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UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW AND ART

SCHOOL OF LAW

**MULTIMODAL TRANSPORT DOCUMENTS IN THE CONTEXT OF
INTERNATIONAL TRADE LAW**

By

Pimkamol Kongphok

Thesis for the degree of Doctor of Philosophy

November 2018

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

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The current cross-border transport of goods has been shifted from unimodal carriage of goods to an integrated multimodal transport where two or more modes of transport are involved in one journey under a single contract. This phenomenon is obviously a by-product of containerisation and technological developments in terms of transport operations and relevant infrastructure.

Despite the constant growth of containerisation and multimodal transport operations, the peculiar but true fact is that, in terms of regulatory framework, there has been no successful attempt that could achieve global uniformity. Almost four decades of the failure of the 1980 MT Convention, coupled with the hopeless situation of the 2009 Rotterdam Rules imply that the fragmented current legal framework on multimodal transport, which involves a mixture of international unimodal conventions, regional/sub-regional agreements, national laws and standard contractual forms, will continue to be applicable to multimodal transport. Therefore, the issues of legal uncertainty and unpredictability, together with conflicts and inconsistencies will remain.

In terms of multimodal transport documents, the number of this type of documents used in transport industry is significantly escalating as a result of the rapid growth of door-to-door transport. However, a lack of international set of rules regulating multimodal transport leads to the situation where the legal status and functions of multimodal transport documents are ambiguous and it can possibly jeopardise the legal value of this type of transport documents in various dimensions, not only for consignors and consignees under carriage of goods contracts, but also for buyers and sellers under sale of contracts as well as banks as examiners of required documents under letters of credit. Thus, an in-depth analysis of legal status and functions of multimodal transport documents in the context of international trade law is the main focus of this thesis.

To tackle with documentary issues, for the short term, the proposed solutions include judicial recognition with regard to the legal status of multimodal transport documents in the same level as maritime bills of lading and an amendment of relevant statutes i.e. COGSA 1992 where a sea carriage is involved as a part of multimodal transport journey. For the long-term solution, an international uniform set of rules on multimodal transport is very likely to be the most optimal way forward to comprehensively cope with the current conundrums regarding the use of multimodal transport documents. Although this long-term solution seems impractical at the moment due to multiple factors, this thesis calls attention to the evolution and upcoming changes in terms of multimodal transport operations which will emphasise the unique characteristics of multimodal transport as a contract *sui generis* and, in order to reflect the real-world trade practice and facilitate international trade transactions, a need for an international convention governing multimodal transport with absolute multimodal thinking will be inevitable in the near future.

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Convention for the Unification of Certain Rules Relating to International Carriage by Air
(signed 12 October 1929, entered into force 13 February 1933)

International Convention for the Unification of Certain Rules of Law relating to Bills of
Lading, drafted in 1924 (The Hague Rules) as amended by Protocol to Amend the
International Convention for the Unification of Certain Rules of Law Relating to Bills
of Lading (The Hague/Visby Rules) (signed 23 February 1968, entered into force 23
June 1977)

Uniform Rules Concerning the Contract of International Carriage of Goods by Rail
[Appendix B to the Convention concerning International Carriage by Rail (COTIF)]
(CIM/COTIF) (signed 9 June 1999, entered into force 1 July 2006)

United Nations Convention on Contracts for the International Carriage of Goods Wholly
or Partly by Sea (signed 11 December 2008, not yet in force)

United Nations Convention on International Multimodal Transport of Goods (signed 24
May 1980, not yet in force)

United Nations Convention on the Carriage of Goods by Sea (signed 31 March 1978,
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United Nations Convention on the Contract for the International Carriage of Goods by
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Partial Agreement for the Facilitation of Multimodal Transport of Goods 1996, adopted
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International Multimodal Transport

Declaration of Authorship

I, PIMKAMOL KONGPHOK, declare that this thesis entitled

Multimodal transport documents in the context of international trade law

and the work presented in it are my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. 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;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. 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;
5. I have acknowledged all main sources of help;
6. 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;
7. None of this work has been published before submission.

Signed:

Date:

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
BIMCO	Baltic and International Maritime Council
CIM	Uniform Rules concerning the Contract of International Carriage of Goods by Rail
CIT	International Rail Transport Committee
CMI	Comité Maritime International
CMNI	Budapest Convention on the Contract of Carriage of Goods by Inland Waterway
CMR	Convention on the Contract for the International Carriage of Goods by Road
COGSA 92	Carriage of Goods by Sea Act, 1992
COMBICONBILL	BIMCO Combined Transport Bill of Lading
COTIF-CIM	Uniform Rules Concerning the Contract of International Carriage of Goods by Rail [Appendix B to the Convention concerning International Carriage by Rail]
DCC	Dutch Civil Code
FIATA	Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Freight Forwarders Associations)
HarvLRev	Harvard Law Review
HGB	German Commercial Code (Handelsgesetzbuch)
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
IMO	International Maritime Organisation
INCOTERMS	International Commercial Terms
IntTLR	International Trade Law and Regulation

List of Abbreviations

ISIC Final Report	Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal liability and documentation, 2005
JBL	Journal of Business Law
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
LMCLQ	Lloyd's Maritime and Commerce Law Quarterly
Mercosur	Mercado Común del Sur
MT Convention	United Nations Convention on International Multimodal Transport of Goods
MULTIDOC	BIMCO Multimodal Transport Bill of Lading
OTIF	Organisation for International Carriage by Rail
Ro-Ro	Roll-on – Roll-off
SDR	Special Drawing Rights
SWIFT	Society for Worldwide Interbank Financial Telecommunications
TCM	Transport Combine de Merchandises
TulMarLJ	Tulane Maritime Law Journal
UIRR	International Union for Road-Rail Combined Transport
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

Chapter 1: Introduction

1.1 Background

It is commonly considered that today's world economic system is 'open market' and 'globalised'. The globalisation process may generate both positive and negative results for each country in different contexts. As a consequence, it is a substantial task for each country, especially developing countries and least-developed countries (LDCs),¹ to enhance their ability to compete with other countries, eliminate trade barriers and generate steady growth in terms of international trade. According to the United Nations Conference on Trade and Development (UNCTAD) X Declaration and UNCTAD's structure which fosters trade facilitation and multimodal transport, the essential understanding amongst the members of UNCTAD is that 'globalization is an ongoing process that presents opportunities, as well as risks and challenges'.²

While there is a need for long-term improvements in terms of infrastructure, technological development and transfer of know-how in order to sufficiently improve the whole system of international trade, the harmonisation of the legal and regulatory framework is also definitely required to facilitate trade and generate transport efficiency.³

Transportation is commonly accepted as a key sector for trade transactions, not only at international but also at regional and national level.⁴ Contemporarily, this is the age of multimodalism or door-to-door transport based on efficient use of all modes of transport, including sea, air, rail, road and inland waterway. Such transport combines

¹ United Nations Conference on Trade and Development (UNCTAD), 'The Least Developed Countries Report 2015: Transforming Rural Economics' (2015) 2 <http://unctad.org/en/PublicationsLibrary/ldc2015_en.pdf> accessed 27 January 2016.

² United Nations Conference on Trade and Development (UNCTAD), 'Trade Facilitation and Multimodal Transport' (2000) 11 UNCTAD Newsletter 5.

³ *ibid* 8.

⁴ *ibid* 7.

various forms of transportation under one responsible transport operator and one contract known as the 'multimodal transport contract'.⁵ Even though there have been several attempts to draft a set of rules to regulate the use of multimodal transport over the last few decades, none of these has achieved enough ratifications and generated international uniformity. A significant milestone occurred in 1980 when the United Nations Convention on International Multimodal Transport of Goods (MT Convention) was adopted. Unfortunately, this convention did not attract the necessary number of ratifications and has not yet entered into force.⁶ In the early 1990s, a set of standard contractual terms, ie the UNCTAD/ICC Rules for Multimodal Transport Documents, was drafted for incorporation into commercial contracts. However, as these rules are contractual in nature, they are subject to an applicable mandatory law and, accordingly, cannot be considered as an effective means of achieving international uniformity.⁷ In this context, the aim of this thesis focuses on the "effective" international legal mechanism that provides proper clarification regarding the legal status of multimodal transport documents and, simultaneously, differentiate the natures of unimodal transport contracts and multimodal transport contracts. To be realistic, even if a successful international convention is achieved, it is true that it will definitely be supplemented by national laws since the provisions in the convention cannot cover every relevant detail. However, at least, having an international convention that is globally ratified and entered into force is an optimal way to set the "floor" and "ceiling" for particular legal issues, especially those that involve conflicts of interest, protection of the traders in lower

⁵ The definition of multimodal transport can be found in Article 1 of the 1980 United Nations Convention on International Multimodal transport (the MT Convention). It is stated 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.'

⁶ United Nations, 'United Nations Treaty Collection' (2017) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&lang=en> accessed 27 January 2017; Theodora Nikaki, 'Bringing Multimodal Transport Law into the New Century: Is the Uniform Liability System the Way Forward?' (2013) 78 *Journal of Air Law and Commerce* 70.

⁷ Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of goods* (Kluwer Law International 2010) 19. Even though there are some sets of standard contractual terms that are accepted worldwide such as the UCP 600, it should be noted that its content mostly deals with the banking transactions between issuers/beneficiaries and banks, together with the banking practice amongst banks in different countries. That is to say, unlike the issues of multimodal transport, there is no major issues relating to the benefits of traders, control of unlimited freedom of contract and unfair limits of liabilities etc.

bargaining position and prevention of unlimited freedom of contract that might lead to unfair international trade transactions.

Due to the fact that no attempts to create a uniform law for multimodal carriage have been successful,⁸ the unimodal transport conventions governing liability regimes, the relationship between the carriers and the shippers or the cargo interests as well as the legal status and functions of unimodal transport documents are still extensively used for the multimodal carriage contracts.⁹

In the context of international sale of goods, it is undeniable that, whether it is port-to-port or place-to-place, the relationship between international sale contracts and transport documents significantly affects legal consequences since, according to the nature of the international sale contract, the obligations relating to transport documents are as crucial as those relating to physical contractual goods.¹⁰ That is to say, the seller's failure to provide conforming transport documents is a breach of contract and, as a result, the buyer may be entitled to reject such documents and/or terminate the contract.¹¹

Currently, there are various kinds of multimodal transport documents used, namely COMBICONBILL (1995), MULTIDOC (1995), the FIATA Multimodal Transport Bill of Lading, COMBICONWAYBILL (1995), MULTIWAYBILL 95 and the FIATA Multimodal Transport Waybill. The legal status of these aforementioned documents is still uncertain and confusing since some of them adopt the term 'bill of lading' such as the FIATA Multimodal Transport Bill of Lading, and indeed, these documents also share some features of bills of lading.¹² However, it is undoubtedly true that multimodal transport documents and traditional ocean bills of lading are not the same things in terms of their legal status and functions.¹³ Hence, concerning the tender of multimodal transport

⁸ Nikaki (n 6) 70.

⁹ *ibid* 71.

¹⁰ D Rhidian Thomas, 'International Sale Contracts and Multimodal Transport Documents: Two Issues of Significance' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 145.

¹¹ *ibid*; *The Hansa Nord* [1976] QB 44, [70] (Roskill J).

¹² For example, Article 3.4 of the FIATA Multimodal Transport Bill of Lading regarding evidentiary effect of the multimodal bills of lading.

¹³ This issue will be discussed in detail in chapters 3 and 4.

documents in the context of documentary credit, how to differentiate multimodal transport documents and unimodal transport documents (port-to-port bills of lading, CMR consignment notes, CIM-COTIF consignment notes, CMNI inland waterway transport documents and air waybills) is the crucial first step to determine which provision under the UCP 600 will apply. Further, the criteria for multimodal transport documents to qualify as a good tender is also significant to facilitate international trade finance.

Even though national laws used in some countries such as Germany, the Netherlands, South Korea, India and Thailand provide a clear status for multimodal transport documents, the issue of the legal status and functions of multimodal transport documents is still unsettled at international level and also in many jurisdictions including under English common law.¹⁴ Thus, it is worth discussing these issues in detail in order to understand the current situations faced by stakeholders in international trade transactions, including the buyer, the seller, multimodal transport operators and banks, as well as identifying the root cause of such problems and then figuring out the possible way forward to cope with them.

1.2 Objectives of the thesis

This thesis has a number of objectives:

1. To examine the *status quo* of legal frameworks governing multimodal transport and the muddle caused by the overlapping of the scopes of application under unimodal transport conventions.

2. To investigate the legal status and functions of multimodal transport documents in the context of international sale of goods in order to understand the extent to which multimodal transport documents can facilitate international sale transactions and

¹⁴ Andrew Tettenborn, 'Bills of Lading, Multimodal Transport Documents, and Other Things' in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law 2014) 127. This issue will be discussed in detail in chapter 4.

whether there are any inconsistencies or legal uncertainty which hinder international sale of goods.

3. To differentiate between unimodal and multimodal transport documents, to scrutinise fundamental issues that result in any discrepancies and to analyse any inconsistency and relevant factors that lead to a bad tender in terms of documentary credit.

4. To propose optimal short-term and long term solutions in order to unify the legal regimes which regulate multimodal transport and clarify the legal status and functions of multimodal transport documents. The ultimate goal of this proposal is to provide a solution that is consistent with other underlying contracts in international trade, namely international sale of goods and letters of credit; to eliminate legal uncertainty regarding the use of multimodal transport documents; and to facilitate international trade transactions as a whole.

1.3 Structure of the thesis

In order to pursue the objectives of the thesis, the content is divided into 7 chapters as follows;

Chapter 1 introduces the background and the objectives of this thesis. In addition, its structure is also provided.

Chapter 2 focuses on the *status quo* where unimodal transport conventions, including Hague/Visby Rules, Hamburg Rules, Warsaw Convention, Montreal Convention, CMR, COTIF-CIM and CMNI, have been applied to multimodal transport. Moreover, a discussion on inconsistencies and conflicts amongst them is provided. Further, the current legal frameworks on multimodal transport at regional and national level are also presented.

Chapter 3 provides an examination of the correlation between multimodal transport documents and international sales of goods. The main issues in this chapter

include an overview of multimodal transport documents used in the transport industry and the legal significance of transport documents in the context of international sale of goods. At the end of this chapter, since the functions of traditional port-to-port bills of lading will be regularly referred to in order to make a comparison with those of multimodal transport documents in chapter 4, an overview of the functions of bills of lading is provided.

Chapter 4 is dedicated to the legal status and functions of multimodal transport documents in the context of international sales of goods. The discussion is divided into three main parts according to the functions of multimodal transport documents, including multimodal transport documents as receipts of goods, as documents of title and as evidence of multimodal transport contracts.

Chapter 5 addresses multimodal transport documents in the context of documentary credit. This chapter starts with an overview of letters of credit under the UCP 600 and the banking practice based on the SWIFT telecommunication system. After that, the issue of how to differentiate unimodal and multimodal transport documents is considered. Then, a discussion on documentary requirements in case of multimodal transport documents is provided.

Chapter 6 focuses on, firstly, an analysis of documentary issues and how to deal with them; secondly, a discussion on current difficulties posed by the fragmented legal frameworks governing multimodal transport based on the contract *sui generis* theory, mixed theory and absorbed theory; and thirdly, a proposal for short-term and long-term solutions.

Chapter 7 provides a conclusion and a recommendation for future research in the area of multimodal transport and international trade law.

Chapter 2: Current legal frameworks governing multimodal transport: international, regional and national schemes

2.1 Introduction

The container revolution and technological development have resulted in the significant growth of worldwide door-to-door transport of goods involving two or more modes of transport. This phenomenon is termed multimodal transport.¹⁵ In relation to a legal framework to regulate multimodal transport, there is a lengthy debate concerning whether it is necessary to have an international, mandatory and uniform set of rules governing multimodal transport or whether the current unimodal transport conventions are an appropriate means of dealing with the disputes that arise from multimodal transport.¹⁶ Even though there have been several attempts to enact a set of rules to regulate multimodal transport over the last few decades, including the 1972 TCM Draft Convention and the 1980 MT Convention, none of these has achieved enough ratifications and international uniformity.¹⁷

In the early 1990s, some sets of standard contractual terms were drafted for incorporation into commercial contracts, ie the UNCTAD/ICC Rules, the FIATA Bill of Lading (FBL) 1992 and BIMCO's MULTIDOC 1995. However, as these rules are contractual in nature, they are subject to applicable mandatory law in the form of either international

¹⁵ For the definition of 'multimodal transport', see Article 1 of the MT Convention.

¹⁶ For example, see Filippo Lorenzon, 'Multimodal Transport Evolving: Freedom and Regulation Three Decades after the 1980 MTO Convention' in Malcolm Clarke (ed) *Maritime Law Evolving* (Hart 2013); Nikaki (n 6); Hoeks (n 7); Mahin Faghfour, 'International Regulation of Liability for Multimodal Transport – In Search of Uniformity' (2006) 5 WMU Journal of Maritime Affairs 95.

¹⁷ Almost four decades of the unsuccessful MT Convention indicates the failure to propose a uniform set of rules regulating multimodal transport. See Nikaki (n 6) 70; D Rhidian Thomas, 'Multimodalism and Through Transport – Language, Concepts, and Categories' (2012) 36 Tulane Maritime Law Journal 761, 761.

conventions or national laws and, accordingly, cannot be considered as an optimal means of achieving international uniformity and set the global standard in terms of the use of multimodal transport, relationship amongst stakeholders, liability regimes for multimodal transport operators and the legal status of multimodal transport documents.¹⁸

Due to the fact that no attempts to create a uniform law for multimodal carriage have been successful,¹⁹ the unimodal transport conventions applicable to unimodal carriage or single mode of transportation are still extensively in use to deal with multimodal carriage contracts.²⁰ In other words, the current legal framework which regulates multimodal transport at international level is a composition of international unimodal transport conventions which were created specifically for single mode of transport²¹ and standard contractual terms, ie FBL 1992, UNCTAD/ICC Rules; BIMCO's COMBIDOC, COMBICONBILL, COMBICONWAYBILL, MULTIDOC 95 and MULTIWAYBILL 95; and P&O Nedlloyd's Bill of Lading and non-negotiable waybill.²²

However, the situation is relatively different at the regional/sub-regional level as there exists various regional/sub-regional agreements specifically governing multimodal transport.²³ These regional/sub-regional rules are generally based on the 1980 MT Convention and the UNCTAD/ICC Rules. Nevertheless, many differences have been found under these regional/sub-regional rules concerning the liability basis, monetary limitation of liability and time-bar. The inconsistencies amongst these rules inevitably leads to 'disunification' at the global level.²⁴

¹⁸ Hoeks (n 7) 19.

¹⁹ Nikaki (n 6) 70.

²⁰ *ibid* 71.

²¹ Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32 *International and Comparative Law Quarterly* 120. This fragmented regime and a lack of uniformity can possibly lead to international disputes regarding forum shopping when considering an applicable law to multimodal transport contracts, see Hoek (n 7) 112. However, the issue of forum shopping is beyond the scope of this thesis.

²² Faghfoury (n 16) 100.

²³ ie The Andean Community Decision 332 of 1993 as modified by decision 393 of 1996 on International Multimodal Transport; Partial Agreement for the Facilitation of Multimodal Transport of Goods 1996, adopted by MERCOSUR and ASEAN Framework Agreement on Multimodal Transport 2005. For further information regarding an overview of these regional/sub-regional regimes, see UNCTAD, 'The Implementation of Multimodal Transport Rules' (2001) UNCTAD Documents (UNCTAD/SDTE/TLB/2).

²⁴ Faghfoury (n 16) 100. This issue will be examined in detail later in this chapter.

As the aim of this thesis is to investigate the legal status, significance and functions of multimodal transport documents in the context of international trade law with the ultimate goal of utilising them as evidence to justify the proposal that a new convention on multimodal transport is required to solve the current conundrums in this area, preliminary background information on the legal regimes which regulate multimodal contracts should be delineated in order to scrutinise the overall *status quo*, conflicts and how the fragmented legal regimes, including those at international, regional and national levels, play an important role as a means to deal with multimodal transport issues in the absence of an international legal instrument on multimodal transport. This chapter will examine the key provisions of each current unimodal convention (including the CMR,²⁵ the CIM/COTIF,²⁶ the Warsaw Convention,²⁷ the Montreal Convention²⁸ the Hague/Visby Rules,²⁹ the Hamburg Rules,³⁰ and the CMNI³¹) that expand the scope of application of such unimodal conventions to cover other modes of transport as part(s) of a whole multimodal journey. The interpretations of those provisions as well as some comments in relation to conflicts amongst unimodal transport conventions will be provided. Subsequently, the current legal frameworks governing multimodal transport at the regional/sub-regional and national level will be examined.

²⁵ United Nations Convention on the Contract for the International Carriage of Goods by Road (signed 19 May 1956, entered into force 2 July 1961) (CMR).

²⁶ Uniform Rules Concerning the Contract of International Carriage of Goods by Rail [Appendix B to the Convention concerning International Carriage by Rail (COTIF)] (signed 9 June 1999, entered into force on 1 July 2006) (CIM/COTIF).

²⁷ Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) (Warsaw Convention).

²⁸ Convention for the Unification of Certain Rules for International Carriage by Air (signed 28 May 1999, entered into force 4 November 2003) (Montreal Convention).

²⁹ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (drafted in 1924) (The Hague Rules) as amended by Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (The Hague/Visby Rules) (signed 23 February 1968, entered into force 23 June 1977).

³⁰ United Nations Convention on the Carriage of Goods by Sea (signed 31 March 1978, entered into force 1 November 1992) (Hamburg Rules).

³¹ Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (signed 22 June 2001, entered into force 1 April 2005) (CMNI).

2.2 Rules governing multimodal transport at the international level

In relation to international unimodal transport conventions, each of them was developed separately and without the intention of working together; therefore, no direct connection between them exists.³² However, there are some provisions under these conventions that extend the scope of application to other modes of transport in the chain of a single multimodal transport operation. In this section, the application and interpretation of such scope under each convention, coupled with the inconsistencies amongst them will be discussed.

2.2.1 Carriage of goods by road: The CMR

Transport by road is a mode of carriage which is extensively used in multimodal transportation since it is part of almost every multimodal contract. To be more specific, road carriage is commonly used as a means to transport goods to and from infrastructure hubs, ie ports, airports and/or railway stations.³³

In the multimodal transport context, there is a provision of the CMR which extends the scope of application to multimodal transport. Article 2 of the CMR³⁴ is as follows:

1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention 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 the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention.

³² Mankabady (n 21) 120.

³³ Hoeks (n 7) 145.

³⁴ This provision was proposed by the United Kingdom delegates for the purpose of through traffic, specifically traffic across the English Channel and the North Sea, see Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (2nd edn, Informa Professional 2008) para 1.16.

Due to the significant growth of door-to-door carriage, Article 2 of the CMR provides that the CMR will be applicable to the whole period of multimodal carriage based on certain conditions. However, this provision has fed an ongoing debate concerning the interpretation of the expanded scope of application as well as the exact scope of the CMR that applies to multimodal transport contracts.³⁵ It is unsurprising that Article 2 of the CMR is regarded as ‘rather puzzling’ and also ‘notoriously difficult’.³⁶

Article 2 of the CMR extends the scope of application to multimodal transport. However, the circumstance to which the CMR would apply is only where the loaded road vehicle is placed on another vehicle in different modes of transport as part of the transit – the so-called ‘RO-RO transport’³⁷ – in the same way as a ‘kangaroo carrying its offspring’.³⁸ In other words, the CMR does not apply where the cargo is unloaded from the road vehicle and transferred to another mode of transport.³⁹ In addition, under the aforementioned *status quo* with regard to the extended scope of application of the CMR, there is no difference whether the sea, air, rail or inland waterway transport is operated at the beginning, in the middle or at the end of the whole journey.⁴⁰

2.2.1.1 Roll-on, roll-off (RO-RO) transport

RO-RO transport under the CMR can be considered as a type of ‘mode-on-mode’ transport or *transport superposé*⁴¹ which involves the road transport vehicle with loaded cargo. At first glance, it seems that RO-RO transport involves two or more means of

³⁵ Hoeks (n 7) 149.

³⁶ Malcolm A Clarke, ‘Harmonization of the Regulation of Carriage of Goods in Europe’ (2002) Transp R 428, 428; section 2.2.1.2.

³⁷ According to this provision, it should also be noted that, in general, transshipment is not permitted. However, under certain conditions under Article 14 of the CMR, if the transshipment is necessary for operating the transport of goods by road, the general concept of expanded scope of application still applies; see Mankabady (n 21) 120.

³⁸ KF Haak and MAIH Hoeks, ‘Arrangements of Intermodal Transport in the Field of Conflicting Conventions’ (2004) 10(5) Journal of International Maritime Law 425, 425.

³⁹ Clarke (n 34) para 1.18.

⁴⁰ A Messent and David A Glass, *Hill & Messent, CMR: Contracts for the International Carriage of Goods by Road* (Lloyd’s of London Press 2000) 44.

⁴¹ Examples of other forms of mode-on-mode carriage are ‘lighter-abroad-ship’ (LASH) carriage and rail-on-ship which is the carriage of rail cars on ferries. The latter service is operated between New Orleans and Coatzacoalcas, Mexico, see Hoeks (n 7) 198.

carriage. However, the actual RO-RO transport is operated by only one transport vehicle.⁴² That is to say, RO-RO transport is solely involved in other modes of transport by which the road vehicle with loaded cargo is passively carried. The benefit of RO-RO transport is that it avoids loss or damage that may occur to the cargo carried since the cargo is never taken away from the vehicle, even during transit or transshipment from one mode of transport to another, which is statistically proven to be the most unsafe stage of the whole transport journey.⁴³

Although RO-RO transport seems to deal with unimodal carriage rather than multimodal transport, Article 2 of the CMR noticeably aims to apply to multimodal transport.⁴⁴ This provision provides that it is an essentially required condition that a stage of road carriage before or after RO-RO transport or both must exist in order for the convention to be applicable to the whole stage of transport. It is quite clear that Article 2 tends to apply to multimodal transport in a broad sense because, apart from road carriage, the RO-RO stage carried by other modes of transport is under the ambit of the CMR. However, it is questionable whether the concept of Article 2 could be an effective solution because it may lead to confusion in case of containerised carriage. In practice, the containers are unloaded separately from the vehicle during transit and, obviously, the CMR does not apply to this circumstance.⁴⁵

2.2.1.2 Extended scope of application of the CMR: The Quantum case⁴⁶

It would be inadequate to discuss the scope of application under the CMR and not mention the prominent and contentious case of *Quantum*. This case involved loss of cargo owned by Quantum during a journey involving a combined transport of goods from

⁴² *ibid.*

⁴³ Michalis D Christou, 'Analysis and Control of Major Accidents from the Intermediate Temporary Storage of Dangerous Substances in Marshaling Yards and Port Areas' (1999) 12 *Journal of Loss Prevention in the Process Industries* 109, 113-114.

⁴⁴ Hoeks (n 7) 199.

⁴⁵ Adrian C Hardingham and Jane Hobbs, 'Chapter 1 Cargo Interests' in Diana Faber (ed), *Practical Guides: Multimodal Transport – Avoiding Legal Problems* (LLP Limited 1997) 11.

⁴⁶ *Quantum Corporation Inc and others v Plane Trucking Ltd and Another* [2002] 2 Lloyd's Rep 25 [535].

Singapore to Dublin. After transporting such goods by air from Singapore to Charles De Gaulle Airport in Paris, the next transport operation was agreed to be carriage of goods by road from Paris to Dublin. During the road carriage, the cargo was stolen in Great Britain. The Commercial Court⁴⁷ rejected the claimants' plea that the CMR applied to the loss since, according to Tomlinson J, the situation, both the whole carriage and the stage from Paris to Dublin, was not under the ambit of Article 2 of the CMR. Tomlinson J was convinced that the most crucial factor to be considered was the nature of the contract, not the carriage itself. He also stated that, in this situation 'it was "essentially" and "predominantly" a contract for carriage by air, and that what was true of the whole was true of the parts'.⁴⁸

Nevertheless, the Court of Appeal disagreed with the decision of the Commercial Court and held that in the case of international transport of goods to or from a contracting state the CMR is applicable to 'every contract for the carriage of goods by road', no matter what other modes of transport are involved.⁴⁹ It can be seen that the Court of Appeal interpreted the scope of application of the CMR in a relatively broad sense. This decision was extensively criticised as it is not commonly accepted that a combined transport of goods contract can be deemed a contract for carriage of goods by road just because road carriage was allowed as part of the whole transport journey.⁵⁰ This decision was supported by a Dutch court⁵¹ and a German court⁵². On the other hand, a French court, a Belgium court and the Danish Supreme Court disagreed with the decision in the *Quantum* case.⁵³

To conclude, despite the fact that the *Quantum* case is an attempt by an English court to fill the gap of applicable law governing multimodal transport, it is questionable

⁴⁷ *Quantum Corporation Inc and others v Plane Trucking Ltd and Another* [2001] 2 Lloyd's Rep 133.

⁴⁸ Malcolm A Clarke, 'Carriage by Road: A Multimodal Mix-up' (2002) *Journal of Business Law* 210, 212.

⁴⁹ Malcolm A Clarke, 'A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on your Doorstep' (2003) 1 *Journal of International Maritime Law* 28, 32.

⁵⁰ Vibe Ulfbeck, 'Multimodal Transports in the United States and Europe – Global or Regional Liability Rules?' (2009) 34 *Tulane Maritime Law Journal* 37, 73.

⁵¹ *Resolution Bay* Rb Rotterdam (28 October 1999) S&S 2000, 35.

⁵² BGH (24 June 1987) *Transp R* 1987, 447.

⁵³ Ulfbeck (n 50) 73.

whether this broad interpretation can serve as an effective means to solve the problem or it appears to lead to more conflicts amongst unimodal conventions. Indeed, based on the *travaux préparatoires* regarding the intention of the drafters of the CMR, it was mentioned that a separate convention dealing with multimodal transport was intended to be launched in the future.⁵⁴ This is supporting evidence that the CMR was not intended to apply to multimodal transport, except in the case of 'Ro-Ro' transport or *transport superposé*. Furthermore, with regard to this case, Article 38 of the Montreal Convention governing carriage of goods by air was not applicable either since it falls outside the scope of application.⁵⁵ It can be seen that a multimodal transport convention which directly deals with multimodal matters is required to efficiently fill the gap as well as create global certainty and uniformity.

2.2.3 Carriage of goods by rail: CIM/COTIF

The COTIF Convention on international rail carriage is the oldest legal uniform regime governing carriage of goods. Similar to the CMR, the CIM/COTIF is, to a great extent, a European convention since almost of the member states are European countries.⁵⁶ The COTIF has been reviewed and amended from time to time with the most recent one in 1999.⁵⁷ This latest revision of the COTIF, the 'Vilnius Protocol',⁵⁸ aims to reflect the general trend to simplify the uniform transport law.⁵⁹ Relating to carriage of goods carried by rail, it is governed by the Appendix B of the COTIF Convention – the so-called 'CIM appendix' which was also amended by the Vilnius Protocol. The reason behind

⁵⁴ Hoeks (n 7) 137.

⁵⁵ Article 38 of the Montreal Convention states that: '1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1. 2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.' The discussion on the international unimodal convention governing carriage of goods by air will be provided later in this chapter.

⁵⁶ Some African and the Middle East countries, ie Turkey, Morocco, Iraq, Syria and Iran have ratified the COTIF Convention, see Intergovernmental Organisation for International Carriage by Rail (OTIF), 'List of Member States' <<http://ibid.otif.org/en/about-otif/list-of-member-states.html>> accessed 17 June 2016.

⁵⁷ The COTIF has been revised in 1898, 1906, 1924, 1933, 1952, 1961, 1970, 1980, 1990, 1992 and 1999, see Hoeks (n 7) 261.

⁵⁸ This amendment has been in force since 1 July 2006.

⁵⁹ Clarke (n 36) 430.

this amendment is to generate harmonisation between the CIM and other unimodal transport conventions governing other modes of carriage.⁶⁰ The provisions of the CIM/COTIF, which extend the scope of this convention to other modes of transport (under certain conditions), are Articles 1.3 and 1.4:

Article 1 - Scope

3. 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.

4. 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.

Article 1.3 provides that if the carriage by road or inland waterway falls under its ambit, such a carriage is considered as part of a single contract of rail carriage and, as a consequence, the CIM/COTIF applies. According to Article 1.3, it is not necessary for the carriage by road or inland waterway to be performed at the beginning stage, at the end of the rail transport, or even between two or more rail carriages.⁶¹ The specific restriction of this provision is that the CIM/COTIF will apply only if the supplemented carriage of goods by road or inland waterway is a non-cross-border carriage. The reason behind this provision is to circumvent possible conflicts that may occur between the CIM/COTIF Convention and the CMR as well as the CMNI.⁶²

With regard to Article 1.4, this provision extends the scope of the CIM/COTIF to other modes of transport which are international carriage. This paragraph maintains the use of a list system in the same way as the previous 1980 CIM/COTIF except that the listed service under the current version of the CIM/COTIF is in a diminished form.⁶³ In order to avoid possible legal uncertainty, in terms of carriage of goods by inland waterways the registration of lines is a requirement since it can prevent possible conflicts between the

⁶⁰ Hoeks (n 7) 262.

⁶¹ *ibid* 271.

⁶² Clarke (n 34) 320; Hoeks (n 7) 271.

⁶³ *ibid* 274.

CIM/COTIF and the CMNI which regulate carriage by inland waterways.⁶⁴ If the countries adopting the CMNI abstain from adding inland waterway services to the CIM list, or exclude inland waterway services from the scope of application of the CMNI by means of Article 30 of the CMNI,⁶⁵ the conflicts between the CIM/COTIF and the CMNI Convention will substantially be prevented.⁶⁶ However, unlike Article 30 of the CMNI concerning supplementary sea carriage, the registration of lines is compulsory in every circumstance no matter whether it is internal or trans-frontier carriage because of the nature and fundamental differences between maritime and rail carriage law.⁶⁷

After discussing the scope of application of the CIM/COTIF, a question that arises is what would be the outcome where a contract of carriage includes road transport, apart from trans-frontier rail carriage? It will be assumed that in case of a contract which states that the cargo is to be transported *internationally* by road first and then the truck (together with the cargo) will be carried to the destination *in another country* by rail, if it can be proved that the loss or damage occurred when the cargo was in the truck, it can be concluded that the stage of road transport is not under the scope of application of the CIM/COTIF but instead under the ambit of the CMR.

If, on the other hand, the cargo is to be transported *domestically* by road first and then the truck (together with the cargo) is to be carried to the destination *in another country* by rail, it can be seen that Article 1.3 of the CIM/COTIF is applicable to the whole journey. However, this situation also meets the requirement under Article 2 of the CMR which extends the scope of application of the road convention to other modes of transport. According to Article 2 of the CMR, which allows the application of certain

⁶⁴ The discussion on the scope of application of the CMNI is provided in 2.2.6.

⁶⁵ Article 30 Carriage by way of specific inland waterways.

'Each State may, at the time of signing this Convention or of ratification, acceptance, approval or accession, declare that it will not apply this Convention to contracts relating to carriage by way of specific inland waterways situated on its territory and to which international rules of navigation do not apply and which do not constitute a link between such international waterways. However, such a declaration may not mention all main waterways of that State.'

⁶⁶ Hoeks (n 7) 274.

⁶⁷ OTIF, 'Central Office Report on the Revision of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and Explanatory Reports on the texts adopted by the Fifth General Assembly' (2011) <http://ibid.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/03_erlaeut/COTIF_Rapport_explificatif_01_01_2011_e.pdf> accessed 17 June 2016.

mandatory laws for regulating other modes of transport, there would be no conflict at all if it can be proved that the loss or damage occurred during the rail stage. However, if the loss or damage cannot be localised, conflicts between the CIM/COTIF and the CMR are inevitable.

2.2.4 Carriage of goods by air: The Warsaw Convention and the Montreal Convention

Compared to sea and land transport, air transport has a shorter history. However, the carriage of goods by air has successfully been governed by uniform rules at the international level for almost a century. The first international uniform rules which regulate carriage of goods by air is the 1929 Warsaw Convention. This convention has been revised and amended by a number of protocols together with a separate convention called 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'.⁶⁸ However, the amendments have not been thoroughly ratified by all member states of the Warsaw Convention. Given this, the application of the Warsaw Convention and its amendments, the 'Warsaw System', is tremendously fragmented and complicated.⁶⁹ In order to handle the complexity and non-unified status of the Warsaw System, a new convention was drafted which was subsequently signed in Montreal on 28 May 1999. The new convention is the 'Convention for the Unification of Certain Rules for International Carriage by Air' (the *so-called* the Montreal Convention). Since the Montreal Convention does not require its member states to cease being members of the Warsaw Convention, both the Warsaw Convention and the Montreal Convention are currently used alongside each other.⁷⁰ Regarding multimodal transportation, the extension of the scope of application of air carriage conventions to other modes of transport is provided

⁶⁸ 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 was signed in Guadalajara on 18 September 1961.

⁶⁹ Hoeks (n 7) 220.

⁷⁰ *ibid.*

in Article 18 and Article 31 of the Warsaw Convention as well as Article 18 and Article 38⁷¹ of the Montreal Convention:⁷²

Article 18.4 of the Montreal Convention

The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, 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. 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.

Article 38 of the Montreal Convention - Combined carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.
2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

The purpose of Article 18 of both the Warsaw Convention and the Montreal Convention is to extend the period of carriage of goods by air, which is under the responsibility of the carrier in terms of loss and damage, beyond the period of actual journey by air.⁷³ According to Article 18(4) of the Montreal Convention, the period of air transport is basically not expanded to other modes of transport that operate *outside* an airport. However, under certain prerequisites there can be exceptions that enable the extension of the air carriage period to other modes of transport that operate outside the airport if such a carriage is operated in the performance of a contract for air carriage, ie for the purpose of loading, delivery or transshipment. In this case, any loss or damage is deemed to occur, according to *prima facie* presumption,⁷⁴ during the period of air transport.⁷⁵

⁷¹ Regarding the discussion on the incompatibility of Article 38 and Article 18(4) of the Montreal Convention, which is regarded as a 'chicken and egg' conundrum, see Hoeks (n 7) 238-239.

⁷² The content of Article 18 and Article 31 of the Warsaw Convention are similar to that of Article 18 and Article 38 of the Montreal Convention. Therefore, the discussion below will mainly focus on the Montreal Convention.

⁷³ *Clarke v Royal Aviation* (1997) 34 Ord (3d) 481; Clarke (n 34) 320.

⁷⁴ This means that if it can be proved that the loss or damage occurred elsewhere without involving loading, delivery or transshipment, the presumption is not taken into account to expand the period of air carriage to another mode of transport, see Hoeks (n 7) 240.

⁷⁵ *ibid* 363.

Concerning the scope of application discussed above, Article 18 of both the Warsaw Convention and the Montreal Convention can potentially lead to conflicts with other unimodal transport conventions. Firstly, regarding the CMR which regulates carriage of goods by road, if the CMR is applicable to international road carriage that is performed for the purpose of loading, delivery or transshipment, the road haulage can possibly be governed by both the air transport conventions and the CMR.⁷⁶ The substantial differences between the uniform air conventions and the road carriage convention may lead to major problems such as the issue of monetary limit of liability which is considerably varied at 8.33 SDR per kilogram under the CMR and 17 SDR per kilogram under the Montreal Convention.⁷⁷ Secondly, with regard to the conflict between the uniform air carriage regimes and the CIM/COTIF which regulate carriage of goods by rail, the same scenario as the conflicts with the CMR may occur, although the possibility of such a conflict is relatively minor since only some airports⁷⁸ have railway stations in the same area or adjacent to them, while all airports can be reached by road.⁷⁹ Thirdly, in relation to the sea carriage treaties and the CMNI governing carriage of goods by inland waterway, the conflicts between the Warsaw/Montreal Conventions and those regimes is unlikely to be an issue as the possibility that sea or inland waterway ports are located near or within the airport is, in fact, considerably low.⁸⁰

To sum up, although the Warsaw Convention and the Montreal Convention which regulate carriage of goods by air provide provisions to extend their scope of application to other modes of transport in order to deal with the practice of multimodal transport, some conflicts still exist. Although the uniform air regimes acknowledge the existence of multimodal transport, the main focus of these rules is on air carriage rather than adopting an absolute multimodal thinking. It can be concluded that the provisions that would apply to multimodal transport under the air carriage conventions do create conflicts with other

⁷⁶ See *Rolls-Royce v Heavylift Volga Dnepr Ltd* [2000] 1 Lloyd's Rep 653; Malcolm A Clarke, 'Carriers' Liability in Cross-Border Air Cargo Substitute Transport' (2005) Transp R 182, 183; Hoeks (n 7) 364.

⁷⁷ See Article 23 of the CMR and Article 22 of the Montreal Convention.

⁷⁸ such as Schiphol, Charles de Gaulle and Gatwick.

⁷⁹ Hoeks (n 7) 364.

⁸⁰ *ibid.*

unimodal transport conventions, and the issue of uncertainty and unpredictability is still ongoing.

2.2.5 Carriage of goods by sea: The Hague/Visby Rules and the Hamburg Rules

Unlike other unimodal transport conventions, uniform maritime conventions do not contain any specific provision that extends the scope of application of the sea transport treaties to other modes of transport. Thus, the only related question in terms of multimodal transport is the simple one of whether the conventions which regulate carriage of goods by sea would apply to an international sea leg that is part of a larger multimodal transport journey. In this section, the discussion focuses on the scope of application of the Hague/Visby Rules and the Hamburg Rules in cases where sea carriage plays a part in a multimodal transport contract.

2.2.5.1 Multimodal transport under the Hague/Visby Rules

Regarding the scope of application to international sea carriage as a part of multimodal transport operations, there are different points of view on this matter. On the one hand, it is believed that the Hague/Visby Rules solely apply to a unimodal sea transport contract because the Rules do not clearly express that a contract of carriage including other modes of transport, even though a bill of lading has been issued, falls under the ambit of the Rules. This perspective is supported by German academics⁸¹ as well as some Italian judgments.⁸²

⁸¹ The German scholars mentioned include Professor R Herber, K Ramming, M Rogert, K Drews and D Rabe, see Hoeks (n 7) 312.

⁸² The Italian cases include, Tribunale of Turin 5 June 2002, *Chinese Polish Joint Stock Shipping v Zust Ambrosetti SpA*, DM 2003, 1042; Tribunale of Gorizia 28 May 2003, Corte di Cassazione 2 September 1998, no 8713, *Andrea Merzario SpA v Vismara Associate SpA and others*, DM 2000, 1349, see Hoeks (n 7) 312-313.

In contrast, in accordance with English judgments, the opinion on this matter is the opposite. For instance, in *Pyrene v Scindia*⁸³ Devlin J stated that:

I think 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 the 'contract of carriage' in Art. I(b), 'relates to the carriage of goods by sea'⁸⁴

From the same judgment, it was further clarified that:

The operation of the Rules is determined by the limits of the contract of carriage by sea and not by limits of time. The function of Article I(e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from the 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.⁸⁵

It is clear from the judgment in *Pyrene* that the judges were quite convinced that the Hague/Visby Rules are able to apply to an international sea transport stage even if such a sea leg is operated as part of the multimodal transport contract.⁸⁶ As the existence of door-to-door delivery and multimodal transport is commonly acknowledged and there is a lack of an international uniform set of rules applicable to multimodal transport, it seems sensible to allow the scope of application of the Hague/Visby Rules to the international sea stage as part of a multimodal carriage contract.

2.2.5.2 Multimodal transport under the Hamburg Rules

Dissimilar to the Hague/Visby Rules, the Hamburg Rules provide a particular provision concerning multimodal transport. Article 1(6) of the Hamburg Rules demonstrates the scope of application where sea transport is part of a multimodal transport contract. The second part of this provision states that the Hamburg Rules will be applicable for:

⁸³ *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402.

⁸⁴ *ibid* 415.

⁸⁵ *Pyrene* (n 83) 416; this perspective was later reaffirmed in *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317.

⁸⁶ This point of view was agreed with by the Dutch judiciary as well. See Hoeks (n 7) 312.

... 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 purposes of this Convention only in so far as it relates to the carriage by sea.

From this provision, it can be seen that the Hamburg Rules acknowledge the existence of multimodal transport or door-to-door delivery that includes an international sea leg as part of a larger contract of carriage. However, the Hamburg Rules will strictly apply to the sea stage, not the whole combined transport.⁸⁷ This concept of application is also emphasised by Article 4(1) of the Rules⁸⁸ which provides that the period of liability of the carrier is restricted to the period starting from the moment the goods are taken in charge by the carrier at the port of loading and ending at the port of discharge.

To sum up, under the current international uniform rules which regulate carriage of goods by sea, no expansion of the scope of application has been provided. In relation to the Hague/Visby Rules, there are different views regarding their scope of application to international sea transport as part of a multimodal transport contract. Since door-to-door transport plays an important role at present, it is quite reasonable that the Rules can be applicable to the stage of carriage of goods by sea. With regard to the Hamburg Rules, Article 1(6) provides a clear statement that the Rules apply to international sea carriage of goods, even when such carriage is part of a multimodal carriage contract. However, the Rules are specifically and strictly applicable to the sea stage, not the whole period of multimodal transport of goods.

2.2.6 Carriage of goods by inland waterways: The CMNI

Compared to other modes of transport, the waterways seem to be overlooked, although they are suitable for large capacity fleet and considered as the most

⁸⁷ *ibid* 332.

⁸⁸ Article 4 - Period of responsibility

'1. The responsibility of the carrier for the goods under this 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 port of discharge.'

environmentally-friendly mode of carriage.⁸⁹ Since barge transport has played a less significant role, the uniform legal regime that governs carriage of goods by inland waterways has not been paid much attention to over the past decades. However, the uniform set of rules which regulates carriage of goods by inland waterways, known as the CMNI, was successfully adopted at a diplomatic conference in 2000 and later came into force in 2005. Under the CMNI (Article 2.2), there is a provision that enables the expansion of its scope to other modes of transport as part of a multimodal transport contract:

Article 2 Scope of application

...

2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless:

- (a) A maritime bill of lading has been issued in accordance with the maritime law applicable, or
- (b) The distance to be travelled in waters to which maritime regulations apply is the greater.

In spite of this extended the scope, it only covers sea carriage under certain prerequisites. The term ‘without transshipment’ means that unless the agreed carriage is operated by the same vessel both on inland waterways and in the sea, the scope of the CMNI will not cover that carriage.⁹⁰ In relation to Article 2.2(a) regarding the maritime bill of lading, the condition is that such a bill of lading must be issued in accordance with the requirements of the applicable maritime conventions. The other condition under Article 2.2(b) is that the CMNI will not cover the maritime carriage, although there is no maritime bill of lading issued, if the maritime stage of transport is greater in terms of geographical distance compared to the inland waterway journey.⁹¹

⁸⁹ ‘Inland waterways generate fewer emissions of particulate matter, hydrocarbons, carbon monoxide and nitrous oxide than rail or truck on a per ton mile move basis’, see Texas Transportation Institute, Center for Ports and Waterways, ‘A Modal Comparison of Domestic Freight Transportation Effects on the General Public’ (2012) <<http://ibid.nationalwaterwaysfoundation.org/study/FinalReportTTI.pdf>> accessed 13 June 2016.

⁹⁰ *ibid* 289; In addition, analogising from the case *Quantum* (n 46), according to the likeness of CMR and the CMNI, the same position can potentially apply to the scope of application of the CMNI, see Clarke (n 76) 183.

⁹¹ Hoeks raises an issue about the lack of clarity of Article 2.2(b), ie whether the term ‘maritime regulations’ include those governing transport or traffic only or whether rules on marine safety are also covered, see Hoeks (n 7) 289.

It can be seen that even though the CMNI was recently launched, compared to other unimodal transport conventions, the issue regarding the ambiguity of its scope of application is still unsettled. Concerning Article 2.2, which is aimed at extending the scope of application to sea transport, it could potentially be in conflict with the maritime conventions, especially the Hamburg Rules and the Rotterdam Rules, which do not require the carrier to issue a bill of lading.⁹²

2.2.7 The problems and inconsistency of the current international legal frameworks

Since the unimodal transport conventions are still used as applicable laws on multimodal transport, the current legal frameworks are fragmented and complicated. This situation contributes to multiple problematic issues in cases where the applicable conventions are in conflict and inconsistent with one another.⁹³ Especially in case of goods carried in sealed containers, the stage of transport where loss or damage occurs is unlikely to be identified. In addition, legal uncertainties also arise, including the overlapping scopes of application, various liability rules, the different monetary limits of liability and dissimilar time-bar under which the claims must be sued according to international unimodal transport conventions.⁹⁴ Another problem that may arise concerns the freedom of contract amongst parties since the unimodal transport conventions have their own mandatory effect. When one of them applies, it prevails over the parties' freedom of contract. As a result, the applicable convention may not be the one that the parties desire to be bound by. In other words, the parties are unable to freely agree on contractual terms that would lead to derogation from the unimodal transport conventions.⁹⁵

⁹² *ibid* 296. However, it should be noted that this conflict is unlikely to cause a major impact in Europe since there are only five countries that are member states of the Hamburg Rules. Furthermore, the conflict with the Rotterdam Rules has not been an issue yet as the Rules have not entered into force or very likely never will.

⁹³ Lorenzon (n 16) 167.

⁹⁴ Faghfour (n 16) 101.

⁹⁵ Hardingham (n 45) 11. This issue will be discussed again in Chapter 6 section 6.5.2.

The most interesting but most-difficult-to-answer question is: what is the optimal solution to all possible conflicts? The first proposed solution is whether it is possible to denounce all unimodal transport conventions and whether this is the right way to eliminate possible conflict and overlapping subject matters. It is argued that this solution will not work in practice and will certainly generate many problematic issues.⁹⁶ To be more specific, even though this solution may eliminate current conflicts in terms of multimodal transport, it will also bring about a gap concerning the applicable regime to mere unimodal transport or single mode carriage. It can be seen that further disharmonisation on mere unimodal transport, such as traditional port-to-port carriage, will occur. The second solution to be discussed focuses on a review of all of the international unimodal transport conventions. Is it possible to amend the scope of application of all unimodal transport conventions to apply exclusively to a specific mode of transport? This ideal solution is regarded as 'too good to be true' since it is almost impossible for the current unimodal transport conventions to be modified as most existing conventions are either quite new or have been amended recently.⁹⁷

Despite the fact that the current international regimes that govern multimodal transport have been fragmented and there are many ongoing conflicts amongst them, regional solutions for multimodal transport exist in some areas such as South America and Southeast Asia. In the next part, an overview of regional/sub-regional agreements on multimodal transport will be given.

2.3 Multimodal transport at regional/sub-regional level

Even though there continues to be a lack of international standard rules that govern multimodal transport, the situation is different at the regional/sub-regional level given the presence of regional agreements on multimodal transport in some regions, ie South America and South-east Asia. In this section, the regional rules that regulate multimodal transport mentioned above will be examined.

⁹⁶ Nikaki (n 6) 102.

⁹⁷ *ibid* 103. Detailed discussion on possibility of each options to deal with the conflicts is provided in Chapter 6 section 6.5.

2.3.1 ANDEAN Community

In an effort to create harmonisation of rules and regulations on multimodal transport within the sub-region,⁹⁸ the ANDEAN Community⁹⁹ enacted the sub-regional agreement Decision 331 of 4 March 1993, as modified by Decision 393 of 9 July 1996: International Multimodal Transport to apply in the member states including Bolivia,¹⁰⁰ Colombia, Ecuador and Peru.¹⁰¹

Generally, the agreement applies to all contracts of international multimodal transport under the condition that the goods are taken in charge from or delivered to a place located in a member state. Apart from that, according to Articles 3 and 4 of Decision 393, the provisions that regulate the multimodal transport operators apply in cases not only where they operate between the member state but also where they operate from or to a member state.¹⁰² However, in accordance with Article 7 of Decision 393, where the loss or damage can be localised then the same approach as Article 19 of the MT Convention is adopted. This means that if the loss or damage can be localised, a modified network system of liability applies. Hence, if the international convention or mandatory law that regulates the stage where the loss or damage occurred provides a higher limit of liability, Decision 393 will be superseded.

