usually insured by means of an open cover contract and in the London market, a typical cargo open cover is now generally evidenced by a Market Reform Contract.<sup>719</sup> Individual consignments can, of course, be insured as and when they are despatched, known as a "facultative insurance", but for most sellers or buyers of goods, some form of fixed arrangement was necessary. The shipper, therefore, enters into an open cover contract with their insurers under which the insurers agree to accept and the assured to declare all shipments coming within the scope of the open cover up to an agreed limit. However, in today's market, individual declarations have somewhat fallen out of practice and premium will more often than not be based on

---

<sup>716</sup> The SG Form was criticised in the courts as "clumsy, imperfect and obscure" (Sir Frederick Pollock cited by McKinnon LJ in *Middows Ltd v Robertson* (1940) 68 Ll L Rep, at 45-63), and as "it cannot be beyond the wit of underwriters and those who advise them in this age of law reform to devise more straightforward and easily comprehended terms of cover" (Mocatta J in *Panamianian Oriental Steamship Corporation v Wright (The Anita)* [1970] 2 Lloyd's Rep 365, at 372).

<sup>717</sup> J Dunt, *Marine Cargo Insurance* (Informa, 2009), para 1.10.

<sup>718</sup> *Ibid.*

<sup>719</sup> J Dunt, *Marine Cargo Insurance* (Informa, 2009), 3.3. However, in foreign markets, particularly Japan, the SG Policy Form as scheduled to the Marine Insurance Act 1906 is still widely used and cargo insurance is still underwritten on the terms of the Institute Cargo Clauses (All Risks).

annual transit turnover.<sup>720</sup>

### 8.3.1.2 The Institute Cargo Clauses

Under the modern system for insuring cargoes, the three sets of clauses are named the Institute Cargo Clauses (ICC) (A), (B) and (C) 1/1/2009.<sup>721</sup> The Institute Cargo Clauses now provide standard terms of cover. When the Institute Cargo Clauses were redrafted in 1982, the risks covered were transferred from the SG Form into the 1982 Clauses themselves, with the whole document given a clear and logical structure. The titles of ICC (All Risks), ICC (With Average)<sup>722</sup> and ICC (Free from particular Average)<sup>723</sup> were replaced by ICC (A), ICC (B) and ICC (C) in 1982, and the new titles are still used in the 2009 version.

### 8.3.2 Who needs a cargo insurance

In order to deal with cargo insurance for cargo owners, it is first necessary to find out who needs to arrange insurance and to what extent. The consignor or consignee will have an interest in the goods depending on the terms of sale. The multimodal carrier or freight forwarder will also have an interest as agent where he arranges insurance on behalf of the cargo owners. First of all, this is mainly decided by the terms of the contract of sale and the terms in the Incoterms<sup>724</sup>, which are widely used in sale contracts. Incoterms 2010 classifies terms by mode of transport, but the four original groupings remain valid. The terms applicable for all modes of transport including multimodal are EXW (EX Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAT (Delivered at Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid).

---

<sup>720</sup> *Ibid*, 3.2.

<sup>721</sup> See J Dunt, *Marine Cargo Insurance* (Informa, 2009), para 1.11-1.13.

<sup>722</sup> Similar to F.P.A. clauses, but with the addition of heavy weather and sea water damage.

<sup>723</sup> It covers the main transit risks, such as fire, collision, stranding, sinking and general average.

<sup>724</sup> The Incoterms rules are an internationally recognised standard and are used worldwide in international and domestic contracts for the sale of goods. First published in 1936, and the latest Incoterms published in 2010, Incoterms rules provide internationally accepted definitions and rules of interpretation for most common commercial terms by clarifying the tasks costs and risks involved in the delivery of goods from sellers to buyers. See <<http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010>>, accessed 27 January 2013.

### 8.3.2.1 Insurance by the buyer

Under EXW, FCA and CPT, cargo insurance is obtained by the buyer. Here, EXW and CPT will be discussed in more detail.

#### EXW (Ex-Works)

This term can be used with any mode of transportation. The seller makes the goods available to the buyer at his premises, e.g. factory, warehouse, on a specified date or within a specified time period. The buyer becomes responsible for loss or damage to the goods on the agreed upon date, or when the goods are picked up within the specified time period, or on expiration of the specified time period.<sup>725</sup> Unless specifically agreed to, the seller is not responsible for loading the goods onto the conveyance at his premises. Regarding cargo insurance, because the buyer is responsible for loss or damage during the main carriage, EXW shipments would be insured under the buyer's cargo policy.

Here, one of the questions that may arise is, since most cargo policies attach on individual shipments when they leave the warehouse of origin<sup>726</sup>, the buyer may not have insurance for the period of time the goods may be on the premises of the seller, or during loading onto the conveyance, or after loading while awaiting transit even though he is responsible for loss or damage. Therefore, when purchasing goods EXW the buyer should seek an insurer that will provide coverage during these situations.

#### CPT (Carriage Paid To)

This term can be used with any mode of transportation. The seller pays all the costs, including freight, until the goods are delivered at a named place in the country of destination.<sup>727</sup> Although the seller agrees to pay freight costs to destination, the seller's responsibility for delivery ends when he has delivered the goods into the custody of the carrier, or party acting on the carrier's behalf, at a named point in the country of shipment. The actual place of delivery could be anywhere in the country

---

<sup>725</sup> Incoterms 2010, EXW B5.

<sup>726</sup> For instance, the warehouse to warehouse or the transit clauses of the open policy. For more information about the transit clause, see paragraph 8.3.3.4

<sup>727</sup> Incoterms 2010, CPT A6.

of shipment, including the premises of the seller, or at the port of shipment, or anywhere in between. That is to say, the risk is transferred to the buyer upon delivery of the goods to the carrier in the country of origin. The seller is responsible for loss or damage until the goods are delivered to the first carrier, if there are subsequent carriers, at the named point or place.<sup>728</sup> The buyer is becoming responsible thereafter. Regarding cargo insurance, because the buyer is responsible for loss or damage during the main carriage CPT shipments would be insured under the buyer's cargo policy. Insurance would attach at the time the goods are delivered to the first carrier as agreed.

Although the transfer of responsibility for loss or damage is clearly defined in Incoterms, insurance questions often arise when loss or damage occurs before the buyer is responsible and before coverage attaches under the buyer's insurance policy. If there is any doubt in the buyer's mind about whether or not they will have proper recourse against the seller for loss or damage during the seller's responsibility, the buyer may wish to review these doubts with their insurers and arrange additional coverage in the form of 'contingency' insurance.

### **8.3.2.2 Insurance by the seller**

Under CIP, DAT, DAP and DDP, cargo insurance is obtained by the seller. Here, CIP will be discussed in more detail.

#### **CIP (Carriage and Insurance Paid to)**

This term can be used with any mode of transportation. The seller pays all the costs, including freight and insurance, until the goods are delivered at a named place in the country of destination.<sup>729</sup> However, the seller is responsible for loss or damage until the goods are delivered to the carrier at the named point or place. The buyer is becoming responsible thereafter. Here, the risk is transferred to the buyer upon delivery of the goods to the carrier, or if there are subsequent carriers to the first carrier, at the country of origin. CIP terms obligate the seller to provide insurance on behalf of the buyer and therefore CIP shipments would be insured under the seller's

---

<sup>728</sup> Incoterms 2010, CPT A4 and A5.

<sup>729</sup> Incoterms 2010, CIP A6.

cargo policy.<sup>730</sup> Although the buyer is responsible for loss or damage during the main carriage, under CIP terms the seller agrees to provide insurance for the buyer's account. Therefore, CIP shipments are insured under the seller's cargo policy. The sale contract should clearly state the type of insurance to be provided. Incoterms state that "failing express agreement to the contrary, the insurance shall be in accordance with minimum cover of the Institute Cargo Clauses".<sup>731</sup> Insurance must also be in negotiable form enabling losses to be payable to the buyer or other party having an insurable interest in the shipment at the time of loss. Proof, or evidence, of insurance is required which is usually accomplished by issuance of a Special Cargo Policy or Certificate of Insurance by the seller or his insurer. Insurance should cover the shipment from the place of origin to the final destination of the buyer.

These are the main forms of contract of sale for exports or imports. The terms CIP and CPT can be used for all modes of transport, but are particularly suitable for container transport and all forms of multimodal traffic, including roll on-roll off operations by trailers and ferries.<sup>732</sup> Moreover, a seller or a buyer will need to effect cargo insurance according to the form of contract of sale and a freight forwarder will also need cargo insurance where they arrange insurance on behalf of the cargo owners.

### **8.3.3 The scope of cargo insurance cover**

Cargo insurance is very flexible in its conditions and cover can range from the most limited to the most comprehensive depending on the wishes of the assured and his willingness to pay the premium. Under the modern system for insuring cargoes, the three sets of clauses are named the Institute Cargo Clauses (ICC) (A), (B) and (C) 1/1/2009. A brief development of the Institute Cargo Clauses is also explored.<sup>733</sup>

---

<sup>730</sup> Incoterms 2010, CIP A3.

<sup>731</sup> *Ibid.*

<sup>732</sup> C Murray, et al, Schmitthoff's The law and Practice of International Trade (12th edn, Sweet & Maxwell, 2012), 2-046; P Todd, Cases and Materials on International Trade Law (Sweet & Maxwell, 2002), 15-026

<sup>733</sup> See J Dunt, *Marine Cargo Insurance* (Informa, 2009), para 1.11-1.13.

### 8.3.3.1 Institute Cargo Clauses (A) (B) (C)

The widest cover is afforded by the ICC (A), which replace and substantially reproduce the terms of the former All Risks Clauses. The name of the clauses has been changed so as to guard against suggestions that the words “All Risks” might be said to misrepresent their scope. The ICC (B) and (C), although they respectively replace the old W.A and F.P.A. Clauses, are far from being mere translations of the former clauses. The new clauses are no longer based on the old S.G. perils, and no longer contain any free from average or franchise provision. Instead, the ICC (B) and (C)<sup>734</sup> each contains a list of specified perils in the Risks Covered Clause, which in modernised and simplified language reflects the terms that followed the average exclusion in the old W.A. and F.P.A. Clauses, with some important modifications. The ICC (B) includes some additional perils, which are not insured by the ICC (C). The additional perils, under the ICC (B), are earthquake, volcanic eruption or lightning,<sup>735</sup> washing overboard,<sup>736</sup> entry of sea, lake or river water into the vessel, craft, hold, conveyance container or place of storage<sup>737</sup> and total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft.<sup>738</sup>

### 8.3.3.2 All risks: ICC (A)

The usual practice is to insure cargo on all risks terms under the Institute Cargo Clauses (A).<sup>739</sup> Clause 1 of the ICC (A) 2009 provides that “This insurance covers

---

<sup>734</sup> Clause 1 of the ICC (C) 2009 provides that “This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below,

1.1 loss of or damage to the subject-matter insured reasonably attributable to

1.1.1 fire or explosion

1.1.2 vessel or craft being stranded grounded sunk or capsized

1.1.3 overturning or derailment of land conveyance

1.1.4 collision or contact of vessel craft or conveyance with any external object other than water

1.1.5 discharge of cargo at a port of distress,

1.2 loss of or damage to the subject-matter insured caused by

1.2.1 general average sacrifice

1.2.2 jettison.

<sup>735</sup> Clause 1.1.6 of the ICC (b) 2009.

<sup>736</sup> Clause 1.2.2 of the ICC (b) 2009.

<sup>737</sup> Clause 1.2.3 of the ICC (b) 2009.

<sup>738</sup> Clause 1.3 of the ICC (b) 2009.

<sup>739</sup> Insurance cover is available against named perils under the Institute Cargo Clauses (B) and, in a more limited form against major casualties, under the Institute Cargo Clauses (C), but these forms of

all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.”

Here, the question arises as to whether the description “all risks” actually covers all possible risks or it is a term of art with a limited meaning so that, for example, it does not cover, *inter alia*, losses caused by inherent vice or mere wear and tear. All risks cover was defined by Lord Sumner in *British & Foreign Marine Insurance Co v. Gaunt* as follows<sup>740</sup>:

“There are, of course, limits to ‘all risks’. They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear.... It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of that subject-matter, being what it is, in the circumstances under which it is carried.”

Insofar as Lord Sumner refers to inherent vice and wear and tear, this reflects section 55(2)(c) of the Marine Insurance Act 1906, which states that, unless the policy otherwise provides, “the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage [or] inherent vice or nature of the subject-matter insured”. It seems clear, therefore, that the expression “all risks”, which is a term of art, does not extend to loss caused by these matters. Nevertheless, ordinary leakage, wear and tear and inherent vice are expressly excluded by the Institute Cargo Clauses.<sup>741</sup>

Moreover, although there are the war and strikes exclusions in clauses 6 and 7, an insurance cover is almost invariably purchased for these risks under the Institute War Clauses (Cargo) and the Institute Strikes Clauses (Cargo).

### **8.3.3.3 Delay**

In the modern global environment, delay in delivery is becoming of increasing concern in connection with effective supply chain management. With the exception of the Hague and Hague-Visby Rules in the field of sea carriage, all unimodal transport conventions for the carriage of goods by land, sea, air and inland waterways, as well as the MT Convention contain rules to regulate liability for delay in delivery.

---

cover are only used for special commodities and trades and for cargo reinsurance.

<sup>740</sup> [1921] 2 AC 41 (HL), at 57.

<sup>741</sup> Clause 4.2 excludes “ordinary wear and tear” and “ordinary leakage”. Clause 4.4 excludes “inherent vice and nature of the subject matter insured”.

The latest convention, the Rotterdam Rules<sup>742</sup> also provide for payment up to two and one-half times the freight payable for the goods delayed but not exceeding the total freight payable under the transport documents concerned.

However, cargo insurers have usually not given any indemnity for delay in delivery. Both the Institute Cargo Clauses 2009<sup>743</sup> and the Marine Insurance Act 1906<sup>744</sup> expressly exclude losses due to delay. However, the Act specifically states “unless the policy otherwise provides” and there is no reason why cargo insurance should not be extended to provide this form of indemnity.<sup>745</sup>

Here, even if the cargo arrived and the cargo is in good condition, but they have no value because of the delay, there is no cover for that. For example, a consignment of diaries or calendars was delayed, and they arrived in good condition, but they are now of no commercial value because they have lost their market value. Thus, seasonal goods that arrive intact, but are worthless due to the delay, cannot be the subject of a valid cargo insurance claim.<sup>746</sup>

However, the insurance remains in force under clause 8.3 of the ICC during delay beyond the control of the Assured. Dunt<sup>747</sup> provides an example for that. Assume that a ship is delayed by a hurricane, because it is necessary to heave to, and the cargo hatches are nevertheless broken open and the cargo is wet damaged. In these circumstances there is cover for loss of and damage to the cargo caused by the storm which occurs during the extended period of the cover caused by the delay to the ship. Here, if a ship is delayed in similar circumstances by a storm and a perishable cargo deteriorates, or there is a loss of market due to the passage of time and not because of any physical damage directly caused by the storm, then there will

---

<sup>742</sup> Article 60 of the Rotterdam Rules.

<sup>743</sup> Clause 4.5 of the ICC (A) 1/1/2009 states that in no case shall this insurance cover “loss damage or expense caused by delay, even though the delay be caused by a risk insured against” (except expenses payable under Clause 2 above)

<sup>744</sup> Section 55 (2) of MIA 1906.

<sup>745</sup> Delay is often covered as an additional risk, though, in which case the cargo insurance makes its own provision for compensation and takes care of the obvious difficulty where goods turn up after the chosen period of delay has expired. M Marshall, ‘Insurance and the Multimodal Convention’, paper delivered at the Multimodal Transport - The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980), D8.

<sup>746</sup> *Federation Insurance Company of Canada v Coret Accessories Inc & Hirsch* [1968] 2 Lloyd’s Rep 109.

<sup>747</sup> J Dunt, *Marine Cargo Insurance* (Informa, 2009), para 11.64.

no cover for that loss which will be caused by delay.<sup>748</sup> Thus, there will be a cover for some delay, but the cover is nevertheless limited.

#### **8.3.3.4 The duration of transit under cargo insurance<sup>749</sup>**

Another important question may arise as to whether the scope of cargo insurance would cover the whole journey of multimodal transport of goods. Under the old standard policy, the insurance only covered the goods against the perils of the sea and, therefore, it attached from when the goods were loaded on board the ship and terminated on the moment the goods were discharged. However, the first standard Institute Cargo Clauses of 1912 extended the duration of the transit cover by a warehouse to warehouse clause.<sup>750</sup> Therefore, the “transit clause” or “warehouse to warehouse clause” is included in the current Institute Cargo Clauses 1982 and 2009. Here, one of the questions that arise is that why it was amended and why it has been extended in scope in order to cover land stage as well. This is because cargo is frequently carried on a door-to-door or warehouse to warehouse basis, which includes carriage by several modes of transport. This is critical to multimodal transport. This extension would now match the multimodal transport regime, such as the Rotterdam Rules and the EU Draft Regime. However, there might be gaps in insurance coverage in the multimodal context and cargo interests might end up bearing the risk for a certain period of time before the insurance enters into force.<sup>751</sup>

---

<sup>748</sup> Ibid.

<sup>749</sup> See R Merkin, *Colinvaux & Merkin's Insurance Contract Law* (Sweet & Maxwell, 2013), B0046-B0048; F Lorenzon, *CIF and FOB Contracts* (5th edn, Sweet & Maxwell, 2012), paras 6.066-6.070; J Dunt, *Marine Cargo Insurance* (Informa, 2009), paras 11.1-11.70; J Gilman, *Arnould's law of marine insurance and average* (17th edn, Sweet & Maxwell, 2008), paras 13.37-13.40; H Bennett, *The Law of Marine Insurance* (2nd edn, Oxford, 2006), paras 17.11-17.21.

<sup>750</sup> The warehouse to warehouse clause in the ICC 1912 provides that “including all risks covered by this Policy from shippers’ or manufacturers’ warehouse until on board the vessel, during transhipment if any, and from the vessel whilst on quays, wharves or in sheds during the ordinary course of transit until safely deposited in consignee’s or other warehouse at destination named in the policy.”

<sup>751</sup> Soyer well pointed out those gaps that exist in the standard insurance cover and these points will be discussed below together with interpretation of the transit clause. See B Soyer, ‘Cargo insurance in the multimodal context: Full and complete cover?’, in Chapter 16 of B Soyer and A Tettenborn (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21<sup>st</sup> Century* (Informa Law, 2013), 286-307.

#### 8.3.3.4.1 The transit clause under the Institute Cargo Clauses 2009

ICC 2009<sup>752</sup> provides that “this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit continues during the ordinary course of transit and terminates on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance.”<sup>753</sup> Transit also terminates “when the assured or their employees elect to use any warehouse<sup>754</sup> or any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit.”<sup>755</sup> There is another provision that “transit terminates on the expiry of 60 days after completion of discharge overseas of the subject-matter insured from the overseas vessel at the final port of discharge.”

#### **Attachment of the insurance**

The starting point for the cover under the ICC 2009 is ‘the time the goods are first moved in the warehouse or at the place of storage for the purpose of the immediate loading’ and this coverage has been extended from the cover under ICC 1982, where the insurance attaches for the time the goods leave the warehouse or place of storage. Therefore, the ICC 2009 covers damage to the goods incurred inside the warehouse of origin. It seems that it provides a full and complete coverage to the cargo interests, but it actually does not. Firstly, there will be no cover for loss or damage arising at any earlier stage. For instance, if damage occurs during the periods when the goods are being prepared for their journey, or during the time when the goods are being conveyed to their departure point or waiting point, so long as the goods have not moved in the warehouse for the purpose of the immediate loading, the goods will not be covered. There will be another situation where the goods are loaded into a container, but loading of the container onto the lorry is then delayed due to the weekend holiday. Here, Soyer<sup>756</sup> raised the question whether the risk attaches as

---

<sup>752</sup> Clause 8 of the ICC 2009.

<sup>753</sup> Clause 8.1.1 of the ICC 2009.

<sup>754</sup> Clause 8.1.2 of the ICC 2009.

<sup>755</sup> Clause 8.1.3 of the ICC 2009.

<sup>756</sup> B Soyer, ‘Cargo insurance in the multimodal context: Full and complete cover?’, in Chapter 16 of

soon as the goods are moved to be loaded into the container or it attaches when the container is first moved to be loaded onto the lorry. The logical answer would be that if the goods are being prepared, packed and stowed in containers, staying in the warehouse over the weekends without the purpose of the immediate loading into or onto the carrying vehicle, this would not form part of the insured transit.

Consequently, the cargo interests are still exposed to risks that arise before loading starts, during the pre-transit movement or during the process of stowing the goods in containers.<sup>757</sup> Therefore, cargo interests are required to supplement standard cargo policies with ‘typed clauses’, which are commonly referred to as ‘voyage clauses’ in order to fill the gap in insurance coverage by extending the cover to the periods before loading.<sup>758</sup>

### **During the ordinary course of transit**

The risk continues during the ordinary course of transit and until a terminating event occurs. Here, the meaning of ‘ordinary course of transit’ was considered in *Mirvaor Ltd v National Insurance Co Ltd*,<sup>759</sup> where it was said that the ordinary course of transit would not be interrupted or terminated unless it had been brought about by a voluntary decision or act that can be shown to be within the assured’s control. In that case, the goods were deposited at an intermediate warehouse from which they were stolen, and the policy was held by the court to respond to the loss in the absence of proof of some intention on the part of the assured to distribute the goods to customers from that warehouse. Thus ‘ordinary course of transit’ would include, for instance, stoppages and delays which are bound to occur in the course of the voyage, and would probably also include delays outside the assured’s control which regularly but do not always occur in a normal voyage.<sup>760</sup> It is suggested that it may be easier to identify the types of circumstances which will not fall within ordinary course of transit. For instance, in *Safadi v Western Assurance*, a deliberate decision by the assured to leave the goods in store to obtain some commercial advantage was held to

---

B Soyer and A Tettenborn (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21<sup>st</sup> Century* (Informa Law, 2013), 289.

<sup>757</sup> *Ibid.*

<sup>758</sup> *Ibid.*

<sup>759</sup> [2003] HKEC 237.

<sup>760</sup> J Gilman, *Arnould's law of marine insurance and average* (17th edn, Sweet & Maxwell, 2008), paras 13.40.

fall outside the ordinary course.

### **Termination of the insurance**

The cover terminates following the occurrence of one of the events specified in clauses 8.1.1 to 8.1.3 or the expiry of 60 days from discharge under clause 8.1.4, whichever first occurs. There is one modification from the ICC 1982, in that the risk under the ICC 2009 extends until the goods have been unloaded in the warehouse, whereas the ICC 1982 excluded unloading losses and terminated the risk when the goods were delivered to the final warehouse. The words ‘final warehouse or place of storage’ do not include transit sheds<sup>761</sup> or customs compounds,<sup>762</sup> given the obvious intention of the assured to transfer the goods elsewhere. For instance, in *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co*,<sup>763</sup> where two cargoes of cars were being shipped to the Turks and Caicos Islands via the Dominican Republic. They were unloaded in the Dominican Republic awaiting transshipment, and were voluntarily placed in the custody of Dominican customs officers due to apparent defects in the shipping documents. The cars were stored by the custom authorities in a customs compound, but in the event they were never released and were ultimately misappropriated by local customs officers. The issue was whether the transit had come to an end by the time of the loss. The Court of Appeal held that the goods were never intended to stay in the Dominican Republic, so the transit could not be regarded as having come to an end and in the present case, a customs compound could not in any event amount to a ‘final place of storage’, as a customs compound was similar to a transit shed in that both were no more than temporary holding areas.

Another issue is that the cover terminates on the expiry of 60 days after completion of discharge overseas of the subject-matter insured from the overseas vessel at the final port of discharge. Therefore, if goods are deposited in transit sheds or other temporary warehouses, the cover will not terminate until the expiry of 60 days from delivery or unless the goods are delivered to a warehouse other than in the course of transit. Here, this provision might work against the interests of the assured particularly in cases where the insured goods, which are subject of a contract of sale,

---

<sup>761</sup> *John Martin of London Ltd v Russel* [1960] 1 Lloyd’s Rep 554.

<sup>762</sup> *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd* [2003] 1 Lloyd’s Rep 131.

<sup>763</sup> [2003] 1 Lloyd’s Rep 131.

are rejected after inspection at the port of discharge. The goods may be returned to their place of origin or alternatively redirected to another potential buyer in a different country. However, in that case, the original policy does not cover the periods of the return voyage or voyage to an alternative buyer.<sup>764</sup> Although the policy remains in force during the period when the goods are held at the port of discharge for 60 days, cargo interests are required to obtain another insurance covering the period after 60 days or the return voyage or voyage to an alternative buyer.

Although the transit clause under the ICC 2009 extends the duration of insurance cover until the completion of unloading from the carrying vehicle or other conveyance, as Soyer<sup>765</sup> pointed out, there will be the situations where loss of or damage to the goods falls outside the scope of transit clause. For example, if any loss of or damage to the goods occurred while de-stuffing containers after their discharge from the carrying vehicle, it will not be covered. Therefore, cargo interests would be required to extend the cover provided by standard cargo clauses to include de-stuffing containers or unpacking with a tailor-made clause.<sup>766</sup>

### **8.3.3.5 Insurance cover and international sale contracts**

#### **8.3.3.5.1 Buyer's insurable interest**

However, the practical questions may arise as to the passing of risk under the contract of sale and the insurance cover available under standard terms. Where the goods are damaged before loading onto the first road carrier, the CIP buyer may sue on the policy, provided that it has been assigned to the buyer, although it has no insurable interest in the goods at the time. The similar situation was held in *J Aron and Co (Inc) v Miall*,<sup>767</sup> where a quantity of cocoa, which was covered from the time of leaving its original warehouse in the African interior until delivery at a warehouse in Boston, was ultimately resold to the plaintiffs under a CIF contract. The cocoa was

---

<sup>764</sup> Clause 8.2 of the ICC 2009.

<sup>765</sup> B Soyer, 'Cargo insurance in the multimodal context: Full and complete cover?', in Chapter 16 of B Soyer and A Tettenborn (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21<sup>st</sup> Century* (Informa Law, 2013), 296.

<sup>766</sup> *Ibid.*

<sup>767</sup> *J Aron and Co (Inc) v Miall* (1928) 34 Com Cas 18.

in fact damaged before shipment, and the underwriters declined a claim under the policy on the ground that at the time when the goods were damaged the plaintiffs had no insurable interest in them.<sup>768</sup> The Court of Appeal, affirming a decision by Roche J, held that by assignment of the policy, the assignee became entitled to sue on any claim of the assignor, whether or not it had an interest in the subject-matter insured at the time of the loss. The plaintiffs therefore were entitled to recover. As the CIP contract is an extended version of a CIF contract, this case would apply to the CIP contract as well. The question as to whether the proceeds or any part thereof are to be held for the benefit of the assignor is to be determined as between the assignee and the assignor, and was of no concern to the underwriter.<sup>769</sup> Soyer<sup>770</sup> also mentioned that, generally speaking, in those circumstances, the buyer would not suffer any loss, as he would be in a position to reject the damaged goods under the sale contract. However, as he pointed out, claiming under the cargo insurance may still be a better option for him because there would be several situations in which the loss suffered does not justify rejection of the goods or if he has paid for the goods in advance and the seller is now insolvent.<sup>771</sup>

#### 8.3.3.5.2 Seller's insurable interest

Here, another question may be concerned with the CIP seller because the CIP seller has no insurable interest in the goods once goods are loaded. The similar situation was held for CIF seller and they, having no insurable interest in the goods subsequent to their shipment, were denied a right to claim under a special policy issued pursuant to an open cover by the United States Court of Appeals for the Fifth Circuit in *York-Shiplely Inc v Atlantic Mutual Insurance Co.*<sup>772</sup> There a boiler was damaged while in transit from Miami to Guatemala. The sellers held an open cargo policy issued by the respondent company covering all their international shipments and permitting them to issue special policies when selling on terms which require them to obtain

---

<sup>768</sup> Section 6(1) of the MIA 1906 requires the assured to have an insurable interest in the subject-matter insured at the time of loss.

<sup>769</sup> F Lorenzon, *CIF and FOB Contracts* (5th edn, Sweet & Maxwell, 2012), para 6.076.

<sup>770</sup> B Soyer, 'Cargo insurance in the multimodal context: Full and complete cover?', in Chapter 16 of B Soyer and A Tettenborn (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21<sup>st</sup> Century* (Informa Law, 2013), 306.

<sup>771</sup> *Ibid.*

<sup>772</sup> *York-Shiplely Inc v Atlantic Mutual Insurance Co*, 474 F. 2d 8(1973).

insurance for the benefit of customers abroad. The sellers who sold the boiler in question on CIF terms issued such a special policy in the instant case. But their right to sue on this policy was denied. The court stated that “once the sellers put the boilers in the possession of the carrier in Miami, they no longer had any interest in them... They had no insurable interest in the cargo and, consequently, ... no standing to sue.”<sup>773</sup> In this situation, as discussed above, the buyer as an assignee became entitled to sue on any claim of the assignor, whether or not it had an interest in the subject-matter insured at the time of the loss. Therefore, the seller may ask the buyer to sue the carrier.

#### 8.3.3.5.3 Gap in insurance cover due to the sale contracts

Another situation may arise where the cargo interests start bearing the risk of loss before the cover under the cargo insurance policy attaches because of discrepancies between the passing of risk under the contract of sale and the insurance cover available under standard terms. For instance, if a cargo of canned mushrooms and canned asparagus is sold by a seller under Ex Works terms. The buyer arranges insurance cover, e.g. under ICC 1982. Under the sale contract, the risk passes to the buyer when the goods are placed at his disposal on the day agreed, whereas the insurance cover under the ICC 1982 attaches only when the goods leave the warehouse. Therefore, there is a gap in insurance cover if the buyer cannot take the delivery of the goods at the agreed time. Here, the risk will pass onto him, whereas the cargo insurance will not attach at that point. Accordingly, any loss arising whilst the goods are in the premises of the seller will need to be borne by the buyer. Therefore, the buyer is required to draft tailor-made clauses to extend the cover to the point in time when the risk passes to the buyer.<sup>774</sup>

### 8.3.4 Relationship between cargo insurance and multimodal regime

---

<sup>773</sup> *Ibid*, para 7.

<sup>774</sup> B Soyer, ‘Cargo insurance in the multimodal context: Full and complete cover?’, in Chapter 16 of B Soyer and A Tettenborn (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21<sup>st</sup> Century* (Informa Law, 2013), 306.

### **8.3.4.1 Impact on cargo insurance**

It seems that there will be several aspects to be of particular interest to cargo insurers and, indirectly, to their assureds which the Rotterdam Rules and EU Draft Regime could bring about.

#### 8.3.4.1.1 Certainty and clarity of the new uniform rules

Under the current multimodal regimes, if goods are lost or damaged in the course of a multimodal transport, the possibility of recovery from a multimodal carrier will depend upon the mode of transport involved at the time when the loss occurred, and whether or not the transport was governed by an international convention relating to this particular mode of transport. As seen earlier,<sup>775</sup> the current multimodal regimes all have different monetary limits of liability, different time limits for suit, and varying circumstances in which the carrier is exempted from liability. The complexity of the situation has consequently caused muddles and uncertainty in the field of multimodal transport liability and resulted in difficulties when determining applicable liability rules in cases of loss, damage or delay. The present complicated and fragmented regime governing multimodal transport creates uncertainty, which in turn creates costly litigation, transaction costs and rising insurance costs.<sup>776</sup>

However, the new Rotterdam Rules and EU Draft Regime provide for a uniform set of rules to govern carrier's liability for loss, damage or delay arising from multimodal transport. They are specially designed for multimodal transport, and it is expected that they will contribute to the greater certainty and clarity in the context of multimodal transport, at least compared to the current complicated and fragmented multimodal regimes. For example, both solutions provide for the solution to the problems of non-localised loss. Furthermore, they are classified as an international convention, they will not be affected by any regional/sub-regional or national multimodal regimes.

---

<sup>775</sup> See paragraphs 3.3.2.1 and 3.3.2.2.

<sup>776</sup> Furthermore, this problem is more serious among the developing countries having small and medium shipping companies as if there is no predictable legal framework, 'equitable access to markets and participation in international trade' would be much harder for those companies. UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003), 10.