2.3.2 MERCOSUR

⁹⁸ UNCTAD (n 23) para 47.

⁹⁹ Title in Spanish is Comunidad Andina (CAN).

¹⁰⁰ In December 2012, Bolivia became an accessing member of the MERCOSUR. As a consequence, the issue of whether Bolivia still holds the member status of the ANDEAN Community is questionable; See Lorenzon (n 16) 171.

¹⁰¹ Venezuela used to be a member State of the Andean Community before leaving to join MERCOSUR in 2006; See Carlos Malamud, 'Venezuela's Withdrawal from the ANDEAN Community of Nations and the Consequences for Regional Integration' (2006) <http://www.realinstitutoelcano.org/wps/wcm/connect/e2093c004f018b51b3cbf73170baead1/ARI542006_Malamud_Venezuela_CAN_partI.pdf?MOD=AJPERES&CACHEID=e2093c004f018b51b3cbf73170baead1> accessed 6 June 2017.

¹⁰² Article 2 of the Decisions.

The MERCOSUR¹⁰³ was established in 1991 and was authorised by the Treaty of Asunción. The current member states include Argentina, Brazil, Paraguay, Uruguay and Venezuela. The sub-regional agreement that regulates multimodal transport is the Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995. This agreement is aimed at facilitating multimodal transport within the member states.¹⁰⁴

In accordance with Article 2 of the Partial Agreement, the scope of application covers contracts for multimodal transport under the condition that the goods must be taken in charge from or delivered to a member state. Nevertheless, this Partial Agreement is not automatically mandatory since specific reference to the Partial Agreement in the multimodal transport contracts is required in order for this agreement to be applicable according to Article 4 of the Partial Agreement.¹⁰⁵ In addition, Article 4 also provides that only duly registered multimodal transport operators are able to invoke the application of this Partial Agreement.¹⁰⁶ In terms of localisation of loss or damage, in general, this Partial Agreement is applicable to the case. The only exception is that, with regard to the limitation of the multimodal transport operators' liability (not including the basis of liability), if the loss or damage can be localised then the provisions of the international conventions or mandatory national law governing that stage of transport where the loss or damage occurred applies instead of the provisions under the Partial Agreement.¹⁰⁷

2.3.3 ASEAN

The Association of South East Asian Nations (ASEAN) was founded on 8 August 1967 under the authorisation of the Bangkok Declaration. There are currently ten member states: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. Due to the recognition

¹⁰³ MERCOSUR stands for Mercado Comun del Sur.

¹⁰⁴ UNCTAD (n 23) para 70.

¹⁰⁵ Article 4 states that: 'The provisions of the Agreement will only apply if a specific reference to the Agreement is made in the MT contract'.

¹⁰⁶ The provisions concerning the registration of the MTOs are provided in chapter VIII of the Partial Agreement.

¹⁰⁷ Article 15 of the Partial Agreement.

of the significance of multimodal transport,¹⁰⁸ together with the desirability of embracing certain international rules that govern multimodal transport of goods, the ASEAN Framework Agreement on Multimodal Transport was enacted and then came into force in 2005.

Basically, the main structure of the ASEAN Framework Agreement is derived from the MT Convention and the UNCTAD/ICC Rules.¹⁰⁹ In relation to the scope of application of this Agreement, it will apply under two specific requirements:

- 1) The multimodal transport operator must be registered with a competent national body, and;
- 2) According to the contracts for multimodal transport, the place for the taking in charge or delivery of the goods must be located in a member state.¹¹⁰

In case of localised loss or damage, similar to those provisions of the MERCOSUR's Partial Agreement, only the monetary limit of liability is to be determined by reference to the provisions of the applicable international convention or mandatory national law that regulates the stage where the loss or damage took place.¹¹¹ It can be noted that there is a marginal difference between Article 17 of the ASEAN Agreement and Article 19 of the MT Convention.¹¹² Under Article 17 of the ASEAN Agreement, the different amount of the liability's limitation provided in the mandatory framework is not necessarily higher in order to be applicable to the case of localised loss or damage.

¹⁰⁸ See the preamble of the ASEAN Framework Agreement on Multimodal Transport.

¹⁰⁹ UNCTAD (n 23) para 107.

¹¹⁰ Article 2 of the Agreement states 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.'

¹¹¹ Article 17 of the Agreement.

¹¹² Article 19 of the MT Convention states that: '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 provides a *higher* limit of liability than the limit that would follow from application of paragraph 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.'

2.4 Rules governing multimodal transport at national level

Despite the failure to harmonise the legal regimes that govern multimodal transport at the international level, some countries launched national rules to cope with the prevalence of multimodal transport. In this section, some examples of national legislations that regulate multimodal transport, namely those of Germany, the Netherlands and Thailand, are examined. The first national regulation to be discussed is the German legal system which has combined the international conventions that govern various modes of transport into one integrated set of rules. With regard to the Dutch legislation, the Netherlands is the first country that launched a national law that governs multimodal transport. Lastly, as a member state of the ASEAN, the Thai Multimodal Transport Act 2005 (B.E. 2548) was implemented according to the ASEAN Framework Agreement on Multimodal Transport.

2.4.1 Germany

There was a significant change in German transport law after the new Transport Law Reform Act 1998¹¹³ came into force. Previously, each modal stage of transport was governed by different rules. However, according to the new Act, the scope of application covers all modes of transport with the exception of marine transport.¹¹⁴ It can be seen that the prevalence of multimodal transportation has been recognised under the German legal system. This Act was mainly derived from the CMR which governs carriage of goods by road.¹¹⁵ However, it extensively applies to carriage of goods ‘over land, on inland waterways or by aircraft’.¹¹⁶

According to Section 452 of the third sub-chapter, it can be assumed from the title, Carriage Using Various Modes of Transport, that this section intends to apply to

¹¹³ See Book 4 (Commercial Contracts) of the German Commercial Code (HGB), as revised by the Act (25 June 1998) to Reform the Law on Freight, Forwarding and Warehousing (Transport Law Reform Act).

¹¹⁴ The provisions regulating maritime transport is separately provided in Book 5 of the HGB (Maritime Commerce).

¹¹⁵ UNCTAD (n 23) para 198.

¹¹⁶ Section 407 of the HGB (Book 4 – Contract of Carriage).

multimodal transport based on one single contract. However, where the loss or damage can be localised, the provisions of international conventions that regulate such a specific mode of transport will be applicable instead.¹¹⁷ This demonstrates that the network system of liability is adopted by this Act. Even though the loss or damage can be localised, the parties have a freedom to agree that the liability is to be regulated by the general provisions provided in the first chapter of the Transport Law Reform Act.¹¹⁸ Moreover, they are also allowed to agree on different liability rules based on the freedom of contract (Section 452d(1)). Nonetheless, the freedom to agree upon different liability rules is restricted under specific conditions.¹¹⁹

2.4.2 The Netherlands

Multimodal transport in the Netherlands is regulated by the provisions of Book 8, title 2, section 2, Articles 40 to 52 together with Article 1722 of the Dutch Civil Code (DCC). Amongst these provisions, Articles 40 to 43 are the core provisions that relate to multimodal transport.¹²⁰

Multimodal transport or combined transport is defined in Article 40 of the DCC. It states that: 'A contract of multimodal carriage (combined carriage) of goods is the contract of carriage whereby the carrier (multimodal transport operator) 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.' It can be seen that this provision adopted the fundamental elements of the MT Convention. Furthermore, concerning the liability system, Article 41 of the DCC provides

¹¹⁷ Section 452(a) states 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 of 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.'

¹¹⁸ Section 452d(2) of the HGB (Book 4 – Contract of Carriage).

¹¹⁹ Section 452d(3) states that 'purporting to exclude the application of a mandatory provision of an international convention binding on the Federal Republic of Germany applicable to a leg of carriage are ineffective'.

¹²⁰ UNCTAD (n 23) para 235.

that, in a contract of multimodal transport, each stage of transport is governed by the judicial rules applicable to that stage. It is obvious that the DCC adopts the network liability system. Nonetheless, where the stage that loss or damage occurred cannot be identified, the liability of the multimodal transport operator will be determined by the rules and regulations that govern the stage of transport which impose the highest level of liability on the multimodal transport operator.¹²¹ The aforementioned provision that regulates the case of non-localised loss or damage is mandatory. In other words, any agreement to the contrary amongst the parties will be null and void as a consequence.¹²²

2.4.3 Thailand

Prior to the passing of the Multimodal Transport Act in 2005 (B.E. 2548), Thailand had no specific law that governed contracts for multimodal transport. As a result, multimodal transport disputes were governed by existing Thai law pertaining to the carriage of goods found in the Thai Civil and Commercial Code, the Carriage of Goods by Sea Act (B.E. 2534) and the State Railways of Thailand Act (B.E. 2494), depending on the circumstances of each dispute.¹²³ As the Thai government wished to promote multimodal transport operations in Thailand and between South East Asian countries, a general understanding to strengthen regional cooperation in the area of multimodal transport operations was proposed to other member states of the ASEAN. Subsequently, the formulation of the ASEAN Framework Agreement was initiated which was intended to be a model law for all ASEAN countries. Thailand has enacted its new Multimodal Transport Act B.E. 2548 (2005) by adopting the ASEAN Framework Agreement on Multimodal Transport as a template.

The Thai Multimodal Transport Act applies to all multimodal transport contracts where the place of taking charge of goods or the place of delivery, as provided for in the

¹²¹ DCC, article 43(1).

¹²² DCC, article 43(2).

¹²³ John Sze and Sue Ann Gan, 'The Outstretched Arms of Thailand's New Multimodal Transport Act: It's Implications on International Multimodal Transport Operators' (2006) 1 *Transport and Maritime Law Journal* 3, 3.

multimodal transport contract, is located in Thailand.¹²⁴ In addition, this Act is applicable to carriage of goods by at least two different modes of transport under one multimodal transport contract, from a place in one country where a multimodal transport operator takes charge of goods, to a place designated for delivery in another country.¹²⁵ This legislation also applies to carriage of goods by at least two different modes of transport in Thailand under a unimodal transport contract if agreed in writing by the parties.¹²⁶ In relation to the registration of multimodal transport operators, similar to Article 2 of the ASEAN Framework Agreement this Act provides criteria and requirements for the multimodal transport operators to register with the competent authority before operating their services in Thailand.¹²⁷ In terms of localised loss or damage, following Article 17 of the ASEAN Framework Agreement only the limitation of liability, not the basis of liability, is to be determined by reference to the provisions of the applicable international convention that regulates the stage of transport where the loss or damage occurred.¹²⁸ It can be seen that the modified network liability system was adopted by this Act in the same way as found in the MT Convention.

2.5 Conclusion

Many difficulties which potentially lead to an increase in the number of legal disputes have been caused by conflicts about the scope of application of the current international unimodal transport conventions, regional/sub-regional agreements as well as national laws. Even though there is an opinion that a possible long-term solution might be to abolish all of the current unimodal transport conventions and subsequently replace them with one convention that is applicable to every mode of international transport of goods, including both unimodal and multimodal, this cannot be considered a sensible solution since it is unlikely to work in reality and will certainly generate many problematic

¹²⁴ *ibid.*

¹²⁵ Multimodal Transport Act B.E. 2548, section 4.

¹²⁶ *ibid* section 5.

¹²⁷ Failure to comply with this requirement may result in severe penalties. The regulation on the control of multimodal transport operators and the punishment for violating this regulation are provided in Chapter 2 and Chapter 4 of this Act respectively.

¹²⁸ Multimodal Transport Act B.E. 2548, section 31.

issues such as a gap in the applicable regime to mere unimodal transport or single mode carriage. Another possible solution is to review all the international unimodal transport conventions. However, at the moment, it is almost impossible to amend the scope of application of all unimodal transport conventions to be in line with one another. Hence, this solution is regarded as ‘too good to be true’¹²⁹ as already discussed above.

Even though there have not yet been any successful conventions that regulate multimodal transport, there are some standard contract terms for incorporation in carriage contracts such as the UNCTAD/ICC Rules. These standard terms have been used as a temporary solution while there is still no mandatory international convention applicable to multimodal transport. The reason why the terms are referred to as a ‘temporary’ solution is that they are not *per se* sufficient and lack mandatory effect to handle the difficulties in multimodal transport that stakeholders in the industry are faced with since they are merely based on contractual agreement which is not universally adopted. This means that the contractual rules are inadequate to solve the ongoing problems relating to a lack of mandatory set of rules on multimodal transport.¹³⁰ Lastly, even though there are some regional/sub-regional agreements and some national legislations that govern multimodal transport available at the moment, a set of international mandatory rules that govern the whole multimodal carriage is still needed to comprehensively tackle the current legal uncertainty. However, in order to generate a successful set of rules in terms of multimodal transport, the noteworthy lesson from the previous attempts, especially the 1980 MT Convention, is that, in the end, bargaining power, support from interested parties in the transport industry and political influences are the real decisive matters.¹³¹ Although several challenges can be observed, the possibility of having a new convention on multimodal transport is widely discussed throughout this thesis, particularly, in the last chapter. It is still firmly believed that this proposed solution is indeed the most optimal way forward to clarify the current ambiguities on the legal status of multimodal transport, eliminate the liability gaps and, ultimately, facilitate the international trade.

¹²⁹ Nikaki (n 6) 103.

¹³⁰ Faghfoury (n 16) 100.

¹³¹ This issue will be discussed in chapter 6.

Chapter 3: Correlation between multimodal transport documents and international sales of goods

3.1 Introduction

The international sale of goods contracts concluded on a port-to-port basis were established many centuries ago and these continue to be used in international trade. These sale contracts negotiated on a port-to-port basis have been reflected by CIF, CFR and FOB terms which has been developed through the evolution of international trade as can be noticed the concept of these shipment terms at international level i.e. the 1980 United Nations Convention on Contracts for the International Sale of Goods, national level such as English common law (common law FOB and CIF),¹³² as well as standard contractual terms under the INCOTERMS 2010 which was developed by the International Chamber of Commerce (ICC).¹³³ The INCOTERMS, an acronym for International Commercial Terms,¹³⁴ were first codified in a pre-INCOTERMS edition of 1923, comprising six terms: FOB (Free On Board), FAS (Free Alongside Ship), FOT (Free On Truck), FOR (Free on Rail), Free Delivered CIF (Cost Insurance and Freight) and C&F (Cost and Freight).¹³⁵ These terms were subsequently released as the first revision of INCOTERMS in 1936. Although international trade transactions have been taking place for several centuries, the problems faced by traders were the differences in interpretations of trade terms, which vary from one country to another around the world.¹³⁶ In order to cope with this issue, INCOTERMS were introduced to address the problems of interpretation, with the

¹³² Filippo Lorenzon, *C.I.F. and F.O.B. Contracts* (5th edn, Sweet & Maxwell 2012) para 1-005. See also Sale of Goods Act 1979. In terms of some particular issues e.g. presentation of conforming documents, passing of risk and passing of property etc., considering both INCOTERMS and common law FOB and CIF alongside each other is essential.

¹³³ INCOTERMS are a set of three-letter standard trade terms most commonly used in international contracts for the sale of goods; Jan Ramberg, *ICC Guide to Incoterms 2010* (ICC Services Publications 2011) 16.

¹³⁴ *ibid* 16.

¹³⁵ Roberto Bergami, 'INCOTERMS 2010: The Newest Revision of Delivery Terms' (2012) 15 *The Scientific Journal for Economics and Management* 33, 34.

¹³⁶ Ramberg (n 133) 8-9.

aim of injecting more certainty into commercial transactions and reducing the number of disputes between sellers and buyers.¹³⁷ After the emergence of INCOTERMS in 1936, the rules were revised for the first time in 1957 and then in 1967, 1976, 1980, 1990, 2000 and 2010 in order to reflect current international commercial practice.¹³⁸

Due to the technological development and the emergence of containerisation, multimodal transportation has become a widely-used means of carriage in door-to-door delivery service. In order to keep consistency with this fast growing practice, the CIP, CPT and FCA terms were specifically established and they can be found in the current version of the INCOTERMS.¹³⁹

With regard to all types of international trade transactions, whether port-to-port or place-to-place, the relationship between international sale contracts and transport documents significantly affects legal consequences since, according to the nature of the international sale contract, the obligations relating to transport documents are as crucial as those relating to physical contractual goods.¹⁴⁰ That is to say, at common law, the seller's failure to provide conforming transport documents is a breach of contract and, as a result, the buyer may be entitled to reject such documents and/or terminate the contract.¹⁴¹

¹³⁷ Drew Stapleton, 'Optimizing Shipper Contracting: The Correct Usage of Incoterms for Containerized/Intermodal Freight' (2014) Production Operations Management Society 1, 1.

¹³⁸ 'To keep pace with the ever-evolving global trade landscape, the latest update to the trade terms is currently in progress and is set to be unveiled in 2020.' See International Chamber of Commerce (ICC), 'Incoterms Rules History' (2017) <<https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history/>> accessed 5 April 2017.

¹³⁹ The INCOTERMS 2010 came into force on 1 January 2011, see Ramberg (n 133) 8.

¹⁴⁰ Thomas (n 10) 145. At common law, the significance of transport documents was presented in *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] KB 198 [202] McCardie J, "All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent..."

¹⁴¹ Thomas (n 10) 145; *The Hansa Nord* (n 11) 70 (Roskill J), "The seller's obligation regarding documentation has long been made sacrosanct by the highest authority and ... the express or implied provisions in a c.i.f. contract in those respects [are] of the class ... any breach of which justified rejection." See also Section 13 – 15A of the Sale of Goods Act 1979.

3.2 Overview of multimodal transport documents used in transport industry

Due to the massive growth of containerisation and technological development, carriage of goods which involves taking charge of the cargo, mostly packed in containers, from the inland terminal and the carrier himself or other sub-contractors transporting it to another inland destination became more and more widespread.¹⁴² Under this circumstance, it is likely that the party dealing with the shipper (or his forwarding agent) would be the multimodal transport operator or the Non-Vessel Owning Common Carrier (NVOCC) rather than a carrier in the traditional sense under a port-to-port carriage scheme.¹⁴³ In relation to the transport documents, except the bulk cargo business, the majority of documents that flow in the transport industry are not old-fashioned ocean bills of lading but standard commercial forms of multimodal transport documents such as COMBICONBILL (1995), MULTIDOC (1995), the FIATA Multimodal Transport Bill of Lading, COMBICONWAYBILL (1995), MULTIWAYBILL 95 and the FIATA Multimodal Transport Waybill.¹⁴⁴ It can be noted that the legal status of these documents is likely to be vague and confusing since some of them adopt the term 'bill of lading' such as the FIATA Multimodal Transport Bill of Lading. In addition, these documents share some features of bills of lading. For example, it is stated on the face of these documents that they can be either negotiable or non-negotiable (as the case may be)¹⁴⁵ or the descriptions related to the goods and their conditions provided in this type of transport document are *prima facie* evidence as regards the shipper, but they are conclusive evidence if the documents are in the hand of third parties.¹⁴⁶ However, it is undoubtedly the case that multimodal transport documents and traditional ocean bills of lading are not the same things as far as legal status and functions are concerned. Even though statutes exist in some countries such as Germany, the Netherlands, South Korea, India and Thailand which provide a clear status for multimodal transport documents, the issue of the legal status and functions of

¹⁴² Tettenborn (n 14) 126.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ See Article 3.1 of the FIATA Multimodal Transport Bill of Lading which states that: 'This BL is issued in a negotiable form unless it is marked "non negotiable". It shall constitute title to the goods and the holder, by endorsement of this BL, shall be entitled to receive or to transfer the goods herein mentioned.' Similar wording can be found in the COMBICONBILL (1995).

¹⁴⁶ See Article 3.4 of the FIATA Multimodal Transport Bill of Lading.

multimodal transport documents is still ongoing at international level and at common law.¹⁴⁷

3.3 Overview of the legal significance of transport documents in the international sales of goods context

It is undeniable that the legal status and functions of transport documents play significant roles in the context of international trade transactions, especially for the main stakeholders: the seller, the buyer and the banks. Due to the nature of international sales, as reflected in the INCOTERMS 2010, the designated place of delivery is normally far away from the destination agreed under the sale contract,¹⁴⁸ that is to say, the seller's obligation to deliver the goods is completed before the actual delivery by the carrier to the buyer at the destination has occurred.¹⁴⁹ It can therefore be seen that the nature of cross-border sales is likely to generate numerous potential risks among the relevant parties and result in conflicts of interest between them.¹⁵⁰

In relation to the risk that may be faced by the buyer, in most cases, loss, damage and delay that might occur to the cargo during the transport journey are at the buyer's risk since the risk was passed to the buyer at the moment where the seller handed over the cargo to the carrier.¹⁵¹ In general, the seller is the one who arranges the carriage contract, deals with the issuance of transport documents¹⁵² and hands over the transport documents to the buyer. Before making a payment, as the risk during transit rests with the buyer, he certainly prefers the document that provides him with the title to sue the carrier in the event where the cargo is lost or damaged because it is more desirable for the buyer to sue the carrier in contract rather than in tort or bailment, which would place

¹⁴⁷ Tettenborn (n 14) 127. This issue will be discussed in detail in chapter 4.

¹⁴⁸ There is an exception to this as can be seen in the D-Term; see the INCOTERMS 2010.

¹⁴⁹ Guenter Treitel, 'Overseas Sales in General' in M Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet and Maxwell 2014) para 18-001.

¹⁵⁰ *ibid.*

¹⁵¹ See Clause A5 and B5 of EXW, F and C-Terms of the INCOTERMS 2010. However, there is an exception to this concept as can be seen in the D-Terms.

¹⁵² Except F-Terms and EXW, see the INCOTERMS 2010.

more burden on the buyer or receiver because they have to investigate the relevant facts to establish the claim.¹⁵³

Another risk that the buyer may face is in the payment for the goods bought. According to the common practice of international trade, after having received all the relevant documents, including the transport documents from the seller, the buyer is obliged to pay the price prior to obtaining actual possession of the goods. Hence, it is unsurprising that the buyer prefers to require the transport documents that gives him the right to claim delivery from the carrier and sell the goods during transit. In other words, in order to be able to sell the goods in transit, the buyer also needs a transport document that enables the transfer of the right to claim delivery and to sue the carrier to the third parties.¹⁵⁴

With regard to the seller, the crucial issue on his side is to make sure that he receives payment and that the risk of loss and damage during transit passes to the buyer at the moment that the goods are handed over to the carrier. For this purpose, the legal functions of transport documents are vital. Firstly, as mentioned in the previous paragraph, the payment will only be made under the condition that conforming transport documents have been presented. Otherwise, the seller will not be entitled to receive the payment. Secondly, even though the goods have already been passed to the carrier, the risk will not pass to the buyer if the seller fails to provide a transport document that enables the right to sue the carrier based on the carriage of goods contract.¹⁵⁵ Lastly, in order to protect himself from a default payment, the seller should retain the transport document to control the goods until the payment has been completed since the transport

¹⁵³ Melis Ozdel, 'Multimodal Transport Documents in International Sale of Goods' (2012) 23(7) International Company and Commercial Law Review 238, 238.

¹⁵⁴ The contractual rights that are 'capable of being transferred to the buyer' was examined in detail in the decision of the case *Soproma SpA v Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367.

¹⁵⁵ Ozdel (n 153) 238; According to Section 32(2) of the Sale of Goods Act 1979, the contract of carriage contained in the transport document must also be reasonable. See also *Hanson v Hamel & Horley* [1922] 2 AC 36 HL.

document holder is deemed to be in constructive possession of the goods.¹⁵⁶ From the abovementioned overview, it can be seen that the transport document is a crucial part of international trade transactions for both buyers and sellers who get involved in international sale contracts.

3.4 The overview of special functions of traditional ocean bills of lading¹⁵⁷

Before discussing the characteristics and functions of multimodal transport documents in the next chapter, the special functions of traditional marine bills of lading are briefly demonstrated in this section in order to provide useful and relevant background for the further discussion in the next chapter as there will be some references and comparisons between the legal status and functions of ocean bills of lading and those of multimodal transport documents. In general, it is accepted that negotiable bills of lading must serve three core functions: receipt of goods shipped, document of title and evidence of carriage contract.¹⁵⁸

3.4.1 A bill of lading in the function of a receipt of goods shipped

As a receipt of goods, the details stated in the bill of lading normally include the quantity and description of the goods together with the condition in which they were discovered by the carrier at the time when they were shipped on board.¹⁵⁹ It also identifies the date on which the goods were loaded, the name of the vessel and the port of lading together with the port of destination.¹⁶⁰ Such representations serve three crucial commercial effects as follows:

¹⁵⁶ However, in most cases, constructive possession is not relevant to title in the goods since the passage of title is governed by the intention of the parties according to Section 16-19 and 20A of the Sale of Goods Act 1979.

¹⁵⁷ As there will be several references to the functions of ocean bills of lading in the next chapter, it is useful to examine the overview of special functions of traditional ocean bills of lading in the first instance.

¹⁵⁸ The functions of the bill of lading may sometimes be divided into 4 functions; 1) as a receipt; 2) as a document transferring constructive possession; 3) as a document of title; 4) as a potentially transferable carriage contract. See Simon Baughen, *Shipping Law* (3rd edn, Cavendish 2004) 5-8.

¹⁵⁹ It is noted that only 'shipped' bill can serve a function of *prima facie* evidence or conclusive evidence; thus, 'received for shipment' bill will not provide *prima facie* evidence function. John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education 2010) 118.

¹⁶⁰ Baughen (n 158) 5.

1. They form the basis of any cargo claim by the consignee or the endorsee, in the situation that any shortage or damage of the cargo is found at the port of discharge.
2. Where the goods had been sold CIF, if the parties agreed on the method of documentary payment, in other words, the payment is against delivery of a set of documents, including a transport document which usually refers to the bill of lading, the buyer or the bank has a right to reject the document where the statements regarding the weight, quantity, description or condition of the goods furnished in the bill of lading is not consistent with those stated in the sale invoice.
3. In terms of CIF contracts, such representations could potentially affect the negotiability of the bill of lading where it is stated that the goods are not in good condition or the details of such goods in the bill of lading are different from those stated in the commercial invoice. That means the goods are probably not able to be sold in transit.¹⁶¹

If such representations are absent, a consignee or an endorsee who needs to recover due to shortage or damage to the goods on discharge bears the burden of proof for the actual quantity or condition of goods when they were shipped on board.¹⁶² From the abovementioned significant effect of the statements furnished in the bill of lading, it can be concluded that the carrier should be required to state accurate and unambiguous information regarding the quantity and condition of the goods shipped as it directly affects the right and obligations of the buyer, the seller and the third parties who purchase the cargo in transit.¹⁶³

¹⁶¹ Wilson (n 159) 118. Please note that in case of FOB contract, the buyer is commonly the one who has obligation to arrange and conclude the contract of carriage (see clause B3(a) of the FOB and *Pyrene* (n 83) Devlin J). Therefore, the buyer directly receives transport documents from the carrier and such documents serve the same legal functions as those under CIF sale in string sale during transit, see Lorenzon (n 132) 10-037, 10-038.

¹⁶² *ibid.*

¹⁶³ However, in reality, the information is usually furnished by the shipper himself. Therefore, it is common for the carrier, who is normally in the stronger bargaining position, to protect himself by inserting a clause, 'weight, quantity and condition unknown' or 'shipper's count'. It is undeniable that the shipper, who lacks the bargaining power in this circumstance, rarely has the opportunity to prevent the carrier from adding this kind of wording; See Wilson (n 159) 118.

3.4.2 A bill of lading in the function of a document of title

Negotiable bills of lading were created since sea voyages normally take a long time from the port of loading to the port of discharge. These can therefore be used during the sea transport in order to provide the cargo interests with the opportunity to trade the goods in transit.¹⁶⁴ A document of title enables the consignee or the endorsee to receive the goods at the port of discharge, entitles him to make legal claims against the carrier for shortage or damage to the goods as well as gives the consignee or the endorsee a right to transfer those two abovementioned rights to a transferee during transit.¹⁶⁵ In relation to the process to transfer such rights, there are two main methods:

- 1) To endorse and deliver the bill to the endorsee in cases of 'order bill'; or,
- 2) To solely deliver the possession of the bill of lading to the transferee in cases of 'bearer bill'.¹⁶⁶

However, it should be borne in mind that although order bills of lading are transferable by indorsement, they cannot be *technically* considered as negotiable instruments because the transferee acting in good faith receives no better title to the goods covered by the bill of lading than that held by the transferor as per Lord Devlin's statement in *Kum v Wah Tat Bank*:¹⁶⁷

It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.¹⁶⁸

Furthermore, a bill of lading merely represents the goods.¹⁶⁹ In other words, possession of a bill of lading is simply equal to possession of the goods covered by it as

¹⁶⁴ *ibid* 132.

¹⁶⁵ Lorenzon (n 132) para 5-047.

¹⁶⁶ Baughen (n 158) 6.

¹⁶⁷ *Kum v Wah Tat Bank* [1971] AC 439.

¹⁶⁸ *ibid* 446.

¹⁶⁹ Wilson (n 159) 132.

per Bowen LJ's statement in *Sanders v Maclean*:¹⁷⁰

A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading, by the law merchant, is universally recognised as its symbol and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods... it is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.¹⁷¹

As possession of a negotiable bill of lading is considered possession of the goods covered by it, this leads to three major consequences:

- 1) The holder of the bill of lading has the right against the carrier to receive the goods at the port of discharge.¹⁷² That is to say, the carrier has a responsibility to deliver the goods only to the holder, not someone else.¹⁷³ Where the carrier delivered the cargo to the holder in good faith, he is protected from liability even if it was later revealed that the holder was not entitled to delivery of goods.¹⁷⁴
- 2) The holder of the bill of lading is entitled to transfer the right over the goods to third parties by means of endorsement.¹⁷⁵
- 3) The bill of lading can be used as security for a debt. In other words, the bill can commonly increase the financial credit when presented to the bank.¹⁷⁶

3.4.3 A bill of lading in the function of evidence of carriage contract

On the back of every standard form of ocean bill of lading, detailed printed

¹⁷⁰ *Sanders v Maclean* (1883) 11 QBD 327.

¹⁷¹ *ibid* 341.

¹⁷² *ibid* 327.

¹⁷³ *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576 [586].

¹⁷⁴ *Glyn Mills Currie & Co v East & West India Dock Co* (1881-82) 7 App Cas 591 (different copies of same bill in hands of A and B: defendants surrendered goods to B: the defendants were protected despite the fact that A had better right to goods as against B).

¹⁷⁵ *Wilson* (n 159) 133.

¹⁷⁶ *ibid*.

contractual terms or a reference to the 'long term bill'¹⁷⁷ can be found. At least as far as the shipper is concerned,¹⁷⁸ these contractual terms do not constitute the affreightment contract but do provide good evidence of such a contract. That is to say, the bill is not the contract itself because the contract has usually been concluded orally according to the carrier's sailing announcements or any negotiations with loading brokers long before the cargo was put on board the vessel and the bill of lading was issued by the carrier.¹⁷⁹ As a result, even though the cargo is lost or damaged before the bill of lading is issued, the shipper will not be deprived of a remedy for breach of carriage contract.¹⁸⁰ In the same way, if the printed terms provided on the bill of lading do not comply with the oral agreement previously concluded between the shipper and the carrier (or his agent), the shipper still has the right to submit the relevant evidence to prove what the precise terms agreed between them before the bill was issued were. This point of view was stated by Lush J in *Crooks v Allan*:¹⁸¹

A bill of lading is not the contract but only the evidence of the contract and it does not follow that a person who accepts the bill of lading which the ship-owner hands him necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which shall express those terms.¹⁸²

In relation to the evidentiary effect of a bill of lading where the consignee or the holder of a bill of lading is involved,¹⁸³ according to the Carriage of Goods by Sea Act 1992, the terms in the bill of lading; (a) in certain circumstances, can be enforced by¹⁸⁴ and, in much more narrow cases,¹⁸⁵ against a consignee or a holder of the bill of lading; and (b)

¹⁷⁷ In case of charter party bills of lading, see Wilson (n 159) 129.

¹⁷⁸ The effect in the case where the consignee is involved is provided later in this section.

¹⁷⁹ In accordance with the current common practice, the contract of carriage comes into existence since the shipper booked the shipping space of the vessel prior to the loading process happening. After the loading process is completed, the bill of lading will then be issued; see Wilson (n 160) 129; Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet and Maxwell 2011) 97.

¹⁸⁰ See *Pyrene* (n 83).

¹⁸¹ *Crook v Allan* (1879) 5 QBD 38 [40].

¹⁸² See also *Sewell v Burdick* (1884) 10 App Cas [105] (Lord Bramwell).

¹⁸³ For detailed explanation on this issue, see *The Dunelmia* (1970) 1 QB 289 (where the consignee doubles as voyage charterer); *Leduc v Ward* (1888) 20 QBD 475 [479-480] (Esther MR).

¹⁸⁴ Section 2 of the COGSA 1992 permits the lawful holder of a bill of lading in most circumstances to enforce the terms provided in the bill of lading against the carrier.

¹⁸⁵ Section 3 of the COGSA 1992 states that:

can be opposed to any action by the cargo owners against the carrier, even though the alleged basis of liability is non-contractual.¹⁸⁶

Normally, a bill of lading serves three functions altogether.¹⁸⁷ However, in terms of a charterparty contract, a bill of lading serves only two functions – as a receipt of goods and a document of title – because the terms of the contract are in accordance with the charterparty contract itself.¹⁸⁸ In the next chapter, each of these three functions in the context of multimodal transport documents will be discussed.

3.4.4 *The Rafaela S*:¹⁸⁹ differing perspectives on straight bills of lading and their function as documents of title

Due to a lack of a negotiable feature, non-negotiable shipping documents serve only two functions: as receipts of goods and as evidence of carriage contracts.¹⁹⁰ However, the English Court of Appeal in the case of *JJ MacWilliam Co Inc v Mediterranean Shipping*

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- (1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—
- (a) takes or demands delivery from the carrier of any of the goods to which the document relates;
 - (b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
 - (c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,
- that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract ...’.

¹⁸⁶ See Article IV bis of the Hague/Visby Rules incorporated in the COGSA 1971 which states that ‘the defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort’.

¹⁸⁷ There is an exception in the case of a ‘straight bill of lading’ which will be discussed in 3.4.4.

¹⁸⁸ ER Hardy Ivamy, *Payne & Ivamy's Carriage of Goods by Sea* (Butterworth 1989) 81.

¹⁸⁹ *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 1 Lloyd’s Rep 347. The issues raised by *The Rafaela S* is discussed here since, in many cases, multimodal transport documents are issued in the form of non-negotiable documents. Hence, it is useful to examine some controversial issues that arise from this prominent case regarding the legal status and functions of non-negotiable (straight) bills of lading.

¹⁹⁰ Wilson (n 159) 132; Treitel (n 149) para 18-059; Treitel (n 181) para 6-007; English and Scottish Law Commissions, *Rights of Suit in Respect of Carriage of Goods by Sea* (Law Com No 196, Scot Law Com 130, 1991) para 2.50; *The Chitral* [2000] 1 Lloyd’s Rep 529

*Co SA (The Rafaela S)*¹⁹¹ raised a number of contentious issues¹⁹² when it was held that a 'straight bill of lading expressly requiring presentation for delivery' was a 'similar document of title' for the purposes of Article I(b) of the Hague and Hague-Visby Rules. This judgment overruled the Arbitration Tribunal's decision,¹⁹³ Justice Langley's judgment in the Commercial Court at first instance,¹⁹⁴ and the commonly accepted view¹⁹⁵ that a straight bill of lading is not a document of title at common law. While the Court of Appeal and House of Lords' judgment seem to meet some commercial expectations in the sense that a document which 'looks and smells'¹⁹⁶ like a bill of lading should be treated by the English court as the same thing, it does not resolve some of the more complex problems with straight bills of lading and indeed now leaves them sitting 'somewhat uncomfortably'¹⁹⁷ across the Carriage of Goods by Sea Act 1971 (COGSA 1971) and the Carriage of Goods by Sea Act 1992 (COGSA 1992).

Although this judgment did clarify the issue of applicability of the Hague/Visby Rules to a straight bill of lading, it also leaves some crucial questions unanswered, for example, does it constitute a document of title for other purposes such as for purposes of a documentary credit or the Sale of Goods Act? and how to deal with the inconsistency between COGSA 1971 and COGSA 1992 according to the Court's interpretation?

1. Document of title for all purposes?

The primary commercial ramification that arises out of the judgment in *The Rafaela S* is whether a straight bill of lading is a document of title for all purposes and in all circumstances or not.

¹⁹¹ *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2002] 2 Lloyd's Rep 403 (Comm); *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2003] 2 Lloyd's Rep 113 (CA); *Jl MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] 1 Lloyd's Rep 347 (HL).

¹⁹² Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (Informa Law 2006) para 2.45; Wilson (n 159) 162.

¹⁹³ By Messrs Mabbs, Hamsher and Moss, Interim Final Arbitration Award (30 May 2001).

¹⁹⁴ *The Rafaela S* (n 191).

¹⁹⁵ Wilson (n 159) 132; Treitel (n 149) para 18-059; Treitel (n 181) para 6-007; English and Scottish Law Commissions (n 190) para 2.50; *The Chitral* (n 190).

¹⁹⁶ *The Rafaela S* (n 191) (CA) 121.

¹⁹⁷ Charles Debattista, "'Straight' Bills Come in from the Cold – Or Do They?" (Lloyd's List, 23 April 2003) <<https://www.lloydslist.com/ll/sector/regulation/article137438.ece>> accessed 27 December 2016.

It should be noted that the decisions in *The Rafaela S* dealt only with a straight bill of lading that expressly required presentation in order to obtain delivery. While the Courts considered that it was not a crucial point whether or not a straight bill of lading required presentation in order to be a document of title, in relation to the situation where there is no express clause requiring presentation, this issue still remains open for interpretation. In other words, given that the bill of lading was not expressly required to be presented for delivery, it is uncertain whether the Court of Appeal and the House of Lords' judgment would be the same as appeared in *The Rafaela S*.

As it can be argued that a straight bill of lading is not a document of title for all purposes, parties engaged in international trade should be aware at all times that they may not be able to rely on the decision in *The Rafaela S*. For example, a CIF seller should not feel that he can, without express stipulation in his sale contract, tender a straight consigned bill of lading on the basis of the *Rafaela S* sanctions such a document as a document of title.¹⁹⁸ In the same way, a bank dealing with documents under a letter of credit cannot rely upon this judgment to characterise all straight bills of lading as meeting the requirements of a traditional bill of lading under Article 20 of the UCP 600.¹⁹⁹

2. Inconsistent consequences with regard to COGSA 1971 and the COGSA 1992

What arises out of the judgment in *The Rafaela S* is that straight bills of lading are now treated inconsistently across COGSA 1971 and COGSA 1992. There are two main issues to be discussed in this section, namely presentation and estoppel.

In relation to the issue of presentation, in accordance with COGSA 1992 straight bills of lading have been excluded from the definition of bills of lading and treated in the same manner as sea waybills.²⁰⁰ This means that a named consignee is entitled to all rights of suit under the contract of carriage including the right to demand delivery even

¹⁹⁸ *ibid.*

¹⁹⁹ This issue will be discussed in chapter 5.

²⁰⁰ COGSA 1992, section 2(1)(b).

without presenting the document, or the proof of identity alone is required.²⁰¹ Consequently, the named consignee in a sea waybill has a contractual right to demand delivery of the goods at the discharge port even without being the holder of the sea waybill, that is to say, only proof of identity is required.²⁰² However, in accordance with the judgment in *The Rafaela S*, straight bills of lading are considered as bills of lading under the COGSA 1971 and, as such, where the bill expressly requires presentation, the consignee must present the document when demanding delivery. It can be seen there is legal uncertainty as to whether a straight bill of lading is within the scope of a bill of lading or a sea waybill. A related issue is whether the consignee has to present the straight bill of lading for delivery under English law, and *vice versa*, whether a carrier can release the cargo without presentation. It can be expected that, unless otherwise expressly agreed in the contract, a straight bill of lading cannot be considered as a good tender, especially under a CIF contract²⁰³ since it can potentially lead to several problematic situations as mentioned above.

While this issue has not yet been resolved under English law, it is clear that reliance upon the view in *The Rafaela S* could potentially be risky and the carrier could face claims for misdelivery. However, since the uncertainty has arisen, P&I Clubs have issued guidance for their members on the use of straight bills of lading as follows:

The document issued should of course properly reflect what has been agreed with the shipper. If a non-negotiable document is sufficient, a sea waybill will usually be most appropriate. If a sea waybill can not be issued, it is suggested that the straight bill should also contain the words (handwritten or stamped to give preference over printed words) such as “where non-transferable/negotiable, the carrier is entitled to deliver the goods to the named consignee without surrender of the original bill of lading, and is obliged to do so unless the shipper requests otherwise before delivery takes place”.²⁰⁴

According to this guideline, the clear message to carriers is that if they do not want to be bound by the rule of presentation, they should not issue non-negotiable shipping

²⁰¹ Wilson (n 159) 160.

²⁰² *ibid.*

²⁰³ See Lorenzon (n 132) para 5-044.

²⁰⁴ Gard P&I Club, ‘Straight Bills of Lading – Delivery – Do your Bills Use Clear Words?’ (Loss Prevention Circular No 13-02, 2013).

documents in the form of bills of lading. Similarly, Rix LJ specifically stated in his Court of Appeal decision that ‘carriers should not use bill of lading forms if what they want to invite shippers to do is to enter into sea waybill type contracts’.²⁰⁵ It can be concluded that *The Rafaela S* cannot be considered to offer the standard criteria for presentation rule since the judgment is based on specific conditions.

Regarding the issue of estoppel, under Section 2(1)(b) of the COGSA 1992 straight bills of lading are treated as sea waybills. Thus, the consignee cannot obtain the benefit of Section 4 of COGSA 1992 which enables a lawful holder of a transferable bill of lading with an estoppel binding the carrier who provides statements in the bill of lading concerning the goods. However, after the judgment in *The Rafaela S*, straight bills of lading can be regarded as bills of lading by virtue of COGSA 1971 and, as a consequence, the consignee can enjoy the benefit of the estoppel or the evidentiary assumption according to Article III, rule 4 of the Hague/Visby Rules. This overlapping situation leads to the question about which legislation is applicable to the case. To be more specific, does the holder of a straight bill of lading under English law have the particular benefit of an estoppel against the carrier under COGSA 1971?

In conclusion, even though the judgment seems acceptable, in the sense that a document which ‘looks and smells’²⁰⁶ like a bill of lading should be treated by an English court as the same thing, the application of this judgment is specifically restricted to straight bills of lading that expressly require presentation for delivery. In other words, the judgment in *The Rafaela S* does arguably create a further sub-category of sea carriage document. Furthermore, given the inconsistent consequences of COGSA 1971 and COGSA 1992, carriers may insist on delivering only against presentation of an original bill of lading. This can potentially lead to negative commercial implications as the carrier may be forced to wait for the arrival of the original bills of lading. Last but not least, the carrier should be aware of the outcomes of straight bills of lading before issuing such documents.

²⁰⁵ *The Rafaela S* (n 191) 144. However, there is another issue to be concerned with which is whether carriers can persuade merchants to accept sea waybills in preference to straight bills of lading, see Gard P&I Club (n 204).

²⁰⁶ *The Rafaela S* (n 191) 121 (Rix LJ).

At the same time, the parties to a sale contract, especially a CIF sale, should also bear in mind that straight bills of lading are unlikely to be considered as a good tender as there is a high possibility that problems may occur due to the unclear legal status of such documents.

Chapter 4: The legal status and functions of multimodal transport documents in the context of international sales of goods

4.1 Introduction

Since neither an international convention on multimodal transport nor any judicial recognition from the English courts concerning the legal status and functions of multimodal transport documents do exist, it is unsurprising that a debate on this issue is ongoing.²⁰⁷ Although some similarities can be found, there are some major differences between ocean bills of lading and multimodal transport documents. For instance, multimodal transport may deal with both marine and non-marine legs and the passage of risk to the buyer may well occur at an inland delivery point.²⁰⁸ Hence, the main focus of this chapter is related to multimodal transport documents and their functions in relation to a contract of sale.

4.2 Multimodal transport documents as receipts of goods

This section examines whether multimodal transport documents also possess the characteristic of receipts of goods in the same way as bills of lading do. It is stated that, compared to the other two functions, the issue of multimodal transport documents as receipts of goods can be regarded as the least contentious one.²⁰⁹ In other words, this function is identical both in traditional ocean bills of lading and multimodal transport documents.²¹⁰ The supporting point of view is based on the question of whether this

²⁰⁷ See, for example, Thomas (n 10); Tettenborn (n 14); Ozdel (n 153) 238.

²⁰⁸ For example, Article A4 and B4 of CIP and CPT terms.

²⁰⁹ Tettenborn (n 14) 130.

²¹⁰ *ibid.*

function is specifically or uniquely designed for ocean bills of lading. Typically, with regard to the relationship between the carrier and the shipper, it is generally accepted that the statements provided in bills of lading are *prima facie* or presumptive evidence against the shipper²¹¹ but they become conclusive evidence when the bills are in the hands of a *bona fide* third party that relies on such statements.²¹²

Further, there is an idea that a document stating the information of goods such as weight, quantity as well as their conditions can be applied beyond bills of lading. For example, in *Nippon Yusen Kaisha v Ramjiban Serowgee*²¹³ the statements provided in a mates' receipt share the same evidentiary effect as bills of lading. A further example is *The George S*²¹⁴ in which shore tank gauge readings raised a similar presumption in the claim regarding the short delivery of oil. It can be seen that the legal function as receipt of goods and this evidentiary effect reflect the general position that is widely and commonly accepted.²¹⁵ Another piece of supporting evidence, in analogy with receipt of money, can be found in the court's judgment in *Foster v Dawber*²¹⁶ where it was held that:

When the receipt in full was given, it was *prima facie* evidence against the plaintiff that the amount stated in it was paid. It was not conclusive evidence; because it is competent for the parties to contradict such a receipt, by showing that the money was not in fact paid.

From this statement, it can be summarised that there is no difference between the evidentiary effect as *prima facie* evidence of bills of lading and receipts of money. It is quite obvious that the *prima facie* evidentiary rule cannot be regarded as a specific or unique characteristic of traditional bills of lading.

In relation to the conclusive evidence rule where third parties that rely on a document in good faith are involved, such a rule is not specifically applied to bills of lading

²¹¹ *Prima facie* evidence refers to the evidence which can be rebutted in some cases, see *Sanday & Co v Strath SS Co Ltd* (1921) 26 Com Cas 277.

²¹² Article III.4 of the Hague/Visby Rules; see also *Compañía Naviera Vasconzada v Churchill & Sim* [1906] 1 KB 237.

²¹³ *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429, 445-446.

²¹⁴ *The George S* [1989] 1 Lloyd's Rep 369.

²¹⁵ For a supporting view, see Tettenborn (n 14) 129.

²¹⁶ *Foster v Dawber* (1851) 6 Exch 839, 581.

either since it follows a general rule known as 'estoppel by representation'.²¹⁷ In relation to this rule, Denman CJ stated in *Pickard v Sears*²¹⁸ that:

... where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

In other words, any person who makes a statement, which he has a reason to acknowledge that such a statement is potentially be relied on by someone else, is precluded from arguing, against the *bona fide* third party, that the statement is in fact inaccurate. This rule has been applied in various cases, especially in cases involving warehousemen.²¹⁹ Most importantly, the rule of estoppel was applied to bills of lading long before the Hague/Visby Rules came into force and expressly indicated the evidentiary effect of bills of lading as can be seen in *Compañía Naviera Vasconzada v Churchill & Sim*.²²⁰ In this case, Channell J stated that:

It seems to me ... that the case does come within the recognised rules as to estoppel. The statement ... is one of fact. If not exactly intended to be acted on, it must be known that it would probably be acted on. Bills of lading are transferable, and the object of the shipper in asking for insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition.²²¹

From the abovementioned supporting evidence, it can be concluded that, with regard to the receipt function, there is no rational reason for differentiating the legal function as receipt of goods in terms of ocean bills of lading and multimodal transport documents since the latter also contains the information such as the quantity, description and condition of the goods taken in charge by the multimodal transport operator in the

²¹⁷ This rule is also known in Latin as *venire contra factum proprium*, see Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) 16-25.

²¹⁸ *Pickard v Sears* (1837) 6 Ad & E 469 at 474.

²¹⁹ See *Coventry, Sheppard & Co v Gt Eastern Ry Co* (1883) 11 QBD 776; *Seton, Laing & Co v Lafone* (1887) LR 18 QBD 139.

²²⁰ *Compañía Naviera Vasconzada* (n 212).

²²¹ *ibid* 247.

same way as a bill of lading does. Moreover, standard forms of multimodal transport documents also state that statements contained in the documents are *prima facie* or presumptive evidence as regards the shipper yet conclusive evidence where the document is in the hands of third parties.²²²

4.3 Multimodal transport documents as documents of title

4.3.1 Historical background of the concept 'document of title' at common law

Historically, one of the major issues that hindered the facilitation of overseas trade was the lack of the buyer's right to claim the goods from the carrier in the event that the carriage of goods contract was concluded between the seller and the carrier according to the doctrine of privity, which does not allow third parties to claim delivery from the carrier. In order to deal with this unfavourable situation, the solution by the English courts was provided in the case of *Lickbarrow v Mason*.²²³ According to this judgment, the court acknowledged the customary use of transferable shipped bills of lading and identified this type of document as 'document of title' at common law.²²⁴ The court also explained that the transfer of shipped bill of lading to third parties, namely the buyer or the bank, was equivalent to the transfer of the right to receive the actual possession of the goods identified in such document.²²⁵ That is to say, firstly, the holder of a transferable shipped bill of lading has the right to claim actual possession of goods upon tendering the document to the carrier²²⁶ and, secondly, the holder is able to re-sell the goods and transfer the rights over such goods by means of endorsement and/or passing the bill to

²²² For instance, Article 3.2 of the FIATA Multimodal Transport Bill of Lading

²²³ *Lickbarrow v Mason* (1794) 5 Term Rep 683.

²²⁴ *ibid*; see also *Hindley & Co Ltd v East Indian Produce Ltd* [1973] 2 Lloyd's Rep 515.

²²⁵ *Lickbarrow* (n 223) 685-686; *Barclays Bank Ltd v Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep 81; Charles Debattista, *Bills of Lading in Export Trade* (3rd edn, Tottel 2009) para 2.3; Treitel (n 149) para 18-007.

²²⁶ Nevertheless, it should be borne in mind that, although the legal function is called 'document of title', there is no direct relationship with title in the contractual goods as the transfer of title is governed by the parties' intentions according to Section 16-19 and 20A of the Sale of Goods Act 1979. However, the parties are free to agree amongst themselves that the title is to pass at the same time the transport document is tendered, see *Sewell* (n 184) 105 (Lord Bramwell).

third parties without the need of assignment.²²⁷ After legally transferring the ‘document of title’, the constructive possession over goods covered by the document is shifted to the transferee.²²⁸ However, it should be noted that this special characteristic of transferability is not, *per se*, the evidence that entitles the shipped bill of lading as the ‘document of title’ at common law.²²⁹

4.3.2 An overview of the definition and qualifications of ‘document of title’ at common law

The next issue to be scrutinised is whether a multimodal transport document qualifies as a ‘document of title’ at common law since, up until now, there has been no court judgment that expressly clarifies the specific legal status of multimodal transport documents.²³⁰ In the common law context, the main criteria to determine this can be taken from *Lickbarrow v Mason*.²³¹ This case provided the general criteria that a transport document can be judicially considered as a document of title under the condition that mercantile custom of the use of such a document can be proved.²³² Commonly, in order to meet the basis of mercantile custom, widespread and consistent acceptance of the practical use of such documents is required.²³³ It can be seen that the concept of document of title at common lacks straightforward clarification and depends on case-by-case basis consideration. Hence, it is unsurprising that the debate on whether multimodal transport documents can be recognised as such at common is still ongoing.

In terms of the national statutes, the definitions of ‘document of title’ under the English legislations, namely Section 1(4) of the Factors Act 1889, which is incorporated into the Sale of Goods Act by virtue of Section 61 of the Sale of Goods Act 1979, and

²²⁷ *Lickbarrow* (n 223); *Official Assignee of Madras v Mercantile Bank of India Ltd* (1935) AC 53 [60].