#### 8.3.4.1.2 Higher limits of liability

Under the new Rotterdam rules and EU Draft Regime<sup>777</sup> the new limits have increased so that it will obviously enable cargo insurers to recover more recovery than that possible under the other international regimes. For instance, the limits under the Hague-Visby Rules are 666.67 SDR per package or unit and 2 SDR per kilogram,<sup>778</sup> have been increased in the Hamburg Rules to 835 SDR and 2.5 SDR respectively and have been further increased in the Rotterdam Rules to 875 SDR and 3 SDR. This is, on the basis of the kilogramme limits, 50% more than the recovery possible under the Hague-Visby Rules and 20% more than that under the Hamburg Rules. Furthermore, in case of packages of relatively light weight the Rotterdam Rules package limit would be significantly higher than the CMR limit per kilogram. For example, for a package of 50 kilograms the CMR limit is 450 SDR and the Rotterdam Rules package limit is 875 SDR.<sup>779</sup> The EU Draft Regime also provides for a higher limit of 17 SDR and even the revised EU Draft Regime also provides for the limit based on the Rotterdam Rules.

Therefore, the Rotterdam Rules and EU Draft Regime generally provide a moderate increase in the level of liability of the multimodal carrier. For the insurance industry, the immediate effect will be that cargo insurers may exercise recourse against the carrier and their P&I clubs to a greater extent than under the current multimodal regimes.

#### 8.3.4.1.3 Deletion of the defences of nautical fault

The current multimodal contracts, for example, based on the FIATA bills of lading or UNCTAD/ICC Rules, still provide for the exceptions of 'act neglect or default in the navigation or management of the ship' and 'fire'. However, under the Rotterdam Rules and EU Draft Regime, the defences of nautical fault and fire have been removed and this has been considered to be the most important change. These defences are characteristic for the Hague-Visby system and are a distinguishing characteristic of maritime law. They are also closely connected with general average,

---

<sup>777</sup> Or even in the revised EU Draft Regime.

<sup>778</sup> Article IV, rule 5(a) of the Hague-Visby Rules.

<sup>779</sup> See, F Berlingieri, 'A review of some recent analyses of the Rotterdam Rules' (2009) *IL DIRITTO MARITTIMO*, 959; F Berlingieri, 'Multimodal Aspects of the Rotterdam Rules', *Colloquium on the Rotterdam Rules* (Rotterdam: September 21, 2009), 5.

the most venerable concept of traditional maritime law. As a result, the abolition of the exceptions of nautical fault and fire will enable cargo insurers to recover probably the most significant losses that may occur.

#### 8.3.4.1.4 Volume contracts under the Rotterdam Rules

Here, there might be a different situation in cases where the volume contracts are utilised by carriers as a means of avoiding a regulatory solution under the Rotterdam Rules. Carriers may ask shippers to enter into volume contracts by offering a contract with minimal liability conditions, for example liability under the Hague-Visby Rules, against a lower freight rate than that would have been valid for a normal shipment under the Rotterdam Rules. Therefore, if there was a reduction of the liability, for instance, like the exceptions and limits under the Hague-Visby Rules, this volume contract allowed by article 80 of the Rotterdam Rules may adversely affect the prospects of the recovery action. This might be true. However, in most cases the insurance claims will be settled in favour of the consignee, because, in general, the goods are at the risk of the buyer during the transit and the reduction of the liability under the volume contracts is agreed between the carrier and the shipper, not consignee. This would not be binding on the consignee and, consequently, on the insurers. However, according to article 80.5 of the Rotterdam Rules, if the consignee accepts the terms agreed between the carrier and the shipper, this would affect the right of subrogation of the insurer. Therefore, if carriers succeed in reducing their liability under volume contracts and it is agreed with shippers and consignees, they could transfer greater cargo liabilities to shippers and their cargo insurers.

#### 8.3.4.1.5 Relationship between the shippers and the insurers

If a cargo owner has an adequate cargo insurance, he need not worry too much about this rather complicated situation, because his insurers are directly liable to their assured irrespective of whether the carrier is liable or not. However, insurers are concerned very much about pursuing recoveries against carriers under subrogation rights. In addition, the extent to which they are successful in this will benefit the assured, because this in turn should result in a lower premium for the account in question. Thus, ultimately the cargo owner is concerned about the liabilities of carriers.

#### 8.3.4.1.6 Relationship between insurance premium and freight rates

Another question arises as to how new multimodal regimes such as the Rotterdam Rules and EU Draft Regime would affect cargo insurance. The most likely situation on this matter would be that there will be no difference. If the Rotterdam Rules enter into force, and consequently the Rules impose greater liabilities upon carriers, the most likely effect on cargo insurance may be that improved recoveries resulting in lower net claims on cargo owners could force down premium rates. Although, recoveries from carriers are only one of the factors to be taken into account by insurers in rating a risk,<sup>780</sup> this improved recoveries would be benefits for cargo owners and cargo insurers. However, because of increased liabilities, the carrier has to pay an extra call to his liability insurers, and they, in turn, have to pass on any extra charge to the customers. Thus, any lower premium rates on cargo owners' contracts would no doubt be compensated for by higher freight charges by the carriers.

#### 8.3.4.2 Mismatch of the rules

One of the crucial issues is how the insurance cover and the liability rules match each other and if there is a mismatch, who is going to insure it. Here, one of the good examples is a delay issue. Again, we are trying to compare whether the cargo insurance matches the Rotterdam Rules and EU Draft Regime liability. Here, the Rotterdam Rules and EU Draft Regime now clearly have liability for delay, whereas the cargo insurance cover excludes most of delay,<sup>781</sup> i.e. "loss, damage or expense

---

<sup>780</sup> In fixing a premium for any cargo insurance, an insurer will have regard to several factors, such as the type of goods and their susceptibility to loss or damage allied with the packing used and their protection for the journey; the journey to be undertaken, its length and whether the route, ports or airports have a good or bad record for loss, or damage; the reputation of the carriers in charge of the goods; the method of transit to be used, in particular in relation to the vessel, its flag, age, ownership and whether it is classed in any of the recognised Classification Societies; the claims experience of the individual assured, as the net claims are counted in the experience it will be seen that the greater these recoveries the lower ultimate premium should be paid by the assured. See J Isaacs, 'Cargo Insurance in relation to Through Transport', paper delivered at the Through Transport: problem areas, documentation and insurance seminar organised by Lloyd's of London Press Ltd (The London Press Centre, 15-16 June 1978), 5-6.

<sup>781</sup> See paragraph 8.3.3.3.

caused by delay, even though the delay is caused by a risk insured against”.<sup>782</sup>

It is important to find out whether there is a mismatch between the insurance cover and liability regime, or between cargo owner’s loss and the carrier’s. Otherwise, we are going to have two claims against the carrier or the carrier’s liability insurance. First, one by the cargo owner for loss because of delay and, secondly, a claim by the subrogated cargo insurers for what they have to pay out under the cargo insurance policy. It is very inefficient in terms of expenses and this may not be a desirable approach. Thus, it is necessary to make sure that all are back-to-back.

## **8.4 Insurance for multimodal carriers**

A cargo owner will insure his cargo against loss or damage during transit and the insurer will pay if loss or damage occurs as a result of an insured peril. Such a claim will be payable to the cargo owner regardless of who was legally liable for causing the loss or damage. Having paid the claim, however, the cargo insurer will usually seek to recover under subrogation from the multimodal carrier if the cargo insurer can show that the multimodal carrier was legally liable for the event leading to the claim. Here, the multimodal carrier is exposed to a number of risks against which he must obtain insurance or financial support of any kind, which will be discussed as follows.

### **8.4.1 Liability insurance cover**

When the multimodal carriers take out insurance for the risks, they have a couple of ways of obtaining cover, i.e. either from the insurance market or mutual insurance clubs.

#### **8.4.1.1 The insurance market**

Multimodal carriers can obtain liability cover from the insurance market comprising

---

<sup>782</sup> Clause 4.5 of the Institute Cargo Clauses (A), (B), (C) 2009.

Lloyd's and the insurance companies in the UK and in many countries all over the world. This market consists of enterprises who set out to underwrite risks on fixed premiums at a profit. In this market place underwriters tend to be grouped into very distinct sectors, such as marine, non-marine, aviation, motor, life, etc., and these divisions tend to be reflected in the structure of most larger broking houses.

#### **8.4.1.2 Mutual insurance clubs or associations**

The features of the mutual club are that the assureds, who are the members, contribute to the club's insurance fund in proportion to their individual risks, as rated by the underwriter. In this category, there are Protection & Indemnity (P & I) Club and Through Transport (TT) Club, which can provide liability cover to multimodal carriers.

##### 8.4.1.2.1 The P & I Club

The P & I Club is an association of commercial shipowners and charterers and other associated parties, which provides protection against a number of risks inherent in industrial ship operation. The essence of P & I Clubs is that they are mostly mutual associations, where the members are both insured and insurers, contributing to claims via so-called "calls". The protection and indemnity insurance offered by the P & I Clubs indemnifies an owner in respect of the discharge of legal liabilities they have incurred in operating their vessel.<sup>783</sup> However, the P & I Clubs are only relevant to the situations where ship owners extend their services to other modes of transport, e.g. multimodal transport.

##### 8.4.1.2.2 The TT Club<sup>784</sup>

The TT Club plays an important role in the context of multimodal transport. The TT Club has a similar mutual insurance. It is a leading provider of insurance and related risk management services for the international transport and logistics industry. Established in 1968, as a mutual association, the TT Club specialises in the insurance of liabilities, property and equipment for multimodal carriers. The TT Club

---

<sup>783</sup> SJ Hazelwood and D Semark, *P & I Clubs: Law and Practice* (4th edn, Lloyd's List, 2010), para 1.1.

<sup>784</sup> For more information about TT Club, see <http://www.ttclub.com>.

represents over 2,000 port/terminal businesses and transport and logistics operations and 70% of the world's container fleet. They include the world's largest shipping lines, the busiest ports across the globe, the biggest freight forwarders, the leading cargo handling terminal, as well as smaller companies. In particular, companies who operate freight services by sea, road, air, rail or inland waterway are included in this category of assured and, therefore, encompass freight forwarding, railway or stack train operations, NVOCs, inland waterway operators, trailer operators, parcel carriers, tank or container operators, air freight carriers, road hauliers and warehouse/depot operators.

TT stands for Through Transport and the Club and its insurances have their origins in the early container industry when door-to-door/multimodal transport operations became popular. Therefore, the TT Club specialise in providing a wide range of insurance for the liabilities for multimodal carriers including ship operators, transport and logistics operators. Having developed in step with the multimodal industry, the TT Club is recognised as an independent industry forum, liaising closely with national and international trade associations including FIATA.

TT insurance is designed specifically for operators within the global transport and logistics industry and is also designed to function alongside other insurances, such as ship owners' P&I cover. Other categories of cover include costs, fines and general average and salvage where appropriate. TT insurance also covers legal liabilities whether arising under contract, national law or international conventions. In addition to these liabilities, TT club insurance includes damage to equipment, errors and omissions, third-party liabilities (including bodily injury and pollution), costs and liability for fines or other penalties imposed by an authority.

## **8.4.2 Multimodal carriers and their insurance**

### **8.4.2.1 Shipowner container operators**

As far as shipowners are concerned, liabilities towards cargo owners are traditionally insured by their P & I Clubs. P & I Clubs were prepared to cover shipowners' liability to cargo on a door-to-door basis under a through transport or multimodal bill of lading. However, these P & I Clubs have provided liability cover up to limits

provided in the Hague or Hague-Visby Rules.<sup>785</sup> This is of particular importance when the goods are carried on a multimodal basis. If the shipowner wishes to contract for more onerous limits or stricter liability, they have to contribute more calls or otherwise seek cover for the excess elsewhere, for instance, either on the market or with the TT Club.

One of the major functions of P & I insurance is to cover a shipowner, or the charterer of a ship, for liability for loss of, or damage to, cargo if there has been a breach of the contract of carriage. This breach of contract usually means that something has happened to the cargo while it was on board the ship or being loaded or discharged, and for which the owner or charterer can be held responsible, i.e. shortage or damage to the cargo. Usually, the cargo insurers will pay the person or company who owns the cargo or the costs of loss or damage to that cargo. The cargo insurers will then seek to recover their losses from the shipowner or charterer. The P&I club will usually take over the handling of such claims on behalf of the assured. This is one of the reasons why evidence in the form of documentation, copies of the log book, surveys of damaged cargo, copies of tally books, dated photos of loading in the rain, and so on, are very important in establishing the exact reason for the damage.

#### **8.4.2.2 Freight Forwarders**

Freight forwarders play an important role in multimodal transport, sometimes acting as agent or principal. The freight forwarder, who issues a multimodal transport bill of lading, accepts responsibility for the performance of the contract of carriage. In general, liabilities of the freight forwarder towards cargo owners are insured by their TT Clubs. TT Clubs provide the standard trading conditions, such as the TT Club Series 600 Logistics Conditions or TT Club Series 400 Freight Forwarders' Conditions and the Standard Trading Conditions. Here, these TT Clubs have provided liability cover up to limits provided in the Hague or Hague-Visby Rules, or

---

<sup>785</sup> For example, Proviso (i) to Rule 25 xiii of Steamship Mutual P & I Club provides as follows; Hague Rules and Hague-Visby Rules

(i) Unless and to the extent that the Directors in their discretion otherwise determine or special terms have been agreed in writing by the Managers, there shall be no recovery from the Club in respect of any liabilities, costs and expenses which would not have been incurred or become payable by the Member if the cargo or other property had been carried under a bill of lading or other contract of carriage incorporating terms no less favourable to the carrier than the Hague Rules or Hague-Visby Rules.

sometimes in the UNCTAD/ICC Rules.

In some cases, the freight forwarder tries to trade on terms no more onerous than their national freight forwarding conditions, while in other cases, mandatory international conventions or national law will oblige them to accept a much greater measure of responsibility, in accordance with, for instance, the CMR, COTIF-CIM, Montreal Convention, or national laws such as the DCC<sup>786</sup> or HGB.<sup>787</sup> In such situations, they would hope to obtain full indemnity from the subcontractor responsible for the loss or damage, but sometimes the measure of recourse may be limited.<sup>788</sup>

### **8.4.3 Relationship between liability insurance and multimodal regime**

When it comes to the relationship between liability insurance and carrier's multimodal liability regime, the question may arise as to the impact of the multimodal liability regime upon the liability insurance.

#### **8.4.3.1 The impact on liability insurance**

It is certainly true that the allocation of liability between the carrier and cargo interests under the multimodal liability regime will determine the extent to which goods will be insured by cargo interests<sup>789</sup> and also the extent to which carriers will be liable for loss, damage or delay in delivery, and in turn, the extent to which carrier's liability insurers will be liable to the cargo insurers.

When claims are made against carriers by cargo interests for loss of or damage to goods, for example, the P & I Clubs cover the resulting liabilities, costs and expenses, which relates to the liability of the carrier under their contract of carriage to pay for any loss of or damage to goods. P & I Clubs will also provide cover in respect of liability under multimodal transport bill of lading or other forms of

---

<sup>786</sup> See paragraph 2.5.3.1.

<sup>787</sup> See paragraph 2.5.3.2.

<sup>788</sup> See paragraph 3.3.5.2.

<sup>789</sup> As far as cargo interests are concerned, although cargo insurers consider a carrier's liability regime as one of the factors for fixing a premium, what is more likely is that the multimodal liability rules could only affect the extent to which the cargo insurer can claim compensation from the carrier or liability insurer by way of subrogation. This is especially true in that goods are mostly insured by the ICC (A) "All Risks" cargo insurance policy.

contract approved by the managers, when carriers provide for carriage of goods by more than two modes of transport, partly to be performed by the insured vessel. P & I Clubs will also cover liability for loss or damage occurring during which the goods are being carried by other means of transport other than the entered vessel or handled outside the dock area of the ports of loading and discharge of the entered vessel.<sup>790</sup>

However, it should be noted that unless prior arrangements are made with the Club managers, the cover in respect of cargo liability contains an obvious echo of the provisions of the Hague-Visby Rules and is intended to ensure that the club is entitled to restrict its liability to what the member's liability would have been under their contract or carriage had it incorporated the Hague or Hague-Visby Rules. The clubs of the International Group have decided that subject to a discretion exercised otherwise under Club Rules, cover will extend to liabilities under the Hamburg Rules only where the contract of carriage is mandatorily subject to the Hamburg Rules.<sup>791</sup> Therefore, if the Rotterdam Rules enter into force, P & I Clubs will consider whether the cover will also extend to liabilities incurred under the Rotterdam Rules and accordingly the relevant provisions in the Club's Rules would be amended to provide for liabilities under the Rotterdam Rules regime.