²²⁸ Debattista (n 225) para 2.3; See also *Barber v Meyerstein* (1869-70) LR 4 [330]; *Ross T Smyth & Co Ltd v TD Bailey & Son Co* [1940] 3 All ER 60 HL [69] (Lord Wright); *Sanders* (n 170) 341; *Kum* (n 167) 442.

²²⁹ Treitel (n 149) paras 18-008 and 18-100. The issue on the criteria to become ‘document of title’ at common law will be discussed in the next section.

²³⁰ Thomas (n 10) 149.

²³¹ *Lickbarrow* (n 223).

²³² For criteria regarding proof of mercantile custom, see *Kum* (n 167).

²³³ A detailed discussion on this issue will be provided in the following section.

COGSA 1971 vary from one to another. According to the Factors Act 1889, the definition of document of title is relatively extensive since 'any bill of lading' is regarded as a document of title.²³⁴ On the other hand, COGSA 1971 does not expressly provide a definition for it. Nevertheless, this Act does mention 'bills of lading or similar document of title' in Section 1(4) for the purpose of considering whether the Hague/Visby Rules is applicable to the carriage of goods contract between the cargo interest and the carrier.²³⁵

However, there is another interesting issue regarding the interpretation and clarification of what kinds of transport documents qualify as documents of title. This can be found in the English case of *The Rafaela S*.²³⁶ It is stated in this judgment that, apart from the negotiable bills of lading, straight bills qualify as documents of title as well in a different context.²³⁷ As a result, the expansion of document of title to non-negotiable documents was established by this distinguished case. Nonetheless, it should be noted that this case is controversial and lacks sufficient reasonable grounds to support that it can be applied in practice without creating more gaps related to the legal status of straight bills of lading as stated in Chapter 3, Section 3.4.4. From the vague criteria to qualify as a document of title at common law and various definitions of document of title provided in the aforementioned legislations, it can be seen that the issue of the specific legal status of multimodal transport documents regarding their qualification as document of title is still questionable.²³⁸

4.3.3 Possibility of multimodal transport documents to qualify as document of title at common law

²³⁴ For more detailed information, see M Bridge, 'Transfer of Title by Non-owners' in M Bridge (ed), *Benjamin's Sale of Goods* (Sweet and Maxwell 2014) paras 7-055, 7-069; Debattista (n 226) para 3.19; Paul Bugden and Simone Lamont-Black, *Goods in Transit* (Sweet and Maxwell 2009) para 17-61.

²³⁵ See also Article I(b) of the Hague/Visby Rules.

²³⁶ *The Rafaela S* (n 191).

²³⁷ For detailed analysis of *The Rafaela S* see chapter 3, section 3.4.4.

²³⁸ This issue will be discussed in more detail in the following section.

As previously mentioned, the legal status of document of title at common law can be acquired by judicial recognition based on mercantile custom or customary use.²³⁹ Since the emergence of multimodal transport documents in the late nineteenth century, there has not been any judicial confirmation from the courts regarding their legal status. It is clear that it is still an ongoing issue that leads to legal uncertainty.²⁴⁰ Hence, the first issue to be considered at this stage is whether the use of multimodal transport documents is widely accepted as mercantile custom and, as a result, can be recognised as documents of title at common law.

Compared to traditional bills of lading which were accepted as document of title at common law a long time ago, multimodal transport documents lack some features of bills of lading.²⁴¹ These missing features include; 1) they are not commonly issued by the sea carrier and, 2) even though sea carriage is involved, the documents cover carriage of goods *partly*, not wholly, by sea.²⁴² Based on these two grounds, there is a concern that if multimodal transport documents were accepted as documents of title, the circumstance might arise where there is more than one document of title covers the same goods in circulation.²⁴³ However, this argument is weakened due to the fact that transport documents do not transfer better rights than those held by the transferor.²⁴⁴

Apart from that, the prevalence of multimodal transport documents in international trade has been reflected in the INCOTERMS 2010 which recognises the issuance of multimodal transport documents in negotiable form²⁴⁵ as well as the acceptance of negotiable multimodal transport documents in the same way as traditional ocean bills of lading under the international banking practice²⁴⁶ also supports the

²³⁹ Lickbarrow (n 223).

²⁴⁰ Thomas (n 10) 149.

²⁴¹ Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (Lloyd's of London Press 1995) para 6.34

²⁴² *ibid*; G Treitel, 'Other Special Terms and Provisions in Overseas Sales' in M Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet and Maxwell 2014) para 21-083; Treitel (n 181) para 8-082.

²⁴³ De Wit (n 241) para 6.34; Bugden (n 234) para 6-04.

²⁴⁴ *ibid*. However, this statement is subject to a statutory exception under Sections 24 and 25 of the Sale of Goods Act 1979; see also Debattista (n 225) para 3.19.

²⁴⁵ See Ramberg (n 133).

²⁴⁶ UCP 600, article 19.

recognition of multimodal transport documents as document of title.²⁴⁷ To be more specific, this type of transport document is widely used under international sale contracts as well as letters of credit.²⁴⁸ Furthermore, it can be seen in the MT Convention that the characteristics of multimodal transport documents with negotiable function are described in a parallel way as the traditional negotiable bills of lading which are unquestionably and indisputably documents of title at common law.²⁴⁹ In spite of the failure to gain the sufficient number of ratifications in order to enter into force, it can be noted that the drafters of the MT Convention were at least aware of the principal similarities regarding legal functions in the context of international trade practice between negotiable multimodal transport and negotiable port-to-port bills of lading.²⁵⁰ Another piece of supporting evidence is found in the joint Report of the English and Scottish Law Commissions titled 'Rights of Suit in Respect of Carriage of Goods by Sea'²⁵¹ which appears to consider negotiable multimodal bills of lading as documents of title.²⁵² It was accepted that this Report was one of the influential factors for the enactment of COGSA 1992.²⁵³ From all of this evidence, it seems clear that multimodal transport documents play an important role in contemporary international trade practice and have gradually gained international acceptance as documents of title.

With regard to the practical aspect of international trade, multimodal transport documents including COMBICONBILL (1995) and MULTIDOC (1995) expressly state the word 'negotiable' on their face in order to emphasise the legal function of such documents. In addition, various bills of lading are printed in an adjustable format, that is to say, one document can be used for either port-to-port or place-to-place depending on the choice of the parties. The applicability clause stated in this bill specifying which function was chosen is often printed in small print so when it is used as port-to-port bill of lading there is no doubt that this document is the document of title at common law.

²⁴⁷ Bugden (n 234) para 6-04; Aikens (n 192) para 11.48.

²⁴⁸ *ibid.*

²⁴⁹ MT Convention, articles 6 and 7.

²⁵⁰ Thomas (n 10) 149.

²⁵¹ English and Scottish Law Commissions (n 190).

²⁵² *ibid* paras 2.46-2.49.

²⁵³ Thomas (n 10) 150.

Nonetheless, it seems peculiar and ‘commercially inconvenient’²⁵⁴ if the legal status of this bill of lading is changed when this document covers a place-to-place carriage of goods contract.²⁵⁵ It can be seen that if the *status quo* of international trade practice is taken into account as the main criteria to establish mercantile custom, there is no doubt that negotiable multimodal transport documents can be considered as documents of title at common law.²⁵⁶

However, it can be argued that the transferability function alone to transfer the constructive possession of goods to the transferee and the right to claim delivery from the carrier are not enough to consider multimodal transport documents as documents of title. Instead, the most significant basis to establish a document of title at common law is to be accepted as mercantile custom.²⁵⁷ In other words, according to the perceptions of all stakeholders in the commercial community, if it can be proved that multimodal transport documents are widely accepted as documents of title, then it is likely that the courts at common law will adopt and uphold this acceptance based on such proof. Obviously, many issues of fact and law are required to provide sensible grounds to obtain the legal recognition of a mercantile custom.²⁵⁸ It should also be borne in mind that mercantile custom is different from mere commercial practice since, in order to qualify as custom, ‘widespread acceptance and adoption, and an underpinning obligation’²⁵⁹ must be manifested. Other crucial criteria that must be presented to settle the commercial custom include ‘the characteristics of universality, longevity, certainty, reasonableness and absence of repugnancy’.²⁶⁰ With regard to transport documents, as per *Kum v Wah Tat Bank*,²⁶¹ the court also settled the criteria for the parties to prove the mercantile custom by providing that the parties have to successfully illustrate that the use of those

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*; Ozdel (n 153) 244.

²⁵⁶ For a supporting view, see Thomas (n 10) 152.

²⁵⁷ See *Lickbarrow* (n 223).

²⁵⁸ Thomas (n 10) 150.

²⁵⁹ *ibid.* See also *Meyer v Dresser* (1864) 16 CB (NS) 646; *Wilson Holgate & Co v Belgian Grain & Produce Co* [1920] 2 KB 1.

²⁶⁰ *Nelson, Donkin & Co v Dahl* [1879] 12 Ch D 568 [575] (Sir John Jessel MR); *Kum* (n 167) 445 (Lord Devlin); Thomas (n 10) 150.

²⁶¹ *Kum* (n 167).

transport documents is ‘widespread and consistent’.²⁶² The court also mentioned that acceptance in the international banking practice context is not sufficient to establish the custom; the documents have to be accepted as documents of title by all stakeholders involved.²⁶³ Moreover, in accordance with the UCP 600, many kinds of transport documents are accepted under letters of credit including those with a non-negotiable function which clearly cannot be documents of title at common law.²⁶⁴ It can be seen that the decision in *Kum v Wah Tat Bank* as well as the point of view of the Law Commission do weaken the supporting ground relating to the acceptance under the UCP 600 of those in favour of the recognition of multimodal transport documents as documents of title at common law.²⁶⁵

4.3.4 Multimodal transport documents including a sea leg and legal status as documents of title

The next issue to be discussed is the legal status of ‘received for shipment’ bills of lading since multimodal transport documents share some of their main characteristics. For example, under both the point of delivery is an inland point and the fundamental function of such documents is to confirm that the goods have already been taken by or are in the charge of the carrier. Thus, multimodal transport documents could be categorised as ‘received for shipment’ bills of lading.²⁶⁶ To begin with the legal status of such bills of lading, due to the fact that this type of transport document is not included in the scope of port-to-port negotiable bills of lading in *Lickbarrow v Mason*,²⁶⁷ their legal status remains uncertain. In *The Marlborough Hill*,²⁶⁸ the Privy Council held that ‘received for shipment’ bills of lading were recognised as documents of title. However, it should be noted that the question before the Privy Council concerned the legal status of a ‘received for shipment’ bill of lading as ‘any bill of lading’ within the Colonial Courts of Admiralty

²⁶² *ibid* 442.

²⁶³ *ibid* 444.

²⁶⁴ English and Scottish Law Commissions (n 190) para 5.8.

²⁶⁵ For supporting views, see Bugden (n 234) para 6-04; Aikens (n 192) para 11.48.

²⁶⁶ Thomas (n 10) 151.

²⁶⁷ *Lickbarrow* (n 223).

²⁶⁸ *The Marlborough Hill* [1921] 1 AC 444.

Act 1890. In contrast, the opposite view was proposed in *Diamond Alkali Export Corp'n v Bourgeois*²⁶⁹ as it was asserted that 'received for shipment' bills of lading could not be qualified under the scope of the Bills of Lading Act 1855 which was solely applicable to negotiable shipped bills of lading. The view following the decision in *The Marlborough Hill* was re-settled in *Ishag v Allied Bank International*.²⁷⁰ The court held that a 'received for shipment' bill of lading which had been deposited as security was recognised as a document of title 'within the custom proved in *The Marlborough Hill*'.²⁷¹ Nonetheless, it must be borne in mind that in *The Marlborough Hill* proof of crucial criteria to support the mercantile custom was not established. Therefore, it is quite difficult to conclude that the legal status of 'received for shipment' bills of lading as document of title is judicially confirmed by the court since there has not been any concrete basis to support the establishment of mercantile custom. As mentioned earlier, multimodal bills of lading can potentially fall into the same category as 'received for shipment' bills of lading. Although *The Marlborough Hill* appears to support the document of title status, the decision seems to be too superficial to clarify the position of both 'received for shipment' bills of lading and multimodal bills of lading due to a lack of proof concerning the mercantile custom which is the crucial criteria for establishing legal recognition of document of title at common law.

4.3.5 Multimodal transport documents not including sea legs and legal status as documents of title

Due to the fact that there has been no court confirmation on the legal status of multimodal transport documents, the players in the shipping market have sought a solution by applying a contractual means, that is to say, by adopting the standard forms of multimodal transport documents such as COMBICONBILL (1995), MULTIDOC (1995), COMBICONWAYBILL (1995), MULTIWAYBILL 95 and the FIATA Multimodal Transport Waybill. These standard forms contain the incorporation clauses, which refer to the

²⁶⁹ *Diamond Alkali Export Corp'n v Bourgeois* [1921] 3 KB 443.

²⁷⁰ *Ishag v Allied Bank International* [1981] 1 Lloyd's Rep 92 [98] (Lloyd J).

²⁷¹ *ibid.* This view was followed in *The Lycaon* [1983] 2 Lloyd's Rep 548 [550].

UNCTAD/ICC Rules. In relation to negotiable multimodal transport documents, Article 4(3)(a), (b) and (c) of the UNCTAD/ICC Rules provides that the carrier must secure that the delivery of goods is made against presentation of a transport document by either the consignee, the indorsee or the bearer.²⁷² In case of non-negotiable transport documents, Article 4(3)(d) provides similar requirements as those for sea waybills under COGSA 1992²⁷³ by stating that the carrier is obliged to deliver the cargo to the receiver named in the transport document, on condition that he can prove his identity, even though he does not present the transport document. However, it should be noted that the UNCTAD/ICC Rules are contractual in nature and so are not able to fulfil the condition of document of title at common law in the same way that COGSA 1992 is.²⁷⁴

Regarding the function as document of title, the main supporting evidence that strengthens the argument that multimodal transport documents cannot, at present, be considered as documents of title is associated with the current trade practice in international sale of goods. Where the buyer and the seller agree that the cargo is intended to be carried by means of multimodal transport, it is not a customary requirement for the seller to provide the buyer with a document of title. To be more specific, the buyer does not usually require transport documents with a negotiable function since the cargo to be transported by multimodal means is not necessarily sold during transit in every case,²⁷⁵ especially in the event that the various cargo is gathered under different sale contracts before being consolidated into a container.²⁷⁶ The aforementioned practice is clearly evidenced in the INCOTERMS 2010. Unlike in the case of CIF and CFR contracts in which the seller is normally required to provide the buyer with a transport document with negotiable function for the purpose of trading the goods during transit,²⁷⁷ the seller under CIP and CPT contracts must provide the buyer with

²⁷² This provision shares the same attribution of 'bill of lading' under the COGSA 1992; See David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (LLP 2004) para 3.103.

²⁷³ Treitel (n 242) para 21-083-21-084.

²⁷⁴ The Rules do not have force of law and, as a consequence, are applicable only insofar as they do not run counter to the mandatory rules envisaged in international conventions and national laws governing carriage of goods; See UNCTAD (n 23) para 31.

²⁷⁵ Treitel (n 242) para 21-083.

²⁷⁶ Aikens (n 192) para 11.3.

²⁷⁷ Clause A8 of CIF and CFR terms of the INCOTERMS 2010.

negotiable transport documents only where it is customary or expressly agreed.²⁷⁸ It can be concluded that, according to the current practice of international sales reflected by the INCOTERMS 2010, it is unlikely that multimodal transport documents can be recognised as documents of title at common law. However, the situation could probably be changed as soon as it becomes customary amongst all parties involved in international trade to require a CIP and CPT seller to tender a transport document with negotiable function, thus enabling the transferee to have constructive possession of the cargo and a right to trade such cargo during transit.

Even though multimodal transport documents cannot be regarded as documents of title due to the fact that they lack the supporting basis as mercantile custom, it might be possible for consignees or the holders of multimodal transport documents to gain their benefit from applying the general law of attornment. According to the statement of Staughton LJ in *The Gudermes*,²⁷⁹ ‘attornment by a bailee consists in an acknowledgement that someone other than the original bailor now has title to the goods and is entitled to delivery of them’. From this statement, it can be explained in the context of multimodal transport that the principle of attornment is that the bailee, including the carrier or the multimodal transport operator, must concede that he holds the cargo on behalf of a person – no matter whether that person is directly entitled against him or not – and, as a consequence, the bailee is obliged under the duty to deliver such cargo to that person.²⁸⁰ However, it is asserted in many cases²⁸¹ that the right of the consignee or the holder is the special instance of the general law of attornment as the legal basis is irrevocable. In addition, the initial relationship under the attornment rule arises through the mercantile custom and then it is completed by means of endorsement to a consignee.²⁸²

²⁷⁸ Clause A8 of CIP and CPT of the INCOTERMS 2010.

²⁷⁹ *The Gudermes* [1993] 1 Lloyd’s Rep 311 [324]; See, generally, Norman Palmer, *Palmer on Bailment* (3rd edn, Sweet and Maxwell 2009) chapter 25; Duncan Sheehan, *The Principles of Personal Property Law* (Hart Oxford 2011) chapter 10.

²⁸⁰ *The Gudermes* (n 279) 324.

²⁸¹ See *The Berge Sisar* [2002] 2 AC 205 [18-19] (Lord Hobhouse); *East West Corp’n v DKBS AF 1912 A/S* [2003] EWCA Civ 83, [2003] QB 1509 [42] (Mance LJ). The opposite view can be found in *The Future Express* [1992] 2 Lloyd’s Rep 79 [96] (HHJ Diamond QC); [1993] 2 Lloyd’s Rep 541 [550] (Lloyd’s LJ).

²⁸² Tettenborn (n 14) 138.

With regard to negotiable multimodal transport documents, where the carrier or multimodal transport operator issued the negotiable types of transport documents, it implies that he attorns to the shipper as well as irrefutably admits the consignor as his bailor.²⁸³ Subsequently, as soon as the consignor tenders the document to a third party with the purpose to transfer his interest in goods, it means that the consignor also transfers his right as a bailor to such a third party. As a result, since the third party obtains the right as a bailor, he is entitled to claim delivery of the goods from the multimodal transport operator or bailee.²⁸⁴

The discussion will now focus on non-negotiable transport documents. In the same way as sea waybills, this type of transport document was issued with the purpose of placing the right of disposal firmly in the hands of the shipper.²⁸⁵ To be more specific, the special feature of non-negotiable transport documents is that not only do they deliberately allow delivery of goods without any requirements of presentation but also explicitly permit the shipper to make some changes regarding the person who is entitled to receive the cargo when it arrives at the destination.²⁸⁶ It can be seen that the right of the consignee could possibly be rejected when he demands delivery of goods from the carrier. However, there is a solution for this situation. Given that the bank or the lender would like to control over the cargo covered by the non-negotiable transport document, the consignor must specify in the transport document the name of the lender as a consignee as well as expressly relinquishing his right to change the destination and the person who is entitled to claim delivery in order to protect the right of his financier.²⁸⁷ By

²⁸³ *ibid* 139; *The Aliakmon* [1986] 2 Lloyd's Rep 1, 818 (in analogy with bill of lading).

²⁸⁴ This point of view is supported by *Franklin v Neate* (1844) 13 M & W 480; *The Future Express* [1993] 2 Lloyd's Rep 541 [550] (Lord Lloyd) (This case followed the decision of *Farina v Home* (1846) 16 M & W 119). However, it might be argued that this view is not true since, after signing the transport document, the multimodal transport operator attorned the holder solely for that occasion, not for other transferees. This argument can be found in *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWHC 538 (Comm); [2011] Lloyd's Rep 190 (the shipper does not contract on behalf of the consignee.)

²⁸⁵ Tettenborn (n 14) 139.

²⁸⁶ For example, Article 8 of the MULTIWAYBILL 95 states that 'undertaking to deliver to consignee or a person as instructed by the Consignor.' [emphasis added].

²⁸⁷ Article 8 of the MULTIWAYBILL 95 also allows the consignor to transfer his right of control. Typical clauses for use in relation to letters of credit are the so-called NODISP clause (No Disposal clause) which provides: 'By acceptance of this Waybill, the Shipper irrevocably renounces any right to vary the identity of the Consignee of the goods during transit' and the CONTROL clause which provides: 'Upon acceptance of this Waybill by a Bank against a Letter of Credit transaction (which acceptance the Bank confirms to the Carrier)

using this solution, the consignor provides his financier with a right against the multimodal transport operator; in other words, such a control clause in the transport document gives the financier the right to claim delivery of the goods from the multimodal transport operator by virtue of the general law of attornment.²⁸⁸

Specifically according to international non-sea unimodal transport conventions, namely the CMR, COTIF/CIM 1999, the Warsaw Convention and the Montreal Convention,²⁸⁹ there are no provisions relating to negotiable transport documents. In other words, all of these conventions provide that the carrier is obliged to deliver the goods to the consignee and such a duty can be enforceable by the consignee from the moment that the goods arrive at the named destination.²⁹⁰ However, the scopes of application of these unimodal transport conventions are not straightforward.²⁹¹ For instance, where air and road carriage is involved, if the final stage of transport to the destination is in fact carriage by lorry, the air carrier cannot be required under the Warsaw Convention to deliver the goods to the consignee.²⁹² It can be summarised that the right of the consignee to demand delivery of goods is based on the unimodal transport convention which is applicable to the final stage of carriage.²⁹³

the Shipper irrevocably renounces any right to vary the identity of the Consignee'; see UNCTAD, 'The Use of Transport Documents in International Trade' UNCTAD Document (UNCTAD/SDTE/TLB/2003/3, 2003) 13.

²⁸⁸ Tettenborn (n 14) 139; Guenter Treitel 'The Legal Status of Straight Bills of Lading' (2003) 119 *Law Quarterly Review* 608, 623-624; *Kum* (n 167) 446-448 (Lord Devlin).

²⁸⁹ The relationship between these unimodal transport conventions and multimodal transport is discussed in Chapter 2.

²⁹⁰ Article 13.1 of the CMR states that '[A]fter arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods'; Article 17.1 of the COTIF/CIM states that 'the carrier must hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage'; Article 13.1 of the Warsaw Convention states that 'except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note'; Article 13 of the Montreal Convention states that 'the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage'.

²⁹¹ The discussion on scopes of application of unimodal transport conventions in relation to multimodal transport is provided in Chapter 2 of this thesis.

²⁹² Article 31.1 of the Warsaw Convention states that: 'In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.' The same wording can be found in Article 38 of the Montreal Convention.

²⁹³ Tettenborn (n 14) 140.

Last but not least, apart from the abovementioned fall-back solutions – the use of contractual standard terms as well as the general law of attornment and the international unimodal transport convention – there is another ‘back-to-basics’ solution in relation to the general law of property. Under English law, transfer of ownership in goods can be done without any formality, that is to say, only the contract of sale between the buyer and the seller is needed.²⁹⁴ In the context of transport contracts, if the consignee of goods can prove to the multimodal transport operator that he is not only the named consignee but also the owner of the goods in the hands of the multimodal transport operator, any groundless denial to deliver the goods will lead to a claim in conversion,²⁹⁵ despite the fact that any exonerating terms in favour of the multimodal transport operator exist.²⁹⁶ All in all, in accordance with the general law of property, there is no logical ground to support the refusal to deliver the goods to the consignee if he can prove that he is the named consignee according to the multimodal transport documents and, in addition to that, under the sale contract, the title in goods has already transferred to him. It can be concluded that even though some of the fall-back solutions exist, judicial recognition that confirms the legal status as document of title is still required in order to solve the current difficulties and provide a unified standard for future interpretations.

4.4 Multimodal transport documents as evidence of multimodal transport contracts

One of the special features of bills of lading is that it is vital evidence of carriage of goods by sea contracts. However, with regard to multimodal transport documents, the legal status as evidence of multimodal transport contracts is still uncertain. Most importantly, the major issue to be discussed in this section is related to the right of third parties who have interest in goods, such as the buyer who bought the cargo covered by a multimodal transport document. At the beginning of this section, an overview of the

²⁹⁴ Sale of Goods Act 1979, section 17; In some jurisdictions such as Germany, specific formalities must be completed prior to transferring ownership, see Sections 929-932 of the BGB.

²⁹⁵ This point of view is supported by *Franklin* (n 284) (General rule); *Evans v Nichol* (1841) 3 Man & G 614 (an action against a wharfinger); *Gatewhite Ltd v Iberia Líneas Aéreas de España SA* [1990] 1 QB 326 and *Western Digital Corp'n v British Airways Plc* [2001] QB 733 (actions against air carriers).

²⁹⁶ Tettenborn (n 14) 140; Norman Palmer and Ewan McKendrick, *Interests in Goods* (2nd edn, LLP 1998) 480-482.

tender of multimodal transport documents under the INCOTERMS Rules will be introduced. After that, due to the fact that the legal consequences, particularly those for third parties, of multimodal transport documents including a sea leg and those without a sea carriage are different, the content of this section is divided into two main parts to cater for these.

4.4.1 Tender of multimodal transport documents under the INCOTERMS Rules

The INCOTERMS Rules whose aim is to be applied to multimodal transport, CIP and revised CPT were first introduced in 1980.²⁹⁷ These new rules replaced the point of the passing of risks and costs from 'on board the ship' to the 'delivery of the goods into the custody of the carrier' which is prior to shipment on board taking place.²⁹⁸ In terms of documentary obligations, the major change was that the seller was not required to tender an 'on board' bill of lading as proof of delivery.²⁹⁹ However, the problem that remains is that 'misuse' of the maritime terms still frequently occurs in practice.³⁰⁰ Regarding the maritime INCOTERMS, they can be considered as the traditional trade terms which traders are quite familiar with. Since 1990, the ICC has tried to convince trading parties not to use the maritime terms for multimodal or container transport.³⁰¹ In the INCOTERMS 2010, invented comprehensive framework was set out to prevent traders from applying the familiar maritime terms where they should actually apply multimodal terms.

With regard to the traditional maritime terms, according to clause A8, the seller entering into the contract under CFR and CIF terms has to tender a negotiable 'on board'

²⁹⁷ See Yves Derains, *Incoterms 1980 from Codification to Formulation* (ICC Services 1980).

²⁹⁸ *ibid* 10.

²⁹⁹ There are other aspects of changes which are not the main focus of this thesis. For instance, the buyers have to be aware that when they change from FOB, CFR or CIF to FCA, CPT or CIP, not only the point of risk transfer but also the point of cost division might change. Therefore, the terminal handling charges (THC) at departure (to be paid in the currency of the seller) will be for the account of the buyer instead of the seller when switching from FOB to FCA. If the buyer does not agree with the shift of costs, parties can apply the variant FCA 'THC for seller's account', or even a split of these costs can be agreed, eg FCA '50% of THC to be paid by the seller', see Ramberg (n 133) 33.

³⁰⁰ Guillermo Jimenez, *Guide to Export-Import Basics: Vital Knowledge for Trading Internationally* (3rd edn, ICC Services 2008) 15.

³⁰¹ See Incoterms 1990 (ICC Services 1990) 14; ICC, *Incoterms 2000* (ICC 1999) 24.

bill of lading to the buyer. Unless otherwise agreed, it has to be a document of title which provides the buyer with the right to receive the cargo from the carrier and sell the goods in transit.³⁰²

The situation is different in 'door-to-door' transport where the seller will present a multimodal or combined bill of lading or other transport documents or receipt documents that are not in line with the documentary obligations established under the maritime terms, CFR or CIF.³⁰³ That is to say, under the maritime terms, the seller has to tender a delivery document proving that the goods have been placed *on board* the ship. In contrast, in container trade, a bill of lading stating that the goods were simply 'received for shipment' is commonly tendered to the seller.³⁰⁴ As a result, this type of document does not meet the requirements of maritime INCOTERMS. Even if the seller provides a port-to-port 'onboard' bill of lading, the buyer may find himself unable to recover against the carrier if the goods were damaged between the inland point and the discharge port.³⁰⁵ For example, if the seller in London agreed to enter into a CIF Yokohama contract but in fact the cargo was carried by air, he may face a problem where an 'on board' bill of lading is required to be presented in order to fulfill his obligations under the CIF contract. Apart from that, the potential worst-case scenario would be where the buyer raised this issue to terminate the sale contract on the ground of a breach of contract since the seller failed to provide the required transport document under the CIF contract.³⁰⁶ It is obvious that choosing the right term is crucial since the seller's documentary obligations with regard to transport documents under the maritime terms and the terms that can be applied to any mode of transport are dissimilar.

³⁰² Ramberg (n 133) 24.

³⁰³ *ibid*; Indira Carr, *International Trade Law* (5th edn, Routledge 2014) 384.

³⁰⁴ 'It is common for the container line, upon the request of the shipper, to convert the 'received-for-shipment' bill of lading with an 'on board notation'. This, however, causes further paperwork and frequent delays for sellers when payment is to be collected under documentary credits requiring an on board bill of lading rather than a received-for-shipment bill of lading to be presented within a prescribed period after the date on which the good are loaded on board the ship.' See Ramberg (n 133) 72.

³⁰⁵ *ibid* 15.

³⁰⁶ *ibid* 24.

4.4.2 Legal status of multimodal transport documents including a sea leg as evidence of multimodal contract

4.4.2.1 Legal status of negotiable and non-negotiable multimodal transport documents under the scope of the Carriage of Goods by Sea Act 1992

(1) The difficulties before the advent of COGSA 1992 and the emergence of this Act

Before the Bill of Lading Act 1855, even though legal status as document of title at common law did provide the transferee with the right to have constructive possession over the goods and claim delivery from the carrier, it did not mean that the document holder simultaneously obtained the right to sue the carrier based on terms stated in bills of lading.³⁰⁷ However, after the Bill of Lading Act 1855 came into force, the right to sue the carrier was solely entitled to bills of lading holders who obtained the property in the goods.³⁰⁸ Undoubtedly, the consequences were undesirable since this legislation created a contractual gap between the carrier and the bill holders who had not received the ownership of the goods or those who had the rights but not the ownership, for example, the bank involved as the pledgee or the ultimate bill holders down a long chain of buyers.³⁰⁹ In order to close this gap and provide a sensible solution, this impractical contractual relationship under the Bill of Lading Act 1855 was ended with the advent of COGSA 1992.

Apart from establishing a practical link between the carrier and the bill holders, COGSA 1992 also expands its scope of application to other types of shipping documents which are not considered as documents of title at common law. To be more specific, COGSA 1992 entitles the right to claim delivery and sue the carrier to the receivers named

³⁰⁷ 'Early actions by the indorsees of bills of lading were brought in trover or conversion, possession of the bill being evidence of property which gave an immediate right to possession and standing for the action', Aikens (n 192) para 1.42.

³⁰⁸ Bill of Lading Act 1855, section 1; *Sewell* (n 184); *The Delfini* [1990] 1 Lloyd's Rep 252.

³⁰⁹ English and Scottish Law Commissions (n 190) 6-7.

in sea waybills, non-transferable (straight) bills of lading and those to whom the cargo has formally transferred to according to the ship's delivery orders.³¹⁰ The solution provided by COGSA 1992 efficiently solved the problem caused by the doctrine of privity, which does not allow the receivers to gain benefits from the terms stated in the shipping documents concluded between the shipper and the carrier.³¹¹ It can be concluded that this Act has settled the contractual relationship between the carrier and the receiver based on the contractual terms in the transport documents as if the receivers were the original parties to the carriage of goods contracts themselves.³¹²

Moreover, there was a distinct novelty established under COGSA 1992, which is its extended scope of application to cover 'received for shipment' bills of lading.³¹³ This extended scope appears to reflect the recently developed position that is opposed to the old-fashioned basis at common law, which considers 'received for shipment' bills of lading as neither 'bills of lading' nor 'documents of title'.³¹⁴ In accordance with the wider scope of application under COGSA 1992, the significant question which has been raised is whether it is possible for COGSA 1992 to shed light on the legal status of multimodal transport documents that cover at least two modes of transport and, as a result, be applicable to such documents. In other words, is it possible for COGSA 1992 to be applicable to multimodal transport documents based on the same ground as 'received for shipment' bills of lading?³¹⁵

In order to address the gap in the contractual relationship, especially the title to sue, between the cargo receiver and the multimodal transport operator, clarification of the legal status and functions of multimodal transport documents is necessary where the

³¹⁰ COGSA 1992, section 1.

³¹¹ As far as sea waybills are concerned, a contractual relationship could be settled by expressly inserting a clause into the documents. While in case of a ship's delivery order, the courts give the right to claim delivery of the goods based on other grounds; See Debattista (n 225) para 2.3; Treitel (n 149) paras 18-059, 18-230, 18-237.

³¹² COGSA 1992, section 2(1).

³¹³ COGSA 1992, section 1(2)(b).

³¹⁴ *Lickbarrow* (n 223); *Diamond Alkali* (n 269) 449-451. For broader aspects, see *The Marlborough Hill* (n 268) 452. Dissimilar to *The Diamond Alkali* case, the court in *The Marlborough Hill* examined the meaning of bill of lading based on a different context.

³¹⁵ This issue will be examined in detail later in this chapter.

transport of goods is not entirely regulated by one international unimodal transport convention³¹⁶ and the multimodal transport documents issued by the transport operators are not expressly covered by COGSA 1992. If the uncertainty concerning the right of the cargo receivers still remains, under the aforementioned circumstance the cargo receivers have no other choice but to sue on the grounds of tort or bailment. This leads to two major burdens on the receiver. Firstly, it is undeniable that in most cases the investigation process to localise the loss of and/or damage to goods is impossible to conduct.³¹⁷ If the localisation of loss and/or damage fails, it means that the receiver is unable to ascertain the actual carrier who is responsible for such loss and/or damage.³¹⁸ Secondly, the onerous task to prove either property in the goods or possessory title to the goods at the moment of loss or damage is also hard to achieve.³¹⁹

The last resort of the receiver is the relatively old-fashioned and desperate 'doctrine of implied contract' first set out in *Brandt v Liverpool*.³²⁰ This case impliedly entitles the cargo receiver to have a contractual relationship with the carrier under the condition that consideration such as freight payment is made.³²¹ However, particularly in the case of multimodal transport, the ambit of application of this doctrine is very limited since it only implies a contractual relationship between the cargo receiver and the *last* carrier operating the last stage of multimodal transport.³²² It can be seen that this doctrine is unable to provide the implied relationship between the cargo receiver and other actual carriers in the whole multimodal transport operation.

In conclusion, COGSA 1992 offers a straightforward solution to the problem of the contractual relationship between the cargo receiver and the carriers when the types of transport documents identified in the Act are issued. At first glance, it seems as if this Act is aimed to solely apply to carriage of goods by sea contracts as stated in the name of this

³¹⁶ Regarding the extended scope of application of international unimodal transport conventions to multimodal transport operations, see chapter 2.

³¹⁷ Hoeks (n 7) 17.

³¹⁸ *ibid.*

³¹⁹ *ibid.* See also *The Aliakmon* (n 283) 809.

³²⁰ *Brandt v Liverpool* [1924] 1 KB 575.

³²¹ *ibid.*; see also *The Aliakmon* (n 283) 809 and *The Aramis* [1989] 1 Lloyd's Rep 213.

³²² Treitel (n 242) para 21-080.

Act. However, due to the fact that COGSA 1992 extends its scope of application to various kinds of transport documents, including those with a non-transferability function as well as 'received for shipment' bills of lading, it is worth discussing the possibility that COGSA 1992 would be applicable to multimodal transport documents since this may be the legal solution to solve the lengthy uncertainty regarding the legal function of multimodal transport documents and provide the holders of multimodal transport documents with the contractual relationship as if they were the original party to the carriage contract, particularly the right to sue the carrier in the event that the cargo is lost or damaged during the multimodal transport journey.

(2) Feasibility of multimodal transport documents to be qualified under the sphere of COGSA 1992

The scope of application of COGSA 1992 covers a wide range of shipping documents including negotiable bills of lading, sea waybills and ship's delivery orders.³²³ The objective of this extensive scope is to provide a statutory mechanism that applies to the transfer of contractual rights under transport documents to the consignees, transferees and indorsees.³²⁴ Basically, COGSA 1992 applies to 'any bill of lading'³²⁵ but there is no clear definition of a 'bill of lading' provided therein.³²⁶ This Act simply states that it is applicable to 'order' and 'bearer' bills of lading, that is to say, to those with negotiable function.³²⁷ In case of non-negotiable bills of lading (also referred to as straight bills of lading), they are treated in the same way as sea waybills under this Act.³²⁸ Another type of transport document that is included within the scope of COGSA 1992 is 'received for shipment' bills of lading.³²⁹ However, whether multimodal bills of lading can be covered under the scope of COGSA 1992 is still uncertain. In this section, the possibilities of multimodal transport documents including a sea leg to be qualified under the ambit of the Act will be discussed.

³²³ COGSA 1992, section 1(1).

³²⁴ COGSA 1992, sections 2 and 3; see also Thomas (n 10) 153.

³²⁵ COGSA 1992, section 1(1)(a).

³²⁶ Thomas (n 10) 153.

³²⁷ COGSA 1992, section 1(2)(a).

³²⁸ COGSA 1992, section 1(3).

³²⁹ COGSA 1992, section 1(2)(b).

(2.1) Negotiable multimodal transport documents

Assuming that COGSA 1992 could be applicable to multimodal transport documents issued by the carrier who is bound to be liable for loss, damage and delay that might occur to the cargo during the period of multimodal transport journey, regardless of the stage of the voyage,³³⁰ the cargo receiver will be entitled to sue the carrier on the grounds of contractual terms under such a transport document as if he is the original party to the multimodal transport contract. It can be seen that, compared to suing the actual carrier in tort or in bailment, the burdens of the cargo receiver are diminished since he does not have to figure out the stage of the journey where the loss and/or damage occurred. With regard to the carrier who is deemed to be responsible for the entire multimodal voyage, he or she can seek recourse against the subcontractors who are actually liable for the loss and/or damage. In this way, it seems that if COGSA 1992 could be applicable to multimodal transport documents, the uncertainty regarding the rights of the multimodal transport document holders to claim for loss of and/or damage to cargo could be resolved.

If COGSA 1992 could apply to multimodal transport documents, in order to consider what types of transport documents should be included within the ambit of this Act, the content of such documents should be carefully scrutinised as going by the name of the documents alone may lead to misunderstanding.³³¹ The first issue to be examined is that although the name of the document is a 'multimodal bill of lading', it will not qualify as a bill of lading unless it was issued by or on behalf of the party acting as the carrier.³³² In other words, if the transport documents are issued by a freight forwarder who acts as

³³⁰ This type of transport document is also regarded as a 'combined transport bill of lading'. However, there is another type of multimodal transport document which is issued by a party acting as or on behalf of the multimodal transport operator and as agent for the remainder of the whole journey, such as Conlinebill 2000. The latter is called a 'through bill of lading'. See Aikens (n 195) paras 2.77, 2.78 and 11.9; Indira Carr, 'International Multimodal Transport – The UK' (1998) 4(3) *International Trade Law and Regulation* 99, 99. It is noted that the definition and legal functions of these two types of multimodal transport documents are different, see *The Maheno* [1977] 1 Lloyd's Rep 81 (Supreme Court of New Zealand).

³³¹ *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (The Oceana Trader)* [1993] FCA 96; See also Articles 19-25 of the UCP 600 which provide that the documents are predominantly described by virtue of their content.

³³² Treitel (n 242) para 21-083; see also *The Maheno* (n 330).

the carrier's agent only,³³³ not as the carrier or on behalf of the carrier, such documents are not considered as bills of lading as they lack the legal function as evidence of contract of carriage concluded between the consignor and the carrier.³³⁴ This issue is supported by the international banking practice for the use of letters of credit. According to Article 19 through to Article 24 of the UCP 600, the documents that the bank will accept must be those issued by or on behalf of a party acting as a carrier only. Moreover, the stakeholders in international trade should be aware that there are some cases where the freight forwarder issues transport documents as or on behalf of the carrier for a particular stage of a multimodal transport journey. However, he only acts as an agent for the rest of the voyage. This type of document is regarded as a 'through bill of lading', and the example of this type is Conlinebill 2000.³³⁵ Due to the fact that through bills of lading contain the carriage of goods contract as well as being commonly used in international trade as can be seen in the international banking practice,³³⁶ it seems that there is no reasonable ground to exclude this type of transport document from the sphere of bills of lading under COGSA 1992.³³⁷

Moving on to the next issue, the main discussion will focus on whether the contractual carrier is required to have actual possession of cargo for the whole multimodal transport voyage in order to be eligible to provide a valid bill of lading. At first glance, if the carrier does not have actual possession of the cargo throughout the

³³³ In order to examine what the exact role of a freight forwarder is, the courts will consider the terms of the transport documents issued by the freight forwarder together with the specific circumstances of the case; see Aikens (n 192); for a detailed explanation of freight forwarder, see Glass (n 272).

³³⁴ See *Gagniere & Co v Eastern Co of Warehouses* [1921] 7 Ll L Rep 188.

³³⁵ Thomas (n 10) 153.

³³⁶ Although no provision expressly mentions through bills of lading, this type of transport documents is acceptable under the UCP 600. To be more specific, despite the fact that Article 19(c)(i) and Article 20(c)(i) of the UCP 600 do require transport documents which cover the whole carriage voyage, it does not mean that through transport documents are disqualified since these two Articles does not require the contractual carrier to be responsible for the entire transport journey; see Charles Debattista, 'The New UCP 600 – Changes to the Tender of the Sellers' Shipping Documents under Letters of Credit' (2007) *Journal of Business Law* 329, 345.

³³⁷ A supporting view was expressed by the English and Scottish Law Commissions (n 190) para 2.49. Nevertheless, the opposite view is found in an Australian case, *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 New South Wales Law Reports 745. The court did take the fact that, under the UCP 600, banks accept transport documents issued by freight forwarders if they act as or on behalf of the carriers. See S Hetherington, 'Freight Forwarders and House Bills of Lading: The Cape Comorin' (1993) 3 *Lloyd's Maritime and Commercial Law Quarterly* 313.

multimodal journey, then the receiver's right to obtain delivery under COGSA 1992 seems to be jeopardised. However, the actual possession of the cargo is not the key requirement in order to be eligible to issue a valid bill of lading since the absolute crucial element is that the contractual carrier has the right to take possession of the goods against the actual carrier.³³⁸ That is to say, the legal status of a multimodal bill of lading is unaffected even if the contractual carrier does not have actual possession of the goods at all or he has possession for only some stages of its transport as part of the whole multimodal voyage.³³⁹ Apart from the aforementioned evidence that supports the view that even the contractual carrier does not actually perform the carriage operations, a transport document issued by him can still be considered as a valid multimodal bill of lading. This view is also strengthened by the international banking practice since, according to Article 14(I) and Articles 19-24 of the UCP 600, banks accept transport documents issued by freight forwarders as well as other non-vessel owners as a carrier.³⁴⁰

From the discussion above, the further issue to be examined is whether multimodal transport documents³⁴¹ can be recognised as 'bills of lading' within the ambit of COGSA 1992. In other words, is it possible for COGSA 1992 to broadly apply to multimodal bills of lading issued by the sea carriers who operate the sea leg as part of the whole multimodal transport? Even though there have not been any judicial recognitions by English courts on this, it has been judicially examined in other common law jurisdictions.

³³⁸ Bugden (n 234) para 6-03.

³³⁹ *Central Optical Ltd v Jardine Transport Service* [2001] WL 1479735 (High Court of Hong Kong); in the event that multimodal transport documents were issued, the court held that contractual carriers (a freight forwarder) were liable even if they were not the actual carrier. In addition, according to this point of view, the consequence can be analogised to the case of a charterer's bill of lading. In this case, the charterer is a party who enters into the carriage contract as a carrier, see Bugden (n 234) para 6-03; Aikens (n 192) para 11.38; see also *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522 HL.

³⁴⁰ It should be noted that the contrary view also exists; see De Wit (n 241) para 6.39 which provided that 'a transport document not issued by a sea carrier is not a document of title'. This issue will be discussed in section 5.4.2.3.

³⁴¹ This refers to the multimodal transport documents issued by a party acting as or on behalf of the carrier which is not restricted to the sea carrier.

The first case to be examined is the New Zealand case of *The Maheno*³⁴² which relates to a dispute between a FOB buyer and the freight forwarder about cargo lost on board a vessel named 'The Maheno'. There were two types of transport documents issued under the carriage of goods contract. One of those was a consignment note which covered both sea and land parts of carriage issued by the freight forwarder. The other was a traditional port-to-port bill of lading issued by the sea carrier for performing only the sea carriage operation. Although the freight forwarder acted as a carrier for the entire land segment, the court held that the freight forwarder was not liable for the loss that occurred during the sea leg since he acted only as an agent, not the sea carrier. As a result, through direct representation of the principal by the forwarding agent, there was privity of contract between the principal and the carrier as parties to the contract of carriage.³⁴³ That is to say, the sea carrier was responsible for the loss even though it was the cargo interest, who was not the original party to the carriage of goods by sea contract, who brought the claim against him.

The next case to be investigated is the decision of the High Court of Hong Kong in *Central Optical Ltd v Jardine Transport Services*³⁴⁴ which involved a dispute between an unpaid Hong Kong exporter who sued the freight forwarder for releasing the cargo to the buyer. In this case, the cargo was covered by a multimodal bill of lading issued by the sea carrier, not by the freight forwarder. The first question for the court was: 'is the multimodal bill considered a bill of lading?'. The High Court of Hong Kong simply stated that a multimodal bill is recognised as a bill of lading. However, the court did not focus on the issue of whether the multimodal bill was issued by the freight forwarder but instead on whether the freight forwarder was a party to conclude the carriage of goods contract. As a result, the Court held that the exporter was able to sue the freight forwarder under the terms of the multimodal transport bill of lading and was also entitled to damages for misdelivery of cargo.³⁴⁵ It can be seen that *Central Optical Ltd v Jardine* sheds light on the

³⁴² *The Maheno* (n 330).

³⁴³ *ibid* 88. A similar assumption was made by the Supreme Court of New South Wales in *Carrington* (n 337). See also Frank Smeele, 'Legal Conceptualisations of the Freight Forwarder: Some Comparative Reflections on the Disunified Law of Forwarding' (2015) 15 *Journal of International Maritime Law* 450.

³⁴⁴ *Central Optical* (n 339).

³⁴⁵ A similar view can be found in the Australian cases, *The Oceana Trader* (n 331).

circumstance where multimodal transport bills of lading are recognised and have the same legal status as traditional bills of lading. Normally, it is almost impossible for cargo interests to obtain a traditional ocean bill of lading issued by the sea carrier to the freight forwarder (as a shipper).³⁴⁶ Even if they can access the terms under an ocean bill of lading, they cannot benefit from them since under such a bill the named shipper and consignee is the freight forwarder, not the real cargo interests.³⁴⁷ It can be noted that if the multimodal transport bill of lading cannot be regarded as equivalent to the traditional bill of lading under COGSA 1992 in terms of legal status, the cargo interests will not have any effective means to claim delivery from the actual carrier even if they hold the transport documents issued by the freight forwarder.

On the other hand, there is a contrary point of view regarding the application of COGSA 1992 to multimodal bills of lading. There are two main views against the expansion of the scope of COGSA 1992 to multimodal bills of lading. Firstly, some may be concerned that the sphere of this Act cannot be extended to include multimodal transport documents which either involve the carriage of goods partly by sea or never relate to sea transport at all.³⁴⁸ Although there are some sceptical opinions regarding the applicability of COGSA 1992 to multimodal transport bills of lading, it is undeniable that such bills have become more widely used in international trade. In addition, international banking practice is likely to recognise the roles of multimodal transport bills of lading in the similar way as traditional bills of lading under the scope of COGSA 1992.³⁴⁹

Another main piece of supporting evidence in favour of including multimodal bills of lading under the ambit of COGSA 1992 is the applicability of this Act to 'received for shipment' bills of lading. Before discussing it, the definition of 'received for shipment' bills

³⁴⁶ Aikens (n 192) para 11.16.

³⁴⁷ *ibid*, see also *Central Optical* (n 339).

³⁴⁸ Treitel (n 242) para 21-078; Treitel (n 182) paras 8-074, 8-075.

³⁴⁹ UCP 600, article 19; In addition, it is proposed that the situation is likely to be more favourable regarding the view that support the extended scope of COGSA 1992 to multimodal transport bills of lading where the sea stage of the whole multimodal journey is a major part, *vice versa*. However, this statement cannot be used as a reliable criterion to consider the legal status and functions of multimodal bills of lading. See Treitel (n 242) para 21-083.

of lading should be examined. In *The Marlborough Hill*,³⁵⁰ the court stated that 'it is a type of bill of lading which does not record that the goods are shipped on board a named vessel, but which instead states that they have been received for shipment'.³⁵¹ However, in reality, the various forms of language and terminology make it difficult to understand what constitutes a 'received for shipment' bill of lading under the scope of COGSA 1992. For instance, the bill of lading in *The Marlborough Hill* case did not specify the name of the vessel on which the cargo would be loaded. In other words, the name of the vessel was unascertained. It just indicated that 'the goods were received for shipment on board *The Marlborough Hill* or an alternative'.³⁵² In contrast, in *Ishag v Allied Bank International*³⁵³ there was the name of the vessel; being stated that the goods were received by the carrier's agent and were intended to be loaded on a named vessel. From these two cases, it seems that there are two main characteristics of a 'received for shipment' bill of lading: first, there must be a record that the goods are received by the carrier or his agent; and, second, there must be the intention to ship the goods on a vessel.³⁵⁴ Despite the fact that this type of bill of lading is less favourable for the parties in international sale transactions since the name of the ship is likely to be significant for them,³⁵⁵ particularly for purposes of trading goods during transit,³⁵⁶ 'received for shipment' bills of lading are accepted by banks in the event that the document required by a letter of credit is a multimodal transport document.³⁵⁷

Before drawing conclusions about the legal status of multimodal bills of lading under the scope of COGSA 1992, another piece of supporting evidence can be found in the Report of the Law Commissions for England and Scotland on Rights of Suit in Respect

³⁵⁰ *The Marlborough Hill* (n 268).

³⁵¹ *ibid.*

³⁵² Similar wording can be found in *Diamond Alkali* (n 269).

³⁵³ *Ishag* (n 270).

³⁵⁴ Aikens (n 192) para 2.51. However, there is a view which asserts that the name of the actual vessel must be provided in the bill of lading, see Treitel (n 242) para 21-078.

³⁵⁵ Debattista (n 336) 352.

³⁵⁶ For selling or buying the cargo in transit, the name of vessel on which the cargo is shipped is regarded as a part of the goods' description which must be consistent with the cargo actually provided. See *Kleinjan Holst NV v Bremer Handels GmbH* [1972] 2 Lloyd's Rep 11 and Section 13 of the Sale of Goods Act 1979.

³⁵⁷ Article 19(a)(iii)(b) and Article 19(a)(ii) of the UCP 600; see also Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart 2010) 259.

of Carriage of Goods by Sea.³⁵⁸ As can be seen in this Report, the Commissions were aware of the specific form of transport documents incorporating a sea leg as part of a single multimodal transport contract or place-to-place carriage of goods contract.³⁵⁹ What is more, the Commissions also proposed that the statute should apply to ‘any bills of lading’, including ‘received for shipment’ bills of lading,³⁶⁰ as well as identifying that multimodal bills of lading qualified under the scope of their recommendations.³⁶¹ Despite the fact that the status of this Report could not be clearly confirmed as *travaux préparatoires*,³⁶² it seems hard to reject the idea that multimodal bills of lading fall within the scope of COGSA 1992.

To conclude, as discussed above that COGSA 1992 extensively applies to any bills of lading, including ‘received for shipment’ bills of lading, together with various pieces of supporting evidence, it is possible that COGSA 1992 can be applicable to multimodal bills of lading which cover an inland part of transport before or after sea carriage and can therefore be regarded as bills of lading.³⁶³ To be more specific, in the event where multimodal transport includes a sea leg³⁶⁴ and a multimodal transport bill of lading containing the key characteristics of a ‘received for shipment’ bill of lading is issued, it is

³⁵⁸ English and Scottish Law Commissions (n 190).

³⁵⁹ *ibid* paras 2.46-2.49. In paragraph 2.47, the Commissions also differentiated between through transport contracts and documents and combined transport contracts and documents.