The Rotterdam Rules are designed to regulate both the international maritime carriage of goods, and the international multimodal carriage of goods where there is a sea leg in the contract of carriage. It is often, therefore, described as a "maritime plus" instrument. The provisions of the Rotterdam Rules could increase the liability of the carrier, resting more burdens upon the carrier than under the existing unimodal conventions. Such increases in liabilities may require additional insurance cover. On the payment of additional calls, the P & I cover extends beyond the sea leg of the carriage and, thus, will protect the carrier throughout a multimodal transport contract from an inland point to another inland point, provided only that the sea leg is performed by an entered ship.

Here, the position of the EU Draft Regime would be different. If the Regime insists the highest limits of liability, because of a huge difference between the TT Club Rules, which provide for lower liability of the Hague-Visby Rules and the EU

---

<sup>790</sup> SJ Hazelwood and D Semark, *P & I Clubs: Law and Practice* (4th edn, Lloyd's List, 2010), para 10.57.

<sup>791</sup> *Ibid*, para 10.67.

Draft Regime, it is highly unlikely that the shipping industry will go for the Draft Regime, particularly in the context of the shipping industry, the EU Draft Regime would be impractical. Therefore, the limitation of liability under the EU Draft Regime is in need of being amended.

## 8.5 Summary and conclusion

In cases of cargo claims arising from multimodal transport of goods, a cargo owner usually has an adequate cargo insurance and his cargo insurers are concerned about pursuing recoveries against the negligent carriers under subrogation rights. The cargo insurers will seek to recover their losses from the carrier. The P&I club will usually take over the handling of such claims on behalf of the assured.

Cargo insurance offers itself as the most effective means of protecting the interests of the shipper and the receiver. Cargo insurance is to indemnify claimants for loss or damage of goods. Such insurance has the distinct advantage that it can be exactly tailored to meet the requirements of the shipper as regards both the transport risks covered and the sums insured. This part of the transport costs can, thus, be kept under close control by the shipper.<sup>792</sup> This insurance enables cargo interests to have funds to replace goods with a minimum disruption of their business and without recourse to demands on their own financial resources.<sup>793</sup>

Liability insurance, by contrast, puts a considerable burden upon the P & I Clubs and TT Clubs, because the carrier's liability rules under the new multimodal regime needs to be analysed, and compensation would be increased due to the increased carrier's liability. In addition, they often have to defend against "unfounded claims."<sup>794</sup> That is why the carrier and his P & I Club are interested in holding indemnification to a minimum, so as to keep down his premium.

In this respect, if a liability regime governing cargo claims arising out of multimodal transport increases the carriers' liability, then carriers may fear about

---

<sup>792</sup> McDowell, CE, 'Containerization: Comments on Insurance and Liability' (1971-72) 3 JMLC 503, 508.

<sup>793</sup> *Ibid*, 509.

<sup>794</sup> *Ibid*, 509.

their liabilities and liability costs. Here, one may ask why carriers should be concerned about the potentially high costs of liability insurance under a new multimodal liability regime, because these costs may simply be passed onto the cargo owner or customer. The most likely answer is that “carriers, especially in the maritime industry, may fear that the entire cost of insurance simply could not be passed on. Conversely, many shippers, especially large shippers who insure under favourable cargo insurance terms, fear that the consolidation of risk onto the carriers may provide the carriers with an excuse to inflate tariffs.”<sup>795</sup>

Another point to ponder would be that as the uniform multimodal regime would provide cargo insurers with more possibilities of recourse, the P & I insurance would increase more than the cargo insurance. Taking into account the cost of exercising recourse, which supposedly will rise, the net result for cargo insurers would have to be lower than the increase of the P & I insurance.<sup>796</sup> This is because the increase of payments for cargo insurers will result in a corresponding increase of the P & I insurance and also in an increase of the freight rates.

---

<sup>795</sup> S Zomora, ‘Carrier Liability for Damage or Loss to Cargo in International Transport’ (1975) 23 *The American Journal of Comparative Law* 391, pp 394-395.

<sup>796</sup> E Selvig, ‘The Hamburg Rules, the Hague Rules and Marine Insurance Practice’ (1981) 12 *JMLC* 299, 315.

# CHAPTER 9 CONCLUSION

## 9.1 Multimodal transport

### 9.1.1 The concept of multimodal transport

The transport of goods involving more than two different modes of transport is considered as multimodal transport. Although the appropriate concept, definition and language of multimodal transport have not been settled yet because of the failure to agree an international multimodal convention widely accepted, it may be suggested that a multimodal transport contract means a contract of carriage whereby a multimodal carrier or MTO, who acts as a principal and assumes responsibility for the performance of the contract, undertakes to perform or procure the carriage of goods by at least two different modes of transport from a place where the goods are taken in charge in one country to a place designated for delivery in a different country. Therefore, the important concepts of multimodal transport cover the carriage of goods by at least two different modes of transport on the basis of one multimodal transport contract under the responsibility of a single transport operator.

However, several phrases, such as ‘multimodal transport’, ‘combined transport’, ‘intermodal transport’ and ‘through transport’ have been used interchangeably and loosely. It was pointed out that those terms have distinguished concepts themselves and the confusion in language stems partly from the need to cover different ideas and variations in commercial or geographical usage. The term ‘multimodal transport’ has become a more modern term and would be the best expression to describe the carriage of goods by at least two different modes of transport on the basis of one multimodal transport contract under the responsibility of a single transport operator.

### 9.1.2 The current legal framework for multimodal transport

Much of the international transport of goods is now carried out on a door-to-door basis, under one contract and with one responsible party and this multimodal transport has played an important role in international trade. However, the current

legal framework governing multimodal transport fails to appropriately reflect these developments. First of all there is currently no international uniform regime in force to govern liability for loss, damage or delay arising from multimodal transport. Instead, the current legal framework consists of a complex formation of international unimodal transport conventions designed to regulate carriage by sea, air, road, rail and inland waterway respectively, various regional/sub-regional agreements, national laws and standard form contracts. This is a sorry state indeed, which requires a uniform set of rules to govern multimodal transport liability.

## **9.2 The need for an international multimodal regime**

### **9.2.1 The practical and legal aspects**

This thesis has looked at the reasons for an international multimodal regime in order to examine whether a uniform set of rules for multimodal transport is necessary or not. There are sufficient reasons for that based on the practical aspects and legal aspects. Firstly, a substantial growth in container or door-to-door transport could be considered. Over the last few decades, much of the international transport of goods is carried on a multimodal basis, and due to the advent of containerisation and cargo unitisation, multimodal transport has been very popular. This popularity of multimodal transport in the commercial area would be one of the reasons for an international multimodal regime. Second, the legal problems arising from the current legal framework for multimodal transport could be another aspect for the reason. The situation of muddles and uncertainty in the field of multimodal transport will definitely justify the reasons for an international multimodal regime. Having explored the current legal framework for multimodal transport, it will become clear that there are many intrinsic legal problems arising from multimodal transport. There are various different rules even on the same subject matter and more seriously they proceed without any reference to each other. Therefore, the situation of those various different rules which are incompatible with each other is a problem in the current legal framework for multimodal transport. This conflict between those different provisions would lead to uncertainty and increased legal cost. Furthermore, the issue of non-localised loss is a typical problem in multimodal transport. There is another problem which a multimodal carrier may encounter when he wishes to recover from

his subcontractors money which he has had to pay cargo interests as compensation for loss or damage under the contract. Last but not least, problems also arise when two different regimes apply to the same claim simultaneously. Therefore, it is necessary to find out the solution through a uniform multimodal regime which would work internationally.

Knowing that we have appropriate reasons for an international multimodal convention, it would be desirable to have an international instrument applicable to multimodal transport. A simple and straightforward uniform regime for multimodal transport would be of great assistance to the industry as a whole, especially in the interests of legal certainty.

### **9.2.2 The result of survey by the UNCTAD**

It is also worth noting that a large scale survey conducted by the UNCTAD secretariat,<sup>797</sup> which was carried out through the industry and governments concerning the question of the feasibility of establishing a new international legal instrument for multimodal transport, pointed out that 83% of all respondents do not consider the existing legal framework for multimodal transportation to be satisfactory and 76% of them also do not consider the existing legal framework to be cost-effective.<sup>798</sup> Furthermore, 92% of respondents representing both Governments and non-governmental stakeholders stated that an international instrument governing liability arising from multimodal transport would be desirable. Therefore, the majority of them supported the need for an international multimodal convention. Although the views are divided in regard to the possible ways forward, i.e. 48% for uniform system, 28% for network system and 24% for modified system,<sup>799</sup> there has been an agreed support for the development of a new international instrument for multimodal transport.

---

<sup>797</sup> See Report by the UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003).

<sup>798</sup> *Ibid*, para 21.

<sup>799</sup> *Ibid* Table 3, 26.

## **9.3 Coping with muddles and uncertainty**

### **9.3.1 The lessons from the past**

Before moving on to the possible solutions, it is worth looking at the past attempts for international uniformity. It was pointed out that possible reasons why the TCM Draft Convention failed to draw enough support to be adopted are its network system of liability, the voluntary nature, and the lack of support by the airline industry. The reasons why the MT Convention did not attract sufficient ratifications to enter into force may also be provided. First, there was a close link with the Hamburg Rules, which were considered to have failed to gain much support among major maritime nations. Second, the high limitation of liability which is 920 SDR per package or 2.75 SDR per kilogram whichever is the higher was considered as a high one as compared with other transport conventions. Third, there was an uncertainty issue regarding limitation, especially because the MT Convention allowed mandatory national laws to apply. Fourth, large numbers of ratifications were required. The number of 30 is relatively very high compared to 20 states for the Hamburg Rules and the Rotterdam Rules. Fifth, it was pointed out that there was lack of awareness and uncertainty on the part of the shippers as to the benefits of the Convention. Sixth, there was a strong opposition by the shipping industry because the increased liability and limits would be a big burden on the carrier. Therefore, above reasons are also considered when proposing the possible international multimodal solutions.

### **9.3.2 Possible multimodal solutions**

#### **9.3.2.1 Do nothing option**

One might ask the question whether it would matter if we did nothing. What would happen if we just leave everybody to have freedom of contract without having any international multimodal regulations. However, in this case, the fragmentation and complexity may still exist because of existing unimodal transport conventions, which could apply mandatorily to the cases. The freedom of contract approach may be one of the possible solutions, particularly given the situations that the market pushes towards more freedom of contract, not more regulation. However, those contractual solutions do not seem to be appropriate for multimodal transport solutions. As

discussed earlier, the current legal framework consists of a complex formation of international unimodal transport conventions designed to regulate carriage by sea, air, road, rail and inland waterway respectively, various regional/sub-regional agreements, national laws and standard form contracts. There are several mandatory regulations which could apply to multimodal transport. However, the freedom of contract approach is contractual in nature and does not have the force of law. The approach is subject to any applicable mandatory international or national laws applicable to the multimodal transport contract. If this approach conflicts with any mandatory laws which have the force of law, it must yield to such mandatory international conventions or national laws. Therefore, it must allow for existing unimodal rules established by international convention in countries where they are applied. Even where they do not operate, there is likely to be mandatory national law. Therefore, as long as there are mandatory international unimodal conventions and national law which are applicable to multimodal transport, the application of freedom of contract approach will necessarily be limited.

### **9.3.2.2 Modified network system**

The Rotterdam Rules may be suggested as a modified network system for multimodal transport. The Convention is primarily designed to cover sea carriage but would also apply to multimodal contracts including a sea-leg. Thus, the Convention is not truly a multimodal legal regime but a maritime plus multimodal convention. The liability provisions envisaged in the Rotterdam Rules do not, however, provide for responsibility of one contracting party throughout the multimodal transport, nor do they provide for uniform liability irrespective of the unimodal stage of transport where a loss, damage or delay occurs. A carrier, even if charging freight for a multimodal contract, would be able to act as agent only for certain parts of the contract, for instance, for land or air carriage ancillary to maritime carriage.

The Rotterdam Rules offer a modified network liability system combined with “a wide step back clause” regarding extended applicability of existing unimodal regimes in multimodal transport.<sup>800</sup> They could offer a global uniform solution, but it is not a truly multimodal convention. Therefore, the solution proposed by the

---

<sup>800</sup> E Eftestol-Wilhelmsson, ‘The Rotterdam Rules in a European multimodal context’ (2010) 16 JIML 274, 280.

Rotterdam Rules in terms of multimodal transport does not effectively address the issues arising from modern multimodal transport.

Regardless of those limitations, the question at issue here is whether there are sufficient additional advantages in adopting the system of liability proposed in the Rotterdam Rules. It seems clear that if the Rotterdam Rules come into force, they will provide the transport industry with a uniform set of rules governing carrier liability in both carriage of goods by sea and multimodal transport with a sea leg. The Convention also provides for a solution to the issue of non-localised loss. If it cannot be identified where the loss of or damage to the goods or event causing delay occurred, the Rotterdam Rules will apply as a default system. This is certainly a very important rule given the fact that a high percentage of container cargo damage is concealed. This problem of non-localised loss or damage has partly been solved by the contractual provisions which based on the UNCTAD/ICC Rules for Multimodal Transport Documents 1992, but those provisions are contractual in nature and will be subject to any mandatory national laws. Thus, a uniform fall back solution for non-localised loss or damage will absolutely be one of the remarkable achievements of the Rotterdam Rules if they come into force.

Nevertheless, if the Rotterdam Rules come into force, the Convention will be the first international mandatory regime governing multimodal transport and may serve as the “next best solution”<sup>801</sup> to the problems arising from international multimodal transport because it may provide a certain level of uniformity in the field of multimodal transport liability. That is why we have to monitor the progress of the Convention.

### **9.3.2.3 Modified uniform system**

The EU Draft Regime provides a modified uniform system which would contribute to make agreements between the parties simpler and easily understandable which would facilitate claims settlements and, thus, contribute to reduce costs. The EU Draft Regime seems a true multimodal regime, which would govern liability for loss of or damage to the goods or delay in delivery arising from multimodal transport.

However, in order for the EU Draft Regime to be one of the possible

---

<sup>801</sup> See K Haak and M Hoeks, ‘Arrangements of International Transport in the Field of Conflicting Conventions’ (2004) 10 JIML 422.

international multimodal solutions, it is necessary to elevate it to the international convention, by extending the geographical scope of the Regime and providing its mandatory application. If the Regime is to follow the simple and strict liability, then it is also necessary to alleviate the carrier's liability by providing a clear list of exceptions. The EU Draft Regime first suggested the highest liability limit, but in order to be a possible multimodal solution which would work internationally, it is necessary to provide a reasonable level of limitation of liability, e.g. included in the proposed limitation solution.

### **9.3.3 The main benefits of the possible multimodal solutions**

We have looked at two different approaches to an international multimodal solution. One is the Rotterdam Rules as a modified network system, the other is the EU Draft Regime as a modified uniform system. The former does not seem a true multimodal regime, only using sea carriage as a base-line for extending to a multimodal service, therefore, rewriting maritime and multimodal transports into one single Convention. Whereas, the EU Draft Regime seems a true multimodal regime, which would govern liability for loss of or damage to the goods or delay in delivery arising from multimodal transport. There are several possible benefits of the new multimodal solutions.

#### **9.3.3.1 Cost-effective**

It seems clear that the Rotterdam Rules and EU Draft Regime will provide the transport industry with a uniform set of rules governing carrier liability in the field of multimodal transport. The first benefit of the new multimodal regimes would be to facilitate the cost-effective liability system and to lead to an overall reduction of associated cost. Carriers and cargo interests all would require predictable and reliable liability rules, which are simple, predictable and operate in a straightforward and cost-effective way. This would have clear advantages for both parties. Transparency and uniformity of regulation are vital in order to avoid unnecessary and costly litigation regarding the applicable rules.

Under the current multimodal regimes, if goods are lost or damaged in the course of a multimodal transport, the possibility of recovery from a multimodal carrier will depend upon the mode of transport involved at the time when the loss

occurred, and whether or not the transport was governed by an international convention relating to this particular mode of transport. As seen earlier,<sup>802</sup> the current multimodal regimes all have different monetary limits of liability, different time limits for suit, and varying circumstances in which the carrier is exempted from liability. The complexity of the situation has consequently caused muddles and uncertainty in the field of multimodal transport liability and resulted in difficulties when determining applicable liability rules in cases of loss, damage or delay. The present complicated and fragmented regime governing multimodal transport creates uncertainty, which in turn creates costly litigation, transaction costs and rising insurance costs. Therefore, the new Rotterdam Rules and EU Draft Regime provide for a uniform set of rules to govern carrier's liability for loss, damage or delay arising from multimodal transport and it is expected that they will contribute to the greater certainty and clarity in the context of multimodal transport, at least compared to the current complicated and fragmented multimodal regimes.