³⁶⁰ It can be seen that this view was adopted in Section 1(1)(a) and 1(2)(b) of the COGSA 1992.

³⁶¹ It is stated that, ‘since the implementing legislation is expressed to cover any bill of lading, including received for shipment bills, multimodal documents are capable of falling within its ambit ...’; English and Scottish Law Commissions (n 190) paras 2.48-2.49.

³⁶² Thomas (n 10) 156.

³⁶³ English and Scottish Law Commissions (n 190) paras 2-47, 2-48, 2-49; see also *Prices Buitoni Ltd v Hapag Lloyd AG* [1991] 2 Lloyd’s Rep 383, quoted in Treitel (n 242) para 21-078, fn 490. In this decision, in order to consider the effect of the voluntarily incorporated CMR Convention on the carrier’s liability, the court held that a multimodal transport document covering both land and sea carriage can be recognised as a bill of lading.

³⁶⁴ Again, it should be noted that multimodal transport documents which do not include sea carriage at all cannot be qualified as bill of lading under the COGSA 1992 since the Act originally drafted to govern the legal status and functions of transport documents covering the cargo transported by sea, see English and Scottish Law Commissions (n 190) para 1.1. A further issue is that if the cargo interests seek to sue based on the rights under such multimodal transport documents, they have to establish the grounds according to the Contracts (Rights of Third Parties) Act 1999 or international unimodal transport conventions regulating a certain stage of a multimodal transport journey. For the extended scope of application of international unimodal transport conventions, see chapter 2.

quite difficult to see the sensible grounds to rebut the argument that COGSA 1992 can apply to the case.³⁶⁵

(2.2) Non-negotiable multimodal bills of lading

Similar to port-to-port transport documents, multimodal transport documents can be issued in the form of negotiable documents or non-negotiable waybills. Some examples of non-negotiable multimodal transport documents include COMBICONWAYBILL (1995), MULTIWAYBILL 95 and the FIATA Transport Waybill. After examining the legal status and functions of negotiable multimodal transport documents, the following issue to be investigated is whether COGSA 1992 can also apply to non-transferable multimodal bills of lading. At the early stage, it is obvious that non-transferable multimodal transport documents cannot qualify as both a bill of lading and a 'received for shipment' bill of lading under COGSA 1992. Therefore, the only issue to be considered is whether non-transferable multimodal bills of lading can be recognised as sea waybills under COGSA 1992. As the definition of a sea waybill is provided in Section 1(3)(a) as 'a receipt of goods that contains or evidences a contract for the carriage of goods by *sea* [emphasis added]', it is not straightforward to consider the case of non-transferable multimodal bills of lading which involve contract of carriage of good partly by sea in the same way as traditional bills of lading that can cover more than one mode of transport.³⁶⁶

Regarding the argument against the broad interpretation that allows non-negotiable multimodal bills of lading under the ambit of COGSA 1992 in the similar way as 'sea waybills', it is asserted that, according to the definition provided in the Act,³⁶⁷ this

³⁶⁵ For supporting perspective, see Thomas (n 10); Ozdel (n 153); and, Tettenborn (n 14).

³⁶⁶ Ozdel (n 153) 238.

³⁶⁷ Section 1(3) of COGSA 1992 states that:

References in this Act to a sea waybill are references to any document which is not a bill of lading but

—

- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by *sea*; and
- (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

type of document cannot be categorised as sea waybills under COGSA 1992 and the scope of this Act must be narrowly interpreted. In other words, mere carriage of goods by sea is solely included within the scope of COGSA 1992.³⁶⁸ Furthermore, the analogy used in the case of traditional bills of lading cannot apply to non-negotiable multimodal transport documents since, unlike sea waybills, there is no express description of bills of lading provided under COGSA 1992.³⁶⁹ Apart from that, dissimilar to the case of bills of lading, no supporting points of view are found in the Law Commissions' Report for sea waybills.³⁷⁰

However, it is questionable whether it is proportionate to rely on the strict interpretation, other than for taking the rights of cargo receivers named in the non-negotiable bills of lading into account. Firstly, it is asserted that, apart from the consideration based on the commercial practices and the ultimate aim to protect the cargo interests, it is probable that a reason for identifying non-negotiable ocean transport documents as sea waybills may be simply to distinguish and exclude air waybills from the scope of COGSA 1992.³⁷¹ Secondly, it is suggested that the commercially sensible solution would be to treat them in the same way as consignees or indorsees of negotiable multimodal bills of lading.³⁷² This means that the cargo receivers could benefit from a contractual relationship with the carriers under the scope of COGSA 1992. Thirdly, this proposed situation is supported by international banking practice since there is no differentiation made between negotiable and non-negotiable multimodal transport documents. Besides, both kinds of documents are accepted by banks under Article 19 of the UCP 600.³⁷³

³⁶⁸ COGSA 1992, section 1(3)(a); Treitel (n 181) paras 8-080, 8-092; For an opposite view, see Aikens (n 192) para 11.48.

³⁶⁹ See Ozdel (n 153) 244.

³⁷⁰ *ibid* 245.

³⁷¹ See Thomas (n 10) 158.

³⁷² *ibid*.

³⁷³ Regardless the legal results concerning the applicability of the COGSA 1992 to negotiable or non-negotiable multimodal bills of lading, it is worth noting that in the event that there is an overlap between the COGSA 1992 and relevant international unimodal transport conventions, such as the CMR or CIM/COTIF, in terms of scope of application, the COGSA 1992 will be superseded by such international conventions; see Treitel (n 242) para 21-065.

In conclusion, from the supporting evidence provided above, the possibility that non-negotiable multimodal transport documents could qualify under the scope of COGSA 1992 is not as great as for negotiable multimodal bills of lading. As an aside, it is hoped that judicial clarifications by the courts that express the legal status and functions of both kinds of multimodal transport documents under COGSA 1992, especially those involving the rights of cargo interests, will materialise in the near future.

4.4.2.2 Should multimodal bills of lading be used amongst parties in international trade? (Or are separate ocean bills of lading more favourable?)

Although there is convincing evidence that multimodal transport documents could be covered under COGSA 1992, the legal status and functions of this type of documents are still uncertain due to the fact that there has not been judicial recognition by the courts. A further issue to be considered is whether, in order to cope with the uncertainty, the stakeholders in international trade, including the seller, the buyer and the bank, should use separate bills of lading for the sea leg as part of the whole multimodal transport journey or whether they should use multimodal transport documents that cover the entire voyage.

As far as the seller is concerned, many difficulties could arise from providing separate transport documents for each stage of multimodal transport. Firstly, tendering a number of transport documents for each carriage leg may lead to a situation where there is a gap or a shortfall of continuous documentary cover against the carrier.³⁷⁴ As a result, if the buyer cannot obtain continuous protection throughout the carriage journey, they have the right to refuse to make payment against such documents³⁷⁵ since the seller has failed to provide the transport documents that cover the whole carriage of goods.³⁷⁶ Secondly, under the UCP 600, the seller cannot receive payment against tendering separate transport documents unless otherwise agreed in the letters of credit.³⁷⁷ In

³⁷⁴ Treitel (n 181) para 8-079.

³⁷⁵ *Hanson* (n 155).

³⁷⁶ Sale of Goods Act 1979, section 32(2).

³⁷⁷ UCP 600, article 19(a)(iii).

addition, it is quite clear that in order to receive payment the obligation to provide a transport document covering the entire carriage contract is of the essence under international trade practice.³⁷⁸ The next question for the seller could be about the appropriate type of transport document he should tender in order to satisfy the buyer. As previously mentioned, under CIP and CPT terms the seller is not strictly required to provide the buyer with a multimodal transport document with transferable function unless it is customary or agreed.³⁷⁹ According to the discussion on the applicability of COGSA 1992 provided previously in this chapter, it is a good tender for the seller to provide a negotiable multimodal transport document which is considered as equivalent to a 'received for shipment' bill of lading under the scope of COGSA 1992 in order to satisfy the buyer since this type of document can facilitate the transfer of rights under the transport documents to the transferee. However, it should be noted that providing non-transferable multimodal transport documents in this context is unlikely to be recognised as a good tender as it cannot enable the buyer or the subsequent transferees with the right to claim delivery from the carrier.

With regard to letters of credit under the UCP 600, both negotiable and non-negotiable multimodal transport documents are accepted.³⁸⁰ However, in the event that the buyer would like to trade goods during transit, the buyer must expressly identify in a letter of credit that a negotiable transport document has to be tendered. Furthermore, it can be noted that, even though the name of the vessel on which the goods have been shipped is not required to be provided in the transport document,³⁸¹ the buyer does need the name of the vessel specified in the transport document in order to facilitate the sale of goods in transit.³⁸²

In relation to international sale contracts, it is common that the place of delivery is located far away from the place of destination and the risk during transit usually lies

³⁷⁸ See Clause A8 of CIP and CPT Terms.

³⁷⁹ *ibid.*

³⁸⁰ UCP 600, article 19.

³⁸¹ *ibid.*

³⁸² For the purpose of selling or buying the cargo in transit, the name of the vessel on which the cargo is shipped is regarded as part of the goods description which must be consistent with the cargo actually provided; see *Kleinjan Holst* (n 356) and Sale of Goods Act 1979, section 13.

with the buyer. Therefore, in order to ensure that the seller delivers the conforming goods within the agreed period and at the agreed place, the buyer prefers to obtain a transport document that can be considered as a receipt confirming that the conforming goods have been handed over to the carrier. In a parallel way, if the seller fails to provide such a document, it is possible that the payment will not be made since, in international trade practice, the buyer does not make payment against physical delivery of the contractual goods. Instead, the main criteria for making a payment is to tender the conforming documents, especially the transport document, as stipulated under letters of credit. Moreover, the failure to provide conforming transport documents also leads to the situation where the risk is not passed to the buyer.³⁸³

When a sale contract contains the agreement that the place of delivery and/or the place of destination is an inland point, it is suitable for the CIP or CPT terms to be used.³⁸⁴ Under these two terms, the delivery obligation is fulfilled as soon as the seller hands over the conforming goods to the first carrier within the agreed period of delivery.³⁸⁵ After fulfilling the delivery obligation, the risk is transferred to the buyer at the point of delivery onwards.³⁸⁶ In addition, there is a connection between the seller's delivery obligation and documentary obligation. That is to say, the multimodal transport documents provided for the buyer must evidence due delivery of the contractual goods.³⁸⁷ To be more specific, the multimodal transport documents which state that the goods have been handed over to or been taken in charge by the first multimodal transport operator within the agreed period of delivery can be considered adequate evidence of due delivery.³⁸⁸ Provided that the first stage of multimodal transport is a sea leg, it is likely that a 'received for shipment'

³⁸³ A4 and A5 of each term under the INCOTERMS 2010; Debattista (n 225) para 4.13; *Groom v Barber* [1915] 1 KB 316 [323]; *The Julia* [1949] AC 293 [301-302]. Even though these cases are involved in sale contracts on shipment terms, they establish the concept that where the agreed point of delivery is different from the agreed destination, the risk of loss and damage lies with the buyer from the point of delivery onwards, under the precondition that the seller has fulfilled his delivery obligations.

³⁸⁴ Charles Debattista, 'Should Shipping Lawyers Care about Incoterms 2010?' (Lloyd's List, 2 February 2011) <<https://ibid.lloydslist.com/ll/sector/insurance/article355329.ece>> accessed 22 September 2016.

³⁸⁵ It should be noted that the parties may change the default position and specify a delivery point in the sale contracts, see guidance notes for CIP and CPT terms in Incoterms 2010.

³⁸⁶ Unless otherwise agreed in the sale contract, see Article A4 and A5 of CIP and CPT terms.

³⁸⁷ The transport document must contain a continuous documentary cover, see Articles A3 and A8 of CIP and CPT terms.

³⁸⁸ Article A8 of CIP and CPT terms.

bill of lading can be regarded as a good tender since it is merely a receipt showing that the goods have been handed over to the first carrier.³⁸⁹

Regardless of the means of transport at the first stage, for the purpose of trading goods during transit, the CIP or CPT buyer may need to obtain a transport document which includes an on-board notation indicating the date of shipment, port of loading and the name of the vessel.³⁹⁰ Since the parties are free to change any terms such as the default position or the passage of risk, the situation mentioned above is possible if there is an express term provided in the sale contract.³⁹¹ In terms of international payment, if on-board notation is required, an express term must be stipulated in a letter of credit.³⁹² According to Article III(7) of COGSA 1971 which implements the Hague/Visby Rules, the seller (the shipper) is entitled to request an on-board notation from the sea carrier because such a document falls within the scope of 'a bill of lading or a similar document of title'. However, the more uncertain issue to be examined is whether multimodal transport documents are also covered under the COGSA 1971. Are they covered under the scope of 'a bill of lading or a similar document of title' under Article III(7) of COGSA 1971?

4.4.2.3 The legal status and functions of multimodal transport documents under the Rotterdam Rules

Due to the prevalence of the use of containerisation and place-to-place carriage of goods, the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009,³⁹³ commonly known as the Rotterdam Rules, was launched in order

³⁸⁹ Article A5 of CIP and CPT terms. See also Ozdel (n 153) 248.

³⁹⁰ *ibid.*

³⁹¹ *ibid.*

³⁹² ICC, 'Recommendations of the Banking Commission in respect of the Requirements for an On-Board Notation' (ICC Document No 470/1128rev final, 2010).

³⁹³ The Convention has not yet come into force due to the insufficient number of ratifications. For the current status of the Rotterdam Rules, see United Nations Commission on International Trade Law (UNCITRAL), 'Status - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)' (2016) <http://ibid.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html> accessed 25 October 2016.

to be consistently applied to the current practice of multimodal transport involving a sea leg.³⁹⁴

Under the Rotterdam Rules, transport documents can be issued in transferable and non-transferable forms.³⁹⁵ A negotiable transport document is defined as:

A transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognised as having the same effect by virtue of 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”.³⁹⁶

On the other hand, the definition of a non-negotiable transport document is provided as ‘a transport document that is not a negotiable transport document’.³⁹⁷ It can be noted that the definitions provided in the Rules seem descriptive and focus on the functions of the documents rather than their legal nature.³⁹⁸ However, it should be borne in mind that negotiable functions are based on ‘the law applicable to the document’, which is not particularly specified under the Rules.³⁹⁹ In other words, although specific wording such as ‘negotiable’ and ‘to order’ are indicated, it does not necessarily mean that such documents possess negotiable functions according to the applicable law.

With regard to the transfer of contractual rights and liabilities, this issue is stated in Chapter 11 of the Rotterdam Rules. Generally, the provisions in Chapter 11 adopt similar concepts to those found in COGSA 1992. Nevertheless, there are major differences between these two legislations.⁴⁰⁰ According to Chapter 11 of the Rules, only negotiable transport documents are covered under the scope of this chapter. In other words, this

³⁹⁴ Article 1.1 of the Rotterdam Rules states that “‘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 sea carriage.’

³⁹⁵ Michael F Struley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules* (Sweet and Maxwell 2010) 7-010.

³⁹⁶ Rotterdam Rules, article 1.15.

³⁹⁷ *ibid* article 1.16.

³⁹⁸ Thomas (n 10) 159.

³⁹⁹ *ibid*.

⁴⁰⁰ Charles Debattista, ‘Chapter 11. Transfer of Rights’ in Yvonne Baatz and others (eds), *The Rotterdam: A Practical Annotation* (Informa Law 2009) para 57.06.

chapter solely applies to negotiable ocean and multimodal bills of lading. Unlike the concepts of COGSA 1992, it seems strange that both ocean and multimodal waybills are not included in this chapter.⁴⁰¹ In addition, it is difficult to understand why this restriction was proposed since the Rotterdam Rules aim to apply to all contracts of carriage of goods wholly or partly by sea, no matter what type of transport document is issued and even where no transport document is issued at all.⁴⁰²

It can be seen that even though this recently-developed international convention, the Rotterdam Rules, was issued to facilitate multimodal transport including a sea leg, some problematic issues and legal uncertainty, especially in the terms of the transfer of rights and legal function of non-negotiable transport documents, can still be found. Therefore, judicial recognition regarding the legal status and functions of multimodal transport documents, both in negotiable and non-negotiable forms, are still required in order to clarify this ambiguous legal issue and truly facilitate the use of multimodal transport documents which play a crucial role in international trade transactions.

4.4.3 Multimodal transport documents not including a sea leg

4.4.3.1 *Contracts (Rights of Third Parties) Act 1999*

Moving on to multimodal transport documents which do not include a sea leg, it is clear that COGSA 1992 is no longer involved since it is not directly or partly related to carriage of goods by sea. Hence, the next issue to be discussed is whether it is possible for the cargo receivers to avail themselves of rights under a multimodal transport document by applying the Contracts (Rights of Third Parties) Act 1999 because, in accordance with some terms in standard forms of multimodal transport documents,⁴⁰³ the consignee can benefit from the terms of a carriage contract. In other words, the terms would potentially

⁴⁰¹ Thomas (n 10) 159; see also D Rhidian Thomas, 'A Comparative Analysis of the Transfer of Contractual Rights under the English Carriage of Goods by Sea Act 1992 and the Rotterdam Rules' (2011) 17 *Journal of International Maritime Law* 437, 437.

⁴⁰² Thomas (n 10) 159.

⁴⁰³ See the delivery provisions such as Article 8 of the BIMCO's MULTIWAYBILL or Article 8 of the BIMCO's MULTIDOC (simply requiring the carrier to deliver to the consignee).

be enforceable at the consignee's suit. According to the Contracts (Rights of Third Parties) Act 1999, a third party is entitled to enforce contract terms under two conditions:

- 1) The contract expressly states that he can;⁴⁰⁴ or,
- 2) The term purports to benefit the third party, including the cases where performance is to be rendered directly to him, and there is no contra-indication suggesting non enforceability.⁴⁰⁵

However, the main barrier to the applicability of this Act to multimodal transport documents can be found in Article 6(5) which states that:

Article 6 Exceptions

- (5) Section 1 confers no rights on a third party in the case of—
- (a) a contract for the carriage of goods by sea, or
 - (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

From this provision, at a first glance, it seems inappropriate to employ the Contracts (Rights of Third Parties) Act 1999 for the cargo receiver to solve the issue of privity rules.⁴⁰⁶ Nevertheless, it is argued that provided that the narrow interpretation of COGSA 1992 was accepted, it would not be wrong to read the exception under Article 6(5) of the Contracts (Rights of Third Parties) Act 1999 in a circumscribed manner, that is to say, if this narrow reading were followed, then 'this would take us to the backdoor of the latter Act'.⁴⁰⁷ To be more specific, by analogy, assuming that COGSA 1992 is not applicable to multimodal transport documents as the scope of this Act does not cover carriage of goods including other modes of transport, the exception under Article 6(5) of the Contracts (Rights of Third Parties) Act 1999 cannot apply to multimodal transport documents. To conclude, where multimodal transport is not regulated either by COGSA

⁴⁰⁴ Contracts (Rights of Third Parties) Act 1999, section 1(1)(a).

⁴⁰⁵ Contracts (Rights of Third Parties) Act 1999, sections 1(1)(b) and 1(2).

⁴⁰⁶ It should be noted that the Himalaya Clause is still allowed to have effect on a case-by-case basis; Tettenborn (n 14) 134.

⁴⁰⁷ Ozdel (n 153) 245; Aikens (n 192) para 11.43.

1992 or by any international transport convention, there seems to be no basis for making it impossible for cargo receivers to rely on the Contracts (Rights of Third Parties) Act 1999.⁴⁰⁸

On the other hand, there is an opposite opinion on this. It is asserted that the international unimodal transport conventions that regulate carriage by road, rail and air all contain the provisions that expand the scope of application to multimodal carriage, namely Article 2 of the CMR,⁴⁰⁹ Articles 1.3 and 1.4 of the CIM/COTIF, Article 31 of the Warsaw Convention and Article 38 of the Montreal Convention.⁴¹⁰ Therefore, carriage of goods involving two or more modes of transport could be regarded as carriage 'subject to the rules of the appropriate international transport convention' under the meaning of Article 6(5) of the Contracts (Rights of Third Parties) Act 1999. This means that the consignee cannot gain benefit or enforce the terms of a multimodal transport contract against the multimodal transport operator by applying this Act. It is also indicated that the Contracts (Rights of Third Parties) Act 1999 refers to a 'contract' for the carriage of goods by rail or road as well as carriage of cargo by air, not solely the 'terms' in the contract.⁴¹¹ Thus, if the cross-border carriage is partly by road, then the Act is not applicable to any terms of such a combined transport contract, whether they are related to carriage of goods by road or not.⁴¹² It can be seen that there are opinions both for and against related to the right of the consignee under the Contracts (Rights of Third Parties) Act 1999. According to the evidence provided, it is clear that there is a risk in the consignee relying on this Act to benefit from the rights provided under multimodal transport contracts.

Nevertheless, in practice, it is still possible for the consignee to benefit and gain protection from international unimodal conventions which make it impossible for the Contracts (Rights of Third Parties) Act 1999 to be applicable to the case of multimodal transport contracts. For instance, it is clearly stated in the CMR that the consignee can

⁴⁰⁸ See the Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (No 242, 1996) fn 20; *Benjamin's Sale of Goods* (Sweet and Maxwell 2014) para 11.43.

⁴⁰⁹ See also *Quantum* (n 46).

⁴¹⁰ This issue is discussed in Chapter 2.

⁴¹¹ Tettenborn (n 14) 134 fn 65.

⁴¹² *ibid.*

bring a statutory claim against the carrier⁴¹³ where there is loss, damage or delay.⁴¹⁴ With regard to the CIM/COTIF, it has protections for the consignee that go beyond those provided in the CMR. In other words, they are at the same level as those under the Contracts (Rights of Third Parties) Act 1999.⁴¹⁵

4.4.3.2 General law

As discussed in Chapter 2 regarding the uncertainty of the scope of application of international unimodal transport conventions as well as the conflicts between them, the next issue to be considered is whether there are other options for the consignee to build up the third party's right against the multimodal transport operator in order to enforce the terms within multimodal transport contracts. One may raise the general law of assignment of contractual rights as a possible solution for the consignee.⁴¹⁶ At the first stage, it seems that the endorsement of the multimodal transport document to the consignee is not considered as an 'implied' assignment of any right under a multimodal transport contract.⁴¹⁷ However, if the parties agree to benefit the consignee as the seller of a sale contract by transferring the rights over the goods covered by the multimodal transport document, there is no logical ground to consider that it is not equal to an 'explicit' assignment of the rights under the multimodal transport contract.⁴¹⁸ In relation

⁴¹³ Article 13 of the CMR states that: 'After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.'

⁴¹⁴ In fact, damage is not explicitly referred to under the CMR, although it is suggested that the concept of loss includes damage, see Clarke (n 34) 1.58.

⁴¹⁵ Article 44.1(b) of the CIM/COTIF states that 'subject to § 3 and 4 actions based on the *contract of carriage* [emphasis added] may be brought:

...

b) by the consignee, from the time when he has

1. taken possession of the consignment note,
2. accepted the goods, or
3. asserted his rights pursuant to Article 17 § 3 or Article 18 § 3.'

⁴¹⁶ Tettenborn (n 14) 134.

⁴¹⁷ *ibid*; in the *The Future Express* (n 284) 550 (Lloyd LJ did not follow the idea that a bill of lading might constitute implied assignment by the carrier to the consignee).

⁴¹⁸ This point of view is supported by several judgments such as *The Kelo* [1985] 2 Lloyd's Rep 85 (transfer of bill of lading holder's rights to agent for efficient prosecution of claim); *The Fjord Wind* [1999] 1 Lloyd's Rep 307 (cargo on unseaworthy vessel has to be transhipped; valid assignment to charterer by sundry cargo

to explicit assignment, this can be legally done either in writing according to Section 136(1) of the Law of Property Act 1925⁴¹⁹ or, in the case of an entirely informal matter in equity,⁴²⁰ the assignee has the right to claim substantial damages from the carrier in the same manner as the assignor could have recovered them if there had been no assignment in place.⁴²¹

The next issue to be examined is whether the assignment of rights to a third party violates the international unimodal transport conventions where they are applicable to multimodal transport contract. According to the CMR, the prohibition solely applies to matters that are strictly regulated under this convention.⁴²² This means that matters not strictly regulated, including an assignment of rights to a third party, are likely to be valid. In addition, concerning the CIM/COTIF, the Warsaw Convention and the Montreal Convention, there is no restriction relating to contractual terms between the parties to add onto the obligation of the carrier.⁴²³ It can be seen that, in accordance with these international conventions, there is no explicit prohibition on an assignment of rights to a third party. Therefore, based on the freedom of contract amongst the parties, the consignee is quite likely to gain benefit from and enforce the terms in the multimodal

owners of rights under bills of lading); *Trendtex Trading Corp'n v Crédit Suisse* [1982] AC 679 [702] (Lord Roskill) 'here the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment was held effective'.

⁴¹⁹ Section 136(1) of the Law of Property Act 1925 states that: 'Any absolute assignment by *writing* under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in *writing* has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice' [emphasis added].

⁴²⁰ Tettenborn (n 14) 135; see generally Marcus Smith QC and Nico Leslie, *The Law of Assignment* (2nd edn, Oxford University Press 2013) chapter 7.

⁴²¹ *Offer-Hoar v Larkstore Ltd* [2006] 1 WLR 2926 (non-carriage case) (clarifying that the assignee recovered what the assignor could have recovered if there had been a sale and no accompanying assignment).

⁴²² Article 41.1 of the CMR states that: 'Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract ...'. See also Tettenborn (n 14) 135.

⁴²³ See Article 5 of the CIM/COTIF ('unless provided otherwise in these Uniform Rules, any stipulation which, directly or indirectly, would derogate from these Uniform Rules shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract of carriage. Nevertheless, a carrier may assume a liability greater and obligations more burdensome than those provided for in these Uniform Rules'), Article 23 of the Warsaw Convention ('any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void') and Article 26 of the Montreal Convention (same wording as Article 23 of the Warsaw Convention).

transport contract against the multimodal transport operator through the general rule of assignment.

4.4.3.3 Opposable effect of the terms of the multimodal transport contract to the consignee or the third party

Where the consignee who is not the original party of the multimodal transport contract sues the multimodal transport operator based on grounds other than contractual terms such as negligence in tort or breach of bailment, the important question that may arise is to what extent the multimodal transport operator can take advantage of the contract to protect himself or at least lower his liability. With regard to bills of lading, the answer is straightforward because the Hague/Visby Rules clearly state that the carrier is protected whatever legal form is brought against him.⁴²⁴ In relation to the cases where non-maritime conventions apply, similar protections available to the multimodal transport operator exist under Article 28.1 of the CMR,⁴²⁵ Article 24 of the CIM/COTIF, Article 41 of the Warsaw Convention and Article 29 of the Montreal Convention.⁴²⁶ These provisions inevitably oppose to the consignee or the third party in the same way as they do to the shipper or consignor himself.

Furthermore, in English law, the same result can be reached through the general rule of bailment,⁴²⁷ specifically a 'bailment on terms',⁴²⁸ which refers to bailments subject to certain conditions. With a bailment on terms, the bailee can gain a benefit even against third parties who have an interest in the bailed goods. For instance, in *Humphrey Ltd v Baxter Hoare & Co Ltd*,⁴²⁹ the court held that a warehouseman could rely on the

⁴²⁴ Article IVbis(1) of the Hague/Visby Rules ('the defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort).

⁴²⁵ Article 28.1 of the CMR ('in cases where, under the law applicable, loss, damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability of which fix or limit the compensation due').

⁴²⁶ Compared to Article 28.1 of the CMR, similar wording can be found in Article 24 of the CIM/COTIF, Article 41 of the Warsaw Convention and Article 29 of the Montreal Convention.

⁴²⁷ Tettenborn (n 14) 136.

⁴²⁸ *ibid*; this term was originally found in *Elder Dempster* (n 341) 564 (Lord Sumner).

⁴²⁹ *Humphrey Ltd v Baxter Hoare & Co Ltd* (1933) 46 LIL Rep 252.

contractual terms against a third party buying the warehoused goods even though the third party was not the original party who entered into the contract with him. The same reasoning can be found in *East West v DKBS AF*.⁴³⁰ According to this judgment, the seller bailed goods to the carriers under the specific terms regarding limitation of the carriers' liability in case of misdelivery. The court held that such terms were opposable to anyone complaining on the grounds of misdelivery in the same manner as they were to the seller or the original party of the contract. From these aforementioned judgments, even though there is no explicit support under any legislation, it is likely that this general rule of bailment can apply to multimodal transport contracts. As a result, the multimodal transport operator would be entitled to enjoy the protections provided in the multimodal transport document since these terms are opposable to any buyers of the goods covered by such document as well as anyone who has an interest in the goods that brings a claim against him.

4.5 Conclusion

In terms of overseas sales, it is undeniable that transport documents play a crucial role amongst the stakeholders, namely sellers, buyers, multimodal transport operators and banks. Multimodal transport documents have become more and more prevalent particularly in the current practice when sale contracts involve place-to-place carriage as the means to deliver the contractual goods to the buyer. However, since there has been no judicial recognition from the English courts yet on this issue, in order to provide a proportionate mechanism to facilitate a smooth delivery process from the seller to the buyer as well as the transfer of rights to third parties or transferees,⁴³¹ it is necessary to clarify the issues of legal status and functions of multimodal transport documents.

At this stage, according to the discussions in this chapter, it is likely that proof of the mercantile custom related to the use of multimodal transport documents as a crucial

⁴³⁰ *East West* (n 281) [1531-1532] (Mance LJ).

⁴³¹ in case of negotiable multimodal transport documents.

basis to establish the position of 'document of title' at common law is still insufficient, though this does not mean that this type of transport document will never qualify as a 'document of title' if there is an increase in door-to-door delivery based on multimodal transport services. In case of multimodal transport documents including a sea leg, it is suggested that COGSA 1992 should be applicable to both negotiable and non-negotiable multimodal bills of lading in order to solve many of the current problems regarding the legal uncertainty related to the right of cargo interests or transferees of such a document. This conclusion seems to be the most suitable approach which is consistent with the current practice of international sales and international banking practice. However, the more unclear issue is related to multimodal transport documents which do not include a sea leg because, even though some general laws, such as bailment or assignment, might be helpful for the transferee to reach the same result as provided under COGSA 1992, there have been no authoritative cases which directly involve multimodal transport documents. That is to say, the suggestion provided in this chapter is based on hypothetical analysis. Indeed, if there was a set of rules governing multimodal transport, the discussion in this chapter would be unnecessary. However, the failure of the MT Convention 1980 as well as the Rotterdam Rules⁴³² can be regarded as a significant clue that it is an extremely challenging task to create uniformity in the context of multimodal transport.

⁴³² Up until now, the Rotterdam Rules had been ratified by only three states, Congo, Togo and Spain. For the current status of the Rotterdam Rules, see UNCITRAL (n 393).

Chapter 5: Multimodal transport documents in the context of documentary credit

5.1 Introduction

The letter of credit has a long history. The first use of a letter of credit can be traced back to the thirteenth century, in the reign of King John.⁴³³ However, it is also stated that although 'the commercial letter of credit has a long mercantile history, it has a much shorter legal history'.⁴³⁴

With regard to the modern form of documentary credit, it was developed approximately fifty years after the emergence of the CIF contract as the banks did not wish to take on direct responsibility for an unknown foreign seller and, at the same time, the buyer was also unwilling to lose control over the payment process.⁴³⁵ This situation is well illustrated by the case of *Re Agra and Masterman's Bank*⁴³⁶ where the bank offered an agreement described as a 'letter of credit' authorising its customer to issue bills of exchange drawn on it up to a limited amount and undertaking to honour them on the presentation of specific documents. In this sense, the bank was aware that such a bill of exchange would be negotiated and the 'letter of credit' would be presented to the third parties to receive the advance payment. In other words, such a 'letter of credit' was deemed to be a guarantee of payment for the goods purchased. In addition, it could also solve the issue of a buyer's cash flow difficulties.⁴³⁷ Another case which represents the modern form of letters of credit at the early stage is *Morgan v Larivière*.⁴³⁸ In this case,

⁴³³ For the historical aspect of letters of credit in detail, see Frederic Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (Professional Books 1930) 347.

⁴³⁴ W McCurdy, 'Commercial Letters of Credit' (1922) 10 Harvard Law Review 539. The first lawsuit regarding a letter of credit is *Pillans v Van Miero* (1765) 97 ER 1035.

⁴³⁵ Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa Law 2007) para 1.33.

⁴³⁶ *Re Agra and Masterman's Bank* (1867) LR 2 QB [391].

⁴³⁷ Todd (n 435) para 1.33.

⁴³⁸ *Morgan v Larivière* (1875) LR 7 HL [423].

the bank agreed to directly undertake an obligation to pay the price to the seller under the condition that a certificate of receipt of the purchased goods issued by the buyer was tendered. However, the unsatisfactory matter relating to the use of letters of credit in the early stage is that, as they were revocable; they therefore did not provide reliability in cases where the letters of credit were cancelled upon the buyer's wish or the buyer was insolvent.⁴³⁹ Due to this undesirable outcomes, the international trade and banking practices regarding the use of letters of credit have continuously evolved in order to better facilitate the financial aspect of international trade transactions and eliminate the potential barriers which could negatively impact on traders and banks. In the next section, an overview of letter of credit transactions which are currently used will be presented.

5.2 Overview of letter of credit transactions and the UCP

Letters of credit are regarded as banking instruments prepared and operated by bankers with banking expertise. Letters of credit also play a significant role as a means of payment under sale contracts. From the seller's perspective, there are three stages to which he needs to pay extra care: when he concludes the sale contract; when he receives the letter of credit from the advising or confirming bank; and when he presents the required documents for payment.⁴⁴⁰ Normally, the traders pay much attention to the second and third stage but, in fact, the first stage is also significant and can form part of the determination of the banks whether the documents will be rejected or not. From the seller's side, the payment depends on whether or not he or she can present conforming documents required under the letter of credit. However, the method and level of difficulty to obtain such documents varies from one case to another. It should be borne in mind that the difficulty in obtaining all documents not only depends on the requirements under the letter of credit itself but also on the agreements between parties when concluding the sale contract.⁴⁴¹ In other words, the degree of difficulty related to the required documents stipulated by the buyer (applicant) has to be in accordance with the terms of the sale

⁴³⁹ Todd (n 435) para 1.35.

⁴⁴⁰ Debattista (n 336) 331.

⁴⁴¹ Richard King, *Gutteridge and Megrah's Law of Bankers' Commercial Credits* (Europa Publications 2001) para 1-17 and 3-04-3-13.

contract.⁴⁴² Therefore, it is crucial for the seller to also pay attention to the agreements related to the letter of credit when concluding the sale contract in order to ensure that it is not beyond his or her ability to obtain the required documents and so receive the payment.

Prior to a payment being made, a beneficiary is obliged to present documents to the bank and the bank will examine whether the documents comply with the requirements under the letter of credit or not. In accordance with the principle of strict compliance, if the documents comply with such requirements, the bank will pay the price to the beneficiary and the issuing bank will advise the applicant that the payment is due.⁴⁴³ On the other hand, if the documents fail to comply with the requirements, the bank will reject the documents and, as a consequence, the payment will not be made unless a waiver of the discrepancies is later granted.⁴⁴⁴ However, it is foreseeable that even if the beneficiary can receive payment by means of a waiver of the discrepancies, this process inevitably causes further delays which might be disadvantageous to the traders in international business transactions. Basically, letter of credit transactions are illustrated in the following diagram.

⁴⁴² HN Bennett, 'Documentary Credits' in M Bridge (ed), *Benjamin's Sale of Goods* (Sweet and Maxwell 2014) para 23-094. If the buyer opens a letter of credit which is not consistent with the payment requirements under the sale contract, the buyer is in breach. However, the buyer may correct the inconsistencies within the time allowed to open the credit according to the sale contract, see *Forbes, Forbes Campbell & Co v Stanley & Co* [1921] 9 Lloyd's Rep 20 and *Kronman & Co v Steinberger* [1922] 10 Lloyd's Rep 39. On the other hand, it is considered as repudiatory breach which entitles the seller to terminate the contract, see *Trans Trust SPRL v Danubian Trading Co* [1952] 1 Lloyd's Rep 348. Nevertheless, it is considered as *de minimis* margin and the buyer cannot be regarded as in breach of the sale contract, see *Bunge Corp v Vegetarian Vitamin Foods* [1985] 1 Lloyd's Rep 613 [616] (Neil J).

⁴⁴³ Todd (n 435) para 1.30.

⁴⁴⁴ *ibid.*

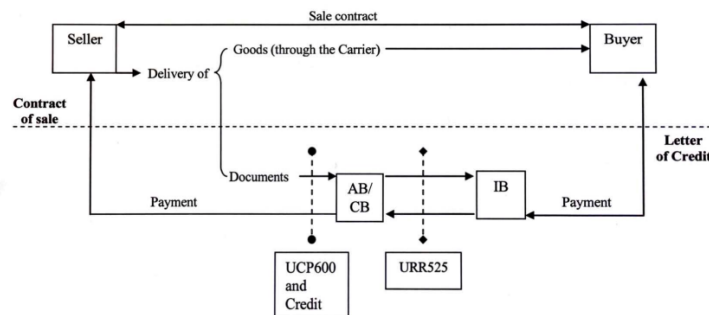


Figure 1: How a letter of credit transaction works⁴⁴⁵

5.2.1 Introduction to the UCP

Currently, almost all credits used throughout the world are subject to the Uniform Customs and Practice for Documentary Credits (UCP).⁴⁴⁶ The UCP is a set of rules proposed by the International Chamber of Commerce (ICC) in order to regulate the operation of letters of credit at the global level. Even though the UCP does not have the force of law,⁴⁴⁷ it is globally-recognised and incorporated into almost all letter of credits used as a means to pay for international trade transactions. The UCP 600, which was formally adopted by the Banking Commission of the ICC on 25 October 2006 and then entered into force on 1 July 2007, is the result of a three-year effort to draft a new set of rules to replace the UCP 500 due to the fact that the UCP 500 came into force too long ago in 1994 and is no longer served as an effective instrument to deal with the current practice of letter of credit transactions.⁴⁴⁸ At first glance, it seems that the UCP 600 was created specifically to deal with the operations of banks, whether these are issuing, confirming or nominated banks; however, the UCP also took the traders' benefit and the facilitation of international trade

⁴⁴⁵ Filippo Lorenzon, 'Bank's Responsibilities when Making Payment under the UCP 600 and the URDG 758' (Institute of Maritime Law 14th CIF and FOB Contract Course: Course Synopses and Materials, Session 14, The Merchant Taylor's Hall, London, 3-7 June 2013).

⁴⁴⁶ *ibid* para 1.77.

⁴⁴⁷ It can also be referred to as 'soft regulation' which means no legislative force; see Debattista (n 336) 329.

⁴⁴⁸ See the introduction of the UCP 600, 11.

into account by removing some ambiguous issues and unlocking some excessively rigid rules.⁴⁴⁹ That is to say, the UCP 600 also aims to solve issues regarding the criteria of document discrepancies and lower the occurrence of rejection of documents.⁴⁵⁰

5.2.2 Application of the UCP 600 to letters of credit

5.2.2.1 Incorporation

The UCP 600 does not possess the regulatory force which is automatically applicable to every letter of credit. Ellinger indicates that, 'right from the start, the UCP was drafted as a set of contractual terms to be incorporated into letter of credit documentation'.⁴⁵¹ It means that the UCP 600 is merely a voluntary-based regime created by the ICC. According to Article 1 of the UCP 600, the rules will be applicable only 'when the text of the credit expressly indicates that it is subject to these rules'.⁴⁵² In *Harlow and Jones Ltd v American Express Co Ltd*,⁴⁵³ Gatehouse J stated that 'the Uniform Rules did not need to be specifically incorporated since all the banks operating in England subscribed to the rules. By contrast, in spite of the UCP's notoriety, clause 1 requires it to be expressly incorporated'.⁴⁵⁴ With regard to the wording to be incorporated, there is no specific wording required as can be seen in *Forestal Mimosa Ltd v Oriental Credit Ltd*⁴⁵⁵ in which the Court of Appeal held that the insertion of appropriate words in the left-hand margin of the document is considered sufficient to incorporate the provisions of the UCP.⁴⁵⁶ Therefore, no matter the wording used, if it is clear that the parties agree to incorporate the provisions of the UCP, then such a letter of credit is subject to the UCP. In relation to

⁴⁴⁹ Debattista (n 336) 329.

⁴⁵⁰ *ibid.*

⁴⁵¹ EP Ellinger, 'The UCP-500: Considering a New Revision' (2004) Lloyd's Maritime and Commercial Law Quarterly, 33.

⁴⁵² UCP 600, article 1; Ali Malek and David Quest, *Jack: Documentary Credits* (4th edn, Tottel 2009) para 1.28; Bennett (n 442) para 23-027; *Royal Bank of Scotland v Cassa di Risparmio Delle Provincie Lombarde* [1992] 1 Bank LR 251 [255-256].

⁴⁵³ *Harlow and Jones Ltd v American Express Co Ltd* [1990] 2 Lloyd's Rep 343.

⁴⁵⁴ *ibid.*

⁴⁵⁵ *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 1 Lloyd's Rep 329.

⁴⁵⁶ Although the 1983 revision was in use at that time, the reasoning could equally apply to the UCP 600, see Todd (n 435) para 1.85.

the benefits that the traders would obtain from the use of letters of credit, for the seller, the advantage obtained is that he will know beforehand the criteria of the examination process.⁴⁵⁷ In a parallel way, the buyer will also know in advance the criteria for which the price will be paid against presentation of documents.

5.2.2.2 Derogation

Although the UCP 600 has already been incorporated in letters of credit, the applicant (the buyer) is still allowed to exclude the application of any provisions of the UCP 600.⁴⁵⁸ In *Royal Bank of Scotland Plc v Cassa di Risparmio delle Provincie Lombarde*,⁴⁵⁹ Mustill LJ held that:

[T]hough the UCP provisions have an important role in the conduct of international trade, it must be recognised they do not constitute a statutory code. As such, it must give way to any express contrary terms, though where the contract is silent, UCP terms can govern.⁴⁶⁰

For instance, Article 20(d) of the UCP provides that the banks have to disregard clauses in bills of lading which reserve the right of the carrier to tranship the goods. In the event that the parties (particularly the buyer) do not wish to accept this provision, the solution is to provide express exclusion of such a provision.⁴⁶¹ It can be concluded that, although the UCP has already been incorporated, the parties still have the freedom to derogate from some provisions as they wish since the UCP has no regulatory force, that is to say, the UCP can be regarded as *per se* contractual terms which are subject to the general principle of freedom of contract.

5.3 A widely used format for letters of credit: The SWIFT format (MT 700)

⁴⁵⁷ UCP 600, articles 14-33.

⁴⁵⁸ Article 1 of the UCP 600 states that: 'They are binding on all parties thereto *unless expressly modified or excluded by the credit*.' [emphasis added].

⁴⁵⁹ *Royal Bank of Scotland* (n 452).

⁴⁶⁰ *ibid*; Todd (n 435) para 1.89.

⁴⁶¹ See Debattista (n 336) 333; Malek (n 452) para 1.31 to 1.32; Bennett (n 442) para 23-030; King (n 441) para 1-13; *Forestal Mimosa* (n 455) (Sir John Megaw) [The parties should explicitly agree on which provisions would be excluded, rather than simply stipulating in a sense contrary to one of the Articles in the UCP].

Due to the advancement of technology, particularly internet-based channels of telecommunication, a banking network facilitating the interchange of data has been developed by the Society for Worldwide Interbank Financial Telecommunication (SWIFT). SWIFT, a leading global banking network provider headquartered in Belgium, provides several telecommunication services connecting financial institutions from more than 200 countries around the world with the messaging platform regarding financial transactions including letters of credit.⁴⁶² Currently, the SWIFT message format used for letters of credit transactions is known as 'MT 700'. This format has been globally adopted by financial institutions when issuing a letter of credit and the data in the MT 700 form will subsequently be sent to the advising bank. The details specified in the MT 700 form are provided by the issuing bank according to the applicant's requirements.⁴⁶³

In relation to the use of multimodal transport documents in the letters of credit context, the relevant common fields that need to be carefully considered include Field 44A (Place of Taking in Charge/Dispatch from .../Place of Receipt), 44E (Port of Loading/Airport of Departure), 44F (Port of Discharge/Airport of Destination), 44B (Place of Final Destination/For Transportation to .../Place of Delivery) and 45A (Description of Goods and/or Services) as these fields can identify the type of transport documents required under the credit, even without the express stipulation regarding the title of transport documents required in Field 46A (Document Required).

5.3.1 Field 44A (Place of Taking in Charge/Dispatch from .../Place of Receipt)

According to the SWIFT standard handbook, Field 44A:

... specifies the place of taking in charge (in case of a multimodal transport document), the place of receipt (in case of a road, rail or inland waterway transport document or a courier or expedited delivery service document), the place of dispatch or the place of shipment to be indicated on the transport document.⁴⁶⁴

⁴⁶² Society for Worldwide Interbank Financial Telecommunication (SWIFT), 'Introduction to SWIFT' (2018) <<https://ibid.swift.com/about-us/discover-swift>> accessed 18 January 2018.

⁴⁶³ Ozgur Eker, 'MT 700 Swift Message Field Specifications' (2018) <<http://ibid.letterofcredit.biz/MT-700-swift-message-field-specifications.html>> accessed 18 January 2018.

⁴⁶⁴ SWIFT, 'Standard: Category 7 - Documentary Credits and Guarantees' (2016) 26 <<https://www.swift.com/node/21326>> accessed 31 March 2018.

It can be seen that for the first stage, that of identifying which transport document must be tendered, the bank has to look into the requirement under the MT 700. If there is a place of receipt identified in Field 44A, it is impossible for a maritime/port-to-port bill of lading or air waybills/air consignment notes to be required under the credit because it is obvious that an inland place of receipt is involved. In addition, there is a separate Field regarding port of loading or airport of departure in Field 44E (Port of Loading/Airport of Departure). The next stage to be considered is whether the place of receipt or taking in charge is an inland place, eg a factory or warehouse which is likely to deal with road haulage or multimodal transport, or a railway station which tends to point to carriage of goods by rail or an inland waterway port or pier which is concerned with inland waterway transport of goods.

5.3.2 Field 44E (Port of Loading/Airport of Departure) and Field 44F (Port of Discharge/Airport of Destination)

If carriage of goods by sea or carriage of goods by air is involved either as a single mode of transport or as part of a multimodal transport journey, port of loading or airport of departure will be identified in Field 44E and then port of discharge and airport of destination will be provided in Field 44F. It should be noted that if Field 44A together with Field 44E and Field 44F are filled in by the issuing bank, there is a high possibility that multimodal transport documents are required in Field 46A (Document Required) because it is very likely that there are at least two transport modes involved.⁴⁶⁵

5.3.3 Field 44B (Place of Final Destination/For Transportation to .../Place of Delivery)

In the same vein as Field 44A (Place of Taking in Charge/Dispatch from .../Place of Receipt), this Field directly represents the existence of certain modes of transportation involved including road haulage, rail transportation and carriage of goods by inland

⁴⁶⁵ However, there could be exceptions to this statement. These will be discussed in section 5.4.1.

waterways. In other words, if this Field is identified, it means that at least road, rail and inland waterways transport operations play a part in the whole journey, either as a single mode of transport or as part of multimodal transport voyage. To be more specific, similar to Field 44A, if Field 44B together with 44E and 44F are all specified, then it is very likely that multimodal transport is involved since at least two modes of transport are used.

5.3.4 Field 45A (Description of Goods and/or Services)

The significance of this Field is that apart from the details of goods being identified, the types of service, commonly based on the INCOTERM Rules, such as FOB, CIF, CFR, CIP or CPT, will also be specified.⁴⁶⁶ The identification of trade terms reflects the transport mode that is intended to be used under the sale of goods contract. If maritime trade terms are provided, it means port-to-port bills of lading are required under the letter of credit, while CIP and CPT indicate that multimodal transport is selected as a means to transport goods under the sale contract and it is very likely that multimodal transport documents must be presented.

5.3.5 Field 46A (Document Required)

In this Field, any documents, including transport documents, as well as a detailed description of each document, will be specified. Regarding transport documents, the type of document required will be provided in this Field. For instance, when multimodal transport documents are required, the following wording and details are normally provided:

Field 46A: Documents Required: Full set of multimodal transport document marked freight collect made out to order of Amsterdam Trade Bank marked notify

⁴⁶⁶ SWIFT (n 464) 28.

applicant indicating that the goods have been dispatched, taken in charge or loaded on board.⁴⁶⁷

When presenting the required documents to the bank, the first thing for a beneficiary to be aware of is the type of transport documents since if a different type of transport document is tendered, then such a document can be rejected by the bank due to this discrepancy. Apart from the title of the documents, other details provided in Field 46A as well as those in Fields 44A, 44E, 44F, 44B and 45A must be consistent with one another in order to qualify as a good tender.

5.4 Multimodal transport documents under the UCP 600

In the context of documentary credit, the history of the provision that regulates the presentation of multimodal transport documents can be traced back to the UCP 290 which was launched in 1974.⁴⁶⁸ However, due to a lack of practical expertise and legal case studies regarding multimodal transport operations as well as the small number of multimodal transport documents used at that time, there were some ambiguities and difficulties such as how the document should be signed. As time went on, subsequent versions of the UCP have tried to reflect developing trading practice, especially the roles of freight forwarders,⁴⁶⁹ and the increasing use of multimodal transport documents which has become more prevalent in the transport industry.

Where a transport document, however named, which covers at least two different modes of transport, was issued, the requirements for presentation are set out in Article 19 of the UCP 600. Overall, this provision adopted the same core structure as Article 20 which applies to bills of lading.⁴⁷⁰ However, there are some differences between these

⁴⁶⁷ Ozgur Eker, 'Transport Document Does Not Cover at Least Two Different Modes of Transport' (2018) <<http://ibid.letterofcredit.biz/Multimodal-Bill-of-Lading-Discrepancy-Multimodal-Bill-of-Lading-not-Presented.html>> accessed 27 January 2018

⁴⁶⁸ UCP 290, article 23; Todd (n 435) para 8.24.

⁴⁶⁹ *ibid.*

⁴⁷⁰ 'By and large, however, Art. 19 simply takes into a multi-modal environment the requirements for the tender of bills of lading under Art. 20.', Debattista (n 336) 352; '... much of Art. 19 mirrors the provision in Art. 20 and 21. So for example, documents that are subject to a charterparty are likewise not permitted...,

two types of documents according to the dissimilar nature of port-to-port maritime voyages and multimodal transport journeys. For instance, the term ‘shipped on board’ in Article 20(a)(ii)⁴⁷¹ was altered to ‘dispatched, taken in charge or shipped on board’ in Article 19(a)(ii).⁴⁷² In this section, the main focuses are on the issue of how to distinguish unimodal transport documents as well as multimodal transport documents and the requirements for multimodal transport documents to be compliant under the UCP 600.

5.4.1 Unimodal or multimodal transport documents: how to differentiate the types of transport documents?

In many cases, multimodal transport documents take the form of bills of lading, road consignment notes, rail consignment notes or air waybills.⁴⁷³ These various types of document may lead to uncertainty and confusion amongst the parties dealing with them under letters of credit.⁴⁷⁴ To be more specific, if traders fail to differentiate between unimodal and multimodal transport documents and present the wrong type of document to the bank, this can potentially lead to the situation where the document is rejected.⁴⁷⁵ According to Articles 19-24 of the UCP 600⁴⁷⁶ with regard to various transport documents, one thing in common is that at the beginning of each article it is emphasised that the name or title of transport documents is not the absolute criterion in determining the types of transport documents. For instance, a transport document that covers at least two different modes of transport can be titled either ‘multimodal transport document’ or

the requirement to tender all originals, added in the 1983 revision, also mirror Arts 20 and 21’, Todd (n 435) para 8.25.

⁴⁷¹ Article 20(a)(ii) of the UCP 600 states that ‘the goods have been *shipped on board* a named vessel at the port of loading stated in the credit by ...’ [emphasis added].

⁴⁷² Article 19 (a)(ii) of the UCP 600 states that ‘the goods have been *dispatched, taken in charge or shipped on board* at the place stated in the credit, by ...’ [emphasis added].

⁴⁷³ Vlad Cioarec, ‘What Transport Documents Meet the Requirements of Article 19 of the UCP 600?’ (Forwarderlaw, 25 June 2007) 1 <http://ibid.forwarderlaw.com/library/view.php?article_id=420> accessed 27 January 2017.

⁴⁷⁴ *ibid.*

⁴⁷⁵ Janet Ulph, ‘The UCP 600: Documentary Credits in the 21st Century’ (2007) *Journal of Business Law* 369.

⁴⁷⁶ Article 19 of the UCP 600: ‘a. A requirement in a credit for the presentation of a transport document, *however named, ...*’. Article 20 of the UCP 600: ‘a. A bill of lading, *however named, ...*’. Article 21 of the UCP 600: ‘a. A non-negotiable sea waybill, *however named, ...*’. Article 22 of the UCP 600: ‘a. A bill of lading, *however named, ...*’. Article 23 of the UCP 600: ‘a. An air transport document, *however named, ...*’. Article 24 of the UCP 600: ‘a. A road, rail or inland waterway transport document, *however named, ...*’.

‘combined transport document’ or indeed any words of similar effect.⁴⁷⁷ Furthermore, according to Article D1(c) of the International Standard Banking Practice (ISBP),⁴⁷⁸ even though any unimodal transport document is required under letters of credit, if it is obvious from the content of transport documents that more than one mode of transport is to be operated, then Article 19 of the UCP 600 will be applicable to such documents instead of Articles 20-24. In a nutshell, the most significant one is the content of each transport document which is the absolute criterion to distinguish the exact type of transport document presented to the bank and to specify which article of the UCP 600 will apply to such transport documents.

5.4.1.1 Port-to-port bills of lading or multimodal transport documents

Due to the constant growth of containerised multimodal transport, some shipping liners may expand their operations from port-to-port services to integrated door-to-door services. That is to say, they may act as a sea carrier in some cases and as a multimodal transport operator in other cases where at least two modes of transport are involved. For instance, in the event that a shipping line performs FCL port/FCL depot service, it acts as a sea carrier undertaking to perform merely a port-to-port carriage service. On the other hand, if the shipping company also provides an inland transport service from the place of taking in charge to the port of loading and/or from the port of discharge to the place of final destination, then it is acting as a multimodal transport operator.⁴⁷⁹ According to common shipping practice, shipping companies often use the same standard form of bill of lading for both port-to-port carriage and multimodal transport carriage.⁴⁸⁰ However, neither the UCP 500 nor the UCP 600 provide clear criteria to distinguish transport documents issued by the shipping companies and so whether they can be considered as port-to-port bills of lading or multimodal transport documents.⁴⁸¹

⁴⁷⁷ ISBP, article D2. This issue will be discussed in more detail in 5.4.2.1-5.4.2.2.

⁴⁷⁸ ISBP, article D1(c).

⁴⁷⁹ Wilson (n 159) 255.

⁴⁸⁰ Cioarec (n 473) 2.

⁴⁸¹ *ibid.*

The first thing to note is that there is no specific requirement related to the name of the documents.⁴⁸² This means that the content and modes of transport actually involved in such a carriage are of the essence. In accordance with Article E1(a) of the ISBP, preliminarily, Article 20 of the UCP 600 that applies to bills of lading will be applicable only when a letter of credit requires a transport document to cover port-to-port carriage only.⁴⁸³ This statement is in accordance with Article D1(c) of the ISBP which states that:

When a credit requires the presentation of a transport document other than a multimodal or combined transport document, and it is clear from the routing of the goods stated in the credit that more than one mode of transport is to be utilized, for example, when an inland place of receipt or final destination are indicated, or the port of loading or discharge field is completed but with a place which is in fact an inland place and not a port, UCP 600 article 19 is to be applied in the examination of that document.

In other words, the type of documents can be distinguished by the type of service provided, rather than the name of the documents. For the banks, when examining the documents it is suggested they should focus on the place of receipt and the final destination, whether they are ports or inland places,⁴⁸⁴ together with the vessel's name, shipment date and freight in order to ensure which type of document is presented.

Overall, according to Article 20 of the UCP 600 which applies to bills of lading, it is obvious that the requirements under the FOB contract and the CIF contract were taken into account as Article 20(a)(ii) requires a bill of lading to provide the information regarding the goods shipped on board as well as the name of the vessel actually used.⁴⁸⁵ Hence, although a 'received for shipment' bill of lading was issued at the early stage, a notation in relation to the vessel's name and the actual shipment date must be attached to the bill of lading when the required documents are tendered according to Article

⁴⁸² See the phrase 'however named' under Articles 19(a), 20(a) of the UCP 600, D1(c) and E2 of the ISBP.

⁴⁸³ Article E1 of the ISBP: 'A requirement in a credit for the presentation of a transport document, however named, only covered a port-to-port shipment, i.e., accredit that contains no reference to a place of receipt or taking in charge or place of final destination means that UCP 600 article 20 is to be applied in the examination of that document'. However, please note that there is an exception to this Article provided in Article E6(e) and E8(b) of the ISBP.

⁴⁸⁴ This information in transport documents must be consistent with those provided under the letter of credit. The bank will focus on the consistency between the transport documents presented and the places provided in Fields 44A, 44E, 44F and 44B in the SWIFT MT 700 form. Please see section 5.3 for more details on the SWIFT format.

⁴⁸⁵ See Clause B7 of the FOB contract and Clause A8 of the CIF contract.

20(a)(iii) of the UCP 600. This provision reflects the effort to harmonise and facilitate the whole international trade transaction by providing the requirements which are in line with international sale of goods practices.

(i) Notations in relation to places of receipt and delivery

This is one of the main criteria to distinguish port-to-port bills of lading and multimodal transport documents. In relation to port-to-port bills of lading, especially container shipments, the place of receipt and the place of delivery will be the same places as port of loading and port of discharge. For example, port-to-port bills of lading for container shipments usually show the following terms, 'Container Yards (CY)' or 'Container Freight Stations (CFS)', whereas, for multimodal transport documents, the place of taking in charge and/or the place of final destination will be inland points. According to Article 20 (a)(iii),⁴⁸⁶ provided that the maritime bills of lading do not indicate the port of loading stipulated in the letter of credit as port of loading, for instance, stating the port of loading as 'place of receipt' instead of 'port of loading', or use 'intended' or similar wording with regard to port of loading, an 'on board' notation containing the reference to the date of shipment, the port of loading and the vessel's name is required.

The issue of places of receipt and delivery is one of the crucial criteria to differentiate bills of lading and multimodal transport documents as well as to determine whether a transport document will be rejected or not. In other words, if a different type of transport document is tendered, the bank can reject the document based on such discrepancy.

(ii) Notations in relation to the vessel's name

⁴⁸⁶ Article 20(a)(iii) of the UCP 600 states that 'if the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.'

An issue which probably leads to a problematic situation, especially for a banker who checks the documents, is related to the name of the ship. For example, if a bill of lading contains a clause stating the name of the ship as 'mv Georgios or substitute', according to the last paragraph of Article 20(a)(ii),⁴⁸⁷ a notation stating the actual date on which the goods were shipped on board and the name of the actual vessel used must be attached to the bill of lading. In contrast, provided that a transport document issued covered at least two modes of transport, Article 19 (a)(iii)(b)⁴⁸⁸ and Article 19 (a)(ii)⁴⁸⁹ apply to the case and, as a consequence, the multimodal bill of lading with the 'intended' qualifications regarding the vessel's name and port of loading (if maritime carriage is involved), coupled with the identification of the place of dispatch or taking in charge and the place of final destination as stated in the credit are sufficient.⁴⁹⁰ However, the issue to be considered is that there is no express statement regarding the requirement that the notation relating to the name of the ship actually used must be provided under Article 19. It is true that there are circumstances where sea transport is not included, for instance, where the cargo is carried by rail and road, or air and road. Nevertheless, if sea carriage is involved, the buyer as the applicant as well as the issuing bank⁴⁹¹ tend to require proof of the vessel actually used in the same way as stated in Article 20(a)(ii) which applies to bills of lading in order to obtain more reliable security that the goods have been shipped on board. Therefore, in order to deal with this uncertainty, the buyer should expressly state in the letter of credit application that, if a sea leg is included as a part of the whole journey, a notation stating the actual date on which the goods were shipped on board and the name of the actual vessel used must be tendered. To sum up, as there is no specific requirement regarding the notations in relation to the vessel's name under Article 19 of the UCP 600 which applies to multimodal transport documents, it can be assumed that, if

⁴⁸⁷ Article 20 (a)(ii) of the UCP 600 states that 'If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.'

⁴⁸⁸ Article 19(a)(iii)(b) of the UCP 600 states that 'the transport document contains the indication "intended" or similar qualification in relation to the vessel, port of loading or port of discharge.'

⁴⁸⁹ Article 19(a)(ii) of the UCP 600 states that 'the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by pre-printed wording, or a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.'

⁴⁹⁰ Article 19(iii) of the UCP 600 states that 'the place of dispatch, taking in charge or shipment and the place of final destination stated in the credit'.

⁴⁹¹ In case of the buyer's default under the letter of credit.

there is no explicit requirement in the letter of credit, the transport document which is superimposed by notation in relation to the vessel's name is likely to be a port-to-port bill of lading rather than a multimodal transport document.

(iii) Notations in relation to shipment date

With regard to shipment date stated in port-to-port bills of lading, it can be indicated in two different ways. Firstly, where the bill of lading provides pre-printed wording specifying that the cargo has been loaded on board or shipped on board a named vessel, for example, where the bill of lading contains the following clause, 'shipped on board in apparent good order and condition ...'. The date when the bill was issued is considered as the date of shipment. Secondly, on the contrary, in case of 'received for shipment' bills of lading that contain a clause like 'Received by Carrier from the Shipper in apparent good order and condition ...', an 'on board' notation is required as evidence that the cargo has already been loaded or shipped on board a vessel according to Article 20(a)(iii) of the UCP 600. In this case, the date of the 'on board' notation is regarded as the date of shipment. However, it should be noted that there is no such requirement where multimodal transport documents are issued. The only circumstance where multimodal transport documents will be attached by the notation in relation to shipment date is when the place of taking in charge is the same place as the port of loading.⁴⁹²

(iv) Notations in relation to freight

The last issue regarding how to distinguish port-to-port bills of lading and multimodal transport documents is related to freight notations. It can be noted that, in relation to maritime bills of lading, freight notations commonly include loading terminal handling charges, sea freight and destination terminal handling charges. However, if the multimodal transport services are provided, apart from those charges and sea freight,

⁴⁹² See UCP 600, article 19(a)(ii).

there will be additional costs involved such as inland haulage charges at the origin and/or the place of final destination.⁴⁹³

All in all, even though some features of maritime bills of lading and multimodal transport documents are quite similar, there are also some different details which should be aware of when distinguishing between these two types of transport documents, including the place of receipt, port of loading, place of final destination and port of discharge, the requirements with regard to date of shipment and vessel's name notations as well as the details of freight.

5.4.1.2 CMR road consignment notes or multimodal transport documents

According to Article 2, the scope of application of the CMR Convention expands to multimodal transport when a road vehicle with the goods is carried by other modes of transport (*transport superposé*) without unloading the goods from the road vehicle.⁴⁹⁴ For instance, if the lorry together with the goods is transported on board a RO-RO vessel, the CMR applies to the sea leg. If such a lorry is transported on a train, the CMR also applies to the rail transport. However, if the goods are unloaded from the lorry, Hague, Hague/Visby or Hamburg Rules will be applicable to the sea part of such a transport journey and the CIM/COTIF will apply to the rail leg, as the case may be. In terms of documentary credit, differentiating between multimodal transport documents and CMR consignment notes is the first step to identify whether Article 24 of the UCP 600 which applies to road, rail or inland waterway transport documents will be applicable⁴⁹⁵ or whether Article 19 should be applied instead.

Generally, there are some key differences between the characteristics of CMR consignment notes and multimodal transport documents. Firstly, multimodal transport

⁴⁹³ It should be borne in mind that other charges may also be added depending on the specific requirements of destination countries, see Cioarec (n 473) 3.

⁴⁹⁴ For detailed information, please see chapter 2. See generally Clarke (n 34); Hoeks (n 7).

⁴⁹⁵ As also stated in Article J1 of the ISBP: 'a requirement in a credit for the presentation of a transport document covering movement of goods by either road or rail or inland waterway means that UCP 600 article 24 is to be applied in the examination of that document'.

documents can be issued in the form of either negotiable or non-negotiable documents,⁴⁹⁶ while the CMR consignment notes are non-negotiable in nature.⁴⁹⁷ Therefore, if road transport is involved but the transport document indicates some phrase like 'to order' or 'negotiable', then such a document tends to be a multimodal transport document, rather than a CMR consignment note.

Secondly, in relation to road transport which also covers other modes of transport such as RO-RO ferry or vessel, a CMR consignment note usually contains a clause 'transport to ship' or the like specifying the intended port of loading, vessel's name and port of discharge. In practice, the 'on board' notation will be provided and attached to the second consignment note.⁴⁹⁸ However, there is no major issue regarding the first and the second originals since the document which is used to present to the banks is the first original (with no 'on board' notations).⁴⁹⁹ Where the road carriage includes sea transport, ie a RO-RO vessel, the consignment notes that contain a clause 'transport to ship' must be considered as multimodal transport documents. Therefore, it must comply with the requirements under Article 19 of the UCP 600 rather than Article 24 which aims to apply to unimodal transport documents. In the same vein, where the road carriage service combines rail transport as part of the whole journey, ie the lorry with the goods will subsequently be transported on the train wagon, the CMR consignment note issued is considered as a multimodal transport document under the scope of Article 19 of the UCP 600 instead of Article 24.

Thirdly, when distinguishing between CMR consignment notes and multimodal transport documents, place of receipt and place of final destination should be paid attention to in order to ensure that the type of transport document is compliant with the

⁴⁹⁶ Please see chapter 4 of this thesis for a detailed discussion on negotiability of multimodal transport.

⁴⁹⁷ Cioarec (n 473) 2. see also Article 6(1) of the CMR

⁴⁹⁸ 'The consignment note is made out in four original copies, all of which should be signed by both the carrier and the consignor of the goods. One copy of the note (printed with red lines) is retained by the consignor; the second copy (printed with blue lines) is for the consignee; and the third copy (printed with green lines) is for the carrier and must travel forward with the vehicle and remain with it while ever goods are on board. A fourth copy (printed with black lines) may be retained on file by the originator of the document'. David Lowe, *Intermodal Freight Transport* (Butterworth-Heinemann 2006) 194.

⁴⁹⁹ It should be noted that there is no requirement for 'on-board notations' under Article 19 of the UCP 600. See also Cioarec (n 473) 4.

requirement under letters of credit. For example, if there are not only place of receipt (Field 44A of the SWIFT MT 700 form) and place of destination (Field 44B of the SWIFT MT 700 form) but also port of loading (Field 44E of the SWIFT MT 700 form) and port of discharge (Field 44E of the SWIFT MT 700 form) specified in one transport documents, it is obvious that such a document is a multimodal transport document, not a CMR consignment note.

5.4.1.3 CIM-COTIF consignment notes or multimodal transport documents

In accordance with Articles 1(3) and (4) of the CIM/COTIF, the scope of application of such a convention can extend to multimodal transport provided that carriage of goods by other modes of transport, including road, inland waterways or sea, is considered as a supplement to trans-frontier carriage of goods by rail. In addition, such a supplement must be subject to a single carriage of goods contract.⁵⁰⁰ In the same way as the CMR road consignment notes, identification of type of transport documents is a crucial procedure for bankers to apply the right article, either Article 19 or Article 24 of the UCP 600, and also to remind the beneficiary to present the right type of transport documents required under letters of credit in order to avoid the risk of rejection.

The first milestone regarding combined transport in terms of rail carriage occurred after the adoption of the UNCTAD/ICC Rules where the International Union of Combined Road – Rail Transport Companies (UIRR)⁵⁰¹ launched its own carriage framework in the same way as FIATA⁵⁰² had.⁵⁰³ As a consequence, CIM/UIRR consignment notes have been widely used in Europe, where rail/road transport of goods and services is extensively

⁵⁰⁰ For detailed information regarding the scope of application of the CIM/COTIF, see chapter 2.

⁵⁰¹ 'Created in 1970, the International Union for Road-Rail Combined Transport (UIRR) is the industry association for the sector of Combined Transport in Brussels. Its members are Combined Transport Operators and Combined Transport Terminals.' This association is registered in the European Commission's Transparency Register (No. 49307536642-11). For detailed information, see UIRR, 'Road-Rail CT' (2017) <<http://www.uirr.com/en/road-rail-ct.html>> accessed 16 December 2017.

⁵⁰² International Federation of Freight Forwarders Associations (FIATA), founded in Vienna/Austria on May 31, 1926, is a non-governmental organisation, represents today an industry covering approximately 40,000 forwarding and logistics firms. For detailed information regarding the organisation, see FIATA, 'Who Is FIATA' (2017) <<http://fiata.com/about-fiata.html>> accessed 16 December 2017.

⁵⁰³ Cioarec (n 473) 5.

provided.⁵⁰⁴ Subsequently, in 2006, the International Rail Transport Committee put forward a new transport document known as 'CIM Consignment Note for Combined Transport' in order to respond to the current trend of international multimodal transport and the need of the transport industry.⁵⁰⁵ This new consignment note for combined transport can be regarded as an efficient instrument in terms of multimodal transport since it covers both rail/sea and rail/inland waterways according to Article 1(3) and (4) of the COTIF/CIM. However, there are some differences between the old CIM/UIRR consignment notes and the new CIM Consignment Note for Combined Transport. For example, with regard to the shipment date, while the date of issuance indicated in box 20 of the new consignment note is considered as the date of shipment, the date indicated in box B of the CIM/UIRR consignment notes which is deemed to be the date of shipment must be the date stamped at the departure station.⁵⁰⁶

To conclude, as mentioned earlier that CIM consignment notes for combined transport⁵⁰⁷ are used separately from unimodal rail consignment notes, it can be anticipated that, in practice, where rail transport is involved it would be less complicated for bankers and stakeholders to distinguish unimodal rail consignment notes from consignment notes for combined transport.

5.4.1.4 CMNI inland waterway transport documents or multimodal transport documents

According to Article 2.2 of the CMNI Convention, the scope of application of this convention can cover another mode of transport, solely maritime carriage, under the condition that there must be no transshipment, both during inland waterways or sea

⁵⁰⁴ The CIM/UIRR Consignment Notes are still in use, see Hoeks (n 7) 267.

⁵⁰⁵ For detailed information of this organisation as well as the specimen of the 'CIM Consignment Note for Combined Transport', see International Rail Transport Committee (CIT), 'The CIT' (2017) <<http://www.cit-rail.org/en/>> accessed 16 December 2017.

⁵⁰⁶ This issue reveals the inconsistency of paragraph 172 of the 2002 recommendations by ICC Banking Commission which aims to provide guidance for determination of shipment date where rail transport documents are issued. It is suggested that this paragraph should be revised in order to reflect the current practices, see Cioarec (n 473) 5; Lowe (n 498) 197.

⁵⁰⁷ Either the 'CIM/UIRR Consignment Notes' or the CIT's 'CIM Consignment Note for Combined Transport'.

voyage, unless a bill of lading has been issued according to applicable maritime law, or the distance of sea carriage which falls under the scope of maritime conventions is the greater.⁵⁰⁸ This provision means that CMNI inland waterways transport documents (either in the form of bills of lading or inland waterways consignment notes) can be considered as multimodal transport documents if no transshipment is allowed during the whole inland waterways/sea transport journey. Similar to CMR road consignment notes and COTIF-CIM consignment notes, if a transport document presented to the bank is considered as a CMNI inland waterway transport document, then Article 24 of the UCP 600 will apply. Otherwise, if it is, in fact, a multimodal transport document, then Article 19 will apply.⁵⁰⁹

Compared to other modes of transport, inland waterways may be considered less significant due to the limited and less prevailing use of this mode. However, when examining an inland waterway transport document, extra attention should be paid to this type of transport document since it is mostly similar to maritime bills of lading⁵¹⁰ as the place of receipt and place of destination are both ports in the same way as maritime bills of lading. Article 1.6 of the CMNI defines 'transport document' as 'a document which evidences a contract of carriage and the taking over or loading of goods by a carrier, made out in the form of a bill of lading or consignment note or of any other document used in trade'. Considered together with Chapter III of the CMNI regarding transport document, the details provided in the CMNI transport documents are almost entirely similar to those under maritime bills of lading. Therefore, the criteria in relation to place of receipt and delivery are the fundamental steps to differentiate between CMNI transport documents and multimodal transport documents. As the CMNI transport documents can include only two modes of transport, namely sea and inland waterways, when considering the transport document, the stakeholders should pay attention to the port of loading and port of discharge, whether one of them is a sea port or both of them are inland waterway ports in order to make sure that the right type of transport document is tendered.

⁵⁰⁸ For detailed information regarding the scope of application of the CMNI Convention, see chapter 2.

⁵⁰⁹ See also ISBP, articles J1 and D1(c).

⁵¹⁰ See CMNI, articles 11 and 13.

5.4.1.5 Air waybills or multimodal transport documents

According to Article 31 of the Warsaw Convention and Article 38 of the Montreal Convention, the scope of these conventions can expand to other modes of transport under specific conditions.⁵¹¹ Thus, considering whether a transport document is an air waybill or a multimodal transport document can indicate whether Article 23 or Article 19 of the UCP 600 will apply. Under Article 23(a) of the UCP 600⁵¹² and Article H2 of the ISBP,⁵¹³ it can be noted that the name of the air transport document is not the crucial part, that is to say, it can be titled 'air waybill', 'air consignment note' or any words of similar effect so long as the content of such a transport document is related to carriage of goods by air. Similar to other unimodal transport documents, the first stage to identify whether air transport documents or multimodal transport documents are presented is to carefully look at the place of receipt and place of destination. If both of them are airports, such as 'Airport of Departure: Changi Airport, Singapore/Air port of Destination: Narita Airport, Tokyo',⁵¹⁴ then it is likely that such documents are air transport documents. On the other hand, if there are other inland places apart from airports involved, there is a high possibility that such documents are multimodal transport documents.

In practice, there is a type of transport documents known as 'Combined Transport Documents' used amongst forwarders for air-sea container traffic between Europe and the Asia/Pacific Region via Dubai hub.⁵¹⁵ This 'Combined Transport Document' takes the form of an air waybill but with additional boxes indicating Place of Delivery and Place for Transshipment.⁵¹⁶ This is not prohibited under Article 31(2) of the Warsaw Convention.⁵¹⁷

⁵¹¹ For detailed information regarding the scope of application of these two conventions, see chapter 2.

⁵¹² Article 23(a) of the UCP 600 states that 'an air transport document, *however named*, must appear to ...' [emphasis added].

⁵¹³ Article H2 of the ISBP states that 'an air transport document need not be titled "air waybill", "air consignment note" or words of similar effect even when the credit so names the required document'.

⁵¹⁴ It should be noted that, in practice, identification of an airport of departure and an airport of destination may be provided in the form of the International Air Transport Association (IATA) codes instead of the full name of the airports such as LHR instead of London Heathrow Airport. See ISBP, article H10.

⁵¹⁵ Cioarec (n 473) 5.

⁵¹⁶ *ibid.*

⁵¹⁷ Article 31(2) of the Warsaw Convention states that 'nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other

Normally, it is also indicated on the air waybill that it is 'not negotiable unless consigned to order' which means that the parties can agree upon the negotiability of the air waybill. Commonly, the modes of transport used must be indicated on such a Combined Transport Documents, such as 'AIR/SEA SHIPMENT: CARRIAGE BY AIR FROM ZURICH TO DUBAI, THEN BY SEA TO TAIWAN'.⁵¹⁸ This Combined Transport Document is subject to the network liability system, that is to say, where loss or damage occurs, unimodal transport conventions will apply based on the place where such loss or damage occurred. For example, if the cargo was lost or damaged during the air carriage, the Warsaw or the Montreal Conventions will apply to the case. On the other hand, if the cargo was lost or damaged while on board the sea vessel, the Hague, Hague/Visby or Hamburg Rules will be applicable.⁵¹⁹

However, despite the fact that there is more than one mode of transport involved, if a transport document does not adopt the pattern of the aforementioned Combined Transport Document and indicates only carriage of goods by air, then all modes of transport are deemed to be parts of air transport and, as a consequence, they are under the scope of the Warsaw Convention or the Montreal Convention by virtue of Article 31 and Article 38 respectively.⁵²⁰ In terms of documentary credit, where an air waybill is required without mentioning other modes of transport, Article 23 of the UCP 600 applies.

5.4.2 The requirements for multimodal transport documents to be compliant under the UCP 600

5.4.2.1 Article 19 of the UCP 600: Scope of application

Compared to Article 26 of the UCP 500, the different styles of wording can be observed. Article 26 begins with "if a Credit calls for a transport documents covering at least two different modes of transport (multimodal transport)..." which implied the sense

modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.'

⁵¹⁸ Cioarec (n 473) 5.

⁵¹⁹ *ibid.*

⁵²⁰ *ibid.*

of restriction that this provision is strictly applicable in this specific case only, while Article 19 of the UCP 600 was written in narrative style by simply providing a definition of what constitutes a 'Transport Document Covering at Least Two Different Modes of Transport' or a multimodal/combined transport document.⁵²¹ Despite the difference in styles of wording, it does not mean that the interpretations of these two provisions, Article 26 of the UCP 500 and Article 19 of the UCP 600, are dissimilar.⁵²² That is to say, if a multimodal or combined transport document is not expressly required under the letter of credit, the bank will not examine such a document. This point of view is supported by Byrne who states that:

A multimodal or combined transport document presented under a credit calling for a transport document indicating one mode of transport would not be examined under UCP 600 article 19 but under the article applicable to the type of transport document required under the credit even if it was labelled a multimodal or combined transport document or covered more than one mode of transport.⁵²³

In relation to the practical aspect, the ICC Banking Commission also pointed out that:

The essence of multimodal transport is that the credit provides for transport by more than one mode of transport, e.g. it covers dispatch from an inland point in the country of export to a port of discharge in the country of import. This would be signified by the transport document evidencing dispatch, say by road from the inland point to a port in the country of export and then shipment by sea to a port of discharge. [Therefore,] a credit which provides for shipment from a port to another would not be covered by the provisions of Article 26.⁵²⁴

With regard to the banking practice, the process to figure out whether a transport document is multimodal transport or not would be done on case-by-case basis.⁵²⁵ According to the ISBP Article D1(c):

[W]hen a credit requires the presentation of a transport document other than a multimodal or combined transport document, and it is clear from the routing of the goods stated in the credit

⁵²¹ Ellinger (n 357) 259.

⁵²² *ibid* 259.

⁵²³ James E Byrne, *The Comparison of UCP 600 and UCP 500* (Institute of International Banking Law & Practice 2007) 166.

⁵²⁴ Gary Collyer and Ron Katz, *ICC Banking Commission Collected Opinions 1995-2001* (ICC Publishing SA 2002) 334 (R354).

⁵²⁵ For a detailed discussion on this issue, see section 5.4.1 of this chapter.

that more than one mode of transport is to be utilised, for example, when an inland place of receipt or final destination is indicated, or the port of loading or discharge field is completed but with a place which is in fact an inland place and not a port, UCP 600 Article 19 is to be applied in the examination of that document.⁵²⁶

In relation to the scope of application of Article 19, the next issue to be discussed is whether the multimodal transport document needs to state that the transport document must evidence that more than one mode of transport will be utilised in the course of the shipment.

The ICC Banking Commission stated that:

For a multimodal type document to be acceptable, a credit does not necessarily need to state that the transport document is to evidence that more than one mode of transport to be utilised in the course of the shipment. The statement “however named” would be covered by the presentation of a transport document evidencing more than one means of transport from the stated place of taking in charge to the place of final destination ...⁵²⁷

In order to confirm that this paradigm is correct, there is another ICC Banking Commission opinion (R462)⁵²⁸ which identifies that:

Article 26 (of the UCP 500) places no obligation on the part of the issuer of the multimodal transport document to specify the modes of transport used. On the basis that the credit required the presentation of a multimodal transport document and such document complied with the provisions of Article 26 and the terms specified in the letter of credit, a bank is not required to seek confirmation that more than one mode of shipment was effected.⁵²⁹

Regarding the banking practice on this issue, it is clearly provided in the ISBP Article D1(b)(i) that ‘[a] multimodal or combined transport document is not to indicate that shipment or dispatch has been effected by only one mode of transport, but it may be silent regarding some or all of the modes of transport utilized’. It can be concluded from the ICC Banking Commission opinions and the ISBP that there is no need for some or all

⁵²⁶ ISBP, article D1(c).

⁵²⁷ Collyer (n 524) 333-334 (R354).

⁵²⁸ *ibid* 337-339 (R462).

⁵²⁹ ‘The essence of multimodal transport is that the credit provides for transport by more than one mode of transport, e.g. it covers dispatch from an inland point in the country of export to a port of discharge in the country of import. This would be signified by the transport document evidencing dispatch, say by road from the inland point to a port in the country of export and then shipment by sea to a port of discharge. [Therefore,] a credit which provides for shipment from a port to another would not be covered by the provisions to Article 26’. Collyer (n 524) 334 (R354).

of the legs of transport to be identified in a transport document in order to fall within the scope of Article 19 of the UCP 600.

5.4.2.2 Rearrangement of articles relating to transport documents under the UCP 600 and the wording in the title of Article 19

Under UCP 600, the first change that can be easily noted is that Article 19 which regulates multimodal transport documents is the first article, before other types of transport documents. This is possibly because of the increasing trend and the prevalence of carriage of goods by more than one mode of transport, so-called 'multimodal transport'. The rearrangement reflects the awareness of the Drafting Group regarding the current use of multimodal transport documents where the shipping industry has been shifted to multimodal transport services.⁵³⁰ That is to say, transport service providers are likely to expand their operations to cover the entire transportation, regardless of which mode of transport is operated during the voyage in order to take control of the whole journey. In a parallel way, it is also beneficial for the applicants and the beneficiaries since only one single document can cover the whole carriage from the place of receipt to the place of final destination. The welcome result is that the sellers (beneficiaries) are not obliged to provide separate documents for each leg of carriage used as part of the whole transport operation.⁵³¹

With regard to the wording in the title of Article 19, at first glance, while the comparable article, Article 26 of the UCP 500, is titled 'Multimodal Transport Document', it is notable that the title of Article 19 provides a descriptive scope of 'Document Covering at Least Two Different Modes of Transport', rather than using a specific term, "multimodal transport document". Furthermore, the title in Article 19 is also provided differently compared to other types of transport document, namely bill of lading, non-negotiable sea waybill, charter party bill of lading, air transport document and road, and rail or inland

⁵³⁰ ICC, *Commentary on UCP 600* (ICC Services Publications Department 2007) 81. See also Ellinger (n 357) 259; Byrne (n 523) 109.

⁵³¹ ICC (n 530) 81.

waterway transport document. The reason behind the title 'Document Covering at Least Two Different Modes of Transport' is relating to a short history of multimodal transport and the fact that various terminologies are interchangeably used to refer to this type of transport documents.⁵³² To be more specific, compared to other types of transport documents, especially bills of lading which have played an important role amongst traders including exporters, importers, banks, shipping companies and forwarders for several centuries, it is undeniable that the recognition of one single term has not yet been unanimously accepted as we can see that the various names in circulation, eg 'multimodal transport document', 'combined transport document', 'combined transport bill of lading', 'through bill of lading' or 'intermodal transport document'.⁵³³ As a result, the Drafting Group decided not to refer to any specific name but instead paid attention to the nature or the modes of transport covered by such transport documents.⁵³⁴ In other words, in order to avoid any ambiguity, all transport documents, *however named*,⁵³⁵ that appear to cover carriage of goods by at least two different modes of transportation fall within the scope of Article 19 of the UCP 600.⁵³⁶ It can be seen that when considering the type of transport document, the nature of such a document is more essential than the name itself.⁵³⁷

⁵³² *ibid.*

⁵³³ For detailed discussion on various wording and terms used in relation to multimodal transport, see Thomas (n 17) 761. 'Multimodal or combined transport documents are documents which cover at least two different modes of transport, for example, rail and sea, or road and air ...', see Malek (n 452) para 8.110.

⁵³⁴ 'The Drafting Group thought it best to describe what happens during the carriage rather than refers to the name or title of the document'. See ICC (n 530) 81. Where there is a statement prohibiting 'Freight Forwarder's Multimodal Transport Documents' or 'House Multimodal Transport Document', Article D4 of the ISBP states that: 'A stipulation in a credit that "Freight Forwarder's Multimodal Transport Documents are not acceptable" or "House Multimodal Transport Documents are not acceptable" or words of similar effect has no meaning in the context of the title, format, content or signing of a multimodal transport document unless the credit provides specific requirements detailing how the multimodal transport document is to be issued and signed. In the absence of these requirements, such a stipulation is to be disregarded, and the multimodal transport document presented is to be examined according to the requirements of the UCP 600 article 19.'

⁵³⁵ The phrase 'however named' would be covered by the presentation of a transport document evidencing more than one means of transport from the stated place of taking in charge to the place of final destination. This would include a document entitled 'combined transport bills of lading' Collyer (n 524) 333-334 (R354).

⁵³⁶ UCP 600, article 19(a); see also the ISBP, article D2.

⁵³⁷ Although the name of transport documents is not the ultimate criterion under Article 19 of the UCP 600, note that in this thesis, the term 'multimodal transport' is frequently used when referring to a 'Document Covering at Least Two Different Modes of Transport'.

5.4.2.3 Signature

(1) General Rules

As can be seen in Article 19(a)(i),⁵³⁸ there are some changes concerning how to sign multimodal transport documents in order to avoid rejection from the bank. The first novelty is that the phrases: 'or otherwise authenticated', 'authentication' and 'authenticating' with regard to the manner in which multimodal transport documents must be signed were deleted since Article 3 of the UCP 600 does provide the general rule regarding the interpretation of signing as well as covering the circumstance where '... any other mechanical or electronic method of authentication' is used.⁵³⁹

Furthermore, according to Article 19(a)(i), the name of the carrier must be specified in multimodal transport documents. This can be done by expressly providing it within the body of the transport document such as 'ABC Co. Ltd, the carrier'⁵⁴⁰ or by the way the respective document is signed such as 'For ABC Co. Ltd as carrier'⁵⁴¹. Apart from the name of the signing party, in relation to the capacity of the company signing the documents, it must be identified either as carrier, master⁵⁴² or agent,⁵⁴³ for example, 'ABC Co. Ltd, the carrier'. In case of an agent, the name of that agent and the capacity in which it is signing must be provided. However, in many cases only the name of the company is provided without the specification of capacity such as 'XYZ Co. Ltd'.⁵⁴⁴ In this case, it is unclear if XYZ Co. Ltd is acting as a carrier or as an agent of the carrier. Under Article 19 (a)(i), the name of the company is not enough;⁵⁴⁵ the capacity of such a company must be

⁵³⁸ Overall, the requirements regarding the way to sign multimodal transport documents is similar to those of maritime bills of lading, see Malek (n 452) para 8.111.

⁵³⁹ ICC (n 530) 82.

⁵⁴⁰ *ibid*; According to ISBP Article D5(b), 'when a multimodal transport document is signed by a named branch of the carrier, the signature is considered to have been made by the carrier'.

⁵⁴¹ ICC (n 530) 82.

⁵⁴² ISBP Article D5(d) states that 'when the master (captain) signs a multimodal transport document, the signature of the master (captain) is to be identified as the "master" ("captain"). The name of the master (captain) need not be stated.'

⁵⁴³ See also the ISBP, article D3(a).

⁵⁴⁴ ICC (n 530) 82.

⁵⁴⁵ It should be noted that 'unless the word "carrier" appears on the transport document linked to the name of the company, the company name in and of itself will not be sufficient', see ICC (n 530) 82.

indicated as well in order to comply with the requirement of this Article. To be more specific, the capacity of the signing party must be identified in the signature space unless the name of the company is indicated elsewhere on the transport document as the carrier. In this case, a simple signature in the signature box with the statement ‘for and on behalf of [name of the company]’ or ‘for and on behalf of the carrier’ is adequate.⁵⁴⁶

Another point to be borne in mind is that where the transport document is signed by an agent, it must be stated that the agent signed on behalf of the carrier or the master. If the agent signs on behalf of the carrier, the carrier’s name is also required.⁵⁴⁷ On the other hand, if the document is signed on behalf of the master, it is not necessary to identify the master’s name in the transport document⁵⁴⁸ since, in practice, it is normal for the agent not to know the name of the master at the time when the multimodal transport document is issued. Thus, it makes sense not to require the master’s name.

A further issue to be mentioned is on the use of the term ‘multimodal transport operator’. Even though this term has been regularly seen and mentioned, especially in academic works, after consulting with the ICC Transport Commission, the Drafting Group decided to end identification of a signing party as the multimodal transport operator or an agent signing for/on behalf of the multimodal transport operator. The rationale behind this was that, in practice, the term was rarely used.⁵⁴⁹ That is to say, despite the carriage involving more than one mode of transport, the service provider is normally and in practice called ‘the carrier’ rather than the ‘multimodal transport operator’.⁵⁵⁰

(2) Transport documents issued by freight forwarders

⁵⁴⁶ *ibid* 83.

⁵⁴⁷ ISBP, article D5(c).

⁵⁴⁸ ISBP, article D5(e).

⁵⁴⁹ ICC (n 530) 83.

⁵⁵⁰ *ibid*.

Unlike the outdated UCP 500, under the UCP 600 the specific Article directly providing for the presentation of a transport document no longer exists.⁵⁵¹ However, this does not mean that this type of transport document is devoid of recognition.⁵⁵² In other words, such a document is still acceptable under the UCP 600 by virtue of Article 14(l) which states that: 'A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.' That is to say, although a transport document is issued or signed by the freight forwarder, if it is in accordance with the requirements under Articles 19, 20, 21, 22, 23 or 24, then banks have no grounds to reject it based on the fact that it is issued by the freight forwarder.

This compares to Article 30 of the UCP 500 which allowed the freight forwarder to issue a multimodal transport document as principal. Due to the fact that there was a concern regarding conflicts of interest in the circumstance where the freight forwarder acted as agent for both the shipper and the carrier,⁵⁵³ there is no provision similar to Article 30 of the UCP 500 which allowed the freight forwarder to issue a multimodal transport document as principal in the UCP 600. Nevertheless, according to the general rule under Article 14, a freight forwarder can still issue a multimodal transport document under the condition that it follows the requirements provided in Article 19 which pay much more attention to the capacity of the issuing party rather than who is the party issuing a multimodal transport document.

In relation to the situation where a multimodal transport document is signed by a freight forwarder on behalf of the carrier but it is stated in the letter of credit: 'Transport document issued by Freight Forwarder not acceptable', the ICC Banking Commission gave a clear explanation on this matter as follows:

⁵⁵¹ Article 30 of the UCP 500 stated that: 'Unless otherwise authorised in the Credit, banks will only accept a transport document issued by a freight forwarder if it appears on its face to indicate:

i) the name of the freight forwarder as a carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as carrier or multimodal transport operator, or
ii) the name of the carrier or multimodal transport operator and to have signed or otherwise authenticated by the freight forwarder as a named agent for or on behalf of the carrier or multimodal transport operator.'

⁵⁵² Ellinger (n 357) 264.

⁵⁵³ Todd (n 435) para 8.29; see also Ulph (n 475) 369.

[T]he terminology “Transport document issued by Freight Forwarder not acceptable” is an ambiguous term that does not clearly define the type of document that would be acceptable. For example, it is not clear whether the credit is seeking to remove the ability for the freight forwarder to issue a bill of lading that would be acceptable under the UCP 500 Article 30 or whether it extends to the manner in which the bill of lading would be signed. In regard to this enquiry, the bank would be obliged to accept a bill of lading that was signed “as carrier” irrespective of any knowledge they may have as the capacity of the issuer.

However, if the freight forwarder signed in the capacity as forwarder, then the bank can reject that transport document.⁵⁵⁴

Another scenario that can be regarded as controversial is where it is expressly stated in a letter of credit that a transport document issued by freight forwarders is prohibited.⁵⁵⁵ On the one hand, it could be argued that, as Article 14(l) does not contain qualifying phrases, ie ‘unless otherwise authorised under the credit’, the documents issued by freight forwarders should not be unacceptable on condition they meet the requirements under Article 19-24 (as the case may be) of the UCP 600.⁵⁵⁶ On the other hand, it can be rebutted that the abovementioned point of view is against the parties’ freedom of contract. That is to say, provided that it is a mutual agreement between parties to an international sale of goods contract to prohibit a transport document issued by a freight forwarder, no matter what the reason is, there is no logical ground to violate their intention.⁵⁵⁷ Hence, the bank must follow the express stipulation under the letter of credit and reject any transport documents issued by freight forwarders.

At common law, there was a court decision with regard to a transport document (port-to-port bill of lading) issued by a freight forwarder in the case of *Lambias (Importers & Exporters) v Hong Kong and Shanghai Banking Corporation*.⁵⁵⁸ According to the facts of

⁵⁵⁴ Gary Collyer and Ron Katz, *ICC Banking Commission Unpublished Opinions 1995-2004* (ICC 2005) 114-115 (R562).

⁵⁵⁵ Ellinger (n 357) 264.

⁵⁵⁶ ‘... there should be no real prejudice to the beneficiary if the document issued by a freight forwarder in fact meets the requirements set out in the relevant article in UCP 600 notwithstanding that it violates the prohibition in the credit against freight forwarder documents’, Ellinger (n 357) 264.

⁵⁵⁷ ‘In the light of the wording in UCP 600 article 14(l), applicants wishing to avoid such documents should ensure that the credit expressly prohibits transport documents issued by freight forwarders’, see Ellinger (n 357) 264.

⁵⁵⁸ *Lambias (Importers & Exporters) v Hong Kong and Shanghai Banking Corporation* [1993] 2 SLR 751. This case was considered in the context of the UCP 1983.

this case, it was unclear whether the freight forwarder signed the transport documents as an agent for a named carrier or in its own capacity as a carrier. The court accordingly held that the bank was entitled to reject this document because it called for further inquiry. The notable result of this case is that the capacity of the signing person should be clear in order for the document to be considered as a good tender.

Nevertheless, in practice, it is still possible for a freight forwarder to sign in his own capacity, neither as the carrier nor on behalf of the carrier. According to Article D3(b) ISBP, as long as the phrase 'Freight Forwarder's Multimodal Transport Document is acceptable' or 'House Multimodal Transport Document is acceptable' is expressly stated in the letter of credit, the issuing party can sign the transport document without identifying the capacity in which it has been signed or the name of the carrier.⁵⁵⁹ This can be regarded as one exception to the general rule which strictly requires the signing party to provide not only the signature but also, most importantly, the capacity of such a signing party.

5.4.2.4 Indication of place of dispatch, taking in charge or shipment and the place of final destination

According to Article 19(a)(ii) of the UCP 600, a multimodal transport document must provide that the goods have been dispatched, taken in charge or shipped on board the vessel at the place stated in the letter of credit either by pre-printed wording or a stamp/notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.⁵⁶⁰ If the place of receipt or place of destination on a multimodal transport document is different from the places stated in a letter of credit, this potentially leads to the rejection of such a transport document based on the

⁵⁵⁹ See ISBP, article D3(b).

⁵⁶⁰ Where the letter of credit calls for a transport document evidencing the shipment from a port (the first leg is sea transportation), the ISBP Article D8 provides that 'the named port of loading should appear in the port of loading field. However, it may also be stated in the field headed "Place of Receipt" or words of similar effect, provided there is a dated on board notation evidencing that the goods were shipped on board a named vessel at the port stated under "Place of receipt" or words of similar effect.'

discrepancy. For example, a letter of credit issued in the SWIFT format indicated the following information on a multimodal transport document:⁵⁶¹

Field 44A: Place of Taking in Charge/Dispatch from.../Place of receipt:

HANNOVER, GERMANY

Field 44E: Port of Loading/Airport of Departure:

HAMBURG, GERMANY

Field 44F: Port of Discharge/ Airport of Destination:

ANY PORT IN CHINA

Field 46A: Document Required:

FULL SET OF MULTIMODAL TRANSPORT DOCUMENT ISSUED BY A SHIPPING COMPANY MARKED FREIGHT (PREPAID) MADE OUT TO ORDER OF AGRICULTURAL BANK OF CHINA MARKED NOTIFY APPLICANT INDICATING THAT THE GOODS HAVE BEEN DISPATCHED, TAKEN IN CHARGE OR LOADED ON BOARD

However, the multimodal transport document presented by the beneficiary provided the following information:⁵⁶²

Place of Receipt: WOLFSBURG, GERMANY

Port of Loading: HAMBURG PORT, GERMANY

Port of Discharge: PORT OF GUANGZHOU, CHINA

This multimodal transport document was rejected because it shows a transport route different to what is stated in the letter of credit. Place of receipt should have been Hannover, Germany but was stated as Wolfsburg, Germany which is not as required by the letter of credit. In other words, in order to be considered as a good tender, a multimodal transport document must indicate the place of receipt, dispatch, taking in

⁵⁶¹ Ozgur Eker, 'Multimodal Bill of Lading Discrepancy - Transport Route not per Letter of Credit' (2018) <<http://www.letterofcredit.biz/Multimodal-Bill-of-Lading-Discrepancy-Transport-Route-not-per-Letter-of-Credit.html>> accessed 3 January 2018.

⁵⁶² *ibid.*

charge, port of loading/airport of departure, port of discharge/airport of destination and place of final destination as stated in the credit.

Unlike Articles 20 and 21 of the UCP 600 which regulates the presentation of bills of lading and sea waybills, Article 19 does not require evidence of actual shipment since multimodal transport documents are normally issued before the goods are shipped on board the vessel⁵⁶³ (if a sea leg is involved as a part of multimodal transport journey). The ICC Banking Commission commented on this issue as follows:

Except in the case of a port-to-port shipment under a marine bill of lading, the majority of transport document will indicate that cargo has been accepted for transport from 'a place of receipt'. Also, and especially in the case of combined transport, insistence on an 'on board' document is likely to hold back the document, thereby postponing the time when the beneficiary can present documents in order to secure payment, and delaying delivery of the goods at destination (with the possibility of costly demurrage) because the goods arrive before the documents.⁵⁶⁴

In relation to Article 19(a)(ii), by means of pre-printed wording, the date of issuance of the transport document will be deemed to be the date of shipment.⁵⁶⁵ In addition, it can be seen that the phrase 'at the place stated in the credit' was added to emphasise that, when the bank examines the transport document, not only must the statement identifying that the goods have been taken in charge or shipped on board *within the shipment period stipulated in the documentary credit* be provided but also the statement evidencing that such goods have been dispatched, taken in charge, or shipped on board *from the place stated in the credit* is required as well.⁵⁶⁶ In the other scenario where a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board has been provided, the date stated will be deemed to be the date of shipment, no matter if it is before or after the date on which the transport document is issued.

⁵⁶³ Todd (n 435) para 8.27.

⁵⁶⁴ ICC, *UCP 1974/1983 Revisions Compared and Explained: Documentary Credits* (ICC Publication Services 1984) 51; Another point that should be borne in mind is that a transport document is compliant, although there is no clause identifying that the goods are shipped on board the named vessel stated in the multimodal transport document, see Todd (n 435) para 8.28.

⁵⁶⁵ See also the ISBP, articles D6 and D7.

⁵⁶⁶ See also the ISBP, articles D9 and D10.

In accordance with Article 19(a)(iii), as multimodal transport usually covers a journey from the manufacturer's plant to the buyer's warehouse which are inland points (so-called door-to-door delivery), other places in the carriage journey *prior to* the place of dispatch, taking in charge or shipment or *after* the place of final destination other than those stated in the documentary credit are allowed.⁵⁶⁷ In other words, the transport document covering the whole journey, including the anticipated route stipulated in the credit, is acceptable. For instance, it is stated under a documentary credit that the transport document covering shipment from Europe to Hong Kong is required. On the transport document presented to the bank, Bern, Switzerland is indicated as the place of dispatch, Marseille is indicated as the port of loading, Hong Kong is specified as the port of discharge and Shanghai is specified as the place of final destination.⁵⁶⁸ According to Article 19(a)(iii), this transport document is acceptable.⁵⁶⁹ Moreover, the term, 'intended' concerning the vessel, port of loading and port of discharge does not affect the status of the transport documents.⁵⁷⁰

5.4.2.5 Presentation of original document(s)

Similar to the position of the UCP 500, Article 19(a)(iv) of the UCP 600 states that, in the first instance, a transport document will be assumed to be the sole original document that was issued. Hence, that sole original must be presented.⁵⁷¹ However, if the transport document has been issued in more than one original, then all of the originals must be presented to the bank. In accordance with the Article D15 ISBP, the number of originals which have been issued must be indicated in the transport document.⁵⁷² Regarding the status as originals, the multimodal transport documents marked as 'First

⁵⁶⁷ Malek (n 452) para 8.111.

⁵⁶⁸ See also ISBP, articles D12, D13 and D14

⁵⁶⁹ Another example can be found in Collyer (n 524) 336 (R355) where a statement 'for transport to East London (inland) is provided in the letter of credit, but in a multimodal transport document, it showed "port of discharge: Port Elizabeth (port); place of delivery: East London (inland)"". The ICC Banking identified that there is no discrepancy although the port of discharge and place of destination was different.

⁵⁷⁰ Malek (n 452) para 8.111. The related issue concerning the legal status of a multimodal transport document and 'received for shipment bills of lading' is considered in chapter 4.

⁵⁷¹ This requirement mirrors Article 20 governing maritime bills of lading.

⁵⁷² ISBP, article D15(a).

Original', 'Second Original', 'Third Original', or 'Original', 'Duplicate', 'Triplicate' or similar expressions with similar meanings are all considered as originals.⁵⁷³ The only situation where a partial set of originals can be acceptable is where there is a disposal instruction for one or more of the original transport documents expressly provided in the letter of credit.⁵⁷⁴

5.4.2.6 Terms and condition of the multimodal transport contracts

It is common for a transport document to contain the terms and conditions of the carriage of goods contract.⁵⁷⁵ However, it cannot be said that all transport documents have to function as evidence of the carriage of goods contract in every case. Therefore, where there is no terms and conditions or only partial terms and conditions are provided in the transport documents (this type of transport document is referred to as a 'short form' or 'blank back' transport document), the reference to a source of carriage contract must be provided in order to comply with the requirement under Article 19(a)(v). However, the bank has no responsibility to examine the contents of terms and conditions of the carriage of goods contract.⁵⁷⁶

Another point to mention relates to a charter party. Under Article 19(a)(vi), the transport document must not contain a statement indicating that such a document is subject to charter party.⁵⁷⁷ Some examples of the indication prohibited under this Article include 'to be used with charter parties', 'freight payable as per charter party' or 'charter party contract number ABC123'.⁵⁷⁸ If these statements or the like are found in the transport document, it is likely that such a document will be rejected by the bank as it does not comply with the requirement of Article 19(a)(vi).

⁵⁷³ ISBP, article D15(b).

⁵⁷⁴ ICC (n 530) 84.

⁵⁷⁵ For a detailed discussion on the legal status and functions of a multimodal transport document, see chapter 4 of this thesis.

⁵⁷⁶ ICC (n 530) 84.

⁵⁷⁷ See also the ISBP, article D1(b)(ii): 'it is difficult to see the relevance of charterparty terms in multimodal document'. Todd (n 435) para 8.25.

⁵⁷⁸ ICC (n 530) 84.

5.4.2.7 Transhipment

Article 19(b) begins with the definition of transhipment as follows:

For the purpose of the article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.⁵⁷⁹

Article 19(c)(i) deals with the requirements regarding transhipment in more detail by providing that where the entire multimodal transport journey is covered by one transport document, it is acceptable for such a transport document to have a statement indicating that the goods will or may be transhipped.⁵⁸⁰ Further, when a document that covers at least two different modes of transport is required, separate transport documents that cover each leg of the carriage will be rejected.⁵⁸¹

Since the nature of multimodal transport involves more than one mode of transport, it is common for transhipment to occur.⁵⁸² Taking this fact into account, the Drafting Group agreed to provide a decisive rule that even though it is stated in the letter of credit that transhipment is prohibited,⁵⁸³ a transport document that indicates that transhipment will or may take place is still acceptable.