### **9.3.3.2 Uniform international regime**

Secondly, the possible solutions would provide for a uniform set of rules for liability in cases of loss, damage or delay arising from multimodal transport, because the potentially effective means of achieving uniformity is by way of international convention. Given the fact that we have appropriate reasons for an international multimodal convention, it would be desirable to have an international instrument applicable to multimodal transport. A simple and straightforward uniform regime for multimodal transport would be of great assistance to the industry as a whole, especially in the interests of legal certainty. In principle, an international multimodal convention would be the best means of ensuring the application of a unified system at international level. As an international regime, it will prevail over any regional/sub-regional multimodal regimes, national multimodal regulations and standard forms of contract which are inconsistent with.

However, this may be the long-term solution given that the adoption of an international convention requires a long process of developing consensus at

---

<sup>802</sup> See paragraphs 3.3.2.1 and 3.3.2.2.

diplomatic conferences.

### **9.3.3.3 Acceptable to the transport industry**

It is pointed out that potential regulatory framework would have to be acceptable to the transport industry. This is one of the lessons from the past attempts. Under the Rotterdam Rules, there would be situations where the carrier may rely on the maritime limits to other modes of transport. In particular, if the loss or damage to the goods was not localised, the limits of the Rotterdam Rules will apply to the case. Under the revised EU Draft Regime, the parties are firstly allowed to tie their contract to any of the existing unimodal liability limits by agreeing on the main mode of transport whose limits of liability apply and, in absence of an express agreement of this, the parties would apply the limits of liability which are similar to that of the UNCTAD/ICC Rules, which is widely used.

### **9.3.3.4 Compatible with existing international law**

Any new liability system has to be compatible with existing unimodal regimes. Therefore, they should address the issue of overlap and conflict. One of the central and problematic issues in connection with the development of an international multimodal regime may arise out of the existence of mandatory unimodal conventions governing the carriage of goods by sea, air, road, rail and inland waterway. In this regard, the Rotterdam Rules provide for the possible solution through articles 26 and 82. However, the situation under the EU Draft Regime is slightly different. As a true multimodal convention, it is necessary to make sure that the EU Draft Regime only applies to the contract of carriage by two different modes of transport. In order for this works, it is also required that, if possible, unimodal transport conventions only apply to unimodal mode of transport, not extending their scope to other modes of transport.

## **9.4 The insurance implications**

### **9.4.1 Several issues in regard to cargo insurance**

#### **9.4.1.1 The impact on cargo insurance**

It seems that there will be several aspects to be of particular interest to cargo insurers and, indirectly, to their assureds which the Rotterdam Rules and EU Draft Regime could bring about.

Firstly, the new Rotterdam Rules and EU Draft Regime provide for a uniform set of rules to govern carrier's liability for loss, damage or delay arising from multimodal transport. They are specially designed for multimodal transport, and it is expected that they will contribute to the greater certainty and clarity in the context of multimodal transport, at least compared to the current complicated and fragmented multimodal regimes. For example, both solutions provide for the solution to the problems of non-localised loss. Furthermore, as they are classified as an international convention, they will not be affected by any regional/sub-regional or national multimodal regimes.

Second of all, under the new Rotterdam rules and EU Draft Regime the new limits have increased so that it will obviously enable cargo insurers to recover more recovery than that possible under the other international regimes. The Rotterdam Rules and EU Draft Regime generally provide a moderate increase in the level of liability of the multimodal carrier. For the insurance industry, the immediate effect will be that cargo insurers may exercise recourse against the carrier and their P&I clubs to a greater extent than under the current multimodal regimes.

Third, under the Rotterdam Rules and EU Draft Regime, the defences of nautical fault and fire have been removed and this has been considered to be the most important change. These defences are characteristic for the Hague-Visby system and are a distinguishing characteristic of maritime law. As a result, the abolition of the exceptions of nautical fault and fire will enable cargo insurers to recover probably the most significant losses that may occur.

Fourth, it is also necessary to look at volume contracts under the Rotterdam Rules. The volume contracts may be utilised by carriers as a means of avoiding a regulatory solution under the Rotterdam Rules. Carriers may ask shippers to enter into volume contracts by offering a contract with minimal liability conditions, for example liability under the Hague-Visby Rules, against a lower freight rate than that would have been valid for a normal shipment under the Rotterdam Rules. Therefore, if there was a reduction of the liability, for instance, like the exceptions and limits under the Hague-Visby Rules, this volume contract allowed by article 80 of the

Rotterdam Rules may adversely affect the prospects of the recovery action. This might be true. However, in most cases the insurance claims will be settled in favour of the consignee, because, in general, the goods are at the risk of the buyer during the transit and the reduction of the liability under the volume contracts is agreed between the carrier and the shipper, not consignee. This would not be binding on the consignee and, consequently, on the insurers. However, according to article 80.5 of the Rotterdam Rules, if the consignee accepts the terms agreed between the carrier and the shipper, this would affect the right of subrogation of the insurer. Therefore, if carriers succeed in reducing their liability under volume contracts and it is agreed with shippers and consignees, they could transfer greater cargo liabilities to shippers and their cargo insurers.

Another question arises as to how the new multimodal regimes would affect the relationship between insurance premium and freight rates. The most likely situation on this matter would be that there will be no difference. If the Rotterdam Rules enter into force, and consequently the Rules impose, in general, greater liabilities upon carriers, the most likely effect on cargo insurance may be that improved recoveries resulting in lower net claims on cargo owners could force down premium rates. Although, recoveries from carriers are only one of the factors to be taken into account by insurers in rating a risk, this improved recoveries would be benefits for cargo owners and cargo insurers. However, because of increased liabilities, the carrier has to pay an extra call to his liability insurers, and they, in turn, have to pass on any extra charge to the customers. Thus, any lower premium rates on cargo owners' contracts would no doubt be compensated for by higher freight charges by the carriers.

#### **9.4.1.2 Practical issues regarding cargo insurance**

When the seller or buyer obtains cargo insurance, there are several situations to be considered. Under EXW terms, one of the questions that may arise is, since most cargo policies attach on individual shipments when they leave the warehouse of origin, the buyer may not have insurance for the period of time the goods may be on the premises of the seller, or during loading onto the conveyance, or after loading while awaiting transit even though he is responsible for loss or damage. Therefore, when purchasing goods EXW the buyer should seek an insurer that will provide

coverage during these situations.

Under CPT terms, because the buyer is responsible for loss or damage during the main carriage CPT shipments would be insured under the buyer's cargo policy. Insurance would attach at the time the goods are delivered to the first carrier as agreed. Although the transfer of responsibility for loss or damage is clearly defined in Incoterms, insurance questions often arise when loss or damage occurs before the buyer is responsible and before coverage attaches under the buyer's insurance policy. If there is any doubt in the buyer's mind about whether or not they will have proper recourse against the seller for loss or damage during the seller's responsibility, the buyer may wish to review these doubts with their insurers and arrange additional coverage in the form of 'contingency' insurance.

Under CIP terms, the shipments are insured under the seller's cargo policy. The sale contract should clearly state the type of insurance to be provided. Incoterms state that "failing express agreement to the contrary, the insurance shall be in accordance with minimum cover of the Institute Cargo Clauses". Insurance must also be in negotiable form enabling losses to be payable to the buyer or other party having an insurable interest in the shipment at the time of loss. Proof, or evidence, of insurance is required which is usually accomplished by issuance of a Special Cargo Policy or Certificate of Insurance by the seller or his insurer. Insurance should cover the shipment from the place of origin to the final destination of the buyer.

#### **9.4.2 The impact on liability insurance**

In cases of cargo claims arising from multimodal transport of goods, a cargo owner usually has an adequate cargo insurance and his cargo insurers are concerned about pursuing recoveries against the negligent carriers under subrogation rights. The cargo insurers will seek to recover their losses from the carrier. The P&I club will usually take over the handling of such claims on behalf of the assured.

Here, cargo insurers may not much concern about the change of liability rules, and they would agree to cover the liability under the EU Draft Regime or the Rotterdam Rules. However, the position of liability insurers is different, particularly, as the EU Draft Regime provides for strict liability and the relatively high limitation of liability, it may be difficult to obtain insurance for that increased liability. Liability insurance would put a considerable burden upon the P & I Clubs and TT Clubs,

because the carrier's liability rules under the new multimodal regime needs to be analysed, and compensation would be increased due to the increased carrier's liability.

While the increase of payments for cargo insurers will result in a corresponding increase of the P & I or TT insurance and also in an increase of the freight rates, the carrier may not be able to pass on all of the extra charges to the customers.

## **9.5 The application to the Case study**

In the Introduction, the question was asked as to what if there was an international multimodal convention governing carrier's liability for loss, damage or delay in the field of multimodal transport. Now let us come back to the case study.

### **CASE 1**

Let us assume that A Line agreed to carry Samsung tablets stuffed in two containers for shipping from South Korea to inland United States destinations. A Line issued a multimodal bill of lading, i.e. a bill of lading covering both the ocean and inland portions of transport in a single document. A Line subsequently arranged the journey, subcontracting with B for rail shipment in the United States. The goods were shipped in A Line vessel to California and then loaded onto a B's train. A derailment along the inland route allegedly destroyed the cargo. The receiver tried to seek compensation for the damage to the goods.<sup>803</sup>

### **CASE 2**

Let us assume that AA airline agreed to carry goods from Singapore to Dublin. AA engaged the BB Trucking company, as a subcontractor to carry the goods from Paris to Dublin by road, including two roll-on, roll-off movements of goods from Paris across the English Channel to Manchester and from there across the Irish Sea to Dublin. The goods were loaded by BB onto two trailers in Paris. Whilst in the course

---

<sup>803</sup> These facts are similar to *Kawasaki Kisen Kaisha Ltd v Regal-Beloit Corp* (2010) 561 US, where the cargo owner sued the carrier in a US court but the defendant carrier objected that there was no jurisdiction, because the bill of lading issued at the start of the carriage was subject to Tokyo jurisdiction. The cargo owner argued that it fell under the so-called US Carmack Amendment, which limited and apportioned liability in relation to rail carriage to the receiving carrier and the delivering carrier; and which also limited the parties' choice of jurisdiction to US state and federal courts.

of being carried by road in England, some of the goods were stolen by a BB Trucking company driver. In addition, some of the goods were found to be damaged when they arrived in Dublin, but it cannot be identified exactly where the damage occurred. The receiver tried to seek compensation for the loss of and damage to the goods. Here, the AA airline as a multimodal carrier contracted to carry the goods from Singapore to Dublin and the contract was evidenced by an air waybill which indicated that the goods would be carried by air from Singapore to Paris and from there to Dublin on a road vehicle operated by AA airline

Now, the best thing is that there is a uniform international multimodal regime. It will provide a great certainty and predictability. Therefore, the EU Draft Regime as a modified uniform system will apply to all of the cargo loss, damage in CASE 1 and 2 as it will govern the entire transport operation from South Korea to the US in CASE 1, from Singapore to Dublin in CASE 2. Such a liability scheme would promote the predictability and certainty of the applicable law, since the contracting parties would know in advance the applicable liability regime. However, the position of the Rotterdam Rules is different. Even if the parties to the contract agreed that it covered the whole journey of multimodal transport, the application of the Rules will vary depending on articles 26 and 82. In CASE 1, the Rotterdam Rules will govern the entire transport, as none of the international conventions or instruments stipulated in articles 26 and 82 is not applicable. And even the US Carmack Amendment which imposes liability on rail carriers under US federal law is not applicable. However, in CASE 2, the Rotterdam Rules will apply to the non-localised damage, but the CMR will apply to the localised damage according to article 82 (b).

In addition, it would provide for adequate solutions for the problems of non-localised loss or damage in CASE 2 as they are covered by the EU Draft Regime and Rotterdam Rules. Nevertheless, while the Rotterdam Rules contain provisions to avoid conflicts, the EU Draft Regime may cause conflicts with the mandatory provisions of the international unimodal conventions.

Therefore, although the EU Draft Regime may be a streamlined straightforward uniform liability regime and may be an ideal solution, practical difficulties may be encountered. It might need further a revolution in the system of cargo claims, including insurance. The Rotterdam Rules may not be the ideal solution to the

current problems of multimodal transport, however, it may be the practical solution which suits in the current system of cargo claims.

“To cut the Gordian knot of multimodal transport what seems to be needed is less the trusty sword of Cervantes than the Subtle Knife of Philip Pullman, as well as the wisdom of Solomon.”<sup>804</sup>

In order to cope with the muddles and uncertainty in the field of multimodal transport liability, the question is whether we need the less trusty sword of Cervantes with the wisdom of Solomon or the Subtle Knife of Philip Pullman.

---

<sup>804</sup> M Clarke, ‘A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on your Doorstep’ (2003) 9 JIML 29, 39.



# BIBLIOGRAPHY

## 1. Books

- Aikens, R, et al, *Bill of Lading* (Informa, 2006)
- Baatz, Y, et al, *The Rotterdam Rules: A Practical Annotation* (Informa, 2009)
- Baatz, Y (ed), *Maritime Law* (2<sup>nd</sup> edn, Sweet & Maxwell, 2011)
- Bennett, H, *The Law of Marine Insurance* (2<sup>nd</sup> edn, Oxford, 2006)
- Bridge, MG (ed), *Benjamin's sale of goods* (8<sup>th</sup> edn, Sweet & Maxwell, 2010)
- Carr, I, *International Trade Law* (4<sup>th</sup> edn, Routledge-Cavendish, 2010)
- Clarke, M, *International Carriage of Goods by Road: CMR* (5<sup>th</sup> edn, Informa, 2009)
- Clarke, M and Yates, D, *Contracts of Carriage by Land and Air* (Informa, 2008)
- Colinvaux, R, *Carver's Carriage by Sea* (13<sup>th</sup> edn, Stevens & Sons, 1982)
- Coghlin, T, et al, *Time Charters* (6<sup>th</sup> edn, Informa, 2008)
- Cooke, J, et al, *Voyage Charters* (3<sup>rd</sup> edn, Informa, 2007)
- Debattista, C, *Bills of Lading in Export Trade* (3<sup>rd</sup> edn, Tottel, 2009)
- De Wit, R, *Multimodal Transport: Carrier liability and Documentation* (LLP, 1995)
- Dunt, J, *International Cargo Insurance* (Informa, 2012)
- Dunt, J, *Marine Cargo Insurance* (Informa, 2009)
- Eder, B, et al, (eds), *Scrutton on Charterparties and Bills of Lading* (22<sup>nd</sup> edn, Sweet & Maxwell, 2011)
- Elias, TO, *The Modern Law of Treaties* (Oceana Publications, 1974)
- Faber, D, *Multimodal transport : avoiding legal problems* (LLP, 1997)
- Gaskell, N, Asariotis, R and Baatz, Y, *Bills of Lading: Law and Contracts* (Informa, 2000)
- Gilman, J, *Arnould's law of marine insurance and average* (17<sup>th</sup> edn, Sweet & Maxwell, 2008)
- Glass, DA, *Freight forwarding and multimodal transport contracts* (2<sup>nd</sup> edn, Informa, 2012)
- Girvin, S, *Carriage of Goods by Sea* (2<sup>nd</sup> edn, Oxford, 2011)
- Goode, RM, *Goode on commercial law* (4<sup>th</sup> edn, Penguin, 2010)
- Harris, B, *RIDLEY's Law of the Carriage of Goods by Land, Sea and Air* (8<sup>th</sup> edn, Sweet & Maxwell, 2010)
- Hayuth, Y, *Intermodality: concept and practice* (Lloyd's of London, 1987)
- Hazelwood, SJ and Semark, D, *P & I Clubs: Law and Practice* (4<sup>th</sup> edn, Lloyd's List, 2010)
- Hoeks, M, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010)