5.4.2.8 Partial shipment

⁵⁷⁹ A detailed definition of 'transhipment' is also provided in the ISBP Article D21 which states that 'Transhipment is the unloading and reloading of goods from one means of conveyance to another means of conveyance (whether or not in different modes of transport) during the carriage of those goods from the place of receipt, dispatch or taking in charge, port of loading or airport of departure to the place of final destination, port of discharge or airport of destination stated in the credit.'

⁵⁸⁰ 'Where a credit calls for a multimodal transport document it should not prohibit transhipment, as this would be a contradiction in terms', see King (n 441) para 7-97.

⁵⁸¹ ICC (n 530) 85.

⁵⁸² '... the multimodal transport document being conceptually a development of the through bill of lading. Unlike the through bill of lading, however, transhipment need not to be from one vessel to another at sea, but can be from land to sea or vice versa ...'. Todd (n 435) para 8.26.

⁵⁸³ This is mostly due to an unintentional mistake, as mentioned earlier that transhipment normally take place in multimodal transport of goods.

Another issue that is not clarified in any of the provisions of the UCP 600 but usually happens in practice is described by the term 'partial shipment'. According to the Article D22 ISBP, the definition of partial transshipment is: 'Shipment on more than one means of conveyance (more than one truck [lorry], vessel, aircraft, etc.) is a partial shipment, even when such means of conveyance leaves on the same day for the same destination.'⁵⁸⁴

There are two scenarios worth considering: first, where partial shipment is prohibited and, second, where the credit allows partial shipment. To begin with the first scenario, when more than one set of original multimodal transport documents covering a place of receipt, dispatch, taking in charge or shipment (as specifically allowed, or within a geographical area or range of places stated in the credit) are presented, the bank will examine whether each set of document indicates 1) the same means of transportation, 2) the same journey, and 3) the same final destination or not.⁵⁸⁵ Provided that these three identifications are consistent amongst all sets of original documents, then these documents are acceptable. After fulfilling the requirements under Article D23(a) ISBP, the next issue to be considered is that if each set of original multimodal transport documents incorporates different dates of receipt, dispatch, taking in charge, or shipment, then any presentation period will be calculated from the latest of these dates.⁵⁸⁶ In order to comply with the requirements under the letter of credit, this latest date must fall on or before the latest date of receipt, dispatch, taking in charge or shipment stipulated under the credit.⁵⁸⁷

With regard to the second scenario where partial shipment is allowed, if the whole transport journey is covered by more than one set of original multimodal transport documents and each of them incorporate different dates of receipt, dispatch, taking in charge or shipment as well as different means of transportation, they must be presented as parts of a single presentation. The presentation period will be calculated from the

⁵⁸⁴ ISBP, article D22.

⁵⁸⁵ *ibid* article D23(a).

⁵⁸⁶ *ibid* article D23(b).

⁵⁸⁷ *ibid*.

earliest of these dates stated on these sets of multimodal transport documents.⁵⁸⁸ A further issue is that each of these dates must fall on or before the latest dates of receipt, dispatch, taking in charge or shipment stated in the credit in order to be compliant.⁵⁸⁹

5.4.2.9 Description of goods

Since multimodal transport documents serve a legal function as receipts of goods received by multimodal transport operators, description of goods is one of the crucial parts that the beneficiary should be aware of when presenting multimodal transport documents to the bank under letters of credit. According to international banking practice, the goods description can be provided in general terms but it must not be in conflict with the goods description in the credit.⁵⁹⁰ The following scenario is an example of a discrepancy based on an inconsistency between a goods description stipulated under a letter of credit and that provided on a multimodal transport document.

A letter of credit issued in the SWIFT MT 700 format:

Field 45-A: Description of Goods: COCOA POWDER (PCPN)

Field 46A: Documents Required: FULL SET OF MULTIMODAL OR COMBINED TRANSPORT DOCUMENT HOWEVER NAMED CONSIGNED TO THE ORDER OF BELFIUS BANK SA, NOTIFY APPLICANT SHOWING FREIGHT PREPAID

The information shown on a multimodal transport document:

Description of Goods: Second Quality Cocoa Powder⁵⁹¹

⁵⁸⁸ *ibid* article D23(c).

⁵⁸⁹ *ibid*.

⁵⁹⁰ *ibid* article D26.

⁵⁹¹ Ozgur Eker, 'Multimodal Bill of Lading Discrepancy – Description of Goods is Inconsistent' (2018) <<http://www.letterofcredit.biz/Multimodal-Bill-of-Lading-Discrepancy-Description-of-Goods-is-Inconsistent.html>> accessed 15 March 2018.

After presentation of documents, this multimodal transport document was rejected by the bank because the goods description was inconsistent with the letter of credit. Although the credit gave the goods description in general terms, it did not mean that lower quality grade products would be accepted.⁵⁹²

5.4.2.10 Requirement regarding carriage on deck and multimodal transport

According to Article 26(a) of the UCP 600,⁵⁹³ if a sea leg is involved in a multimodal transport journey and there is a qualification indicating that the goods are or will be loaded on deck, such a document will be rejected. However, if a transport document just mentions the possibility that the goods may be carried on deck, then such a document is acceptable. The rationale behind this Article originates from the common notion regarding carriage of goods on deck, namely that it is dangerous and likely to cause damage to the cargo.⁵⁹⁴ However, it should be noted that, in the era of containerisation, the situation has changed due to the improved design and construction of container vessels which are capable of carrying high stacks of containers on deck with low risk of loss or damage.⁵⁹⁵

Another issue that can be noted from Article 26 is that, where a letter of credit expressly prohibits carriage on deck or specifically requires under-deck loading only but the multimodal transport document tendered to the bank indicates that the cargo may be loaded on deck, it is unclear whether this document would be acceptable or not.⁵⁹⁶ In Article 26(a), it can be noted that the phrase 'unless otherwise stipulated in the Credit' was removed. This change may lead to uncertainty as to whether it is possible for the parties to agree to accept an 'on deck' multimodal transport document and whether a transport document stating that the cargo is stowed on deck will be accepted by the bank

⁵⁹² *ibid.*

⁵⁹³ Article 26(a) of the UCP 600 states that: 'A transport document must not indicate that the goods are or will be loaded on deck. A clause on a transport document stating that the goods may be loaded on deck is acceptable.'

⁵⁹⁴ Todd (n 435) para 8.42.

⁵⁹⁵ Malek (n 452) para 8.121.

⁵⁹⁶ *ibid.*

according to the parties' agreement. However, this uncertainty can be clarified by Article 1 of the UCP 600⁵⁹⁷ which allows the parties to agree on terms that vary from the requirements under the UCP 600. This means that the freedom of contract prevails over those provisions. In order to deal with this issue based on the current containerised shipping practice and eliminate unnecessary interpretation, it is proposed that Article 26 should be amended by providing an express exception in case of containerised multimodal transport.

With regard to the cargo carried on deck,⁵⁹⁸ according to Article I(c) of the Hague/Visby Rules,⁵⁹⁹ this type of cargo is outside the scope of the Rules. Therefore, the parties can freely agree upon their own terms and conditions in relation to such carriage.⁶⁰⁰ Due to the fact that a uniform international convention governing multimodal transport does not exist and the network liability system has currently been adopted, if the cargo packed in a closed container, which is carried on deck and there is a clause expressly allowing the cargo to be carried on deck, is washed over board or damaged during a sea leg as part of a multimodal transport voyage, then the cargo interest needs to look in detail to find out which legal regime will be applicable as this is on a case-by-case basis. Moreover, it is highly possible that there is an unlimited limitation and/or an exclusion of liability stated in a transport document since parties can freely negotiate their terms beyond the scope of the Hague/Visby Rules. This is a critical issue since the

⁵⁹⁷ Article 1 of the UCP 600: 'The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 are rules that apply to any documentary credit (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto *unless expressly modified or excluded by the credit*.' [emphasis added].

⁵⁹⁸ In this sense, it refers to carriage of goods on deck under two conditions, firstly, the cargo must be actually stowed on deck and, secondly, there must be a clause on a transport document stating that the goods are carried on deck. At common law, a general liberty clause provided an option for the carrier to carriage on deck (which is acceptable under Article 26(a) of the UCP 600) is insufficient to be considered as the authorisation for carriage on deck because it was quite impossible for a third party or a transferee of such transport document to ascertain whether that liberty clause had been exercised or not. See *Svenska Tractor v Maritime Agencies* (1953) 2 QB 295 [300] (Pilcher J). Moreover, it should be noted that only the fact that it is customary in the trade (ie timber or inflammable goods) to be stowed on deck is not a criterion to determine whether the Hague/Visby Rules will be applicable or not. See Wilson (n 159) 178-179.

⁵⁹⁹ Article I(c) of the Hague/Visby Rules: "'Goods" includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.'

⁶⁰⁰ Wilson (n 159) 178.

protection of cargo interests, ie buyers, transferees or banks as a pledgee, is clearly jeopardised.

From this scenario, it is suggested that an international legal instrument to regulate multimodal transport could be an effective solution to deal with this issue in three dimensions. Firstly, carriage on deck should be recognised and the goods so carried should be expressly covered under the scope of application as it is common practice when the cargo is packed in containers⁶⁰¹ and this novelty can obviously reflect the current practice adopted by the transport industry.⁶⁰² In addition, it is noted that development of containers themselves and construction of container vessels does significantly reduce the risk of loss and damage.⁶⁰³ Secondly, appropriate protection of cargo interests must be provided in cases where the goods stowed on deck are lost or damaged. This can potentially lead to a balanced regime between the multimodal transport operators' and cargo interests' benefits. In addition, legal certainty in terms of applicable law will occur so that the burden placed on the cargo interest is lowered because he does not need to figure out which regime would apply under each transport document. Thirdly, if the containerised cargo carried on deck were recognised by a uniform international legal instrument governing multimodal transport, it could be expected that the banking practice would accordingly be amended to be consistent with such an international regime in order to reflect the transport practice, harmonise with relevant legal regimes and facilitate international trade transactions.

5.4.2.11 Clean multimodal transport documents

⁶⁰¹ Todd (n 435) para 8.43.

⁶⁰² Currently, most states consider carriage of enclosed containers on deck of purpose-built container vessels as a customary method of carriage. However, this notion is not globally absolute since in some jurisdictions, such as Belgium, have not recognised this practice as a customary method yet. See Gard News, 'Belgium – Carriage of Containers on Deck' (Gard News Issue No 162, 1 May 2001) <<http://ibid.gard.no/web/updates/content/52652/belgium-carriage-of-containers-on-deck>> accessed 15 March 2018. Therefore, specific provision regarding carriage on deck in case of containerised cargo shipped on purpose-built container vessels can be a solution to harmonise and unify the legal notion regarding this practice as a customary method of transportation.

⁶⁰³ Malek (n 452) para 8.121.

It is common in international trade that buyers are keen to demand that sellers must present clean transport documents to ensure that the goods are in the same condition and transporting to the destination as agreed in the sale contract.⁶⁰⁴ Further, if a clean transport document was tendered but the goods are damaged or lost on discharge, buyers will know that they need to sue the carrier and not the sellers who fulfilled their obligation at the time they handed the goods to the carrier.⁶⁰⁵ In relation to the banking practice, a multimodal transport document will be rejected if there is a clause (or clauses) expressly declaring the defective condition of the goods or their packaging.⁶⁰⁶ Therefore, in theory, the only scenario where the bank will accept an 'unclean' transport document is when the letter of credit expressly allows such a document. Otherwise, the bank is entitled to reject an unclean transport document.⁶⁰⁷ When reading Article 27 together with Article 26(b) of the UCP 600, it can be seen that the following phrases, 'shipper's load and count' or 'said by shipper to contain' and the like, such as 'weight, measure, quantity, contents and value unknown', 'said to contain' or 'said to weigh' do not affect the status of clean transport documents.⁶⁰⁸

⁶⁰⁴ Anna Mari Antoniou, 'New Rules for Letters of Credit: Time to Update the UCP 600' (2017) 32(4) *Journal of International Banking Law and Regulation* 128, 133; See also *British Imex Industries v Midland Bank Ltd* [1958] 1 QB 542 [551], Salmon J stated that '... In my judgment, when a credit calls for bills of lading, in normal circumstances it means clean bills of lading. I think that in normal circumstances the ordinary business man who undertakes to pay against presentation of bills of lading means clean bills of lading; and he would probably consider that was so obvious to any other business man that it was hardly necessary to state it.'

⁶⁰⁵ Antoniou (n 604) 133. In order to avoid the unfavourable result from tendering an 'unclean' transport document, in some cases the shipper (the seller) may offer an indemnity against liability in exchange for a clean transport document if the goods are, in fact, not in good condition. However, this may be considered as fraud. For more details, see Malek (n 452) para 8.126.

⁶⁰⁶ Article 27 of the UCP 600: 'A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word "clean" need not appear on a transport document, even if a credit has a requirement for that transport document to be "clean on board".' See also ISBP, article D24. At common law, the similar requirement in the same way as provided under the UCP can be found in *British Imex Industries* (n 604) 598, as the Court held that 'when a letter of credit stipulated payment against bills of lading (without qualification), it meant clean bills of lading in that they contained no reservation by way of indorsement, clausung or otherwise to suggest that the goods were or might be defective in any respects', see Ellinger (n 357) 266.

⁶⁰⁷ *ibid*, it should be noted that this statement is only aimed at theoretically clarifying the possibility that the bank will accept unclean transport documents. However, it is totally uncommon that this scenario will happen in reality.

⁶⁰⁸ At common law, this statement is supported by *M Golodetz & Co Inc v Czarnikow – Rionda Co Inc* [1980] WLR 495 (the court held that the words of such effect were unable to render the bill of lading 'unclean').

Further, despite the fact that the letter of credit calls for a 'clean on board' or a 'clean' multimodal transport document, there is no requirement under the ISBP that the word 'clean' must appear on the transport documents.⁶⁰⁹ In addition, if the word 'clean' is deleted on a multimodal transport document, such a deletion does not expressly mean that the condition of the goods or their packaging is defective.⁶¹⁰ In accordance with Article D24 (a) and (b) of the ISBP, some examples of phrases with regard to the defective condition of goods or their packaging are provided to give a guideline concerning the criteria of document examination. In the first case, if the phrase 'packaging *is* not sufficient for the sea journey' or words of similar effect⁶¹¹ is declared on a transport document, this is an example of a clause expressly declaring a defective condition of packaging.⁶¹² As a result, a transport document containing such a phrase can be rejected by the bank. On the other hand, if it shows on a multimodal transport document that 'packaging *may not* be sufficient for the sea journey' (or words of similar effect), no express declaration regarding the defectiveness of packaging is identified.⁶¹³ Thus, the transport document is acceptable under the credit. It can be seen that the dissimilarity of only one single word can make a difference in terms of compliance under the documentary credit.

Apart from the wording provided on transport documents, time is another crucial factor in determining whether a transport document is clean or unclean. In *M Golodetz & Co Inc v Czarnikow – Rionda Co Inc*,⁶¹⁴ the sugar shipped on board the vessel was damaged by fire during loading. Thus, approximately 200 tons of damaged sugar was discharged and, subsequently, the remaining sugar was loaded and transported to the destination. A bill of lading issued covering the entire sugar order including the part which was

⁶⁰⁹ UCP 600, article 27 and ISBP, article D25(a).

⁶¹⁰ ISBP, article D25(b).

⁶¹¹ Another example of phrases with a similar meaning is 'Goods which are improperly stored at the port of loading have been shipped on board partially wet and not in good condition', see Ozgur Eker, 'Multimodal Bill of Lading Discrepancy - Unclean Multimodal Bill of Lading Discrepancy' (2018) <<http://www.letterofcredit.biz/Multimodal-Bill-of-Lading-Discrepancy-Unclean-Multimodal-Bill-of-Lading-Presented.html>> accessed 12 March 2018.

⁶¹² ISBP, article D24(a).

⁶¹³ ISBP, article D24(b).

⁶¹⁴ *M Golodetz* (n 608).

discharged indicated that the sugar was shipped in apparent good order and condition. However, there was a typewritten notation stating that some cargo was discharged since it was damaged by fire. The court held that in order to qualify as a clean bill of lading there must be nothing to qualify the statement that the goods were in apparent good order and condition *at the time of shipment*.⁶¹⁵ As Donaldson J said:

A tender of documents which, properly read and understood, call for further inquiry or are such as to invite litigation is clearly a bad tender. But the operative words are 'properly read and understood'. I fully accept that the clause on this bill of lading makes it unusual, but properly read and understood it calls for no inquiry and it casts no doubt at all upon the protection which anyone is entitled to expect when taking up such a document whether as a purchaser or as a lender on the security of the bill.⁶¹⁶

From this judgment, it can be concluded that if a bill of lading is clean at the time of shipment, then any additional notations specifying the condition of goods after shipment do not affect the status of such a document or, in other words, a transport document cannot be rendered unclean as a result of those additional notations.⁶¹⁷

5.4.3 Multimodal transport documents as documents of title in the context of banks' security

Despite the constant growth of multimodal transport operations since the emergence of commercial containerisation in the 1960s, the status of transport documents, especially as documents of title, has not yet been statutorily recognised.⁶¹⁸ However, the bank fraternity has adapted itself over time to reflect the transport

⁶¹⁵ Ellinger (n 357) 267 states that 'Both Donaldson J and the Court of Appeal were prepared to accept that their decision would be different if the arbitrators had found as fact that a bill of lading in this form was not acceptable in the sugar trade. It is, however, difficult to see how practices specific to a trade should affect banker's obligation when determining whether or not a bill of lading complied with terms of credit.' This perspective is supported by *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd* [1973] AC 297 [285-286]. ('The banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description (Lord Diplock)').

⁶¹⁶ *M Golodetz* (n 608) 510-511.

⁶¹⁷ It is proposed that, in order to provide a higher level of certainty, Article 27 of the UCP 600 should be amended and added this following wording, 'a clean transport document is one bearing no clause or notation expressly declaring the defective condition of the goods or their packaging *at the time of shipment*.'; Antoniou (n 604) 134. See also Malek (n 452) para 8.125.

⁶¹⁸ This issue is discussed in detail in chapter 4, section 4.3.

revolution and facilitate international trade finance. The first indication that banking practice had changed due to multimodal transport operations was in 1969 when OCL and ACL combined transport documents were accepted by the banks as maritime bills of lading under the condition that they were indorsed as 'shipped' bills.⁶¹⁹ From that starting point up until now, it can be seen that there continues to be a specific article applying to multimodal transport documents provided in UCP 600 – Article 19 – alongside Article 20 which applies to maritime bills of lading.

The significance of multimodal transport documents as fundamental documents to be tendered to the bank under documentary credits to finance international trade as well as providing security as a documentary pledge is not less than that of unimodal transport documents.⁶²⁰ However, due to legal uncertainty as a document of title, from the banker's perspective, multimodal transport documents seem not to effectively serve as an effective security at the same level as maritime bills of lading can based on two main reasons which are, firstly, there is no statutory or judicial recognition confirming the legal status of multimodal transport as documents of title, and, secondly, compared to port-to-port bills of lading, the place of receipt is commonly an inland point rather than a port of loading. In this sense, multimodal transport can be regarded as 'received for shipment' bills, not shipped bills of lading which are certainly documents of title and provide security to the bank as an equitable documentary pledge.⁶²¹

When a bank makes a payment on a letter of credit, it is common that it also seeks reimbursement from the next in the chain. That is to say, if the bank acts as a nominated bank, it looks for reimbursement from the issuing bank or if the bank acts as an issuing bank, it then looks to the applicant.⁶²² However, there are two situations where the bank may not be able to receive reimbursement as it should. The first situation is when the issuing bank or the applicant becomes insolvent. If this happens, the paying bank has two options it can rely upon: firstly, any security arrangements between them and, secondly,

⁶¹⁹ Wilson (n 159) 257.

⁶²⁰ *ibid.*

⁶²¹ Todd (n 435) para 7.129.

⁶²² Malek (n 452) para 11.1.

the security of the documents retained under its custody.⁶²³ The second situation is when the bank makes a payment by mistake because documents are not compliant under the credit. In this case, it is not entitled to seek reimbursement. The only option that the bank can rely upon relates to the security provided by documents.⁶²⁴ In *Guaranty Trust Co of New York v Hannay*,⁶²⁵ Scrutton LJ explained the nature of transport documents as security to the bank thus:

The vendor thus gets his money before the purchaser would, in the ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent ...⁶²⁶

However, it should be noted that this situation only applies when port-to-port bills of lading are presented. Normally, once the bank obtains bills of lading made out to order of the shipper and blank indorsed, such documents become security of a pledge. As a consequence, the bank also receives the possessory title of pledgee until the reimbursement is entirely fulfilled by either the issuing bank⁶²⁷ or the applicant.⁶²⁸ As Paull J mentioned in *Sale Continuation Ltd v Austin Taylor & Co Ltd*:⁶²⁹

The ownership of the goods passes to the buyer⁶³⁰ but the bank has the possessory title of a pledgee as against the buyer. He has that title until the buyer puts the bank in funds and discharges his liability for interest payable in respect of the draft. If the pledgor does not do so the bank has the usual right of a pledgee to sell as if he were the owner.⁶³¹

It is obvious that in relation to maritime bills of lading which have been globally accepted as negotiable documents of title for a long time,⁶³² the question of security as a

⁶²³ *ibid.*

⁶²⁴ *ibid.*

⁶²⁵ *Guaranty Trust Co of New York v Hannay* [1918] 2 KB 623.

⁶²⁶ *ibid* 659.

⁶²⁷ Provided that the bank seeking reimbursement is a nominated bank.

⁶²⁸ Provided that the bank seeking reimbursement is an issuing bank.

⁶²⁹ *Sale Continuation Ltd v Austin Taylor & Co Ltd* [1968] 2 QB 849.

⁶³⁰ It should be borne in mind that the issue regarding property is separated from the issue of pledge as the passage of property is determined by the intention of the parties. See Malek (n 455) para 11.5.

⁶³¹ *Sale Continuation Ltd* (n 629) 59 (Paull J).

⁶³² See *Lickbarrow* (n 223) 685-686; *Barclays Bank Ltd* (n 225); Debattista, *Bills of Lading in Export Trade* (n 225) para 2.3; Treitel (n 149) para 18-007.

documentary pledge does not exist.⁶³³ However, the circumstance is different for multimodal transport documents, in this context, *those with negotiable function*, whose legal status is still unclear. As a consequence, when the bank is unable to put itself forward as a pledgee, in order to deal with the legal uncertainty and avoid the risk that might weaken the bank's security, once other types of transport documents are required under a credit, the bank is likely to look to the creditworthiness of the parties and their security arrangements such as lien over the documents,⁶³⁴ taking a debenture over the assets of the applicant or requesting guarantees from its holding companies or from its directors rather than rely solely upon the documents tendered under the credit.⁶³⁵ However, the security for the bank is not as good as that provided under documentary pledge when negotiable bills of lading are presented because the only situation that the bank could take benefit from these fall-back solutions is when the applicant becomes insolvent.⁶³⁶ If the bank pays by mistake and the documents do not comply with the requirements under the credit, it will be in an undesirable position as it cannot rely on lien over the documents in this case.⁶³⁷

It can be seen that if there is no judicial or statutory recognition confirming the status of transport documents, especially those in negotiable form, the legal value as documents of title remains questionable. At common law, to determine whether a transport document is a document of title or not is based on the proof of mercantile

⁶³³ 'A pledge may be described as the transfer of possession of goods by way of security whereby the ownership of the goods remain in the pledgor and the pledgee obtains a right to possession only. He has a "special interest" in the goods, which include a right to sell. The goods must be transferred to the possession of the pledgee and actual possession is normally required. One of the exceptions to actual possession is the case where a bill of lading is transferred with the intention of pledging the goods to which the bill is title. Then the pledge is effective on the transfer of the bill alone.', Malek (n 452) 11.1-11.2. See also *Official Assignee of Madras* (n 227) 59 (Lord Wright). For more details on the right of banks as lawful holders of shipping documents, see *The Erin Schulte* [2014] EWCA CIV 1382 where the court specifies the criteria to consider whether the bank possessing a bill of lading by means of presentation under a letter of credit can be a lawful holder for the purposes of section 5(2)(b) of COGSA 1992, "as a result of the completion, by delivery of the bill, of any indorsement of the bill".

⁶³⁴ In this context, it refers to the right of retaining the transport documents as a security until the reimbursement is fully paid.

⁶³⁵ Malek (n 452) paras 11.1-11.2.

⁶³⁶ In this case, the bank can negotiate with the liquidator or receiver of the applicant that the goods be sold on terms that the proceeds go in reduction of the bank's claim. See *ibid* para 11.9.

⁶³⁷ *ibid*.

custom. As such, this issue is a question of fact, not a matter of law.⁶³⁸ Although multimodal transport documents cannot be qualified as documents of title at the moment, there is some evidence that they could certainly be ones in the near future: firstly, multimodal transport documents can be issued in the form of negotiable documents in the same way as maritime bills of lading; secondly, banking practice has accepted multimodal transport documents since 1969⁶³⁹ and a specific provision applying to multimodal transport⁶⁴⁰ can confirm the common use of this type of documents in international trade transactions; thirdly, it has been shown that the majority of transport documents currently used in the transport industry has shifted from bills of lading to multimodal transport.⁶⁴¹ All in all, it is expected that a judicial or statutory recognition of the legal status of multimodal transport documents will arise in the near future so that it can guarantee the legal value of such documents and, as a result, they can serve as a reliable security to the bank in the same way as negotiable bills of lading, as well as truly facilitate international trade finance transactions.

5.5 Conclusion

In determining which type of transport document is tendered, whether it is a unimodal transport document or multimodal transport document, the significant criterion is not the 'heading' of such a document but its content. It means that, rather than focusing on the heading, the information and details shown on the transport document must be carefully scrutinised. After determining the type of documents, the next step is to apply either Article 19, Article 20, Article 23 or Article 24 of the UCP 600 as the case may be.

In relation to the requirements for multimodal transport documents, there are some novelties introduced under the UCP 600 such as the title of the Article, the requirements concerning the identification of the signing party and the capacity in which it has been signed and the abolition of Article 30 of the UCP 500 allowing freight forwarder

⁶³⁸ Todd (n 435) para 7.96.

⁶³⁹ Wilson (n 159) 257.

⁶⁴⁰ UCP 600, article 19.

⁶⁴¹ Tettenborn (n 14) 126. See also chapter 3, section 3.2 of this thesis.

to issue a multimodal transport document as principal etc. These novelties reflect the current transport practice and aim to provide the proper regulations for the use of documentary credit as a crucial means to facilitate international trade transaction. However, there are still some inconsistencies such as the issue of deck cargo and multimodal transport operations.

Last but not least, the uncertain status as documents of title leads to the situation where the legal value of negotiable multimodal transport documents is less than that of bills of lading. Thus, the bank cannot consider a multimodal transport document as a documentary pledge to provide effective security for the bank in cases where the applicant becomes insolvent or an error payment occurs.⁶⁴² It is suggested that as the use of negotiable multimodal transport documents is widely accepted in the transport industry as well as amongst bankers, this type of document should be able to serve as an effective security in the same way as bills of lading. Judicial recognition or an international legal instrument that regulates multimodal transport is a potential solution to reach that goal. For the time being, however, the bank may have to rely upon other fall-back solutions to cope with the risks that might arise.

⁶⁴² The issue regarding the right of a bank as a lawful holder of bills of lading after a payment under a letter of credit was made can be found in *The Erin Schulte* (n 633). In this judgment, the Court of Appeal held that, from the moment that the bank made a payment under the credit, it then became a lawful holder according to section 5(2)(b) of COGSA 1992. Therefore, the bank is entitled to make a claim against the carrier for misdelivery.

Chapter 6: Optimal solutions for international multimodal transport and issues related to multimodal transport documents

6.1 Introduction

It is undeniable that the current legal frameworks governing multimodal transport are complex and fragmented since the international conventions regulating unimodal transport modes including sea, air, road, rail and inland waterway as well as regional/sub-regional agreements, national legislations and contractual standard forms have been applied to multimodal transport on a case-by-case basis and there are various ways to interpret the scope of application of each legal framework. This situation has inevitably led to higher transaction and insurance costs as well as an increase in the number of litigations.⁶⁴³ Although development in terms of infrastructure and physical capacities such as the RO-RO system, LASH and containerisation etc. has developed greatly over the past few decades, it is questionable why this advancement has not been reflected in the context of law, especially at the international level after almost forty years of significant attempts to propose the MT Convention in 1980. After looking into the details of many controversial issues in chapters 2, 3, 4 and 5, this chapter aims to investigate the possible ways forward and propose potential short-term and long-term solutions to cope with these uncertainties.

6.2 Optimal solutions for specific issues related to the use of multimodal transport documents

In this section, the crucial issues related to multimodal transport documents are divided into three groups: firstly, the documentary issues with regard to their legal

⁶⁴³ UNCTAD Secretariat, 'Multimodal Transport: The Feasibility of an International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1) para 21.

function as receipt of goods, namely the significant qualifications provided in multimodal transport documents; secondly, those with regard to their legal function as document of title, including the issues of negotiability and the legal status at English common law; and thirdly, the documentary issues with regard to their legal function as evidence of multimodal transport contracts, particularly the right of the transferees to rely on the contractual terms in multimodal transport contracts. Solutions will be presented after scrutinising these documentary issues.

6.2.1 Documentary issues with regard to their legal function as receipt of goods

As discussed in chapter 4, the first legal function of multimodal transport documents is to serve as receipt of goods taken in charge by the multimodal transport operators. In short, there are two main ways in which their receipt function is significant. Firstly, in terms of multimodal transport contracts, it is in the descriptions of the goods, including weight, quantity, number, and specifications etc., coupled with their condition. These are considered as the *prima facie* evidence against multimodal transport operators when loss or shortage occurs and the evidentiary effect will change from *prima facie* evidence to conclusive evidence when the multimodal transport documents are legally transferred to *bona fide* third parties.⁶⁴⁴ Secondly, in the context of international sales of goods and documentary credit, all qualifications provided in multimodal transport documents must be consistent with the goods specified in the sale contract to fulfil the obligations as a seller and, at the same time, it must be in accordance with the requirements under the letter of credit in order to qualify as a good tender with the result that the seller will be entitled to receive payment.

⁶⁴⁴ As discussed in 4.2, the issue of evidentiary effect (*prima facie* and conclusive evidence) is not controversial as multimodal transport documents hold the same functions as the maritime bills of lading, see Tettenborn (n 14) 130. For its practical aspect, see also Article 3.2 of the FIATA Multimodal Transport Bill of Lading.

In terms of the MT Convention, standard banking practices⁶⁴⁵ and the standard forms of multimodal transport documents,⁶⁴⁶ there is some fundamental information that must be provided in multimodal transport documents:

1. The general description of goods⁶⁴⁷
2. The leading marks necessary for identification of the goods⁶⁴⁸
3. The number of packages or pieces or their quantity⁶⁴⁹
4. The weight of the goods⁶⁵⁰
5. The apparent condition of the goods⁶⁵¹
6. The name and address of multimodal transport operator⁶⁵²
7. The place of taking in charge of the goods by the multimodal transport operator⁶⁵³
8. The place of delivery⁶⁵⁴
9. The place and date of issue of the multimodal transport document⁶⁵⁵
10. The signature of the multimodal transport operator or of a person having authority from him⁶⁵⁶

This fundamental set (1-10) of required information, especially the details and condition of goods, the date of dispatch, taking in charge or shipped on board and place of dispatch, taking in charge or shipment and the place of final destination, is of the essence in the context of both sale contracts and letter of credits to consider whether there is any breach of sale contract or any discrepancy with letters of credit.⁶⁵⁷ However,

⁶⁴⁵ UCP 600 and ISBP.

⁶⁴⁶ FIATA Multimodal Transport Bills of Lading and BIMCO's MULTIDOC 95. Please see appendices for references.

⁶⁴⁷ MT Convention, article 8(1)(a); ISBP, article D26.

⁶⁴⁸ *ibid.*

⁶⁴⁹ *ibid.*

⁶⁵⁰ *ibid.*

⁶⁵¹ MT Convention, article 8(1)(b); ISBP, article D26.

⁶⁵² MT Convention, article 8(1)(c); UCP 600, article 19(a)(i); ISBP, article D3.

⁶⁵³ MT Convention, article 8(1)(f); Rotterdam Rules, article 36(3)(c); UCP 600, article 19(a)(iii); ISBP, article D6.

⁶⁵⁴ MT Convention, article 8(1)(g); UCP 600, article 19(a)(iii); ISBP, articles D12-D13.

⁶⁵⁵ MT Convention, article 8(1)(j); UCP 600, article 19(a)(ii); ISBP, article D6.

⁶⁵⁶ MT Convention, article 8(1)(k); UCP 600, article 19(a)(i); ISBP, article D5.

⁶⁵⁷ Note that the issues related to electronic substitutes of traditional transport documents will not be discussed here since it is beyond the scope of this thesis.

there are four unsettled issues that should be further discussed in order to create harmonisation amongst them – multimodal transport contracts, sale contracts and letters of credit. This will ultimately facilitate international trade transactions as a whole.

6.2.1.1 The name of multimodal transport operators and the capability to sign the transport documents

As per Article 8(c) of the MT Convention and Article 19(a)(i) of the UCP 600, it is clear that the name of the multimodal transport operator must be identified in the transport documents. Nevertheless, it should be borne in mind that two things must be provided, both a name of the multimodal transport operator and wording specifying its status or capacity,⁶⁵⁸ for instance, 'ABC Co. Ltd, the carrier' or 'ABC Co. Ltd as carrier'. Therefore, the stakeholders, especially the seller, must pay attention to this detail since it may lead to a situation where the bank rejects such a document.

With regard to the capacity of the person signing multimodal transport documents, Article 8(k) of the MT Convention provides that multimodal transport documents must be signed by the multimodal transport operator or person authorised by him. However, in reading this article, coupled with Article 19(a)(i) of the UCP 600, it can be found that the signature of the multimodal transport operator or the person signing on its behalf in the signature box is not enough. A clear specification of capacity is equivalently important to satisfy the documentary requirements under the UCP 600.⁶⁵⁹ Although this issue is widely known in practice amongst players in the transport industry, it is worth noting that if there is a possibility that an international legal instrument governing multimodal transport will exist in the future, then it should contain a provision identifying the requirement to provide the capacity of the signing person together with the signature in order to maintain consistency with the global banking practice under the UCP 600.

⁶⁵⁸ ICC (n 530) 82.

⁶⁵⁹ *ibid* 82-83.

6.2.1.2 Freight forwarder multimodal transport documents

In relation to multimodal transport documents issued by freight forwarders or 'house multimodal transport documents', in order to qualify as a valid transport document, a freight forwarder must only sign in the capacity of a multimodal transport operator or on behalf of a multimodal transport operator.⁶⁶⁰ That is to say, if a freight forwarder issues a multimodal transport document in his own capacity, such a document lacks legal status as a valid multimodal transport document because it is not signed by an authorised person.⁶⁶¹ This consideration is in line with the requirement of letters of credit since under the UCP 600, it can be noted that there is no longer a specific provision regarding the presentation of a freight forwarder's transport documents like the one provided under the old UCP 500 in Article 30. The main reason why the provision specifically relating to freight forwarder transport documents was removed is because of the concern about conflicts of interest as, in many cases, freight forwarders act as agents for both carrier and consignor at the same time.⁶⁶² Thus, this change under the UCP 600 is likely to be a logical one from the perspective of the cargo interest and it can better clarify the role of stakeholders in the multimodal transport chain.

However, it seems that the status of this type of document is somewhat uncertain. According to the general rules provided in Article 14(l) of the UCP 600,⁶⁶³ if a multimodal transport document was issued by freight forwarder as a carrier or on behalf of the carrier,⁶⁶⁴ not as a mere freight forwarder, there is no reasonable grounds for the banks to reject such a transport document.⁶⁶⁵ The strength of this approach is that it focuses on the capacity of the signing person rather than who is the one signing such a document. It is suggested that the issue about the capacity of a freight forwarder to sign a multimodal transport document is something too superficial to include in a future international legal

⁶⁶⁰ see Treitel (n 242) para 21-083.

⁶⁶¹ 'merely because the freight forwarder issued a bill of lading does not mean that he acted as a carrier', *Gagniere* (n 334).

⁶⁶² Todd (n 435) para 8.29; see also Ulph (n 475) 369.

⁶⁶³ Article 14(l) of the UCP 600 states that: 'A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.'

⁶⁶⁴ See UCP 600, article 19(a)(i).

⁶⁶⁵ See also Collyer (n 554) 114-115 (R562).

instrument. Nevertheless, in order to avoid unsatisfactory results such as delay during a bank's documentary examination process or the risk of rejection due to non-compliance with the UCP 600 and standard banking practice, this issue is necessary to mention and promote to players in the transport industry because the role of a freight forwarder has become more crucial as a result of the rapid growth of multimodal transport operations and containerisation.

6.2.1.3 *'On board' notation and ship's name*

When a sea leg is involved, according to Article 36(3)(b) of the Rotterdam Rules,⁶⁶⁶ 'the name of a ship, if specified in the contract of carriage' must be identified in multimodal transport documents while there is no specific reference to the ship's name under the MT Convention. It can be assumed that as the MT Convention was intended to apply to all modes of transport as part of the whole multimodal transport journey, it was considered unnecessary to specifically mention the ship's name which is a crucial part of a maritime voyage. In contrast, the Rotterdam Rules was specifically designed to apply to multimodal transport that involves sea carriage so the ship's name is one of the key parts when a maritime journey is involved. In practice, since a sea journey can take quite a long time to reach the port of discharge, there is a high possibility that the parties would want to trade goods in transit before the goods arrive at the destination and it is common for the subsequent buyers and the banks to require an on board notation and the ship's name to ensure that the cargo has actually been shipped on the vessel.⁶⁶⁷ Despite the inconsistency between two conventions, it seems to make sense that the MT Convention does not require the vessel's name to be stated in multimodal transport documents because, if adopting an absolute multimodal thinking which considers all modes of transport as equally important, a particular norm used in maritime shipping practice should not be commonly required in an international convention for regulating

⁶⁶⁶ 'Article 36 Contract particulars ... 3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include: ... (b) The name of a ship, if specified in the contract of carriage'.

⁶⁶⁷ Wilson (n 159) 132.

multimodal transport and a sea leg does not always form part of every multimodal transport voyage.

However, even though the buyer and the banks as pledgees are likely to identify in the letter of credit that proof of the vessel's name used for the sea leg is required to trade goods during transit and to gain a stronger guarantee that the goods have been shipped on board. Under the UCP 600, unlike Article 20 which applies to maritime bills of lading, Article 19 does not require the notations in relation to the actual date that the cargo was shipped on board as well as the vessel's name. As a consequence, if the notation of a ship's name is really needed, the parties must specifically add this requirement in the credit. Otherwise, the bank will not automatically reject or ask for further documents. In other words, where multimodal transport documents are concerned, it is based on voluntary agreement to it or the notation of the vessel's name is not required since it is not a general requirement under Article 19 of the UCP 600.

The next issue to be examined is whether it is really necessary to require the notation in relation to the ship's name when a sea leg is involved in a multimodal transport journey. Although there are some situations in which proof of the vessel's name is required by the parties, it should be noted that, if the sea leg is not the first mode of transport, then multimodal transport documents are likely to have been issued long before the cargo is actually shipped on board.⁶⁶⁸ In addition, the insistence of an 'on board' document can potentially jeopardise the whole international trade transaction since it causes delay for the beneficiary to gather the required documents to secure payment as well as probably leading to the situation where the cargo interests cannot obtain the cargo at the destination if the goods arrive before the documents.⁶⁶⁹ In order to avoid unfavourable results, it is suggested that it is not necessary to provide a specific provision relating to the requirement for an 'on board' notation including those relating to the vessel's name in the prospective multimodal transport convention.⁶⁷⁰ However, where a sea leg is involved and the parties do need that kind of document, then it is surely

⁶⁶⁸ Todd (n 435) para 8.27.

⁶⁶⁹ ICC (n 564) 51; Todd (n 435) para 8.28.

⁶⁷⁰ The same approach is adopted by the MT Convention.

possible to do so based on freedom of contract. In other words, the parties can provide specific terms in their sale contract and in the letter of credits as an exceptional case.

6.2.1.4 Qualifications regarding transshipment

According to Article 8(m) of the MT Convention, places of transshipment must be identified in multimodal transport documents, if known at the time of issuance of the document. From this provision, unlike the maritime practice that normally prohibits transshipment,⁶⁷¹ it is inevitable for multimodal transport operations that involve various modes of transport to avoid transshipment. However, problems arise where there is a term stating that 'transshipment is prohibited' provided in multimodal transport documents by mistake.⁶⁷² This may lead to uncertainty amongst stakeholders, especially during the document examination process according to letter of credit. In order to cope with this issue, Article 19(c)(i) and (ii) accept multimodal transport documents even though there is a prohibition concerning transshipment provided in the credit. This approach is reasonable and can clarify the legal effect of the phrase 'transshipment is prohibited'. In other words, the parties have no need to worry if such a phrase is included unintentionally and no correction is required in order to secure payment. However, it is suggested that, if known at the time of issuance, the requirement of details regarding places of transshipment under the MT Convention should be followed as it could be beneficial for traders, especially transferees, to acknowledge the details of the journey and manage their risks as it is widely accepted that transshipment is statistically the most dangerous stage of the whole journey.⁶⁷³

6.2.2 Documentary issues with regard to their legal function as documents of title

As can be seen in Article 8(i) of the MT Convention, multimodal transport documents can be issued in the form of negotiable or non-negotiable documents

⁶⁷¹ It can be noted that there is no provision related to transshipment under the Rotterdam Rules.

⁶⁷² 'Where a credit calls for a multimodal transport document it should not prohibit transshipment, as this would be a contradiction in terms', see King (n 441) para 7-97.

⁶⁷³ See Christou (n 43) 113-114.

according to parties' intention.⁶⁷⁴ In addition, there is no restriction regarding negotiability under the UCP 600 and the standard forms for multimodal transport documents, including COMBICONBILL (1995) and MULTIDOC95, also expressly state the word 'negotiable' on their face to emphasise the negotiable function of such documents. Even though it is clear that the negotiability of multimodal transport documents is not an issue here, the circumstance is quite the opposite for their legal status as documents of title at common law. As stated in *Lickbarrow v Mason*,⁶⁷⁵ the only way to be considered a document of title at common law is to be accepted by the court based on the mercantile custom or customary use which can be referred to as 'the characteristics of universality, longevity, certainty, reasonableness and absence of repugnancy'⁶⁷⁶ and 'widespread and consistent'.⁶⁷⁷ Despite the fact that multimodal transport documents can be issued in negotiable form, at the moment, there is not enough evidence to express that it is customary for the parties to provide negotiable multimodal transport documents⁶⁷⁸ in the same way as the requirement under the maritime contractual terms (CFR and CIF contracts).⁶⁷⁹ However, if taking the current market practice that globally accepts them as negotiable documents, this practice implies that the proof of mercantile custom can be achieved in the near future.

Up until now, there has not been any judicial confirmation with regard to their status as documents of title. Therefore, compared to the legal status as documents of title of maritime bills of lading, the right of the transferee of negotiable multimodal transport documents to trade goods in transit and claim for delivery at the destination is still uncertain at common law.

⁶⁷⁴ The supporting evidence of this statement can also be found in English and Scottish Law Commissions (n 190) paras 2.46-2.49.

⁶⁷⁵ *Lickbarrow* (n 223) 683.

⁶⁷⁶ *Nelson* (n 260) 575 (Sir John Jessel MR); *Thomas* (n 10) 150.

⁶⁷⁷ *Kum* (n 167) 445 (Lord Devlin).

⁶⁷⁸ Even if the status as documents of title is mentioned in the UNCTAD/ICC Rules, as a soft regulation based on voluntary agreement it lacks force of law. See Article 4(3)(a), (b) and (c) of the UNCTAD/ICC Rules; this provision shares the same attribution of 'bill of lading'; See *Glass* (n 272) para 3.103. A detailed discussion on this issue is provided in chapter 4 of this thesis.

⁶⁷⁹ See Clause A8 of the CIF and CFR in comparison with Clause A8 of the CIP and CPT of the INCOTERMS 2010.

As the judicial recognition of their legal status as documents of title is exclusively dependent on the national jurisdiction, it can be anticipated that it is impossible to provide any provision entitling their legal status as documents of title in future international uniform rules since the qualification of documents of title can only be granted by the national courts. The only solution at this moment that could be possible is to 'wait and see' and it can be assumed that, as the use of multimodal transport documents becomes more prevalent as a result of the growth of door-to-door service and containerisation, judicial clarification by the English courts will emerge in the near future.

However, the prospective convention governing multimodal transport could endorse certain issues such as the right of the transferees or the cargo interest to claim delivery at the destination and the discharge of multimodal transport operators' liability when delivering the cargo to the rightful consignees in the same way as Article 6(2)⁶⁸⁰ and 7(2) of the MT Convention.⁶⁸¹ Under these two provisions, it is clearly stated that transferees of negotiable multimodal transport documents⁶⁸² are entitled to claim for delivery. If a convention came into force in the future, it could emphasise the legal status of negotiable multimodal transport documents as documents of title to the same extent as maritime bills of lading. This approach would be beneficial for traders since the uncertain aspect of this type of document would be eliminated and, simultaneously, it would set the new standard for documentary pledge so that the banks would not be reluctant to use multimodal transport documents as effective securities and it could better promote the international trade finance system. It should be borne in mind that having an international convention on multimodal transport may not be possible in a

⁶⁸⁰ Article 6(2) of the MT Convention states that: 'Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary.'

⁶⁸¹ Article 7(2) of the MT Convention states that: 'The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.'

⁶⁸² The methods to transfer multimodal transport documents are similar to those applying to maritime bills of lading, see Article 6(1) of the MT Convention which states that: 'Where a multimodal transport document is issued in negotiable form:

...

(b) If made out to order it shall be transferable by endorsement;

(c) If made out to bearer it shall be transferable without endorsement ...'.

short period of time. Nevertheless, it is hoped that successful uniformity at the global level will ultimately be achieved.⁶⁸³

6.2.3 Documentary issues with regard to their legal function as evidence of multimodal transport contracts

One of the major problems to be solved relates to the right of the cargo interests or third parties to have title to sue and the right to rely on the contractual terms under a multimodal transport contract as if they were the original party. In this section, as the possible solutions for multimodal transport documents including a sea leg and those without sea carriage involved are different, the discussion is divided into two parts.

6.2.3.1 Multimodal transport documents including a sea leg

Historically, before the emergence of COGSA 1992, one of the main issue was where third-party cargo interests were not entitled to sue the carrier based on the terms stated in the transport document because of the doctrine of privity.⁶⁸⁴ In order to cope with this issue, COGSA 1992 was enacted to establish the contractual relationship between the carrier and the cargo receivers so that receivers are entitled to rely on the contractual terms provided in various types of maritime bills of lading.⁶⁸⁵ Since the scope of application of COGSA 1992 extensively covers 'received for shipment' bills of lading, which share many similar characteristics with multimodal transport documents (provided that a sea leg is included as part of the multimodal transport journey),⁶⁸⁶ there is a lot of evidence that supports the possibility of extending the scope of COGSA 1992 to multimodal transport documents.⁶⁸⁷

⁶⁸³ See section 6.5 of this chapter.

⁶⁸⁴ Aikens (n 192) para 1.42. For detailed discussion, please see section 4.4.2.

⁶⁸⁵ Debattista (n 225) para 2.3; Treitel (n 149) para 18-059, 18-230, 18.237.

⁶⁸⁶ In this section, multimodal transport documents refer only to those covering a sea leg. Moreover, the terms 'multimodal transport documents' and 'multimodal bills of lading' are used interchangeably.

⁶⁸⁷ For a detailed discussion, see section 4.4.2.

Firstly, compared to the scenario where the cargo interests under bills of lading are entitled to have a contractual relationship with the carrier on a par with the shipper (an original party) and to make a claim against the carrier in case of loss, damage or delay, it seems to be unfair and unreasonable if the cargo interests under multimodal transport documents are unable to have the same kind of contractual relationship granted by any statutory mechanism in the same way as provided in COGSA 1992. That is to say, if the cargo interests which hold multimodal transport documents have to sue a multimodal transport operator on the grounds of tort or bailment, they must bear too many burdens, for instance, the burden to investigate and localise the loss, damage or delay in order to identify the actual carrier responsible for such loss, damage or delay.⁶⁸⁸ For the multimodal transport operator, if the fault is not his responsibility, ie the loss, damage or delay occurs during the stage which other actual carriers are responsible for, he can seek a recourse action afterwards.⁶⁸⁹ Assuming that COGSA 1992 could apply to this multimodal transport document holder, it is obvious that they can get benefits from the contractual relationship and be able to sue the multimodal transport operator on the grounds of the multimodal transport contract. This is likely to be the most favourable circumstance since it creates a balance between all relevant parties and no one has to bear too many burdens.

Secondly, although there has been no authoritative case from the English courts related to the legal status of multimodal transport documents, this issue was examined in other jurisdictions, namely by the High Court of Hong Kong in *Central Optical Ltd v Jardine Transport Services*.⁶⁹⁰ The Court held that a multimodal bill of lading could be recognised as a bill of lading. As a consequence, the cargo interest was able to bring a claim against the freight forwarder (as a multimodal transport operator) under the contractual terms stated in multimodal bills of lading. Moreover, the cargo interest was also entitled to damages for any misdelivery of the cargo. This decision can be considered as a solid support for the legal function of multimodal transport documents as evidence of a

⁶⁸⁸ Hoeks (n 7) 17.

⁶⁸⁹ *ibid.*

⁶⁹⁰ *Central Optical* (n 339). A similar view can be found in an Australian case, *The Oceana Trader* (n 331).

multimodal transport contract and the cargo interest should obtain the same degree of protection as those under bills of lading.

Thirdly, another piece of strong supporting evidence can be found in the report by the Law Commissions of England and Scotland on Rights of Suit in Respect of Carriage of Goods by Sea.⁶⁹¹ It was stated in the report that the scope of the proposed Act at that time⁶⁹² should apply to any bills of lading, including multimodal bills, for place-to-place carriage.⁶⁹³ In other words, after comparing the key features of multimodal bills of lading and 'received for shipment' bills of lading, the Commissions concluded that it was sensible to include multimodal bills in the same category as 'received for shipment' bills.

According to all aforementioned supporting evidence and the identical characteristics of multimodal bills of lading and 'received for shipment' bills of lading, it is highly suggested that the scope of COGSA 1992 should cover multimodal transport documents in order to provide a proportionate right to sue and establish a contractual relationship based on the contractual terms provided in multimodal transport documents to the cargo interests in the same way as those holding maritime bills of lading. Thus, a clear judicial recognition of the extended scope of COGSA 1992 covering multimodal transport documents or a statutory revision of COGSA 1992 adding a specific provision governing multimodal transport documents would clarify this issue and eliminate legal uncertainty amongst traders. It should be noted that as title to sue is based on the judicial sovereignty of each state, the prospective convention on multimodal transport could play no part in this issue.

6.2.3.2 Multimodal transport documents not including a sea leg

⁶⁹¹ English and Scottish Law Commissions (n 190).

⁶⁹² It refers to COGSA 1992.

⁶⁹³ It is stated that '... since the implementing legislation is expressed to cover any bill of lading, including received for shipment bills, multimodal documents are capable of falling within its ambit ...'; English and Scottish Law Commissions (n 190) paras 2.48-2.49.

Regarding this type of multimodal transport document, it is clear that the situation is more difficult because, where the connection to sea carriage no longer exists, the option to extend the scope of COGSA 1992 to this type of document is certainly impractical. In addition, the possibility to adopt the Contract (Right of Third Parties) Act 1999 is still unsettled since there is no judicial confirmation and the argument over whether this Act can apply to multimodal transport is still ongoing.⁶⁹⁴ Therefore, at this moment, apart from relying on the contractual relationship that the cargo interest is entitled to under unimodal transport conventions applicable to the stage in which loss, damage or delay occurs,⁶⁹⁵ other fall-back solutions based on general law principles, i.e. bailment, assignment or attornment, could also be currently used.⁶⁹⁶ However, there is no authoritative case to confirm that these fall-back solutions do work in reality. Again, assuming that an international mandatory set of rules regulating multimodal transport existed, the legal status of multimodal transport would be accepted as a unique type of transport document and; once this happened, it is expected that national legislations would be drafted to reaffirm the title to sue and settle the contractual relationship between the cargo interests and multimodal transport operators. This solution would then lead to the situation where stakeholders in the multimodal transport industry would not have to worry about the applicable laws and current uncertainty relating to title to sue. For the time being, due to a lack of specific set of rules on multimodal transport as well as different natures of multimodal transport documents including sea leg and those with no sea leg involved, the fall-back solution is to rely on general law i.e. bailment, assignment or attornment as mentioned above. However, in case that a sea leg is involved as a part of multimodal transport journey, the sensible way to deal with the issues regarding the relationship between stakeholders in such multimodal transport contracts is to apply COGSA 1992 in a broad sense. However, this is a proposed short-term solution and, indeed, having an international mandatory uniform law is still needed as a long-term solution.

⁶⁹⁴ For a detailed discussion, see section 4.4.3.1.

⁶⁹⁵ Nevertheless, it should be noted that from the discussion in Chapter 2 and previously in this chapter the application of these conventions to multimodal transport is uncertain and even the localisation process to identify the carrier and applicable law is not an easy task.

⁶⁹⁶ For a detailed discussion, see section 4.4.3.2.

To conclude, there are various approaches that should be undertaken to cope with the issues of multimodal transport documents. Firstly, some short-term solutions, such as organizing a short course or PR strategies regarding the practical knowledge about multimodal transport documents, some crucial issues on the details provided on the documents, negotiability and some basic legal implications should be pursued to promote better understanding amongst stakeholders. Secondly, as some issues are directly related to the judicial sovereignty of each state, e.g. the judicial recognition of legal status as documents of title, contractual relationship between multimodal transport operators and the cargo interests, coupled with title to sue, a movement at national level, so in this context amendment of COGSA 1992 or judicial recognition from the English courts, is needed to eliminate the legal uncertainty and provide proportionate protection to traders as this should be at the same level as provided under maritime transport contracts.⁶⁹⁷ Apart from that, the revision of relevant national laws could be another option that is more realistic compared to the international approach like launching a new international instrument or amendments to unimodal conventions, since the factors involved in the law revision process at national level are far less than those at global level.⁶⁹⁸

However, the ultimate solution that has been frequently mentioned throughout this thesis is to have an international mandatory uniform law to comprehensively govern the use of multimodal transport documents, clarify the legal status and function of multimodal transport documents as well as building up the contractual relationship between multimodal transport operators and cargo interests. An intriguing point is that, after the failure of the MT Convention, is it reasonable to cling to this hope? Despite the fact that this solution may not happen in a few years, is it possible that a set of international uniform rules will finally materialise over the long term? In the next sections, a discussion on the nature of multimodal transport contracts will be conducted and the possibility of various approaches as well as an optimal long-term solution will be presented.

⁶⁹⁷ As mentioned in chapter 4 and this chapter, section 6.2.3.1, this solution is exclusively for multimodal transport documents that include a sea leg.

⁶⁹⁸ This issue will be discussed in section 6.5.

6.2.4 Future evolution of multimodal transport documents

In terms of multimodal transport documents, due to the rapid development of communication and internet-based data transmissions, electronic alternatives to paper-based documents⁶⁹⁹ have become more and more prevalent.⁷⁰⁰ Although the majority of transport documents are in paper form, it is likely that electronic records will be widely used in the near future because of the various benefits such as speed, efficiency and reduction of transaction costs.⁷⁰¹ Nonetheless, in spite of high technological development in relation to practical electronic records as substitutes to paper-based transport documents over the past few decades, there is still no successful legal framework that can effectively govern the use of such electronic alternatives.⁷⁰²

Apart from the legal uncertainties in terms of status and functions which are similar to those of paper-based multimodal transport,⁷⁰³ the major challenge is the replication of the document of title function in an electronic environment⁷⁰⁴ since, under the current legal framework governing transport documents both at national and international level, the exclusive right to delivery of the goods is 'locked up' in the

⁶⁹⁹ Note that the topic of electronic transport documents is beyond the scope of this thesis. Therefore, this section will touch only the surface of its content. However, the author acknowledges the significance of this topic and will definitely conduct further research on it after completing this PhD project.

⁷⁰⁰ In order to address the prevalence of electronic records, the 1996 UNCITRAL Model Law on Electronic Commerce together with other legislations such as European Commission Directive on Electronic Signatures have been implemented by a number of states in order to solve the problems that arise from legal uncertainties, ie the requirements and criteria of 'writing', 'original' or 'signature', recognitions in terms of evidentiary effects of data transmissions. Further, the UNCITRAL Model Law on Electronic Signatures was adopted in 2001. The main objective of this Model Law is to provide a more comprehensive legal framework for contracting in an electronic environment. See UNCTAD (n 287) para 35; UNCITRAL, 'UNCITRAL Model Law on Electronic Signatures' (2001) <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html> accessed 28 February 2017.

⁷⁰¹ UNCTAD (n 287) para 35.

⁷⁰² *ibid.* In terms of the unimodal conventions, recognitions of electronic alternatives can be found in the additional protocol of the CMR, the COTIF-CIM, the Warsaw Convention, the Montreal Convention and the CMNI. However, it should be noted that there is no reference to electronic alternatives found under the Hague/Visby Rules. See David A Glass and Rawindaran Nair, 'Towards Flexible Carriage Documents? Reducing the Need for Modally Distinct Documents in International Goods Transport' (2009) 15(1) *Journal of International Maritime Law* 37, 42-43.

⁷⁰³ For detailed discussion on various legal problems concerning legal status and functions of electronic alternatives to a paper document, see Miriam Goldby, 'Electronic Alternatives to Transport Documents and the New Convention: A Framework for Future Development?' (2007) 14(6) *Journal of International Maritime Law* 586.

⁷⁰⁴ UNCTAD (n 287) para 38; Goldby (n 703) 588-590.

document.⁷⁰⁵ That is to say, physical possession of the original paper-based document is equivalent to possession of the goods. However, it is questionable whether this principle can be fully adopted where electronic records are issued. Under Articles 16 and 17⁷⁰⁶ of the UNCITRAL Model Law on Electronic Commerce, it seems that the same principle regarding transfer of rights and title is also provided in an electronic environment. However, as the UNCITRAL Model Law is 'soft law', there has been concern regarding the effectiveness and legal enforceability of Articles 16 and 17.⁷⁰⁷ Therefore, it is suggested that a mandatory set of rules regulating multimodal transport equipped with the specific recognition of legal status and features of electronic alternatives is established to reduce or, ideally, remove the need for paper-based transport documents as well as enabling the electronic flow of information and control messages.

6.3 Nature of multimodal transport contracts: Theoretical aspect

Before considering the optimal way forward for multimodal transport, it is worthwhile discussing the legal theories concerning the nature of multimodal transport contracts. The theories that will be examined are the *sui generis* contract theory, the mixed contract theory and the absorbed contract theory. Each theory has influenced the legal frameworks that were proposed in the past and they can be the fundamental legal basis to propose a prospective international legal instrument to regulate multimodal transport in the future.

6.3.1 The contract *sui generis* theory

The term '*sui generis*' can be defined as 'of its own kind; the only one of its kind'.⁷⁰⁸ Applying this theory to the context of multimodal transport contracts is to treat them as contracts in an autonomous form which is different from any unimodal carriage of goods

⁷⁰⁵ *ibid.*

⁷⁰⁶ United Nations, 'UNCITRAL Model Law on Electronic Commerce with Guide to Enactment' (1996) <http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf> accessed 4 March 2017.

⁷⁰⁷ UNCTAD (n 287) para 37.

⁷⁰⁸ Mick Woodley, *Osborn's Concise Law Dictionary* (11th edn, Sweet & Maxwell 2009) 398.

contract.⁷⁰⁹ In other words, a multimodal transport contract goes far beyond a mere carriage of goods as there are some special additional services included, eg transshipment, Roll-on/Roll-off and storage services which can be regarded as the comprehensive organisation of a transport chain and operation.⁷¹⁰ Simultaneously, these additional services point to higher obligations and responsibilities borne by multimodal transport operators that are far greater than those placed on unimodal carriers under unimodal carriage of goods contracts. Hoeks states this point in the following way:

The multimodal transport operator takes it upon himself to perform various services which could all be the subject of separate contracts, but which are connected in such a manner that they form one dividable whole.⁷¹¹

According to this theory, since multimodal transport contracts are perceived as a specific type of contract with unique characteristics, neither a subordinate part of any major leg of transport nor a sequence of various unimodal modes of carriage, the current complex and fragmented framework could be expected to be solved by replacing it with a uniform international convention that specifically governs multimodal transport contracts.⁷¹² If a future convention regulating multimodal transport was created, the paradigm of contract *sui generis* could in theory solve the conflicts between the new convention and the existing unimodal conventions.⁷¹³ However, it should be borne in mind that to achieve such a goal in practice the scope of application of all existing unimodal conventions, except those governing sea carriage, need to be amended since they currently extend their scope to other modes of transport when a multimodal

⁷⁰⁹ Hoeks (n 7) 75.

⁷¹⁰ *ibid.*

⁷¹¹ *ibid.*

⁷¹² Erlling Selvig, 'The Background to the Convention' (Paper delivered at the Maritime Transport - The 1980 UN Convention seminar at University of Southampton, Faculty of Law, 12 September 1980) A14; DC Jackson, 'The Conflict of Conventions' (Paper delivered at the Maritime Transport - The 1980 UN Convention seminar at University of Southampton, Faculty of Law, 12 September 1980) G2.

⁷¹³ Hoeks (n 7) 76. See also MA Clarke and others, 'Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal Liability and Documentation' (DG TREN/04/MD/S07.38573, 2005) 12-13 <<http://folk.uio.no/erikro/WWW/cog/Intermodal%20liability%20and%20documentation.pdf>> accessed 22 May 2016.

transport is operated.⁷¹⁴ This issue should be taken into account as it has the potential to prevent a new uniform convention from being globally successful.⁷¹⁵

If the *sui generis* doctrine is adopted, a multimodal transport contract will be considered as a new type of contract with unique characteristics. In theory, to deal with *sui generis* contracts effectively, the ideal situation would be for the contract in question to be considered a multimodal transport contract; the prospective multimodal transport convention must be applicable to the case and it could not be overruled by any other unimodal transport convention.⁷¹⁶ However, before reaching that goal, a challenging task awaits the international legal community.⁷¹⁷

6.3.2 The mixed contract theory

According to the mixed contract theory, multimodal transport contracts cannot be considered as a contract *sui generis* but as a series of unimodal transport contracts or, in this sense, a mixed contract. Following this approach, it is therefore acceptable for the application of unimodal transport conventions to exist alongside international legal instruments that regulate multimodal transport. That is to say, if the loss or damage can be localised, the unimodal conventions must be applicable to particular modes of transport since it is believed that each stage of carriage has its own unique characteristics and it is subject to be governed by specific unimodal transport conventions. Hoeks outlines it thus:

The combination approach is in essence identical to the network approach. Although they are labelled differently, both approaches dissect a contract into various sufficiently independent parts and then apply the rules of laws whose requirements are met by these parts.⁷¹⁸

⁷¹⁴ See section 2.2.

⁷¹⁵ See section 6.5.

⁷¹⁶ There are arguments against this theory in the *Quantum* case, which obviously supports the idea of mixed contract theory rather than *sui generis* theory. As Mance LJ stated: '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 'mix' or 'multimodal' contract providing for two different means of carriage', see *Quantum* (n 46) 33.

⁷¹⁷ In section 6.5, the possibility of *sui generis* doctrine and solutions for multimodal transport will be discussed.

⁷¹⁸ Hoeks (n 7) 74.

In theory, this approach seems to avoid the dissimilar results concerning the liability when the same mode of transport is operated. However, it is questionable whether this theory can be regarded as a reliable solution for multimodal transport issues since, in many cases, even though the damage occurred under the same conditions, the liability regime could be different depending on the stage in which loss and/or damage was localised. Moreover, the stakeholders must also be aware of the circumstance where unimodal transport conventions could be applicable to some parts while others could fall under the scope of multimodal transport convention, if available in the future.

As it is referred to as a fragmented scheme, this theory could lead to the unfavourable and unpredictable situation where the consignor and the multimodal transport operator agree to certain contractual terms throughout the entire voyage which involves more than one mode of transport yet their intentions may fail because the contractual terms are subject to be superseded by an international unimodal convention where it is applicable to a particular mode.⁷¹⁹ What is more, when bringing a case to court, apart from the complicated multiple international conventions involved, the plaintiff also needs to consider relevant regional or national legislations that may be applicable to the case.

Another drawback of this theory is that determination of applicable law depends upon the localisation of loss, damage or delay. It should be noted that in many cases it is impossible to localise the place where the loss or damage occurred;⁷²⁰ the damage may have developed gradually throughout various modes of transport. This is obviously burdensome for the cargo interests bringing the claim against the multimodal transport operators.⁷²¹

6.3.3 The absorbed contract theory

⁷¹⁹ Wilson (n 159) 254.

⁷²⁰ It is stated that a very high percentage of cargo damage during multimodal transport journey is unable to be localised. See Selvig (n 712) A14.

⁷²¹ *ibid.*

According to this theory, a multimodal transport contract is divided into two types: a predominant contract and other subordinate modes of transport.⁷²² The dominant mode is used to determine which legal instrument is applicable to the case. That is to say, there is no need to consider any other modes of carriage since they are included as supplements of the main transport operation. As a consequence, although the loss or damage occurred during other subordinate legs, the unimodal transport convention regulating the predominant mode of transport will apply to the case.⁷²³ One example of an international convention that follows this theory is the Montreal Convention. Its Article 18(4) states that:

The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, 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. 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.

In accordance with this Article, assuming that the road haulage is operated for the purpose of loading, delivery or transshipment as part of carriage of goods by air, this stage is considered subordinate and deemed to be within the period of air carriage. Accordingly, if there is any loss or damage to the cargo, the Montreal Convention is applicable to that loss or damage that occurs during the road haulage.⁷²⁴

If, for example, the cargo will be carried mainly by sea, together with preceding and subsequent transport by road and rail, it can be questioned whether it is rational to apply Hague, Hague/Visby or Hamburg Rules (as the case may be) to the road or rail legs which have different natures and characteristics, compared to those of carriage of goods

⁷²² This theory is similar to the German doctrine of 'overall consideration' or *Gesamtbetrachtung*, see Hoeks (n 7) 71.

⁷²³ *ibid* 72.

⁷²⁴ Another example of the absorbed contract theory can be found in Article 2(2) of the CMNI which considers a standard of geographical distance as a criterion to determine the dominant element of a contract.

by sea.⁷²⁵ To conclude, this the absorbed contract theory seems to facilitate multimodal transport but it cannot reflect the entire nature of multimodal transport since, in many cases, each leg of carriage is equally significant and it is impossible to weigh up which should be the predominant mode of transport.

In conclusion, after considering each contract theory, both strengths and drawbacks can be observed. However, the author firmly agrees with the idea of the contract *sui generis* theory since the sensible way to tackle multimodal transport issues should start with the fundamental concept that considers containerised multimodal transport as a seamless line of operation with additional services including transshipment, Roll-on/Roll-off and storage services etc., which are obviously not the same nature as single mode of carriage operation. From that point, a new set of rule based on true multimodal thinking can be developed. In the next sections, more discussion and supporting evidence for this proposal are presented.

6.4 Liability regimes

Although the focus of this thesis is on the issues related to the use of multimodal transport documents, when discussing the form of international legal instrument that should be launched to govern multimodal transport it is unavoidable to mention the liability regimes since they are the main criteria that will directly influence the form and structure of the prospective international instrument. Of course, if the lengthy debate on the liability regime were settled and an international legal instrument were adopted, then the ambiguous areas in terms of legal status and functions of multimodal transport documents would potentially be clarified as well. Therefore, in this section, each liability regime will be examined.

6.4.1 Uniform liability regime

⁷²⁵ For example, there are several aspects of carriage of goods by sea which are entirely irrelevant to other modes of transport, such as 'seaworthiness', 'peril of the sea' or 'general average'. At the same time, other modes also possess particular features that are different from those of sea carriage.

As an offshoot of the the contract *sui generis* theory, only one set of uniform rules ought to be applicable to the entire carriage journey no matter when the loss, damage or delay occurred. In other words, localisation of loss, damage or delay is not the significant criterion to determine an applicable regulatory framework and the one who takes responsibility for such loss, damage or delay for the whole journey is the multimodal transport operator since a single set of rules governs all the unimodal stages of transport involved.⁷²⁶

Evidence supporting the uniform liability regime was given in a study which revealed that, from interviews with shippers, forwarders, carriers and insurers, the savings from removing the uncertainty, as well as eliminating time and costs of legal claims approximately accounted for 20% of the administrative costs can be anticipated.⁷²⁷ It can be seen that the strength of this regime is that it can provide simplicity and transparency as well as simultaneously reduce the 'friction cost' including litigation cost, legal consultation cost and insurance cost.⁷²⁸

This idea of having uniform rules to govern multimodal transport is also supported by a survey conducted by the UNCTAD Secretariat which identified that 48% of the participants from private and government sectors supported the uniform liability regime.⁷²⁹ It is clear that this liability regime provides legal certainty and predictability for stakeholders in the transport industry.⁷³⁰

Nevertheless, it is not possible to simply conclude that, because this regime could potentially lead to the situation where legal certainty and predictability can be achieved, the uniform liability regime will be welcomed by all interested parties. In fact,

⁷²⁶ UNCTAD Secretariat (n 643) paras 45-46; Bevan Marten, 'Multimodal Transport Reform and the European Union: A Treaty Change Approach' (2012) 36 Tulane Maritime Law Journal 741, 746.

⁷²⁷ Ian G Black, Henri Chua and Christoph Seidelmann, 'The Economic Impact of Carrier Liability on Intermodal Freight Transport' (Association for Europe Transport, 2002) <https://aetransport.org/public/downloads/_ya4f/542-514ec4ef3a017.pdf> accessed 25 December 2017.

⁷²⁸ See Marten (n 726) 745; Erasmus University Rotterdam, 'Working Paper on Intermodal Liability' (2004) Competitive and Sustainable Growth Programme 19.

⁷²⁹ '50% of governments and 45% of others provided a response'. UNCTAD Secretariat (n 643) para 57.

⁷³⁰ *ibid*; Erasmus University Rotterdam (n 728) 19; Hoeks (n 7) 26.

stakeholders in the transport industry have voiced concerns about it, especially multimodal transport operators.⁷³¹ The first concern is that the level of liability would increase compared to the liability regime under the current unimodal transport conventions. The majority of carriers concerned about this issue are mainly maritime carriers who currently enjoy relatively fewer liability rules under the maritime regimes compared to other carriers operating other modes of transport.⁷³² Another issue of concern for contracting multimodal transport operators is that the amount of damages they would have to pay to the cargo interest where loss, damage or delay occurs under the uniform rules could potentially be higher than the damages they could obtain after seeking recourse against the subcontracting carrier or the performing party who is actually responsible for such loss, damage or delay under the unimodal transport convention applicable to the specific leg of carriage.⁷³³ Such a discrepancy between the amount of damages is the main reason behind resistance to accepting the uniform liability system from the commercial players.

Another crucial problem relating to the adopting of a uniform liability system is that, as unimodal transport conventions currently expand their scope of application to multimodal transport under certain conditions which vary from one to another, if an international instrument adopting the uniform liability system were launched in the future, the current scopes of application under unimodal transport conventions must be revised in order to avoid conflicts of application. In other words, the scope of each unimodal transport convention must be restricted to mere unimodal modes of carriage and they must not extend their scopes to other modes which are substitutes or parts of a multimodal transport journey.⁷³⁴

⁷³¹ Bevan Marten, 'Multimodal Transport Reform and the European Union: A Minimalist Approach' (2012) *European Transport Law* 129, 133.

⁷³² Monetary limits of liability under the unimodal regimes are as follows: 2, 8.33 or 17 Special Drawing Rights (SDRs) per kilogram according to Article 4(5)(a) of the Hague/Visby Rules, Article 23(3) of the CMR and Article 30(2) of the COTIF/CIM respectively.

⁷³³ Roger Clarke, 'Cargo Liability Regimes' (OECD Maritime Transport Committee, January 2001) 14 <<https://www.scribd.com/document/40531201/Cargo-Liability-Regime>> accessed 19 January 2018.

⁷³⁴ UNCTAD Secretariat, 'Transport Law: Preparation of Draft Instrument on the Carriage of Goods [by Sea] – Proposal by the Netherlands on the Application Door-to-Door of the Instrument' UN Doc A/CN.9/WG.III/WP.33 (2003) 6.

In conclusion, in theory, an international uniform convention would be the ideal solution but achieving this would be too good to be true at the moment⁷³⁵ since there is still some resistance from players in the multimodal transport industry who are afraid of what they may face, especially when seeking recourse against subcontractors.⁷³⁶ It can be said that if acceptance by the stakeholders in the transport industry and government sectors in terms of liability, defences and limit of liability cannot be reached, it is unlikely that the international uniform rules governing multimodal transport will materialise and it is undeniable that reaching a mutually favourable agreement upon these issues will be extremely challenging.⁷³⁷ Although there is a low possibility of having mandatory uniform rules in the near future, this does not mean that there is no hope at all in the long run since the evolution of multimodal transport operations and technological revolution in shipping industry have constantly emphasised the nature of multimodal transport as one seamless line of service rather than a mixture of separate modes of transport.⁷³⁸

6.4.2 Network liability regime

In contrast to the uniform liability system, the network liability regime considers multimodal transport as a 'sum of unimodal journeys'.⁷³⁹ Based on the mixed contract theory, each leg of transport as part of the whole multimodal transport should be governed by a unimodal transport convention that specifically applies to such a mode of transport; that is to say, according to this regime, localisation of loss, damage and delay is the key to determine which unimodal transport convention is applicable to the case.⁷⁴⁰ From chapter 2 which explains the current legal frameworks that regulate multimodal transport, as there is no international legal instrument in particular which governs multimodal transport, the network liability system has currently been adopted.⁷⁴¹

⁷³⁵ Nikaki (n 6) 103.

⁷³⁶ Marten (n 731) 754.

⁷³⁷ Even though the agreement could be reached at the first stage, it does not guarantee that such an international legal instrument would obtain enough ratifications to enter into force. See also Erasmus University Rotterdam (n 728) 20.

⁷³⁸ This issue will be discussed in section 6.5.6.

⁷³⁹ EC, 'The Final Report of June 2009' (TREN/CC/01-2005/LOT1/Legal assistance activities) 54.

⁷⁴⁰ De Wit (n 241) para 2.145; Marten (n 731) 746; Ulfbeck (n 50) 46.

⁷⁴¹ UNCTAD Secretariat (n 643) para 50.

In terms of the advantages of this regime, the first advantage is that all the current unimodal transport conventions are not subject to be changed since it was specifically designed to apply to particular mode of transport. In other words, there is no need to revise any of those conventions. Even when there is a revision to a unimodal convention, other conventions will not be interfered with since there is no linkage between all of them. As a result, the network system provides flexibility in cases where a unimodal convention might be revised in the future.⁷⁴² Another strong point that is more likely to be favourable from the perspective of multimodal transport operators is regarding the result of the recourse actions because the amount of damages paid to the cargo interests will not be greater than the amount that is the operators are entitled to obtain after seeking recourse against the performing carrier or the subcontractor who is actually responsible for the loss, damage or delay.⁷⁴³

However, a range of disadvantages under this liability regime also exist. Although there are some good points that can be observed from this regime, it is very unlikely to apply it to the real circumstances with practically sensible consequence.⁷⁴⁴ The first pitfall to be mentioned is the problem of localisation of loss, damage and delay as the network system relies on the identification of the stage of transport in order to determine which convention will be applicable to the case, which varies from one to another or the same circumstance may not be governed by the same rule according to the particular fact of each case.⁷⁴⁵ Nonetheless, in reality the localisation process is not always feasible, for instance, loss or damage may gradually develop throughout the whole journey or may be caused by multiple reasons in different stages. Apart from that, if the cargo was packed in a closed container, then it is unlikely that the loss or damage can be identified. There may also be a liability gap under this regime even if the loss, damage or delay can be

⁷⁴² Erasmus University Rotterdam (n 728) 20.

⁷⁴³ However, some exceptions to this scenario can happen e.g. in cases where the performing party only operates a domestic road haulage, the liability of the contracting multimodal transport operator is likely to be governed by the CMR, but the liability regime, monetary limits or defences of the performing party would be determined by national legislations; see Erasmus University Rotterdam (n 728) 20.

⁷⁴⁴ De Wit (n 241) para 2.146; Ulfbeck (n 50) 81.

⁷⁴⁵ Marten (n 731) 741, 746; Ulfbeck (n 50) 41.

localised. For example, when this occurs during the storage process at the port or in the warehouse.⁷⁴⁶ These are examples of common situations that occur but the network liability regime cannot close the liability gap and the result will vary according to different interpretations. A negative by-product of the abovementioned difficulties is the issue of predictability and harmonisation which is a central problem of this regime since a greater burden and friction costs are placed on the cargo interests who make a claim based on loss, damage or delay that occurs to their goods.⁷⁴⁷

Although the network regime has been used for quite a long time due to the lack of an international instrument governing multimodal transport, it does not guarantee that it can close the liability gap and provide legal certainty for stakeholders in the long run, especially for the cargo interests who have to bear a greater burden to figure out at which stage a loss, damage or delay occurs, which convention to rely on and the party who is actually liable for such loss, damage or delay.⁷⁴⁸

6.4.3 Modified liability regime

There is an alternative, the so-called 'modified liability regime', that combines the advantages of the two above systems and copes with their negative results. According to this regime, the combination of the unimodal rules based on the specific mode of transport and those which apply regardless of the stage of carriage coexist alongside each other.⁷⁴⁹ For example, in case of monetary limitation of liability and time-bar which vary considerably from one unimodal convention to another, the applicable regulatory framework will be based on the stage of transport where loss, damage or delay occurred.

⁷⁴⁶ UNCTAD Secretariat (n 734) 5, De Wit (n 241) para 2.150. See also *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep 595 and *Mayhew* (n 85) (Hague Rules were not applicable to the period of storage on the dock, so that the carrier could benefit from the 'exclusion of liability' contractual term).

⁷⁴⁷ UNCTAD Secretariat (n 643) para 51.

⁷⁴⁸ In practice, standard form contracts, like BIMCO's MULTIDOC 95 or FIATA Bill of lading, are widely used by the parties and provide a 'fall-back solution' where the loss, damage or delay cannot be localised. According to their contractual terms, UNCTAD/ICC Rules would apply to such a case. However, it should be noted that the rules provide the same defences and limit of liability as those under the Hague/Visby Rules tend to be extremely beneficial for the carriers.

⁷⁴⁹ UNCTAD Secretariat (n 643) para 52-53; Marten (n 731) 746.

The provisions that are in accordance with this statement can be found in the 1980 MT Convention⁷⁵⁰ as well as the UNCTAD/ICC Rules.⁷⁵¹ At the same time, the rest of the issues are governed by the uniform rules which leads to more certain and predictable situations including the issue of the legal status and functions of multimodal transport documents. Furthermore, the most significant approach of the modified system is that it also provides a 'fall-back' solution for unlocalised loss, damage and delay which can potentially close the liability gap and solves the main problem of the network system.

To conclude, this 'meet me halfway' approach can to some extent increase the level of legal uncertainty while taking the concerns of the multimodal transport operators into account, especially the issue of monetary limitation of liability. It can be seen that although neither total legal certainty according to the uniform system nor full familiarity amongst carriers of the liability system under the network system can be reached, the modified liability regime can lead to a win-win situation, not a zero sum game, by compromising on the advantage of cargo interests and the benefit of multimodal transport operators. However, if looked at the other way round, this hybrid regime is still incapable of comprehensively solving the problems caused by the current messy legal framework and the full benefits of uniform and network systems cannot be achieved under the modified regime. This is one piece of evidence that, in order to eliminate legal uncertainty, create uniformity and provide proportionate protection to all stakeholders getting involved in multimodal transport contracts in a long run, a uniform set of rules is needed.

6.5 Optimal solutions

6.5.1 Is amendment of current unimodal transport conventions possible?

As widely discussed in chapter 2 regarding the current legal frameworks regulating multimodal transport, it can be seen that the uncertainty of the extended scope of

⁷⁵⁰ MT Convention 1980, article 19.

⁷⁵¹ UNCTAD/ICC Rules, rule 6.4.

application of each convention and conflicts amongst them are two significant problems that need to be solved in order to lessen the burden of stakeholders, both in terms of proof and high friction costs, as well as creating international harmonisation. Although some might think about the possibility of amending the scope of application of the unimodal conventions to solve the conflicts,⁷⁵² this is not an easy task since too many factors are involved including procedural difficulties,⁷⁵³ support from the industry⁷⁵⁴ and political bargaining power.⁷⁵⁵ In practice, as Hoeks states, it seems to be too straightforward to seek this option as a short-term solution:

Sadly, the adjustment of the existing transport regimes is unlikely to occur. In general uniform law is rather inert due to the large number of State Parties that generally need to be involved in any amendments, and even if adjustments are made it is likely that not all of the original parties accept the amended regime, which then create diversity rather than uniformity.⁷⁵⁶

Specifically, in the case of the CMR, Clarke indicated that:

... any change in CMR is unlikely to occur. Past moves to improve CMR have come to nothing: CMR, it has been said, works well enough There is little evidence that road carriers, their customers or trade organisations that represent them today want change.⁷⁵⁷

It can be concluded that, not to mention a new convention regulating multimodal transport, even the amendments of current unimodal conventions are not likely to happen in the short term. However, it is believed that this option may be possible as a long-term plan.⁷⁵⁸ All that can be done at the moment is 'wait and see' about the feasibility of amendment in the future.

⁷⁵² For a detailed discussion focusing on amending the conventions in the perspective of the European Union, see Marten (n 731).

⁷⁵³ Each convention has its own unique requirements with regard to the amendment of conventions, for example, the COTIF/CIM has a specific provision regulating the amendment procedure (Article 33), while there is no such similar provision under the CMR so general rules under Article 40 of the Vienna Convention on the Law of Treaties would apply ('all parties will be informed and have the right to participate in negotiations').

⁷⁵⁴ See UNCTAD Secretariat (n 643).

⁷⁵⁵ Marten (n 731) 740.

⁷⁵⁶ Hoeks (n 7) 481.

⁷⁵⁷ Malcolm Clarke, 'Case Comment: The Line in Law Between Land and Sea' (2003) *Journal of Business Law* 522, 524.

⁷⁵⁸ See José Alcántara and others, 'A Blueprint for a Worldwide Multimodal Regime?' (2011) 9 <<http://pysdens.com/v2/uploads/ROTTERDAM%20RULES%20AGUGUST%202011.pdf>> accessed 5 December 2017. It is proposed that the possible way to make the amendment happen should start from

6.5.2 Is unlimited 'freedom of contract' between parties possible?

If we disregard the case of multimodal transport that falls under the sphere of the extended scope of unimodal transport conventions, there is a wide range of cases that do not appear to be covered by any scope of application, eg the transshipment of cargo which is not *transport superposé* under Article 2 of the CMR and the unlocalised loss or damage. In relation to the contract *sui generis* theory, the interesting question is whether it is possible for the parties to have the right to freely agree on (opt in) the liability system that suits their circumstance or freely incorporate any rules, eg one specific unimodal convention or the UNCTAD/ICC Rules, to govern the whole multimodal transport journey.⁷⁵⁹

According to the contract *sui generis* theory, when considering a multimodal transport contract as a specific type of contract rather than the sum of unimodal carriage of goods contract with no convention directly regulating multimodal transport contracts, it is quite clear that parties should be entitled to determine the suitable set of rules that they would like to abide by.⁷⁶⁰ This approach could potentially not only perfectly suit the needs of the parties but also provide simplicity and certainty in terms of the applicable law, especially in case of unlocalised loss, damage or delay.⁷⁶¹ Another supporting statement for this approach is that the concept of 'greater freedom of contract' can be referred to as 'the basis of contemporary business-to-business contracts in most areas of

the movement of the EU since it is a powerful region that can potentially make an impact at a global level. Moreover, the EU is the majority of members of the CMR and COTIF/CIM so the European countries can be the pioneer group for amendments. See also Marten (n 731). Hoeks also demonstrated the influential movement of the EU when all members ratified the Montreal Convention on the same day which showed the coordinating actions amongst all members, see Hoeks (n 7) 484.

⁷⁵⁹ It should be noted that, in the case of member states of the unimodal transport conventions, this option might be a very exceptional case since it might violate some of the provisions and lead to the situation where the contract could be ineffective (evasion of mandatory law). See Hoeks (n 7) 484; Marten (n 731) 144. In this thesis, this option is based on a theoretical hypothesis and it is acknowledged that in order to make it happen in reality, a range of changes, eg re-considering the scope of each unimodal transport conventions, need to be done beforehand.

⁷⁶⁰ For example, the unimodal convention applicable to the greatest geographical distance of the multimodal transport journey. See UNCTAD Secretariat (n 734) 6.

⁷⁶¹ Marten (n 731) 744.

law'.⁷⁶² Unavoidably, according to this regime, every contractual term agreed will be based on the bargaining power of each party.⁷⁶³ For instance, with regard to the monetary limits of liability, various levels of bargaining power will lead to the result of 2,⁷⁶⁴ 8.33⁷⁶⁵ or 17⁷⁶⁶ Special Drawing Rights (SDRs) per kilogram as the case may be according to negotiating capacity. In other words, the powerful multimodal transport operators tend to rely on low-liability maritime regimes whereas consignors with high negotiating power would want the liability regimes that provide higher limits, ie those under the CMR and COTIF/CIM, or in an extreme scenario, no limits of liability at all depending on the specific requirements of the parties.⁷⁶⁷

With regard to recourse actions, where the low liability maritime regime is chosen to apply to multimodal transport contracts, after seeking recourse action against the subcontractors who are indeed liable, it is possible that the contracting multimodal transport operators may obtain higher compensation from the recourse action compared to the damages they previously paid to the cargo interests. Despite the imbalance of these two amounts of compensation, compared to the case where the compensation paid to the cargo interest is higher than the amount received after the recourse action, it seems unfair in some respects, yet more favourable in general.⁷⁶⁸ The main reason is that if the amount of damages after the recourse action is lower, then it will lead to a situation that discourages the majority of multimodal transport industry players.⁷⁶⁹ Taking relevant factors into account, especially the fact that there are no international rules governing multimodal transport, this approach may be the optimal solution since it creates legal certainty in terms of the rules and liability regimes that would apply to multimodal transport contracts. At the same time, it is fair that cargo interests could obtain the amount of compensation according to the limit of liability agreed under their contract and

⁷⁶² *ibid* 755.

⁷⁶³ It is stated that, in the contemporary practice, the majority of shippers is not always (and no longer) in the weaker position, see Ulfbeck (n 50) 89-90.

⁷⁶⁴ Hague/Visby Rules, article 4(5)(a) (2 SDR per kilo or 666.67 SDR per package or unit).

⁷⁶⁵ CMR, article 23(3).

⁷⁶⁶ COTIF/CIM, article 30(2).

⁷⁶⁷ Marten (n 731) 755.

⁷⁶⁸ Ellen Eftestøl-Wilhelmsson, 'EU Intermodal Transport and Carrier Liability – Content and Context' (2007) *Scandinavian Institute of Maritime Law Year Book* 133, 149.

⁷⁶⁹ *ibid*.

the contracting multimodal transport operators could receive the damages based on the mandatory unimodal transport convention applicable to certain modes of transport in which the loss, damage or delay actually occurs. It can be further assumed that if this approach had been adopted and evolved over time, it could possibly shed light on the trend that is commonly and in practice accepted by the transport industry in general. Ultimately, it could lead to a long-term solution.

However, the negative results of this aforementioned approach can also be anticipated because all the fundamental protections under the unimodal transport conventions that are allocated for both consignors and consignees would be entirely withdrawn. That is to say, it would be too dangerous and risky, especially for the consignors and relevant cargo interests,⁷⁷⁰ to leave every issue on freedom of contract amongst parties.

6.5.3 Is the opt-out solution possible?

The proposal based on the contract *sui generis* theory which provides an 'opt-out' alternative for the parties is the main focus of this section and the 2005 Integrated Services in the Intermodal Chain (ISIC) Final Report Task B: Intermodal liability and documentation' (ISIC Final Report)⁷⁷¹ presented by an independent panel of legal experts in transport and international trade laws is an ideal model to examine in this respect. The objective of this project was to draft 'a set of uniform intermodal liability rules which concentrate the transit risk on one party and which provide for strict and full liability of the contracting carrier (the intermodal operator) for all types of losses (damage, loss, delay) irrespective of the modal stage where a loss occurs and the causes of such a loss'.⁷⁷²

⁷⁷⁰ It is noted that, in general, the shipper does not have the bargaining power against the contractual terms, particularly those with regard to liability, defences and limit of liability of the carrier or, in many cases, multimodal transport contracts were concluded without a reasonable level of attention to carefully scrutinise every details under the standard form contracts (usually tiny print contract form). See UNCTAD Secretariat (n 643) para 15.

⁷⁷¹ Clarke and others (n 713).

⁷⁷² *ibid* 6.

One of the strong points of the ISIC Final Report is that it emphasises the importance of uniform liability regime as the ideal solution for the current complex legal frameworks in terms of both legal certainty and cost effectiveness: ‘the proposed Regime offers a simple, streamlined and uniform regime of legal liability of a kind which is new in the international legal domain’.⁷⁷³ This standpoint clearly shows two aspects: firstly, a uniform liability system is favourable for the commercial community; and, secondly, it is another piece of supporting evidence that multimodal transport contracts should be considered as a contract *sui generis* which is separately subject to a specific set of rules rather than a series of unimodal carriage ones governed by the current network system.

Taking into account the possible resistance against the change of the familiar network regime to the new mandatory rules, under the ISIC regime, instead of launching a mandatory instrument governing multimodal transport, this draft acts like ‘model rules’ or a ‘soft law’ solution that the parties can choose whether to abide by or not.⁷⁷⁴ Nevertheless, some pitfalls can also be anticipated including a lack of legal enforceability and a situation where this proposal would be superseded by mandatory national laws or international unimodal conventions in case its scope of application overlaps.⁷⁷⁵

Focusing on the ‘opt out’ approach, the one simple rule is that ‘if the parties do not opt out (a) they will be bound by the Regime in its entirety, and (b) any contractual provisions in conflict with the Regime will be overridden’.⁷⁷⁶ This means that the parties can choose to opt out of this regime or be completely bound by it. However, this approach also reflects an attempt to find a balance between cargo interest protections and freedom of contract by providing an unbreakable limit of liability whilst not restricting the parties to agree on a higher limit as per their wish.⁷⁷⁷

⁷⁷³ *ibid* 10.

⁷⁷⁴ *ibid* 11.

⁷⁷⁵ In the summary of this proposal, the feasibility of conflicts with unimodal transport conventions was provided. Although there is a likelihood that the scope of this proposal could overlap with the scope of the CMR, the possibility of conflicts is quite low in case of other unimodal transport conventions, see Clarke and others (n 713) 12-13.

⁷⁷⁶ See *ibid* 11-12 [emphasis added].

⁷⁷⁷ Such as the case where the consignor declares the value of the goods and ‘*ad valorem* freight’ applies, see comment (ii) of Article 9 of the ISIC Proposal.

It is clear that the ISIC Final Report keeps away from the fragmented network liability system while there is still some room provided for the parties to agree on contractual terms based on their specific conditions which at least creates legal certainty and foreseeability if something goes wrong with the cargo. Another advantage of the ISIC Final Report is that it demonstrates that a simple uniform liability regime for multimodal transport is possible as stated in the conclusion of the report: 'The main conclusion for this work is that there is an actual possibility to create a simple uniform liability regime for multimodal transport which concentrates the risk of transit loss on one party'.

Nevertheless, regarding the possibility of the opt-out approach, or the ISIC regime in particular, will become the solution for multimodal transport at the international level is still doubtful based on three main reasons. Firstly, this draft can be regarded as an experimental instrument since it was acknowledged in the summary of this proposal that further discussion and consultation with all interested parties in the transport industry⁷⁷⁸ was highly recommended through the use of this proposal as the basis to figure out the best solution that is jointly satisfactory.⁷⁷⁹ Therefore, it is clear that the ISIC Final Report is not intended to be used as the final answer for the current difficulties. Secondly, as this draft acts like model rules or soft law, a lack of legal enforceability is certainly an issue as it is for the UNCTAD/ICC Rules which are, *per se*, contractual and cannot be adopted as a permanent or sustainable solution.⁷⁸⁰ Thirdly, in order to create the utmost simplicity and uniformity, the correct step forward should be a mandatory regime rather than an opt-out one since the ongoing issues of legal uncertainty, weak protection for traders and excess reliance on 'negotiating power' will never be thoroughly resolved.

6.5.4 'Do nothing' approach: let the legal framework evolve in its own way

As can be seen from the failure of the MT Convention, coupled with the low possibility that any changes could be achieved at the international level, it is very

⁷⁷⁸ Such as carriers, insurers, freight forwarders, port authorities, cargo interests, international organisations and unimodal carriers' associations, Clarke and others (n 713) 7.

⁷⁷⁹ *ibid* 32.

⁷⁸⁰ See Hoeks (n 7) 23, and section 2.1.

interesting that the transport industry, especially multimodal containerised transport, has grown so rapidly and successfully over time while the current legal framework has remained so messy.

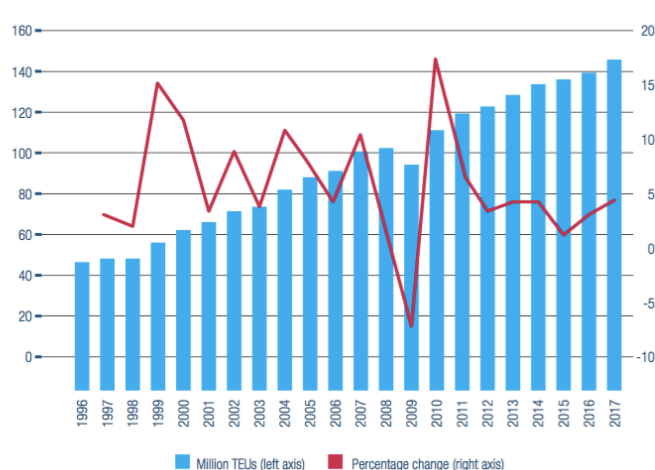


Figure 2: Global containerized trade, 1996–2017 (Million 20-foot equivalent units and annual percentage change)⁷⁸¹

This peculiar situation leads to two propositions; firstly, through several decades of evolution in terms of containerisation and multimodal transport operations, the market has also adapted itself in its own way, including how to survive with no uniform legal regime, and, secondly, such a legal environment is perfectly suitable for multimodal transport.⁷⁸²

To support the first proposition, although there is serious concern about the inefficiency of the current fragmented legal regime according to the UNCTAD survey conducted in 2003,⁷⁸³ it is suspected that this concern may mostly come from small- or medium-sized enterprises trying to access the market. In other words, they are not the influential or leading players in the transport industry.⁷⁸⁴ Furthermore, the feedback contrast with the consultation session with the European Association for Forwarding,

⁷⁸¹ UNCTAD, 'Review of Maritime Transport 2017' UNCTAD/RMT/2017, 12.

⁷⁸² Lorenzon (n 16) 165.

⁷⁸³ UNCTAD Secretariat (n 643) para 21.

⁷⁸⁴ Lorenzon (n 16) 167.

Transport, Logistic and Customs Service (CLECAT) conducted on behalf of DG TREN at the Institute of Maritime Law in Southampton in 2006. The results of the consultation gave no indications that any radical change was desired by the industry.⁷⁸⁵

For the second proposition, from Figure 1 above, together with the massive development in terms of containerised transport and its current volumes and routes, and the increasing number of container ports worldwide,⁷⁸⁶ if we look beyond the theoretical or academic aspect and carefully perceive global transport industry practice as it really is, it is hard to say that the fragmented legal regime is a serious issue that hinders containerised multimodal transportation from being globally successful.⁷⁸⁷ In short, from a practical perspective, it is likely that the players in transport industry have adapted and familiarised themselves well with the current legal regime. Of course, this legal framework is incredibly messy and may lead to various problematic issues. However, if there is no critical change or strong incentives for the industry, then it is likely that they will continue to insist on this fragmented legal regime. Thus, the only thing that can be done at the moment is to keep an eye on the evolution of the legal framework relating to multimodal transport and observe the future trends and feedback from the market.

6.5.5 A proposed short-term solution

After examining each possible approach in sections 6.5.1-6.5.4, it seems that they all have weaknesses. In short, the amendment of unimodal conventions is unlikely to happen due to its complicated process and a lack of support from the member states. Secondly, the unlimited freedom of contract approach is considered too risky since the contractual terms are absolutely based on negotiating power and no protection is guaranteed for the party in a weaker position. Thirdly, the opt-out solution proposed under the ISIC Final Report seems to provide a balanced solution where protection for cargo interests as well as freedom of contract are both taken into account. However, as its status is a set of model rules or soft law, legal enforceability is a big issue for this

⁷⁸⁵ *ibid* 177-178.

⁷⁸⁶ UNCTAD (n 780) 12-13.

⁷⁸⁷ Lorenzon (n 16) 165.

approach. Fourthly, although it seems quite desperate to mention the ‘do nothing’ approach, it has revealed several contemporary aspects, for instance, the standpoints of the industry and the ability to adapt to a fragmented regime. Ultimately, it persuades us to re-think whether a uniform set of rules is really needed. If so, there is a very real need to deal with all aspects in the prospective international legal instrument more carefully to avoid a failure like the MT Convention.

At this stage, it is strongly believed that a uniform set of rules regulating multimodal transport is still needed to comprehensively cope with all legal uncertainties both in terms of liability regime and the legal status of multimodal transport documents. Moreover, according to the contract *sui generis* theory, ‘the only way to achieve a truly multimodal regime must be that of taking a firm multimodal approach, look at the container itself as a single mode of transport and design a special regime applicable to containerised carriage’.⁷⁸⁸ However, after scrutinising all obstacles and realising how hard it could be to be successful, the author is convinced that the consultation at the international level proposed by the ISIC Final Report which would use its regime as the basis for discussion⁷⁸⁹ is of the essence to achieve such a goal.

The lesson learnt from the ‘Do nothing’ approach that seems to be preferred by the players in the transport industry is that the consultation process should finally answer these crucial questions: is a compulsorily applicable multimodal regime really needed? If it is, who needs protection? Who should negotiate it? Who should compromise?⁷⁹⁰ The issue of the industry’s needs should be carefully handled because it once led to the failure of the MT Convention as explained below:

⁷⁸⁸ Lorenzon (n 16) 177.

⁷⁸⁹ ‘Start extensive consultation with all interested parties, using the proposed Regime as a basis for discussion. Carriers, insurers, freight forwarders, port authorities and cargo interests should be involved in the consultation, together with international organizations and multimodal and unimodal carriers’ associations. Given the broad applicability of this Regime and the consequences it may carry to trade worldwide, consultation should not be limited to interested parties based in the EU. Consultation should be carried out by way of conferences and round table discussions, followed by position papers.’ Clarke and others (n 713) 7.

⁷⁹⁰ Lorenzon (n 16) 177.

A mandatory international or regional regime which applies by force of law creates uniformity. At the same time, such a regime may be rejected by (some sectors of) powerful national industries lobbying their governments during the negotiation/drafting and ratification processes and thus fails to attract sufficient support. Fear of change, suspicion of mandatory law or uncertainty as to possible implications may lead to the drafting of more complex provisions which in turn create new insecurities and eventually perpetuate a cycle of rejection and ineffective attempts at achieving a satisfactory result. Fear of change may also underlay the insistence of some industries, flying in the face of facts, that all is well with the present situation.⁷⁹¹

This is a clear diagnosis of why the MT Convention has never been successful. What is more, in a report presented at the European Transport Conference,⁷⁹² it was stated that some transport industry players have not considered changing the liability regimes from the network to uniform system as an essential issue since, based on the practical daily basis, the overall loss rate is less than 0.1% of cargo value.⁷⁹³ Thus, they seldom faced cargo claims. In other words, they are likely to pay more attention to commercial issues rather than concerning themselves with the liability regimes because the number of lawsuits against them has been relatively low.⁷⁹⁴ It is clear that if a lack of commercial support still exists, there is little hope for an international uniform legal instrument governing multimodal transport in the near future.⁷⁹⁵

As Lorenzon states, 'International trade law is usually responsive to the needs of its industry and market practice'.⁷⁹⁶ The needs of stakeholders in the industry are certainly significant and influential indicators that can potentially point to the possible long-term solutions for multimodal transport. Hence, their needs should not be taken for granted by the government sectors or any relevant international organisations. When the aforementioned questions have been clearly answered by stakeholders from the various sectors, the issue of resistance from the industry is expected to be solved. This would be a good sign for a realistic way forward with regard to the prospective legal instrument governing multimodal transport and sustainable legal development to effectively respond to contemporary trade practice in the long run. To conclude, even though it seems that

⁷⁹¹ Eftestøl-Wilhelmsson (n 768) 165.

⁷⁹² Black and others (n 727).

⁷⁹³ *ibid.*

⁷⁹⁴ *ibid.*

⁷⁹⁵ However, it should be noted there is no negative critique on the theory behind the proposed convention that considers multimodal transport contract as a contract *sui generis*.

⁷⁹⁶ Lorenzon (n 16) 163.

radical changes are unlikely to happen shortly, the current market practice that emphasises the nature of multimodal transport as a contract *sui generis* and technological revolution in shipping industry lead to the new conclusion that a new convention on multimodal transport is needed.

6.5.6 A proposed long-term solution

Following the consultation process, the long-term solution will look at multimodal transport and its future evolution, coupled with technological development which will certainly have an impact on the transport industry both in terms of infrastructure and the legal aspect.

6.5.6.1 Looking to the future of multimodal transport

Due to advances in technology and innovations, evolution is inevitable. The cutting edge revolution in terms of containerised multimodal transport that should be kept an eye on is unmanned automated vessels capable of carrying ‘intelligent’ containers equipped with real-time exchange of information via satellite communications technology.⁷⁹⁷ Recently, the testing of the world’s first autonomous unmanned containership, Yara Birkeland, in Norway was revealed. This aims to be the world’s first fully electric container feeder and is scheduled to switch to remote operation in 2019. After that, it will begin operating with a fully autonomous system from 2020. With regard to its operating system, Yara Birkeland is ‘designed for loading and discharge to be done automatically using electric cranes and equipment. The ship will also be equipped with an automatic mooring system; berthing and unberthing will be done without human intervention.’⁷⁹⁸ Simultaneously, Nippon Yusen KK, a leading Japanese shipping line, is planning to conduct in the near future a remote pilot test of automated large container

⁷⁹⁷ Filippo Lorenzon, ‘From Sails to Drones: Time to Reconsider a Uniform Liability Regime for Multimodal Transport’ (2016) 21(5) *Journal of International Maritime Law* 331, 332.