- Hudson, NG and Allen, J, *Marine Claims Handbook* (5<sup>th</sup> edn, LLP, 1996)
- Kindred, HM and Brooks, MR, *Multimodal Transport Rules* (Kluwer Law International, 1997)
- Lowry, J and Rawlings, P, *Insurance Law: Doctrines and Principles* (2<sup>nd</sup> edn, Hart Publishing, 2005)
- Merkin, R, *Colinvaux & Merkin's Insurance Contract Law* (Sweet & Maxwell, 2013)
- Merkin, R, *Marine Insurance Legislation* (4<sup>th</sup> edn, Lloyd's List, 2010)
- Murray, C, et al, *Schmitthoff's The law and Practice of International Trade* (12<sup>th</sup> edn, Sweet & Maxwell, 2012)
- Reuter, P, *Introduction to the Law of Treaties* (2<sup>nd</sup> edn, Kegan Paul International, 1995)
- Reynolds, BWB and Tsimplis MN, *Shipowners' Limitation of Liability* (Wolters Kluwer, 2012)
- Rose, FD, *Marine Insurance: Law and Practice* (2<sup>nd</sup> edn, Informa, 2012)
- Sinclair, IM, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, Manchester University Press, 1984)
- Soyer, B and Tettenborn, A (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21st Century* (Informa Law, 2013).
- Sturley, MF, et al, *The Rotterdam Rules* (Sweet & Maxwell, 2010)
- Tetley, W, *Marine Cargo Claims* (4<sup>th</sup> edn, Thomson Carswell, 2008)
- Thomas, DR (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules: an analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext Pub, 2009)
- Thomas, DR (ed), *The Modern Law of Marine Insurance Vol.3* (LLP, 2009)
- Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010)
- Todd, P, *Cases and Materials on International Trade Law* (Sweet & Maxwell, 2002)
- Treitel, G and Reynolds, FMB, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell, 2011)
- UNCTAD, *The economic and commercial implications of the entry into force of the Hamburg rules and the Multimodal Transport Convention : report* (United Nations, 1991)
- Verwey, D, *The European Community, the European Union and the International Law of Treaties* (TMC Asser Press, 2004)
- Von Ziegler, A, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010)
- Wilson, JF, *Carriage of Goods by Sea* (7<sup>th</sup> edn, Pearson, 2010)

## 2. Articles

Alcántara, JM, 'The new regime and multimodal transport' [2002] 3 LMCLQ 399-

- Alcantara, J, et al, 'Particular concerns with regard to the Rotterdam Rules' (Apr 2010),  
 <<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Particular%20concerns%20-%20Rotterdam%20Rules.pdf>>, accessed 15 September 2012
- Alcantara, J, et al, 'A blueprint for a worldwide multimodal regime?' (September 2011)
- Asariotis, R, 'Burden of proof and allocation of liability for loss due to a combination of causes under the new Rotterdam Rules' (2008) 14 JIML 537
- Atamer, K, 'Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing parties' (2010) 41 JMLC 469-497
- Beare, S, 'Liability regimes: where we are, how we got there and where we are going' [2002] LMCLQ 306-305
- Berlingieri, F, 'A Review of Some Recent Analyses of the Rotterdam Rules' (2009) IL DIRITTO MARITTIMO 992-1036
- Berlingieri, F, 'Multimodal Aspects of the Rotterdam Rules', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009),  
 <<http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf>>, accessed 15 September 2012
- Berlingieri, F, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' CMI paper, delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009.
- Berlingieri, F, et al, 'The Rotterdam Rules – An attempt to clarify certain concerns that have emerged' (5 August 2009),  
 <<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/5RRULES.pdf>>, accessed 15 September 2012
- Berlingieri, F, 'Revisiting the Rotterdam Rules' [2010] LMCLQ 583-639
- Carl, H, 'Future developments in the regulatory aspects of international multimodal transport of goods' IUMI Conference Berlin (12-16 September 1999)
- Carr, I, 'International multimodal transport-United Kingdom' (1998) 4(3) ITLR 99-110
- Calleros, CR, 'Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?',  
 <[http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=charles\\_calleros](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=charles_calleros)> accessed 15 September 2012
- Chenal, TK, 'Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules' (1978) 20 Arizona Law Review 953-982
- Chuah, J, 'Editorial: The Rotterdam Rules and the EU – a case of mixed messages' (2011) 17 JIML 5-6
- Clarke, M, 'The transport of goods in Europe: patterns and problems of uniform law'

- [1999] LMCLQ 36-70
- Clarke, M, 'A multimodal mix-up (Case Comment)' (2002) Mar JBL 210-217
- Clarke, M, 'A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on your Doorstep' (2003) 9 JIML 29
- Clarke, M, 'The line in law between land and sea (Case Comment)' (2003) Sep JBL 522-524
- Clarke, MA, Herbr, R, Lorenzon, F and Ramberg, J, 'Integrated Services in the Intermodal Chain (ISIC)', Final Report Task B: Intermodal liability and documentation (Southampton, 28 October 2005)
- Clarke, M, 'Road transport' (2006) Jun JBL 429-436
- CLECAT Secretariat, CLECAT Opinion on the European Commission's Consultation on 'Freight Integrator Action Plan' (Brussels, October 19<sup>th</sup> 2003)
- Coffey, WJ, 'Multimodalism and the American carrier' (1990) 64 Tulane Law Review 569-594
- Cordero, O, 'UNASUR and its Future Impact on the Americas' 2009 USAWC Strategy Research Project.
- Crowley, ME, 'The impact of the Rotterdam Rules on Multimodal Transport in the US', [http://nb-ny.com/global\\_pictures/The\\_Impact\\_of\\_the\\_Rotterdam\\_Rules\\_on\\_Multimodal\\_Transport\\_in\\_the\\_U.S.;\\_by\\_Michael\\_E.\\_Crowley.pdf](http://nb-ny.com/global_pictures/The_Impact_of_the_Rotterdam_Rules_on_Multimodal_Transport_in_the_U.S.;_by_Michael_E._Crowley.pdf) accessed 15 September 2012
- Daiches, M (ed), 'Cases-Canada: carriage of goods by sea and rail - carrier contracting with cargo owner to carry cargo from Hong Kong to Montreal' (2008) 745 LMLN 3-4
- Daiches, M (ed), 'Cases-United States: carriage of goods by sea: combined transport contract providing for carriage of goods via France and Canada for ultimate destination to United States' (2008) 739 LMLN 4
- Daley, J.M, 'The Extension of an Ocean Carrier's Limitation of Liability to the Inland Carriage of Goods Under a Through Ocean bill of Lading: How the Second and Eleventh Circuits Have Undone the Work of the Supreme Court in Kirby' (2008-09) 33 Tulane Maritime Law Journal 111-135
- Davies, M, 'Australian Maritime Law-*Parlus SpA v. M & U Imports Pty Ltd*' [2009] IMCL Yearbook 8-9
- Davies, M, 'Forum selection, choice of law and mandatory rules' [2011] LMCLQ 237-250
- Debattista, C, 'The CIM/UNCITRAL Cargo Liability Regime: regulation for the 21<sup>st</sup> century?' [2002] LMCLQ 304-305
- Delebecque, P, 'The UNCITRAL Draft Instrument on the carriage of goods by sea' CMI YEARBOOK 2003 208-229
- Dempsey, PS, 'The law of Intermodal Transportation' (2000) 27 Transportation Law Journal 367

- De Wit, R, 'Minimal music: Multimodal transport including a maritime leg under the Rotterdam Rules', in Chapter 5 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010)
- Diamond, A, 'Legal Aspects of the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980)
- Diamond, A, 'The United Nations Convention on International Multimodal Transport of Goods 1980', in Chapter 5 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997)
- Diamond, A, 'The next sea carriage Convention?' [2008] LMCLQ 135-187
- Diamond, A, 'The Rotterdam Rules' [2009] 4 LMCLQ 445-536
- Donner, P, 'Managing Risks of Multimodal Transport Operators' Arab Logistics & Multimodal Transport Conference (Amman, 20-22 May 2008)
- Donovan, A, 'Intermodal Transportation in Historical Perspective' (2000) 27 *Transportation Law Journal* 317-344
- Driscoll, W, 'The Convention on International Multimodal Transport: A Status Report' (1978) 9 *JMLC* 441-460
- Driscoll, W and Larsen, PB, 'The Convention on International Multimodal Transport of Goods' (1982) 57 *Tulane Law Review*, 193-281
- Eckardt, T, et al, 'Multimodal Transport Including Cross-border Road Haulage – Will the CMR Apply?' (2010) 3 *European Journal of Commercial Contract Law* 153-162
- Eftestol-Wilhelmsson, E, 'Part IV EU intermodal transport and carrier liability – content and context' (2007) *Scandinavian Institute of Maritime Law Yearbook* 133-166
- Eftestol-Wilhelmsson, E, 'The Rotterdam Rules in a European multimodal context' (2010) 16 *JIML* 274-288
- Erasmus University Rotterdam, Working Paper on Intermodal Liability, Competitive and Sustainable Growth Programme (2004)
- European Association for Forwarding Transport Logistic and Customs Services (CLECAT), 'The Position Paper – The European Voice of Freight Logistics and Customs Representatives' (Brussels, 11 May 2009), available at CMI website
- European Commission, *Intermodality and Intermodal Freight Transport in the European Union* (1997)
- European Commission, *Final Report on Intermodal Transportation and Carrier Liability, which is the study co-funded by the European Commission, Director General for Transport, DGVII* (June 1999).
- European Commission, *Final Report - The Economic Impact of Carrier Liability on Intermodal Freight Transport* (10 January 2001)
- EC, *The Final Report of June 2009, TREN/CC/01-2005/LOT1/Legal assistance activities. 'Study on the details and added value of establishing a (optional)*

- single transport (electronic) document for all carriage of goods irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests’, <[http://ec.europa.eu/transport/strategies/studies/doc/2009\\_05\\_19\\_multimodal\\_transport\\_report.pdf](http://ec.europa.eu/transport/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf)>, accessed 15 September 2012
- European Shippers’ Council, ‘View of the European Shippers’ Council on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also known as the ‘Rotterdam Rules’, (March 2009), available at CMI website
- Faber, D, ‘Problems arising from multimodal transport’ [1996] 4 LMCLQ 503-518
- Faghfour, M, ‘International Regulation of Liability for Multimodal Transport – In search of Uniformity’ (2006) 5(1) WMU Journal of Maritime Affairs 95-114
- FIATA Working Group on Sea Transport, ‘FIATA Position on the UN Convention on Contracts for the International Carriage of Goods wholly or partly by Sea (the Rotterdam Rules)’, Annex II to FIATA’s document MTI/507 of 26 March 2009, available at CMI website.
- Fitzgerald, GF, ‘The Proposed Convention on International Multimodal Transport of Goods: A Progress Report’ (1979) 17 The Canadian Yearbook of International Law 247-279
- Franco, M, ‘Multimodal transport after the Rotterdam Rules: will it work this time?’ (2012) 18 JIML 208-226
- Fujita, T, ‘The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications’ (2009) 44 Texas International Law Journal 349-373
- Girvin, S, ‘English Shipping Law-*Bhatia Shipping and Agencies Pvt Ltd v. Alcobex Metals Ltd*’ [2006] IMCL Yearbook 94-96
- Glass, DA and Nair, R, ‘Towards flexible carriage documents? Reducing the need for modally distinct documents in international goods transport’ (2009) 15 JIML 37-64
- Glass, DA, ‘Meddling in the multimodal muddle?-a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea]’ [2006] 3 LMCLQ 307-334
- Goddard, KS, ‘The application of the Rotterdam Rules’ (2010) 16 JIML 210-219
- Graham, MG, ‘The economic and commercial implications of the multimodal conventions’, paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980)
- Haak, K and Hoeks, M, ‘Arrangements of International Transport in the Field of Conflicting Conventions’ (2004) 10 JIML 422-433
- Haak, K and Hoeks, M, ‘Intermodal transport under unimodal arrangements’ (2005)

28(3) Transportrecht 89-102

- Hancock, C, 'Multimodal transport and the new UN Convention on the carriage of goods' [2008] 14 JIML 484-495
- Hancock, C, 'Multimodal transport under the Convention' in Chapter 2 of Thomas, DR (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009)
- Hilton, C, 'Multimodal Transport Operators-Recourse Actions', in Chapter 3 of D Faber, *Multimodal transport : avoiding legal problems* (LLP, 1997)
- Hoeks, M, 'Multimodal carriage with a pinch of sea salt: door to door under the UNCITRAL Draft instrument' (2008) 10 European Transport Law 257-280
- Holmes, W.C, 'Risk allocation in the intermodal importation of cargo into the U.S. via sea and rail' (2006) 12(6) JIML 378-392
- Honka, H, 'Scope of Application and Freedom of Contract', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), <<http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Hannu%20Honka.pdf>>, accessed 15 September 2012
- Huybrechts, MA, 'Package limitation as an essential feature of the modern maritime transport treaties: a critical analysis', in Chapter 7 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010)
- IORGA, I and Costache, M, 'Contracting Parties in the International Successive Transport' (2010) 3 Acta Universitatis Danubius 127
- Isaacs, J, 'Cargo Insurance in relation to Through Transport', paper delivered at the Through Transport: problem areas, documentation and insurance seminar organised by Lloyd's of London Press Ltd (The London Press Centre, 15-16 June 1978)
- Johansson, SO, et al, 'A Response to the Attempt to Clarify Certain Concerns over the Rotterdam Rules Published 5 August 2009', 1 September 2009
- Kim, IH, 'An Introduction to Korean Law Governing Carriage of Goods by Sea' (2005) 36(4) JMLC 447-476
- Kim, IH, 'Korean Maritime Law Update: 2007' (2008) 39(3) JMLC 435-455
- Kim, IH and Choi, SR, 'Korean Maritime Law Update: 2010' (2011) 42 JMLC 421-440
- Kremer, W, 'How much bigger can container ships get?' (BBC News Magazine, 19 February 2013) <<http://www.bbc.co.uk/news/magazine-21432226>>, accessed 4 March 2013
- Leung, W, 'The Dual role of the Freight Forwarder: Wastfame Camera Ltd v Birkart Globistics Ltd, 2005 High Court of Hong Kong 117, Stone J, 5 October 2005: 2005 AMC 2864 (High Court of Hong Kong, 2005)' (2007) 38(1) JMLC 97-109
- Mankabady, S, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32 ICLQ 120-140

- Marsden, SH, 'Putting a premium on reform: The impact of the Rotterdam Rules on shippers and insurers of cargo' (2012) 3 *European Insurance Law Review* 56-63
- Marshall, M, 'Insurance and the Multimodal Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980)
- Massey, EA, 'Prospects for a new Intermodal Legal Regime: A Critical Look at the TCM' (1972) 3 *JMLC* 725-757
- McDowell, CE, 'Containerization: Comments on Insurance and Liability' (1971-72) 3 *JMLC* 503-512
- Morgan, J, 'Liability beyond the tackles' [2005] 3 *LMCLQ* 290-295
- Mukherjee, PK and Bokareva, O, 'Multimodal maritime plus: some European perspectives on law and policy' (2010) 16 *JIML* 221-242
- Mukherjee, PK and Bal, AB, 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', Colloquium on the Rotterdam Rules (Rotterdam: September 21, 2009), <[http://www.rotterdamrules2009.com/cms/uploads/Def\\_tekst\\_Abhinayan\\_Basu\\_Bal\\_-\\_Volume\\_Contract\\_Final.pdf](http://www.rotterdamrules2009.com/cms/uploads/Def_tekst_Abhinayan_Basu_Bal_-_Volume_Contract_Final.pdf)>, accessed 15 September 2012
- Myburgh, P, 'Uniformity or unilateralism in the law of carriage of goods by sea?' (2000) 31 *VUWLR* 355-383
- Nasseri, K, 'The Multimodal Convention' (1988) 19(2) *JMLC* 231-260
- Neels, P, 'The Rotterdam Rules and modern transport practices: a successful marriage?' available at <http://www.rotterdamrules.com/The%20Rotterdam%20Rules%20and%20modern%20transport%20practices%20-%20a%20successful%20marriage.pdf>
- Nikaki, T, 'The UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]: multimodal at last or still all at sea?' (2005) Sep *JBL* 647-658
- Nikaki, T, 'Conflicting Laws in 'Wet' Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]' (2006) 37(4) *JMLC* 521-544
- Nikaki, T, 'The statutory Himalaya-type protection under the Rotterdam Rules: capable of filling the gaps?' (2009) 4 *JBL* 403-421
- Nikaki, T, 'The carrier's duties under the Rotterdam Rules: Better the devil you know?' (2010) 35 *Tulane Maritime Law Journal* 1-44
- Nikaki, T, 'Himalaya clauses and the Rotterdam Rules' (2011) 17 *JIML* 20-39
- Ozdel, M, 'Multimodal Transport Documents in International Sale of Goods', paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Multimodal Transport Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011).
- Ozdel, M, 'Multimodal transport documents in international sale of goods' (2012) 23(7) *International Company and Commercial Law Review* 238-250

- Palmer, RW and Degiulio, FP, 'Terminal Operations and Multimodalism' (1989) 64 *Tulane Law Review* 281-360
- Ramberg, J, 'Unification of the Law of International Freight Forwarding' (1998) *Uniform Law Review* 5-13
- Ramberg, J, 'Freight forwarder law', *Modern Law for Global Commerce, UNCITRAL Congress (Vienna, 9-12 July 2007)* 257-266
- Ramberg, J, 'The Future of International Unification of Transport Law', <<http://www.scandinavianlaw.se/pdf/41-16.pdf>> accessed 15 September 2012
- Rasmussen, UL, 'Additional Provisions Relating to Particular Stages of Carriage' in Chapter 6 of Von Ziegler, A, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010)
- Richardson, J, 'Deep Sea Container Services' in *Through transport : problem areas, documentation and insurance : a two-day seminar organised by Lloyd's of London Press Ltd at the London Press Centre, (London, 15-16 June 1978)*
- Røsæg, E, 'The applicability of Conventions for the carriage of goods and for multimodal transport' [2002] 3 *LMCLQ* 316-335
- Røsæg, E, 'Conflicts of Conventions in the Rotterdam Rules' (2009) 15 *JIML* 238-248
- Rossmere, AE, 'Cargo Insurance and Carriers' Liability: A New Approach'(1974-75) 6 *JMLC* 425-434
- Sassoon, DM, 'Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons' (1972) 2 *JMLC* 759-773
- Schelin, J, 'Freedom of Contact and Carriage of Goods, Report from the London Seminar (20-21 February 2004), <<http://folk.uio.no/erikro/WWW/cog/Report.pdf>> accessed 15 September 2012
- Schmid, A, 'Austria: carriage of goods-rail and road (Case Comment)' (1995) 3(10) *Int. ILR* G199-200
- Schmitt, D.G, 'Presentation on Rotterdam Rules to the Canadian Transport Lawyers' Association, October 2, 2009
- Schoenbaum, TJ, 'Important new U.S. Supreme court case on the Multimodal carriage of goods' (2010) 16 *JIML* 184-185
- Schoenbaum, TJ, 'An Evaluation of the Rotterdam Rules from the US' (2011) 17 *JIML* 274-290
- Seeck, S, et al, 'Freight Integrator – a new way for intermodal transports', <[http://www.trafficforum.ethz.ch/vwt\\_2003/beitraege/vwt19proceedings\\_contribution\\_81.1-81.15.pdf](http://www.trafficforum.ethz.ch/vwt_2003/beitraege/vwt19proceedings_contribution_81.1-81.15.pdf)> accessed 13 November 2012
- Selvig, E, 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 *JMLC* 299-326
- Selvig, E, 'The background to the Convention', paper delivered at the Multimodal Transport-The 1980 UN Convention seminar at Southampton University, Faculty of Law (12 September 1980)

- Si, Y and Guo, P, 'Limits of Liability' in Chapter 12 of Von Ziegler, A, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010)
- Soyer, B, 'Cargo insurance in the multimodal context: Full and complete cover?', in Chapter 16 of Soyer, B and Tettenborn, A (ed), *Carriage of Goods by Sea, Land and Air – Unimodal and Multimodal Transport in the 21st Century* (Informa Law, 2013)
- Stirling, AM, 'Insurance for Through Transport Operators', paper delivered at the Through Transport: problem areas, documentation and insurance seminar organised by Lloyd's of London Press Ltd (The London Press Centre, 15-16 June 1978)
- Sturley, MF, 'Scope of Coverage under the UNCITRAL Draft Instrument' (2004) 10 JIML 138-154
- Sturley, MF, 'Phantom carriers and UNCITRAL's p's proposed transport law Convention' [2006] 3 LMCLQ 426-441
- Sturley, MF, 'Sea carriage goes ashore: relationship between multimodal conventions and domestic unimodal rules', *Modern Law for Global Commerce, UNCITRAL Congress (Vienna, 9-12 July 2007)* 267-270
- Sturley, MF, 'Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' (2008) 14 JIML 461-483
- Sturley, MF, 'Transport law for the twenty-first century: An introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' in Chapter 1 of Thomas, DR (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009)
- Sturley, MF, 'Scope of Application' in Chapter 2 of Von Ziegler, A, et al, *The Rotterdam Rules 2008* (Kluwer Law International, 2010)
- Tetley, W, 'Some general criticisms of the Rotterdam Rules' (2008) 14 JIML 625-628
- Tetley, W, 'Canadian Maritime Law-*Canadian Pacific Ry Co v. Boutique Jacob Inc*' [2009] IMCL Yearbook 14-15
- Tetley, W, 'Canadian Maritime Law-*Rexroth Hydraudyne BV v. Ocean world Lines Inc*' [2009] IMCL Yearbook 180-182
- Theis, WH, 'Third-Party Beneficiaries in Multimodal Contracts of Carriage. *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 125 S. Ct. 385, 2004 AMC 2705 (2004)' (2005) 38(2) JMLC 201-215
- Thomas, DR, 'An appraisal of the liability regime established under the new UN Convention' (2008) 14 JIML 496-511
- Thomas, DR, 'An analysis of the liability regime of carriers and maritime performing' in Chapter 3 of Thomas, DR (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules* (Lawtext Pub, 2009)
- Thomas, DR, 'The Emergence and application of the Rotterdam Rules', in Chapter 1 of Thomas, DR (ed), *The Carriage of Goods by Sea under the Rotterdam Rules*

- (Lloyd's List, 2010)
- Thomas, DR, 'Multimodality and Through Transport – Linguistics, Concepts and Categories', paper delivered at the Second Annual Oslo-Southampton-Tulane (OST) Multimodal Transport Colloquium, Tulane Maritime Law Center, New Orleans (September 16-17, 2011).
- Trappe, J, 'The reform of German transport law' (2001) LMCLQ 392-405
- UK P&I Club, 'What impact will the Rotterdam Rules have on your liability?' (2009) Legal Briefing, <[http://www.ukpandi.com/fileadmin/uploads/uk-pi/Knowledge\\_Base\\_-\\_International\\_Conventions/Rotterdam%20Rules.pdf](http://www.ukpandi.com/fileadmin/uploads/uk-pi/Knowledge_Base_-_International_Conventions/Rotterdam%20Rules.pdf)> accessed 15 September 2012
- Ulfbeck, V, 'Direct actions against the insurer in a maritime setting: the European perspective' [2011] LMCLQ 293-306
- Ulfbeck, V, 'Contracts of logistics under the Rotterdam Rules' (2011)17 JIML 219-225
- UNESCAP, 'Towards an appropriate regulatory environment for the multimodal transport and logistics industry', Technical material available at <[http://www.unescap.org/ttdw/common/TFS/FFMultimodalTx/Technical\\_Material.pdf](http://www.unescap.org/ttdw/common/TFS/FFMultimodalTx/Technical_Material.pdf)>, accessed 15 September 2012
- UNESCAP Training Module 'Multimodal Transport Operations', <[http://www.unescap.org/ttdw/capbuild/module-multimodal\\_transport\\_operations.pdf](http://www.unescap.org/ttdw/capbuild/module-multimodal_transport_operations.pdf)>, accessed 15 September 2012
- Williams, R, 'The Rotterdam Rules: winners and losers' (2010) 16 JIML 191-209
- Xerri, A, 'Combined Transport: A new attempt at unification' (1980) II Uniform Law Review 138-153
- Zomora, S, 'Carrier Liability for Damage or Loss to Cargo in International Transport' (1975) 23 The American Journal of Comparative Law 391-450

### **3. Negotiation Documents (UNCTAD, UNCITRAL, CMI)**

- CMI, 'Issues of Transport Law: Door-to-Door Transport', CMI Yearbook 2000.
- CMI International Working Group, 'Questions and Answers on The Rotterdam Rules' (10 Oct 2009)
- UN, Official Records of the U.N. CONFERENCE ON THE CARRIAGE OF GOODS BY SEA, Hamburg, 6-31 March 1978 (U.N. Doc. A/CONF.89/14) (New York, 1981)
- UN, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)
- UN, Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)
- UN, Official Records of the General Assembly, Sixty-third Session, Supplement No.

17 (A/63/17)

- UN, Report of the Study Group of the International Law Commission, A/CN.4/L.682 (2006)
- UNCITRAL, Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), UN Doc. A/CN.9/510 (2002)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002), UN Doc. A/CN.9/525 (2002)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March to 4 April 2003), UN Doc. A/CN.9/526 (2003)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), UN Doc. A/CN.9/544 (2003)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), UN Doc. A/CN.9/552 (2004)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004), UN Doc. A/CN.9/572 (2004)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005), UN Doc. A/CN.9/576 (2005)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November-9 December 2005), UN Doc. A/CN.9/591 (2006)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006), UN Doc. A/CN.9/594 (2006)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006), UN Doc. A/CN.9/616 (2006)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007), UN Doc. A/CN.9/621 (2007)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007), UN Doc. A/CN.9/642 (2007)
- UNCITRAL, Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), UN Doc. A/CN.9/645 (2008)
- UNCITRAL Secretariat, 'Preliminary Draft Instrument on the Carriage of Goods by Sea', UNCITRAL WG, 9<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.21 (2002).
- UNCITRAL Secretariat, 'Preliminary Draft Instrument on the Carriage of Goods by Sea (Proposal by Canada)', UNCITRAL WG, 10<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.23 (2002).
- UNCITRAL Secretariat, 'The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and the other transport Conventions (Comparative tables)',

- UNCITRAL WG, 11<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.27 (2003)
- UNCITRAL Secretariat, 'Preparation of a draft instrument on the carriage of goods [by Sea] - Addendum to compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument', UNCITRAL WG, 12<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.28/Add.1 (2003)
- UNCITRAL Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – General remarks on the sphere of application of the draft instrument', UNCITRAL WG, 11<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.29 (2003)
- UNCITRAL Secretariat, 'Draft Instrument on the carriage of goods [wholly or partly] [by sea]', UNCITRAL WG, 12<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.32 (2003)
- UNCITRAL Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – Proposal by the Netherlands on the application door-to-door of the instrument', UNCITRAL WG, 12<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.33 (2003)
- UNCITRAL Secretariat, 'Draft convention on the carriage of goods [wholly or partly] [by sea]', UNCITRAL WG, 16<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.56 (2005)
- UNCITRAL Secretariat, 'Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Relation with other conventions', UNCITRAL WG, 18<sup>th</sup> Sess., UN Doc. A/CN.9/WG.III/WP.78 (2006)
- UNCTAD Secretariat, 'Preparation of a Preliminary Draft of a convention on International Intermodal Transport', UNCTAD Document TD/B/AC.15/2 (1973)
- UNCTAD Secretariat, 'Legal and documentary aspects of the marine insurance contract', TD/B/C.4/ISL/27/Rev.1 (1982)
- UNCTAD Secretariat, 'Facing The Challenge of Integrated Transport Services', UNCTAD/SDD/MT/7 (28 April 1995)
- UNCTAD Secretariat, 'Implementation of Multimodal Transport Rule', UNCTAD/SDTE/TLB/2 (2001)
- UNCTAD Secretariat, 'Implementation of Multimodal Transport Rule-Comparative Table', UNCTAD/SDTE/TLB/2/Add.1 (2001)
- UNCTAD Secretariat, 'Questionnaire on multimodal transport regulation', TDN 932(2)SITE (2002)
- UNCTAD Secretariat, 'Multimodal transport: the feasibility of an international legal instrument', UNCTAD/SDTE/TLB/2003/1 (2003)
- UNCTAD Secretariat, 'Development of Multimodal Transport and Logistics Services', TD/B/COM.3/EM.20/2 (15 July 2003)
- UNCTAD Secretariat, 'Report of the Expert Meeting on the Development of

- Multimodal Transport and Logistics Services' (Held at the Palais des Nations, Geneva, 24-26 September 2003), TD/B/COM.3/EM.20/3
- UNCTAD Secretariat, 'Container Security: Major Initiatives and Related International Developments', UNCTAD/SDTE/TLB/2004/1 (26 February 2004)
- UNCTAD Secretariat, 'Carrier Liability and Freedom of Contract under the UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]' UNCTAD/SDTE/TLB/2004/2 (24 November 2004)
- UNCTAD Secretariat, 'Chapter 5 Port and Multimodal Transport Developments' in Review of Maritime Transport 2009
- UNCTAD Secretariat, 'Chapter 6 Legal Issues and Regulatory Developments' in Review of Maritime Transport 2009
- UNECE Secretariat, 'Terminology on Combined Transport', TRANS/WP.24/2000/1
- UNECE Secretariat, 'Possibilities for Reconciliation and Harmonization or Civil Liability Regimes Governing Combined Transport', TRANS/WP.24/2000/3

# APPENDICES

## 1. The Rotterdam Rules

United Nations

A/RES/63/122



### General Assembly

Distr.: General  
2 February 2009

Sixty-third session  
Agenda item 74

### Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/63/438)]

#### **63/122. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*The General Assembly,*

*Recalling* its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

*Concerned* that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents,

*Noting* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Convinced* that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Noting* that shippers and carriers do not have the benefit of a binding and balanced universal regime to support the operation of contracts of carriage involving various modes of transport,

*Recalling* that, at its thirty-fourth and thirty-fifth sessions, in 2001 and 2002, the Commission decided to prepare an international legislative instrument governing door-to-door transport operations that involve a sea leg,<sup>1</sup>

*Recognizing* that all States and interested international organizations were invited to participate in the preparation of the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea and in the forty-first session of the Commission, either as members or as observers, with a full opportunity to speak and make proposals,

*Noting with satisfaction* that the text of the draft Convention was circulated for comment to all States Members of the United Nations and intergovernmental organizations invited to attend the meetings of the Commission as observers, and that the comments received were before the Commission at its forty-first session,<sup>2</sup>

*Taking note with satisfaction* of the decision of the Commission at its forty-first session to submit the draft Convention to the General Assembly for its consideration,<sup>3</sup>

*Taking note* of the draft Convention approved by the Commission,<sup>4</sup>

*Expressing its appreciation* to the Government of the Netherlands for its offer to host a signing ceremony for the Convention in Rotterdam,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea;

2. *Adopts* the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature to be held on 23 September 2009 in Rotterdam, the Netherlands, and recommends that the rules embodied in the Convention be known as the “Rotterdam Rules”;

4. *Calls upon* all Governments to consider becoming party to the Convention.

*67th plenary meeting 11 December 2008*

## **Annex**

### **United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea**

*The States Parties to this Convention,*

*Reaffirming* their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

---

<sup>1</sup> *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 319–345; and *ibid.*, *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 210–224.

<sup>2</sup> A/CN.9/658 and Add.1–14 and Add.14/Corr.1.

<sup>3</sup> *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 298.

<sup>4</sup> *Ibid.*, annex I.

*Convinced* that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, equity and common interest, and to the well-being of all peoples,

*Recognizing* the significant contribution of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25 August 1924, and its Protocols, and of the United Nations Convention on the Carriage of Goods by Sea, signed in Hamburg on 31 March 1978, to the harmonization of the law governing the carriage of goods by sea,

*Mindful* of the technological and commercial developments that have taken place since the adoption of those conventions and of the need to consolidate and modernize them,

*Noting* that shippers and carriers do not have the benefit of a binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport,

*Believing* that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally,

*Have agreed* as follows:

## **Chapter 1 General provisions**

### *Article 1 Definitions*

For the purposes of this Convention:

1. “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.
2. “Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.
3. “Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
4. “Non-liner transportation” means any transportation that is not liner transportation.
5. “Carrier” means a person that enters into a contract of carriage with a shipper.
6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or

delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

(b) "Performing party" does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

8. "Shipper" means a person that enters into a contract of carriage with a carrier.

9. "Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record.

10. "Holder" means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

11. "Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

12. "Right of control" of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

13. "Controlling party" means the person that pursuant to article 51 is entitled to exercise the right of control.

14. "Transport document" means a document issued under a contract of carriage by the carrier that:

(a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

15. "Negotiable transport document" means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable".

16. "Non-negotiable transport document" means a transport document that is not a negotiable transport document.

17. "Electronic communication" means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.

18. “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

(a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and

(b) Evidences or contains a contract of carriage.

19. “Negotiable electronic transport record” means an electronic transport record:

(a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and

(b) The use of which meets the requirements of article 9, paragraph 1.

20. “Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

23. “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

24. “Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.

25. “Ship” means any vessel used to carry goods by sea.

26. “Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

27. “Vehicle” means a road or railroad cargo vehicle.