⁷⁹⁸ Jessica Maitra, ‘Unmanned Vessels and the Carriage of Goods – Contractual and Insurance Considerations’ (2018) <<https://www.clydeco.com/insight/article/unmanned-vessels-and-the-carriage-of-goods-contractual-and-insurance-consid>> accessed 30 April 2018.

ships from a Japanese port to North America.⁷⁹⁹ It is stated that ‘the Japanese government is supporting efforts to develop fully automated commercial ships and has set a target of 250 domestically built ship being equipped with autonomous operation technology by 2025’.⁸⁰⁰ Moreover, it is also reported that Rolls Royce is working on an ‘autonomous naval vessel’ project in collaboration with Google.⁸⁰¹ The artificial intelligence (AI) technology employed in the unmanned automated vessels involves a collection of algorithms that are currently in production and testing process. Once this innovation is launched for commercial use, it will improve the entire process of transportation such as selecting alternative ports or routes, estimating accurate times of arrival, and providing customers and freighting companies with much better insight into how the journey will go and when the cargo will be delivered at the destination.⁸⁰²

AI technology is also part of the intelligent containers and there will be a digital record of every circumstance that happens within the containers without the need to open them.⁸⁰³ A large variety of internal and external sensors will provide real-time exchange of information with regard to the condition of goods.⁸⁰⁴ When a cargo claim is made, the digital record will be automatically generated and provide the parties with complete answers regarding what went wrong, when it happened and the actual root cause of the loss or damage. This innovation can be anticipated to reduce the management time and legal costs with regard to who should take responsibility. The transparency of this system will also be beneficial for the underwriter to calculate the premium as well.⁸⁰⁵

⁷⁹⁹ Julian Ryall ‘Japanese Shipping Line to Launch Unmanned Container Ships’ *The Telegraph* (25 August 2017) <<https://www.telegraph.co.uk/news/2017/08/25/japanese-shipping-line-launch-unmanned-container-ships/>> accessed 29 April 2018.

⁸⁰⁰ *ibid.*

⁸⁰¹ Terri Coles, ‘Artificial Intelligence and Automation Make Waves in Shipping’ *ITPro Today* (5 January 2018) <<http://www.itprotoday.com/analytics-reporting/artificial-intelligence-and-automation-make-waves-shipping>> accessed 29 April 2018.

⁸⁰² *ibid.*

⁸⁰³ Maitra (n 798).

⁸⁰⁴ Lorenzon (n 797) 334.

⁸⁰⁵ Maitra (n 798)

According to Rolls-Royce,⁸⁰⁶ the evolution of unmanned automated naval vessel is anticipated to be as follows:



Figure 3: The future evolution of unmanned automated naval vessels⁸⁰⁷

It is clear that a new page in transport history is being written and will be upon us soon. Therefore, quick and efficient adaptability is crucial. One thing that should be carefully considered is that even though the industry is in the early adoptive stage of unmanned vessels and AI technologies, the best practice that should be done before they are fully and widely in use is to figure out an appropriate regulatory framework and suitable liability regime that effectively tackle new challenges, facilitate the new operations and clarify legal uncertainties that may hinder international trade transactions.⁸⁰⁸

6.5.6.2 Overcoming all current difficulties

⁸⁰⁶ Rolls Royce, 'Autonomous Ship: The Next Step' (2016) <<http://www.rolls-royce.com/~media/Files/R/Rolls-Royce/documents/customers/marine/ship-intel/rr-ship-intel-aawa-8pg.pdf>> accessed 29 April 2018.

⁸⁰⁷ *ibid* 7.

⁸⁰⁸ At the moment, the Comité Maritime International (CMI) has adopted the issue of unmanned ships on its agenda and is now working on a new international legal framework for the safe operation of these vessels, see Patrick Griggs, 'Comité Maritime International: Review and Analysis' 23(4) *Journal of International Maritime Law* 304, 308-309.

It can be expected that the new innovations are going to change the model for dealing with multimodal transport. Besides, its prospective uniqueness in terms of operation means that the current network system based on mixed contract theory will become obsolete in the future, provided that the innovations, ie unmanned vessels and intelligent containers, are fully and commercially in use. Further, the scope of liability of multimodal transport operators is set to be significantly affected since human error which has been referred to as a major root cause of accidents at sea⁸⁰⁹ will be substantially reduced by the use of unmanned automated ships. It can be seen that many traditional concepts such as 'care of cargo' and 'localisation of loss', coupled with the scope of multimodal transport operators' obligation and liability related to human error, including those of the master, other crews and sub-contractors, will be finally replaced by the new concepts that will be trade practice in the future. This issue is noted by Lorenzon:

Turning again to the difficulties of multimodal carriage, will it make any sense to worry about non-localised damage? If computer software takes care of the cargo from the moment it is delivered to the first carrier to the moment it is released to the consignee, does it really matter how the software arranges for the carriage? How many automated transshipment hubs the box goes through? How many different modes of transport it used? Does it really matter what criteria the software may adopt to make such choices? It would seem at least doubtful.⁸¹⁰

Regarding the support from the industry in terms of liability system, when the unmanned vessels with cutting edge AI technology and the intelligent containers are fully operational, it can be expected that the perspectives of transport industry players is likely to be completely changed. Let us imagine the brand new environment where all processes from taking the cargo from the consignor's warehouse, through automated vehicle operations and transshipment, until its delivery to the consignee at the destination are carried out with no human contact and no subcontractor unimodal carriers involved, it is not difficult to determine who will thrive: 'the MTO who sells variable liability on *incertus an incertus quando* terms or a player similar to the Transport integrator whose publicity

⁸⁰⁹ 'Human error costs the maritime industry \$541 million per year, according to the United Kingdom Protection and Indemnity (UK P&I) Club; Human error contributes to 84–88% of tanker accidents; Human error contributes to 79% of towing vessel groundings; Over 80% of marine accidents are caused or influenced by human and organization factors; Human error contributes to 89–96% of ship collisions.' See Raluca Apostol-Mates and Alina Barbu, 'Human Error – The Main Factor in Marine Accidents' (2016) XIX(2) *Mircea cel Batran Naval Academy Scientific Bulletin* 451, 451.

⁸¹⁰ Lorenzon (n 797) 333.

says: “Leave it to me. If my drones do not deliver, I will compensate you up to ...”?. This statement appears to be true because when the radical change occurs in the near future, the current fragmented network regime that currently survives would be inadequate to tackle the new challenges, new types of risk and new liability schemes, the new methods to calculate limitation of liability and so on. Ultimately, what the trading world needs is transparency, certainty and predictability.⁸¹¹ In other words, traders should not need to read every word of each particular carriage contract. They should be protected against the risk of being caught by ‘fine print modifications’. At the same time, insurers also require a firm basis for calculating a proportionate premium that truly reflects the exact risks of real-world trading practice.

It is worthwhile noting Lorenzon’s use of Charles Darwin’s renowned theory on evolution to explain the evolution of international trade law:⁸¹²

It is here suggested that when it comes to international commerce, where the law constantly changes to follow new industry needs or overcome problems or situation created by practice, major accidents and new risks, the concept of evolution is extremely apposite. Evolution means first and foremost striving for success, resolving, improving, making more efficient and reliable: the very essence of commerce.⁸¹³

It can be concluded that contract *sui generis* theory should be adopted as the basis for a prospective mandatory legal instrument for multimodal transport because the unique practices of modern containerised multimodal transport will be totally different from mere traditional unimodal carriage of goods and it is very likely that the liability regime as well as the currently controversial issue about limitation of liability will be comprehensively solved. In other words, an absolute uniform liability regime that provides simplicity and transparency with the new standard for monetary limitation of liability based on the up-to-date method of calculating risks will be the most optimal long-term solution for multimodal transport.

⁸¹¹ Alcántara and others (n 758) 4.

⁸¹² Lorenzon (n 16) 164-165.

⁸¹³ *ibid* 165.

Chapter 7: Conclusion

7.1 Conclusion

In relation to the legal uncertainties in terms of multimodal transport documents, three approaches are suggested. Firstly, short-term solutions including organizing a short course or PR strategies regarding the practical knowledge about multimodal transport documents, some crucial issues on the details provided on the documents, negotiability and some basic legal implications should be arranged to promote a better understanding amongst stakeholders.

Secondly, some certain issues should be tackled at national level because it involves the judicial sovereignty of states, for example, the judicial recognition of 'documents of title' status, contractual relationship between multimodal transport operators and cargo interests, and the title to sue. Particularly, at English common law, the amendment of COGSA 1992 or judicial recognition from the English courts is required to eliminate the legal uncertainty and offer proportionate protection to traders as it should be at the same level as that provided to maritime transport document holders. Further, the revision of relevant national laws could be another option that is more realistic, compared to the international approach like launching the new international instrument or amendments of unimodal conventions since the factors involved in the law revision process at national level are far fewer than those at global level. In the long run, it can be anticipated that the national and regional movements in the context of multimodal transport are likely to be a good start. After being in force for a while, they could act as a 'compass' pointing towards the correct direction for a long-term solution that is mutually acceptable to stakeholders in the multimodal transport industry.

Thirdly, the proposed ultimate solution that has been frequently mentioned throughout this thesis is to have a set of international mandatory uniform laws to comprehensively govern the use of multimodal transport documents, clarify the legal

status and function of multimodal transport documents, as well as build up the contractual relationship between multimodal transport operators and cargo interests. However, after the failure of the MT Convention, is it reasonable to still hope for this solution? Although this solution may not happen in a few years, is it possible for a set of international uniform rules to finally become a long term solution?

As a wide range of drawbacks of the current network system have been pointed out throughout this thesis, the issue of predictability and harmonisation is a major problem of this regime since a greater burden and friction costs are placed on the cargo interests who make a claim based on loss, damage or delay that occurs to their goods. After examining possible approaches ie amending the current unimodal conventions, relying on an unlimited freedom of contract, adopting an 'opt out' soft law or simply doing nothing to bother the current network system, it seems obvious that they all have weak spots. In short, the amendment of unimodal conventions is unlikely to happen due to its complicated process and a lack of support from the member states. Secondly, the unlimited freedom of contract approach is considered too risky since the contractual terms are absolutely based on negotiating power and no protection is guaranteed for the party in a weaker position. Thirdly, although the opt-out approach seems be a compromised solution, its status as a set of model rules or soft law leads to an issue of legal enforceability. Fourthly, although several negative aspects of the current regulatory framework were mentioned, 'Do nothing' approach has revealed several contemporary aspects, for instance, the standpoints of the industry and the ability to adapt to a fragmented regime. Ultimately, it persuades us to re-think whether a uniform set of rules is really needed. If so, there is a very real need to deal with all aspects in the prospective international legal instrument more carefully to avoid a failure like the MT Convention.

Theoretically, it is undeniable that the international uniform convention would be the ideal solution that comprehensively cope with all legal uncertainties both in terms of liability regime and the legal status of multimodal transport documents. Unfortunately, due to many factors, particularly resistance from multimodal transport industry players and a lack of international support from major developed countries, this solution is unlikely to happen in the near future. However, if we consider the correlation between

the possibility of a prospective international uniform set of rules regulating multimodal transport and the future evolution of containerised multimodal transport which tends to emphasise the contract *sui generis* nature of multimodal transport contracts, it can be concluded that a uniform set of rules is possible and can be considered as the optimal long-term solution for multimodal transport. The supporting evidence for this statement is based on the fact that the shipping innovations, ie unmanned automated vessels and intelligent containers, will radically differentiate multimodal transport from unimodal carriage and the traditional concepts of unimodal transport will no longer be able to adapt to multimodal transport. It is very likely that the current resistance to a new uniform international legal instrument amongst multimodal transport operators will finally be abolished because of that. However, it should also be noted that before reaching a final long-term solution, a consultation with interested parties is highly recommended as a short-term solution in order to make sure that the new uniform set of rules will utterly match industry's needs, provide proportionate protections, clarify the current legal uncertainty and maintain consistency with the contemporary evolution of multimodal transport operations and international trade practice. Since today's evolutionary pace moves very fast, the familiar 'Do nothing' approach seems to be mistaken since the future of containerised multimodal transport clearly points in the opposite direction. According to Charles Darwin's legendary quote, 'It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change'. When a revolutionary phenomenon is about to occur, this is the time to show the adaptability of the legal community to the new environment and the new challenges.


7.2 Recommendations for future research


As evolution of law is an ongoing process and the contemporary legal systems tend to involve multidisciplinary and integrated knowledge from both theoretical and practical aspects, this thesis aims to promote the movement to emphasise the significant of multimodal transport, particularly multimodal transport documents, in the context of international trade law since it would be futile to seek an optimal way forward without investigating the current conundrums of legal significance and functions of this type of transport documents. At this moment, when technological development and cutting edge

innovations are unavoidable, it is recommended that the future research should focus on electronic substitutes of multimodal transport documents since this area is even more unclear than that of paper-based ones. Further, as mentioned in Chapter 6, the legal community should keep an eye on the technological development that impacts on the nature of multimodal transport operations and containerised carriage, ie unmanned automated vessel, AI technology in containerised carriage and real-time communication system equipped in modern containers, because it will definitely affect the current legal framework regulating multimodal transport. Last but not least, it can be expected that the recently-developed innovations of cryptocurrencies such as “Bitcoin” and intelligent cryptographic record, “Blockchain”, will lead to a revolution in terms of international trade and finance. Therefore, a long-term project on this topic is highly recommended.

Appendices

Appendix 1: A sample of bills of lading for multimodal transport

 MAERSK LINE		BILL OF LADING FOR OCEAN TRANSPORT OR MULTIMODAL TRANSPORT		SCAC: MAEU
				B/L No.
Shipper		Booking No. 865058542		
		Export references		Svc Contract
		Onward inland routing (Not part of Carriage as defined in clause 1. For account and risk of Merchant)		
Consignee (negotiable only if consigned "to order", "to order of" a named Person or "to order of bearer")		Notify Party (see clause 22)		
Vessel (see clause 1 + 19)	Voyage No.	Place of Receipt. Applicable only when document used as Multimodal Transport B/L. (see clause 1)		
Port of Loading	Port of Discharge	Place of Delivery. Applicable only when document used as Multimodal Transport B/L. (see clause 1)		

PARTICULARS FURNISHED BY SHIPPER		Weight	Measurement
Kind of Packages; Description of goods; Marks and Numbers; Container No./Seal No.			
			
Above particulars as declared by Shipper, but without responsibility of or representation by Carrier (see clause 14)			

Freight & Charges	Rate	Unit	Currency	Prepaid	Collect
Carrier's Receipt (see clause 1 and 14). Total number of containers or packages received by Carrier.		Place of Issue of B/L		SHIPPED, as far as ascertained by reasonable means of checking, in apparent good order and condition unless otherwise stated herein, the total number or quantity of Containers or other packages or units indicated in the box entitled "Carrier's Receipt" for carriage from the Port of Loading (or the Place of Receipt, if mentioned above) to the Port of Discharge (or the Place of Delivery, if mentioned above), such carriage being always subject to the terms, rights, defenses, provisions, conditions, exceptions, limitations, and liabilities hereof (INCLUDING ALL THOSE TERMS AND CONDITIONS ON THE REVERSE HEREOF NUMBERED 1-35 AND THOSE TERMS AND CONDITIONS CONTAINED IN THE CARRIER'S APPLICABLE TARIFF) and the Merchant's attention is drawn in particular to the Carrier's liabilities in respect of on deck stowage (see clause 18) and the carrying vessel (see clause 19). Where the bill of lading is non-negotiable the Carrier may give delivery of the Goods to the named consignee upon reasonable proof of identity and without requiring surrender of an original bill of lading. Where the bill of lading is negotiable, the Merchant is obliged to surrender one original, duly endorsed, in exchange for the Goods. The Carrier accepts a duty of reasonable care to check that any such document which the Merchant surrenders as a bill of lading is genuine and original. If the Carrier complies with this duty, it will be entitled to deliver the Goods against what it reasonably believes to be a genuine and original bill of lading, such delivery discharging the Carrier's delivery obligations. In accepting this bill of lading, any local customs or preferences to the contrary notwithstanding, the Merchant agrees to be bound by all Terms and Conditions stated herein whether written, printed, stamped or incorporated on the face or reverse side hereof, as fully as if they were all signed by the Merchant.	
Number & Sequence of Original B(s)/L		Date of Issue of B/L		IN WITNESS WHEREOF the number of original bills of Lading stated on this side have been signed and wherever one original Bill of Lading has been surrendered any others shall be void.	
Declared Value (see clause 7.3)		Shipped on Board Date (Local Time)		Signed for the Carrier A.P. Møller - Maersk A/S trading as Maersk Line	
As Agent(s) for the Carrier					

Appendix 2: A sample of COMBICONBILL

BIMCO		Code Name: "COMBICONBILL"	
Shipper		B/L No. Click here to enter text. Reference No. Click here to enter text.	
		Negotiable COMBINED TRANSPORT BILL OF LADING	
		Revised 1995	
Consigned to order of			
Notify party/address			
Place of receipt			
Ocean Vessel	Port of loading		
Port of discharge	Place of delivery	Freight payable at	Number of original Bills of Lading
Marks and Nos	Quantity and description of goods	Gross weight, kg, Measurement, m ³	
Particulars above declared by Shipper			
Freight and charges		<p>RECEIVED the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated.</p> <p>The Carrier, in accordance with and to the extent of the provisions contained in this Bill of Lading, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the combined transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge to the place and time of delivery and accepts responsibility for such transport and such services.</p> <p>One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.</p> <p>IN WITNESS whereof TWO (2) original Bills of Lading have been signed, if not otherwise stated above, one of which being accomplished the other(s) to be void.</p> <p>Place and date of issue</p>	
Shipper's declared value of		Signed for	
subject to payment of above extra charge.	as Carrier	
<p>Note: The Merchant's attention is called to the fact that according to <u>Clauses 10 to 12</u> and <u>Clause 24</u> of this Bill of Lading, the liability of the Carrier is, in most cases, limited in respect of loss of or damage to the goods and delay.</p>		by	
		As agent(s) only to the Carrier	

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The Baltic and International Maritime Council
(Bimco), Copenhagen, 1995

This document is a computer generated COMBICONBILL form printed by authority of BIMCO. Any insertion or deletion to the form must be clearly visible. In the event of any modification made to the pre-printed text of this document which is not clearly visible, the text of the original BIMCO approved document shall apply. BIMCO assumes no responsibility for any loss, damage or expense as a result of discrepancies between the original BIMCO approved document and this computer generated document.

COMBINED TRANSPORT BILL OF LADING

Adopted by The Baltic and International Maritime Council in January, 1971 (as revised 1995)

Code Name: "COMBICONBILL"

I. GENERAL PROVISIONS

1. **Applicability.**
Notwithstanding the heading "Combined Transport", the provisions set out and referred to in this Bill of Lading shall also apply, if the transport as described in this Bill of Lading is performed by one mode of transport only.

2. **Definitions.**

"Carrier" means the party on whose behalf this Bill of Lading has been signed.
"Merchant" includes the Shipper, the Receiver, the Consignor, the Consignee, the holder of this Bill of Lading and the owner of the goods.

3. **Carrier's Tariff.**

The terms of the Carrier's applicable Tariff at the date of shipment are incorporated herein. Copies of the relevant provisions of the applicable Tariff are available from the Carrier upon request. In the case of inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

4. **Time Bar.**

All liability whatsoever of the Carrier shall cease unless suit is brought within 9 months after delivery of the goods or the date when the goods should have been delivered.

5. **Law and Jurisdiction.**

Disputes arising under this Bill of Lading shall be determined by the courts and in accordance with the law at the place where the Carrier has his principal place of business.

II. PERFORMANCE OF THE CONTRACT

6. **Methods and Routes of Transportation.**

(1) The Carrier is entitled to perform the transport and all services related thereto in any reasonable manner and by any reasonable means, methods and routes.
(2) In accordance herewith, for instance, in the event of carriage by sea, vessels may sail with or without pilots, undergo repairs, adjust equipment, drydock and tow vessels in all situations.

7. **Optional Stowage.**

(1) Goods may be stowed by the Carrier by means of containers, trailers, transportable tanks, flats, pallets, or similar articles of transport used to consolidate goods.
(2) Containers, trailers, transportable tanks and covered flats, whether stowed by the Carrier or received by him in a stowed condition from the Merchant, may be carried on or under deck without notice to the Merchant.

8. **Hindrances etc. Affecting Performance.**

(1) The Carrier shall use reasonable endeavours to complete the transport and to deliver the goods at the place designated for delivery.
(2) If at any time the performance of the contract as evidenced by this Bill of Lading is or will be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, and if by virtue of sub-clause 8.11 the Carrier has no duty to complete the performance of the contract, the Carrier (whether or not the transport is commenced) may elect to:
(a) treat the performance of this Contract as terminated and place the goods at the Merchant's disposal at any place which the Carrier shall deem safe and convenient;
(b) deliver the goods at the place designated for delivery;
(3) If the goods are not taken delivery of by the Merchant at a reasonable time after the Carrier has called upon him to take delivery, the Carrier shall be at liberty to put the goods in safe custody on behalf of the Merchant at the latter's risk and expense.
(4) In any event the Carrier shall be entitled to full freight for goods received for transportation and additional compensation for extra costs resulting from the circumstances referred to above.

III. CARRIER'S LIABILITY

9. **Basic Liability.**

(1) The Carrier shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time of delivery.
(2) The Carrier shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract of carriage evidenced by this Bill of Lading.
(3) The Carrier shall, however, be relieved of liability for any loss or damage if such loss or damage arose or resulted from:
(a) The wrongful act or neglect of the Merchant.
(b) Compliance with the instructions of the person entitled to give them.
(c) The lack of, or defective conditions of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed.
(d) Handling, loading, stowage or unloading of the goods by or on behalf of the Merchant.
(e) Inherent vice of the goods.
(f) Insufficiency or inadequacy of marks or numbers on the goods, covering or unit loads.
(g) Strikes or lock-outs or stoppages or restraints of labour from whatever cause whether partial or general.
(h) Any cause or event which the Carrier could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence.
(4) Where under sub-clause 9 (3) the Carrier is not under any liability in respect of some of the factors causing the loss or damage, he shall only be liable to the extent that those factors for which he is liable under this Clause have contributed to the loss or damage.
(5) The burden of proving that the loss or damage was due to one or more of the causes or events, specified in (a), (b), and (h) of sub-clause 9 (3) shall rest upon the Carrier.
(6) When the Carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events, specified in (c) to (g) of sub-clause 9 (3), it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by one or more of the causes or events.

10. **Amount of Compensation**

(1) When the Carrier is liable for compensation in respect of loss of or damage to the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the Merchant in accordance with the contract or should have been so delivered.
(2) The value of the goods shall be fixed according to the

commodity exchange price or, if there be no such price, according to the current market price or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(3) Compensation shall not, however, exceed two Special Drawing Rights per kilogramme of gross weight of the goods lost or damaged.
(4) Higher compensation may be claimed only when, with the consent of the Carrier, the value for the goods declared by the Shipper which exceeds the limits laid down in this Clause has been stated on the face of this Bill of Lading at the place indicated. In that case the amount of the declared value shall be substituted for that limit.

11. **Special Provisions for Liability and Compensation**

(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:
(a) cannot be departed from by private contract, to the detriment of the claimant, and
(b) would have applied if the Merchant had made a separate and direct contract with the Carrier for the carriage by the same stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply.
(2) Insofar as there is no mandatory law applying to carriage by sea by virtue of the provisions of sub-clause 11 (1), the liability of the Carrier in respect of any carriage by sea shall be determined by the International Brussels Convention of 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 - The Hague/Visby Rules.
(3) The Hague/Visby Rules shall also determine the liability of the Carrier in respect of carriage by inland waterway as if such carriage were carriage by sea. Furthermore, they shall apply to all goods, whether carried on deck or under deck.

12. **Delay, Consequential Loss, etc.**

If the Carrier is held liable in respect of delay, consequential loss or damage other than loss of or damage to the goods, the liability of the Carrier shall be limited to the freight for the transport covered by this Bill of Lading, or the value of the goods as determined in Clause 10, whichever is the lesser.

13. **Notice of Loss of or Damage to the Goods.**

(1) Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the Merchant to the Carrier when the goods are handed over to the Carrier, or when the goods are received by the Carrier, the Carrier shall not be liable for such loss or damage.
(2) Where the loss or damage is not apparent, the same *prima facie* shall apply in any action against the Carrier for loss or damage to the goods if notice in writing is not given within three (3) consecutive days after the day when the goods were handed over to the Merchant.

14. **Defences and Limits for the Carrier, Servants, etc.**

(1) The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage to the goods whether the action can be founded in contract or in tort.
(2) The Carrier shall not be entitled to the benefit of the limitation of liability provided for in sub-clause 10 (3), if it is proved that the loss or damage resulted from a personal act or omission of the Carrier done with intent to cause such loss or damage or recklessly and with knowledge that damage would probably result.
(3) The Merchant undertakes that no claim shall be made against any servant, agent or other persons whose services the Carrier has used in order to perform this Contract and if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof.
(4) However, the provisions of this Bill of Lading apply whenever claims relating to the performance of this Contract are made against any servant, agent or other person whose services the Carrier has used in order to perform this Contract, whether such claims are founded in contract or in tort. In entering into this Contract, the Carrier, to the extent of such provisions, does so not only on his own behalf but also as agent or trustee for such persons. The aggregate liability of the Carrier and such persons shall not exceed the limits in Clauses 10, 11 and 24, respectively.

IV. DESCRIPTION OF GOODS

15. **Carrier's Responsibility.**

The information in this Bill of Lading shall be *prima facie* evidence of the taking in charge by the Carrier of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, have been made in the printed text or superimposed on the Bill of Lading. Proof to the contrary shall not be admissible when the Bill of Lading has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the Consignee who in good faith has relied and acted thereon.

16. **Shipper's Responsibility.**

The Shipper shall be deemed to have guaranteed to the Carrier the accuracy, at the time the goods were taken in charge by the Carrier, of the description of the goods, marks, number, quantity and weight, as furnished by him, and the Shipper shall defend, indemnify and hold harmless the Carrier against all loss, damage and expenses arising or resulting from inaccuracies in or inadequacy of such particulars. The right of the Carrier to such indemnity shall in no way limit his responsibility and liability under this Bill of Lading to any person other than the Shipper. The Shipper shall remain liable even if the Bill of Lading has been transferred by him.

17. **Shipper-packed Containers, etc.**

(1) If a container has not been filled, packed or stowed by the Carrier, the Carrier shall not be liable for any loss of or damage to its contents and the Merchant shall cover any loss or expense incurred by the Carrier, if such loss, damage or expense has been caused by:
(a) negligent filling, packing or stowing of the container;
(b) the contents being unsuitable for carriage in container; or
(c) the unsuitability or defective condition of the container unless the container has been supplied by the Carrier and the unsuitability or defective condition would not have been apparent upon reasonable inspection at or prior to the time when the

container was filled, packed or stowed.

(2) The provisions of sub-clause (1) of this Clause also apply with respect to trailers, transportable tanks, flats and pallets which have not been filled, packed or stowed by the Carrier.
(3) The Carrier does not accept liability for damage due to the unsuitability or defective condition of reefer equipment or trailers supplied by the Merchant.

18. **Dangerous Goods.**

(1) The Merchant shall comply with all internationally recognised requirements and all rules which apply according to national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any event inform the Carrier in writing of the exact nature of the danger before goods of a dangerous nature are taken into charge by the Carrier and indicate to him, if need be, the precautions to be taken.
(2) Goods of a dangerous nature which the Carrier did not know were dangerous, may, at any time or place, be unloaded, destroyed, or rendered harmless, without Compensation; further, the Merchant shall be liable for all expenses, loss or damage arising out of their handling over for carriage or of their carriage.
(3) If any goods shipped with the knowledge of the Carrier as to their dangerous nature shall become a danger to any person or property, they may in like manner be landed at any place or destroyed or rendered innocuous by the Carrier without liability on the part of the Carrier except to General Average, if any.

19. **Return of Containers**

(1) For the purpose of this Clause the Consignor shall mean the person who concludes this Contract with the Carrier and the Consignee shall mean the person entitled to receive the goods from the Carrier.

(2) Containers, pallets or similar articles of transport supplied by or on behalf of the Carrier shall be returned to the Carrier in the same order and condition as handed over to the Merchant, normal wear and tear excepted, with interiors clean and within the time prescribed in the Carrier's tariff or elsewhere.

(3) (a) The Consignor shall be liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignor and return to the Carrier for carriage.
(b) The Consignor and the Consignee shall be jointly and severally liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignee and return to the Carrier.

V. FREIGHT AND LIEN

20. **Freight.**

(1) Freight shall be deemed earned when the goods have been taken in charge by the Carrier and shall be paid in any event.
(2) The Merchant's attention is drawn to the stipulations concerning currency in which the freight and charges are to be paid, rate of exchange, devaluation and other contingencies relative to freight and charges in the relevant tariff conditions. If no such stipulation as to devaluation exists or if applicable the following shall apply:
If the currency in which freight and charges are quoted is devalued between the date of the freight agreement and the date when the freight and charges are paid, then all freight and charges shall be automatically and immediately increased in proportion to the extent of the devaluation of the said currency.

(3) For the purpose of verifying the freight basis, the Carrier reserves the right to have the contents of containers, trailers or similar articles of transport inspected in order to ascertain the weight, measurement, value, or nature of the goods.

21. **Lien.**

The Carrier shall have a lien on the goods for any amount due under this Contract and for the costs of recovering the same, and may enforce such lien in any reasonable manner, including sale or disposal of the goods.

VI. MISCELLANEOUS PROVISIONS

22. **General Average.**

(1) General Average shall be adjusted at any port or place at the Carrier's option, and to be settled according to the York-Antwerp Rules 1994, or any modification thereof, this covering all goods, whether carried on or under deck. The New Jason Clause as approved by BIMCO to be considered as incorporated herein.

(2) Such security including a cash deposit as the Carrier may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon, shall, if required, be submitted to the Carrier prior to delivery of the goods.

23. **Both-to-Blame Collision Clause.**

The Both-to-Blame Collision Clause as adopted by BIMCO shall be considered incorporated herein.

24. **U.S. Trade**

(1) In case the contract evidenced by this Bill of Lading is subject to the Carriage of Goods by Sea Act of the United States of America, 1936 (U.S. COGSA), then the provisions stated in the said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.
(2) If the U.S. COGSA applies, and unless the nature and value of the goods have been declared by the shipper before the goods have been handed over to the Carrier and inserted in this Bill of Lading, the Carrier shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding USD 500 per package or customary freight unit.

Appendix 3: A sample of MULTIDOC 95

"MULTIDOC 95" Multimodal Transport Bill of Lading		
Code Name: "MULTIDOC 95"	MT Doc. No.	
BIMCO Consignor	Negotiable	Reference No.
Consigned to order of	MULTIMODAL TRANSPORT BILL OF LADING	
Notify party/address	Issued by The Baltic and International Maritime Council (BIMCO), subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481).	
Place of receipt	Issued 1995	
Ocean Vessel	Port of loading	
Port of discharge	Place of delivery	
Marks and Nos.	Quantity and description of goods	Gross weight, kg, Measurement, m ³
Particulars above declared by Consignor		
Freight and charges	<p>RECEIVED the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated.</p> <p>The MTO, in accordance with and to the extent of the provisions contained in this MT Bill of Lading, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the multimodal transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge to the place and time of delivery and accepts responsibility for such transport and such services.</p> <p>One of the MT Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.</p> <p>IN WITNESS whereof MT Bill(s) of Lading has/have been signed in the number indicated below, one of which being accomplished the other(s) to be void.</p>	
Consignor's declared value of subject to payment of above extra charge.	Freight payable at	Place and date of issue
Note: The Merchant's attention is called to the fact that according to Clauses 10 to 12 of this MT Bill of Lading, the liability of the MTO is, in most cases, limited in respect of loss of or damage to the goods.	Number of original MT Bills of Lading	Signed for the Multimodal Transport Operator (MTO)
	 as Carrier
		by
		As agent(s) only to the MTO

p.t.o

"MULTIDOC 95" Multimodal Transport Bill of Lading

MULTIMODAL TRANSPORT
BILL OF LADING

Code Name: "MULTIDOC 95"

I. GENERAL PROVISIONS

1. Applicability

The provisions of this Contract shall apply irrespective of whether there is a unimodal or a Multimodal Transport Contract involving one or several modes of transport.

2. Definitions

"Multimodal Transport Contract" means a single Contract for the carriage of Goods by at least two different modes of transport. "Multimodal Transport Bill of Lading" (MT Bill of Lading) means this document evidencing a Multimodal Transport Contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and is issued in a negotiable form.

"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.

"Carrier" means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the Multimodal Transport Operator or not. "Merchant" includes the Shipper, the Receiver, the Consignor, the Consignee, the holder of this MT Bill of Lading and the owner of the Goods.

"Consignor" means the person who concludes the Multimodal Transport Contract with the Multimodal Transport Operator.

"Consignee" means the person entitled to receive the Goods from the Multimodal Transport Operator.

"Taken in charge" means that the Goods have been handed over to and accepted for carriage by the MTO.

"Delivery" means

- (i) the handing over of the Goods to the Consignee; or
- (ii) the placing of the Goods at the disposal of the Consignee in accordance with the Multimodal Transport Contract or with the law or usage of the particular trade applicable at the place of delivery; or
- (iii) the handing over of the Goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the Goods must be handed over.

"Special Drawing Rights" (SDR) means the unit of account as defined by the International Monetary Fund.

"Goods" means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

3. MTO's Tariff

The terms of the MTO's applicable tariff at the date of shipment are incorporated herein. Copies of the relevant provisions of the applicable tariff are available from the MTO upon request. In the case of inconsistency between this MT Bill of Lading and the applicable tariff, this MT Bill of Lading shall prevail.

4. Time Bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under this MT Bill of Lading unless suit is brought within nine months after:

- (i) the Delivery of the Goods; or
- (ii) the date when the Goods should have been delivered; or
- (iii) the date when, in accordance with sub-clause 10 (e) failure to deliver the Goods would give the Consignee the right to treat the Goods as lost.

5. Law and Jurisdiction

Disputes arising under this MT Bill of Lading shall be determined by the courts and in accordance with the law at the place where the MTO has his principal place of business.

II. PERFORMANCE OF THE CONTRACT

6. Methods and Routes of Transportation

(a) The MTO is entitled to perform the transport in any reasonable manner and by any reasonable means, methods and routes.

(b) In accordance herewith, for instance, in the event of carriage by sea, vessels may sail with or without pilots, undergo repairs, adjust equipment, drydock and tow vessels in all situations.

7. Optional Stowage

(a) Goods may be stowed by the MTO by means of containers, trailers, transportable tanks, flats, pallets, or similar articles of transport used to consolidate Goods.

(b) Containers, trailers, transportable tanks and covered flats, whether stowed by the MTO or received by him in a stowed condition, may be carried on or under deck without notice to the Merchant.

8. Delivery of the Goods to the Consignee

The MTO undertakes to perform or to procure the performance of all acts necessary to ensure Delivery of the Goods:

- (i) when the MT Bill of Lading has been issued in a negotiable form "to bearer", to the person surrendering one original of the document; or
- (ii) when the MT Bill of Lading has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed; or
- (iii) when the MT Bill of Lading has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transferred "to order" or in blank, the provisions of (i) above apply.

9. Hindrances, etc. Affecting Performance

(a) The MTO shall use reasonable endeavours to complete the transport and to deliver the Goods at the place designated for Delivery.

(b) If at any time the performance of the Contract as evidenced by this MT Bill of Lading is or will be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind and if by virtue of sub-clause 9 (a) the MTO has no duty to complete the performance of the Contract, the MTO (whether or not the transport is commenced) may elect to

- (i) treat the performance of this Contract as terminated and place the Goods at the Merchant's disposal at any place which the MTO shall deem safe and convenient; or
- (ii) deliver the Goods at the place designated for Delivery.

(c) If the Goods are not taken Delivery of by the Merchant within a reasonable time after the MTO has called upon him to take Delivery, the MTO shall be at liberty to put the Goods in safe custody on behalf of the Merchant at the latter's risk and expense. (d) In any event the MTO shall be entitled to full freight for Goods received for transportation and additional compensation for extra costs resulting from the circumstances referred to above.

III. LIABILITY OF THE MTO

10. Basis of Liability

(a) The responsibility of the MTO for the Goods under this Contract covers the period from the time the MTO has taken the Goods into his charge to the time of their Delivery.

(b) Subject to the defenses set forth in Clauses 11 and 12, the MTO shall be 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 his charge as defined in sub-clause 10 (a), unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in sub-clause 10 (c) has caused or contributed to the loss, damage or delay in Delivery.

However, the MTO shall only be liable for loss following from delay in Delivery if the Consignor has made a written declaration of interest in timely Delivery which has been accepted in writing by the MTO.

(c) The MTO shall be responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the Contract, as if such acts and omissions were his own.

(d) Delay in Delivery occurs when the Goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case.

(e) If the Goods have not been delivered within ninety (90) consecutive days following the date of Delivery determined according to Clause 10 (d) above, the claimant may, in the absence of evidence to the contrary, treat the Goods as lost.

11. Defences for Carriage by Sea or Inland Waterways

Notwithstanding the provisions of Clause 10 (b), the MTO shall not be responsible for loss, damage or delay in Delivery with respect to Goods carried by sea or inland waterways when such loss, damage or delay during such carriage results from: (a) neglect, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the vessel;

(b) fire, unless caused by the actual fault or privity of the Carrier;

(c) the causes listed in the Hague-Visby Rules article 4.2 (c) to (j); however, always provided that whenever loss or damage has resulted from unseaworthiness of the vessel, the MTO can prove that due diligence has been exercised to make the vessel seaworthy at the commencement of the voyage.

12. Limitation of Liability

(a) 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 Bill of Lading, the MTO shall in no event be or become liable for any loss of or damage to the Goods in an amount exceeding:

- (i) when the Carriage of Goods by Sea Act of the United States of America, 1936 (US COGSA) applies USD 500 per package or customary freight unit; or
- (ii) when any other law applies, the equivalent of 666.67 SDR per package or unit or two SDR per kilogramme of gross weight of the Goods lost or damaged, whichever is the higher.

(b) Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the MT Bill of Lading as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

(c) Notwithstanding the above-mentioned provisions, 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 shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the Goods lost or damaged.

(d) In any case, 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 MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

(e) If the MTO is liable in respect of loss following from delay in Delivery, or consequential loss or damage other than loss of or damage to the Goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the Freight under the Multimodal Transport Contract for the Multimodal Transport.

(f) The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the Goods.

(g) The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in Delivery resulted from a personal act or omission of the MTO 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.

13. Assessment of Compensation

(a) Assessment of compensation for loss of or damage to the Goods shall be made by reference to the value of such Goods at the place and time they are delivered to the Consignee or at the place and time when, in accordance with the Multimodal Transport Contract, they should have been so delivered.

(b) The value of the Goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of Goods of the same kind and quality.

14. Notice of loss of or Damage to the Goods

(a) Unless notice of loss of or damage to the Goods, specifying the general nature of such loss or damage, is given in writing by the Consignee to the MTO when the Goods are handed over to the Consignee, such handing over is prima facie evidence of the Delivery by the MTO of the Goods as described in the MT Bill of Lading.

(b) Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within six consecutive days after the day when the Goods were handed over to the Consignee.

15. Defences and Limits for the MTO, Servants, etc.

(a) The provisions of this Contract apply to all claims against the MTO relating to the performance of the Multimodal Transport Contract, whether the claim be founded in contract or in tort.

(b) The Merchant undertakes that no claim shall be made against any servant, agent or other persons whose services the MTO has used in order to perform the Multimodal Transport Contract and if any claim should nevertheless be made, to indemnify the MTO against all consequences thereof.

(c) However, the provisions of this Contract apply whenever claims relating to the performance of the Multimodal Transport Contract are made against any servant, agent or other person whose services the MTO has used in order to perform the Multimodal Transport Contract, whether such claims are founded in contract or in tort. In entering into this Contract, the MTO, to the extent of such provisions, does so not only on his own behalf but also as agent or trustee for such persons. The aggregate liability of the MTO and such persons shall not exceed the limits in Clause 12.

IV. DESCRIPTION OF GOODS

16. MTO's Responsibility

The information in the MT Bill of Lading shall be prima facie evidence of the taking in charge by the MTO of the Goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, have been made in the printed text or superimposed on the document. Proof to the contrary shall not be admissible when the MT Bill of Lading has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the Consignee who in good faith has relied and acted thereon.

17. Consignor's Responsibility

(a) The Consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the Goods were taken in charge by the MTO, of all particulars relating to the general nature of the Goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the Goods as furnished by him or on his behalf for insertion in the MT Bill of Lading.

(b) The Consignor shall indemnify the MTO for any loss or expense caused by inaccuracies in or inadequacies of the particulars referred to above.

(c) The right of the MTO to such indemnity shall in no way limit his liability under the Multimodal Transport Contract to any person other than the Consignor.

(d) The Consignor shall remain liable even if the MT Bill of Lading has been transferred by him.

18. Return of Containers

(a) Containers, pallets or similar articles of transport supplied by or on behalf of the MTO shall be returned to the MTO in the same order and condition as when handed over to the Merchant, normal wear and tear excepted, with interiors clean and within the time prescribed in the MTO's tariff or elsewhere.

(b) (i) The Consignor shall be liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignor and return to the MTO for carriage.

(ii) The Consignor and the Consignee shall be jointly and severally liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignee and return to the MTO.

19. Dangerous Goods

(a) The Consignor shall comply with all internationally recognised requirements and all rules which apply according to national law or by reason of international convention, relating to the carriage of Goods of a dangerous nature, and shall in any event inform the MTO in writing of the exact nature of the danger before Goods of a dangerous nature are taken in charge by the MTO and indicate to him, if need be, the precautions to be taken. (b) If the Consignor fails to provide such information and the

"MULTIDOC 95" Multimodal Transport Bill of Lading

MTO is unaware of the dangerous nature of the Goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation and the Consignor shall be liable for all loss, damage, delay or expenses arising out of their being taken in charge, or their carriage, or of any service incidental thereto.

The burden of proving that the MTO knew the exact nature of the danger constituted by the carriage of the said Goods shall rest upon the person entitled to the Goods.

(c) If any Goods shipped with the knowledge of the MTO as to their dangerous nature shall become a danger to the vessel or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the MTO without liability on the part of the MTO except to General Average, if any.

20. Consignor-packed Containers, etc.

- (a) If a container has not been filled, packed or stowed by the MTO, the MTO shall not be liable for any loss of or damage to its contents and the Consignor shall indemnify any loss or expense incurred by the MTO if such loss, damage or expense has been caused by:
- (i) negligent filling, packing or stowing of the container;
 - (ii) the contents being unsuitable for carriage in container; or
 - (iii) the unsuitability or defective condition of the container unless the container has been supplied by the MTO and the unsuitability or defective condition would not have been apparent upon reasonable inspection at or prior to the time when the container was filled, packed or stowed.
- (b) The provisions of sub-clause (a) of this Clause also apply with respect to trailers, transportable tanks, flats and pallets which have not been filled, packed or stowed by the MTO.
- (c) The MTO does not accept liability for damage due to the

unsuitability or defective condition of reefer equipment or trailers supplied by the Merchant.

V. FREIGHT AND LIEN

21. Freight

- (a) Freight shall be deemed earned when the Goods have been taken into charge by the MTO and shall be paid in any event.
- (b) The Merchant's attention is drawn to the stipulations concerning currency in which the freight and charges are to be paid, rate of exchange, devaluation and other contingencies relative to freight and charges in the relevant tariff conditions. If no such stipulation as to devaluation exists or is applicable the following provision shall apply:

If the currency in which freight and charges are quoted is devalued or revalued between the date of the freight agreement and the date when the freight and charges are paid, then all freight and charges shall be automatically and immediately changed in proportion to the extent of the devaluation or revaluation of the said currency. When the MTO has consented to payment in other currency than the above mentioned currency, then all freight and charges shall - subject to the preceding paragraph - be paid at the highest selling rate of exchange for banker's sight draft current on the day when such freight and charges are paid. If the banks are closed on the day when the freight is paid the rate to be used will be the one in force on the last day the banks were open.

- (c) For the purpose of verifying the freight basis the MTO reserves the right to have the contents of containers, trailers or similar articles of transport inspected in order to ascertain the weight, measurement, value, or nature of the Goods. If on such inspection it is found that the declaration is not correct, it is agreed that a sum equal either to five times the difference between the correct freight and the freight charges or to double the correct freight less the freight charges, whichever sum is the

smaller, shall be payable as liquidated damages to the MTO notwithstanding any other sum having been stated on this MT Bill of Lading as the freight payable.

- (d) All dues, taxes and charges levied on the Goods and other expenses in connection therewith shall be paid by the Merchant.

22. Lien

The MTO shall have a lien on the Goods for any amount due under this Contract and for the costs of recovering the same, and may enforce such lien in any reasonable manner, including sale or disposal of the Goods.

VI. MISCELLANEOUS PROVISIONS

23. General Average

- (a) General Average shall be adjusted at any port or place at the MTO's option, and to be settled according to the York-Antwerp Rules 1994, or any modification thereof, this covering all Goods, whether carried on or under deck. The New Jason Clause as approved by BIMCO to be considered as incorporated herein.
- (b) Such security including a cash deposit as the MTO may deem sufficient to cover the estimated contribution of the Goods and any salvage and special charges thereon, shall, if required, be submitted to the MTO prior to Delivery of the Goods.


24. Both-to-Blame Collision Clause

The Both-to-Blame Collision Clause as adopted by BIMCO shall be considered incorporated herein.

25. U.S. Trade

In case the Contract evidenced by this MT Bill of Lading is subject to U.S. COGSA, then the Provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the Goods are in the Carrier's custody.

Appendix 4: A sample of MULTIWAYBILL

Code Name: "MULTIWAYBILL"		MT Doc. No.
Consignor		Reference No.
		MULTIMODAL TRANSPORT WAYBILL Issued by The Baltic and International Maritime Council (BIMCO), subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No. 481) and to the CMI Uniform Rules for Sea Waybills. Issued 1995
Consignee (not to order)		
Notify party/address		
Place of receipt		
Ocean Vessel	Port of loading	
Port of discharge	Place of delivery	
Marks and Nos.	Quantity and description of goods	Gross weight, kg, Measurement, m ³
Particulars above declared by Consignor		
Freight and charges	RECEIVED the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated. The MTO, in accordance with and to the extent of the provisions contained in this MT Waybill, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the multimodal transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge to the place and time of delivery and accepts responsibility for such transport and such services. The Consignor shall be entitled to transfer right of control of the cargo to the Consignee, the exercise of such option to be noted on this MT Waybill and to be made no later than the receipt of the cargo by the Carrier.	
Consignor's declared value of	Freight payable at	Place and date of issue
subject to payment of above extra charge.		Signed for the Multimodal Transport Operator (MTO) as Carrier
Note: The Merchant's attention is called to the fact that according to Clauses 10 to 12 of this MT Waybill, the liability of the MTO is, in most cases, limited in respect of loss of or damage to the goods.		by As agent(s) only to the MTO

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The Baltic and International Maritime Council
(BIMCO), Copenhagen, 1995

Printed by the BIMCO Charter Party Editor

p.t.o.

Appendix 5: A sample of COMBICONBILL



Code Name: "COMBICONBILL"

Shipper

B/L No. [Click here to enter text.](#)Reference No. [Click here to enter text.](#)

Negotiable

COMBINED TRANSPORT BILL OF LADING

Revised 1995

Consigned to order of

Notify party/address

Place of receipt

Ocean Vessel

Port of loading

Port of discharge

Place of delivery

Freight payable at

Number of original Bills of Lading

Marks and Nos

Quantity and description of goods

Gross weight, kg, Measurement, m³

Particulars above declared by Shipper

Freight and charges

RECEIVED the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated.

The Carrier, in accordance with and to the extent of the provisions contained in this Bill of Lading, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the combined transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge to the place and time of delivery and accepts responsibility for such transport and such services.

One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.

IN WITNESS whereof TWO (2) original Bills of Lading have been signed, if not otherwise stated above, one of which being accomplished the other(s) to be void.

Shipper's declared value of

Place and date of issue

subject to payment of above extra charge.

Signed for

.....as Carrier

by

As agent(s) only to the Carrier

Note:
The Merchant's attention is called to the fact that according to [Clauses 10 to 12](#) and [Clause 24](#) of this Bill of Lading, the liability of the Carrier is, in most cases, limited in respect of loss of or damage to the goods and delay.

Appendix 6: A sample of CMR International Consignment Note for multimodal carriage

LETTRE DE VOITURE INTERNATIONALE **CMR** **INTERNATIONAL CONSIGNMENT NOTE**

Sender (Name, Address, Country) Expéditeur (Nom, Adresse, Pays)		1	Senders/Agents References Référence de l'expéditeur/de l'agent		2/3
Consignee (name, Address, Country) Destinataire (Nom, Adresse, Pays)		4	Carrier (Name, Address, Country) Transporteur (Nom, Adresse, Pays)		5
Place & date of taking over the goods (place, country, date) Lieu et date de la prise en charge des marchandises (lieu, pays, date)		6	Successive Carriers Transporteurs successifs		7
Place designated for delivery of goods (place, country) Lieu prévu pour la livraison des marchandises (lieu, pays)		8	<p>This carriage is subject, notwithstanding any clause to the contrary, to the conversion on the Contract for the international Carriage of Goods by Road (CMR) Ce transport est soumis nonobstant toute clause contraire à la Convention Relative au Contract de Transport International de Marchandises par Route (CMR)</p>		
Marks & Nos: No & Kind of Packages: Description of Goods* Marques et Nos: No et nature des colis; Désignation des marchandises*		9	Gross weigh (kg) Poids Brut (kg)	10	Volume (m ³) Cubage (m ³)
Carriage Charges Prix de transport		12	Sender's Instructions for Customs, etc... Instructions de l'Expéditeur (optional)		
Reservations Réserves		14	Documents attached Documents Annexés (optional)		
			Special agreements Conventions particulières (optional)		
Goods Received/Marchandises Reçues		17	Signature of Carrier/Signature du transporteur		18
			Company completing this note Société émettrice		19
			Place and Date; Signature Lieu et date; Signature		20

Approved by FIAT/HAUSIT/PRO UK 1981:1987 COPY 1 BENDER
 COPY 2 CONSIGNEE
 COPY 3 CARRIER
 193922
 *NB FOR DANGEROUS GOODS
 INDICATE
 1. CORRECT TECHNICAL NAME (PROPER SHIPPING NAME)
 2. HAZARD CLASS
 3. UN NUMBER
 4. FLASHPOINT (IF ANY)
 IN°C.

Appendix 7: A sample of CIM/UIRR Consignment Notes

TEL (1) 43 87 41 79 - TELEX 285 625 F

UIRR

Contrat
Vertrag
Contratto
Contract

① Gare de départ / Versandbahnhof / Stazione di partenza / Forwarding station

② Expéditeur / Absender / Mittente / Consignor

③ Destinataire / Empfänger / Destinataro / Consignee

④ Client à facturer / Rechnungsempfänger / Da fatturare a / Firm paying charges

⑤ Douane de départ / Versandzoll in Dogana di partenza / Export customs A dédouaner à / Zu verzollen in Da sdoganare a / To be cleared through customs at

⑥ Tarifs et itinéraires demandés Verlangte Tarife und Wege Tariffe e itinerari richiesti Tariffs and routes required

⑦ Gare destinataire Empfangsbahnhof Stazione destinataria Destination station

⑧ N° Identification / Kennzeichen No. No. Identificazione / Registration N°

⑨ Description de la marchandise Bezeichnung der Güter Descrizione della merce Description of Goods

⑩ Documents douaniers Zolldokumente Documenti doganali Customs documents Piombage / Plombiert Piombatura / Seal

⑪ Aide aux constatations éventuelles / Hilfe für evtl. feststellen Eventuale constatazioni di danni / Potential damages

⑫ Nom du chauffeur / Namen der Fahrer Nome dell'auista / Name of Driver

⑬ La société de ferroutage expéditrice Versand Hupackgesellschaft La società di ferroutage mittente For warding piggy back company

⑭ Signature de l'expéditeur / Unterschrift des Absenders Firma del mittente / Signature of Sender

⑮ La société de ferroutage destinataire Empfang-Hupackgesellschaft La società di ferroutage destinataria Receiving piggy back company

⑯ Signature / Unterschrift / Firma

⑰ Date / Datum / Data

⑱ Wagon / Wagen / Vagone / Wagon No.

⑲ Référence / Referenz / Riferimento

⑳ Déclaration / Erklärungen / Dichiarazioni / Declaration

㉑ Date / Datum / Data

㉒ Wagon / Wagen / Vagone / Wagon No.

㉓ Le transport est soumis à la CIM et aux conditions générales de Ferroutage de l'UIRR et des sociétés de Ferroutage

㉔ Es gelten die CIM und die allgemeinen