28. “Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

29. “Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

30. “Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

### *Article 2 Interpretation of this Convention*

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

### *Article 3 Form requirements*

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

### *Article 4 Applicability of defences and limits of liability*

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.

2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

## **Chapter 2 Scope of application**

### *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.

*Article 6 Specific exclusions*

1. This Convention does not apply to the following contracts in liner transportation:

(a) Charter parties; and

(b) Other contracts for the use of a ship or of any space thereon.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and

(b) A transport document or an electronic transport record is issued.

*Article 7 Application to certain parties*

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

**Chapter 3 Electronic transport records**

*Article 8 Use and effect of electronic transport records*

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

*Article 9 Procedures for use of negotiable electronic transport records*

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.

2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

*Article 10 Replacement of negotiable transport document or negotiable electronic transport record*

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:

(a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;

(b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and

(c) The negotiable transport document ceases thereafter to have any effect or validity.

2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:

(a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and

(b) The electronic transport record ceases thereafter to have any effect or validity.

**Chapter 4 Obligations of the carrier**

*Article 11 Carriage and delivery of the goods*

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

*Article 12 Period of responsibility of the carrier*

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.

2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.

(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.

3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or

(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

*Article 13 Specific obligations*

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

*Article 14 Specific obligations applicable to the voyage by sea*

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

(a) Make and keep the ship seaworthy;

(b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and

(c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

*Article 15 Goods that may become a danger*

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

*Article 16 Sacrifice of the goods during the voyage by sea*

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety

or for the purpose of preserving from peril human life or other property involved in the common adventure.

### **Chapter 5 Liability of the carrier for loss, damage or delay**

#### *Article 17 Basis of liability*

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

#### *Article 18 Liability of the carrier for other persons*

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) Any performing party;

(b) The master or crew of the ship;

(c) Employees of the carrier or a performing party; or

(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

#### *Article 19 Liability of maritime performing parties*

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place:  
(i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

#### *Article 20 Joint and several liability*

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.

2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

#### *Article 21 Delay*

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

#### *Article 22 Calculation of compensation*

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.

2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

#### *Article 23 Notice in case of loss, damage or delay*

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of

loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.

2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.

3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.

4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.

6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

## **Chapter 6 Additional provisions relating to particular stages of carriage**

### *Article 24 Deviation*

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

### *Article 25 Deck cargo on ships*

1. Goods may be carried on the deck of a ship only if:

(a) Such carriage is required by law;

(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or

(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.

3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.

4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.

5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

#### *Article 26 Carriage preceding or subsequent to sea carriage*

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

### **Chapter 7 Obligations of the shipper to the carrier**

#### *Article 27 Delivery for carriage*

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.

3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

*Article 28 Cooperation of the shipper and the carrier in providing information and instructions*

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

*Article 29 Shipper's obligation to provide information, instructions and documents*

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:

(a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and

(b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.

2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

*Article 30 Basis of shipper's liability to the carrier*

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.

2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

*Article 31 Information for compilation of contract particulars*

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.

2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this

article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

*Article 32 Special rules on dangerous goods*

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

*Article 33 Assumption of shipper's rights and obligations by the documentary shipper*

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

*Article 34 Liability of the shipper for other persons*

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

**Chapter 8 Transport documents and electronic transport records**

*Article 35 Issuance of the transport document or the electronic transport record*

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the

carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

*Article 36 Contract particulars*

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;
- (b) The name and address of the carrier;
- (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
- (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:

- (a) The name and address of the consignee, if named by the shipper;
- (b) The name of a ship, if specified in the contract of carriage;
- (c) The place of receipt and, if known to the carrier, the place of delivery; and
- (d) The port of loading and the port of discharge, if specified in the contract of carriage.

4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

*Article 37 Identity of the carrier*

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.

2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.

3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

#### *Article 38 Signature*

1. A transport document shall be signed by the carrier or a person acting on its behalf.

2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

#### *Article 39 Deficiencies in the contract particulars*

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.

2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:

(a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or

(b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.

3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

#### *Article 40 Qualifying the information relating to the goods in the contract particulars*

1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:

(a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or

(b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.

2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.

3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:

(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or

(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.

4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:

(a) Article 36, subparagraphs 1 (a), (b), or (c), if:

(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and

(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and

(b) Article 36, subparagraph 1 (d), if:

(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or

(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

#### *Article 41 Evidentiary effect of the contract particulars*

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier's receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

#### *Article 42 "Freight prepaid"*

If the contract particulars contain the statement "freight prepaid" or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

### **Chapter 9 Delivery of the goods**

#### *Article 43 Obligation to accept delivery*

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

#### *Article 44 Obligation to acknowledge receipt*

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

#### *Article 45 Delivery when no negotiable transport document or negotiable electronic transport record is issued*

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

*Article 46 Delivery when a non-negotiable transport document that requires surrender is issued*

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

*Article 47 Delivery when a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic

transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

#### *Article 48 Goods remaining undelivered*

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

(e) The goods are otherwise undeliverable by the carrier.

2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:

(a) To store the goods at any suitable place;

(b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and

(c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.

3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.

4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.

5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

#### *Article 49 Retention of goods*

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

### **Chapter 10 Rights of the controlling party**

#### *Article 50 Exercise and extent of right of control*

1. The right of control may be exercised only by the controlling party and is limited to:

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and

(c) The right to replace the consignee by any other person including the controlling party.

2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

#### *Article 51 Identity of the controlling party and transfer of the right of control*

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its

notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

#### *Article 52 Carrier's execution of instructions*

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:

(a) The person giving such instructions is entitled to exercise the right of control;

(b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and

(c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.

2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.

3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.

4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

#### *Article 53 Deemed delivery*

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

#### *Article 54 Variations to the contract of carriage*

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).

2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

#### *Article 55 Providing additional information, instructions or documents to carrier*

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.

2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

*Article 56 Variation by agreement*

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

**Chapter 11 Transfer of rights**

*Article 57 When a negotiable transport document or negotiable electronic transport record is issued*

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:

(a) Duly endorsed either to such other person or in blank, if an order document; or

(b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.

2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

*Article 58 Liability of holder*

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.

2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.

3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:

(a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

(b) It transfers its rights pursuant to article 57.

**Chapter 12 Limits of liability**

*Article 59 Limits of liability*

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the

goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.

2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.

3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

*Article 60 Limits of liability for loss caused by delay*

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

*Article 61 Loss of the benefit of limitation of liability*

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

## **Chapter 13 Time for suit**

### *Article 62 Period of time for suit*

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.
2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.
3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

### *Article 63 Extension of time for suit*

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

### *Article 64 Action for indemnity*

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

### *Article 65 Actions against the person identified as the carrier*

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

- (a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or
- (b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

## **Chapter 14 Jurisdiction**

*Article 66 Actions against the carrier*

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

*Article 67 Choice of court agreements*

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph *b*), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

*Article 68 Actions against the maritime performing party*

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

*Article 69 No additional bases of jurisdiction*

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

*Article 70 Arrest and provisional or protective measures*

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

*Article 71 Consolidation and removal of actions*

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

*Article 72 Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance*

- 1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
- 2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

*Article 73 Recognition and enforcement*

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.

2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.

3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

*Article 74 Application of chapter 14*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

**Chapter 15 Arbitration**

*Article 75 Arbitration agreements*

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:

(a) Any place designated for that purpose in the arbitration agreement; or

(b) Any other place situated in a State where any of the following places is located:

(i) The domicile of the carrier;

(ii) The place of receipt agreed in the contract of carriage;

(iii) The place of delivery agreed in the contract of carriage; or

(iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.

3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:

(a) Is individually negotiated; or

(b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.

4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

(a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;

(b) The agreement is contained in the transport document or electronic transport record;

(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

*Article 76 Arbitration agreement in non-liner transportation*

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

(a) The application of article 7; or

(b) The parties' voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

(a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and

(b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

*Article 77 Agreement to arbitrate after a dispute has arisen*

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

*Article 78 Application of chapter 15*

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

**Chapter 16 Validity of contractual terms**

*Article 79 General provisions*

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;

(b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or

(c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.

2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

(a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

(b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

*Article 80 Special rules for volume contracts*

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.

2. A derogation pursuant to paragraph 1 of this article is binding only when:

(a) The volume contract contains a prominent statement that it derogates from this Convention;

(b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;

(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

(d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.

5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.

6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

*Article 81 Special rules for live animals and certain other goods*

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

**Chapter 17 Matters not governed by this convention**

*Article 82 International conventions governing the carriage of goods by other modes of transport*

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;

(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;

(c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or

(d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

*Article 83 Global limitation of liability*

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.

*Article 84 General average*

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.

*Article 85 Passengers and luggage*

This Convention does not apply to a contract of carriage for passengers and their luggage.

*Article 86 Damage caused by nuclear incident*

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

**Chapter 18 Final clauses**

*Article 87 Depositary*

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

*Article 88 Signature, ratification, acceptance, approval or accession*

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article 89 Denunciation of other conventions*

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

*Article 90 Reservations*

No reservation is permitted to this Convention.

*Article 91 Procedure and effect of declarations*

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2,

shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.

2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.

3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.

4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

*Article 92 Effect in domestic territorial units*

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

*Article 93 Participation by regional economic integration organizations*

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence

has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.

3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

*Article 94 Entry into force*

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

*Article 95 Revision and amendment*

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.

2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 96 Denunciation of this Convention*

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December two thousand and eight, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.



## 2. The EU Draft Regime

### Part 1. GENERAL

#### *Article 1 Definitions*

1. For the purposes of this Regime:

(a) ‘Contract of transport’ means a contract whereby a Transport Integrator undertakes to perform or procure the transport of goods from a place in one country to a place in another country, whether or not through a third country, involving at least two different modes of transport, and to deliver the goods to the consignee.

(b) ‘Consignor’ means any person by whom a contract of transport has been concluded with a Transport Integrator.

(c) ‘Consignee’ means the person entitled to take delivery of the goods.

(d) ‘Goods’ includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.

(e) ‘Transport document’ means a document in writing, which evidences a contract of transport and the taking in charge of the goods by the Transport Integrator.

(f) ‘Transport Integrator’ means any person who concludes a contract of transport and who acts as principal, not as agent or on behalf of the consignor and assumes responsibility for the performance of the contract of transport.

(g) ‘Charge’ means the amount to which the Transport Integrator is entitled under the contract of transport.

(h) ‘Writing’, unless otherwise agreed by the parties to the contract of transport, includes the transmission of information by electronic mail or electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data exchange (EDI), provided that the information is retrievable in perceivable form.

2. Unless the context otherwise requires, any reference in this instrument to the consignor, the consignee or the Transport Integrator shall include their servants or agents, and any other person engaged for the performance of the obligations under the contract of transport, as the case may be.

#### *Article 2 Scope of application*

The provisions of this Regime shall mandatorily apply to all contracts of transport between places in two different States, if (a) the place for the taking in charge of the goods by the Transport Integrator as provided for in the contract of transport

is located in a State member of the European Economic Community, or

(b) the place for delivery of the goods by the Transport Integrator as provided for in the contract of transport is located in a State member of the European Economic Community, unless the parties to the contract have agreed that it shall not be governed by the Regime.

## **PART 2. DOCUMENTATION**

### *Article 3 Transport document*

1. When the goods are taken in charge by the Transport Integrator, he shall issue a transport document, which, at the option of the consignor, shall be in either negotiable or non-negotiable form.

2. The transport document shall be signed by the Transport Integrator.

3. The signature on the transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means.

### *Article 4 Contents of the transport document*

1. The transport document shall contain the following particulars:

(a) a statement that the contract is subject to this Regime;

(b) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;

(c) the apparent condition of the goods;

(d) the name and principal place of business of the Transport Integrator;

(e) the name of the consignor and, if known, of the consignee;

(f) the place and date of taking in charge of the goods by the Transport Integrator;

(f) the place of delivery of the goods;

(g) the place and date of issue of the transport document;

(h) the signature of the Transport Integrator in accordance with article 3.3;

(i) the charge payable to the Transport Integrator to the extent payable by the consignee;

(j) any other particulars which the parties may agree to insert in the transport document.

2. The absence from the transport document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the validity of the contract or the applicability of any provision of this Regime.

#### *Article 5 Reservations*

1. Where the transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the Transport Integrator knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the Transport Integrator shall insert in the transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the Transport Integrator fails to note on the transport document the apparent condition of the goods, he is deemed to have noted on the transport document that the goods were in apparent good condition.

#### *Article 6 Evidentiary effect of the transport document*

1. The transport document shall be prima facie evidence of the contract of transport.

2. Except for particulars in respect of which and to the extent to which a reservation permitted under article 5 has been entered, the transport document shall be prima facie evidence of the taking in charge by the Transport Integrator of the goods as described therein. Proof to the contrary by the Transport Integrator shall not be admissible if the transport document is issued in negotiable form and the transferee has acted in good faith in reliance on the description of the goods therein.

#### *Article 7 Responsibility for particulars*

1. The consignor shall be deemed to have guaranteed to the Transport Integrator the accuracy, at the time the goods were taken in charge by the Transport Integrator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the transport document. The foregoing shall also apply where the person acting in this regard on behalf of the consignor is also the agent of the Transport Integrator.

2. The consignor shall indemnify the Transport Integrator against loss resulting from the irregularity, incorrectness or incompleteness of the particulars referred to in paragraph 1 of this article.

3. Subject to the provisions of paragraphs 1 and 2, the Transport Integrator shall indemnify the consignor against all loss suffered by him, by reason of the irregularity, incorrectness or incompleteness of the particulars inserted by the Transport Integrator or on his behalf.

### **PART 3. LIABILITY OF THE TRANSPORT INTEGRATOR**

#### *Article 8 Liability of the Transport Integrator*

1. The Transport Integrator shall be liable for total or partial loss of the goods or damage to the goods occurring between the time he takes over the goods and the time of delivery, as well as for any delay in delivery.
2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon by the parties to the contract of transport or, in the absence of such agreement, within a reasonable time, having regard to the circumstances of the case.
3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2, the claimant may treat the goods as lost.
4. The Transport Integrator shall not be liable for any total or partial loss of the goods, or damage to the goods, or delay in delivery of the goods to the extent that it was caused by circumstances beyond the control of the Transport Integrator.

#### *Article 9 Limitation of Liability*

1. When the Transport Integrator is liable for loss resulting from loss of or damage to the goods according to article 8, his liability shall be limited to an amount not exceeding 17 units of account per kilogram of gross weight of the goods lost or damaged.
2. The liability of the Transport Integrator for loss resulting from delay in delivery according to the provisions of article 8 shall not exceed twice the amount of the charge payable under the contract of transport.
3. The aggregate liability of the Transport Integrator, under paragraphs 1 and 2 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 of this article.
4. By declaration of value or otherwise, the Transport Integrator and the consignor may agree on limits of liability exceeding those provided for in the preceding paragraphs of this article.
5. The unit of account referred to in paragraph 1 is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in paragraph 1 shall be converted into the national currency of a State according to the value of such currency on the date of the judgement or award or the date

agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions.

*Article 10 Loss of right to limit responsibility.*

The Transport Integrator shall not be entitled to the benefit of the limitation of liability provided for in this Regime if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Transport Integrator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

*Article 11 Non-contractual liability*

The defences and limits of liability provided for in this Regime shall apply in any action against the Transport Integrator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

*Article 12 Dangerous Goods*

1. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the consignor hands over dangerous goods to the Transport Integrator, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the Transport Integrator does not otherwise have knowledge of their dangerous character

(a) the consignor shall be liable to the Transport Integrator for all loss resulting from the shipment of such goods and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2 (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where the Transport Integrator is liable in accordance with the provisions of article 8.

## **PART 4. CLAIMS AND ACTIONS**

### *Article 13 Notice of loss, damage or delay*

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the Transport Integrator not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the Transport Integrator of the goods as described in the transport document.
2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.
3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.
4. In the case of any actual or reasonable apprehension of loss or damage the Transport Integrator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.
5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the Transport Integrator within 21 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods
  - (a) have been delivered, or
  - (b) placed at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade applicable at the place of delivery, or
  - (c) handed over to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.
6. If any of the notice periods provided for in this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

### *Article 14 Limitation of Actions*

1. Any action relating to a contract of transport subject to this Regime shall be timebarred if judicial or arbitral proceedings have not been instituted within a period of nine months.
2. The limitation period commences on the day after the day on which the Transport Integrator has delivered the goods or part thereof or, where the goods have not been delivered, on the day

after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. A recourse action for indemnity by a person held liable under this Regime against another person liable under this Regime may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.



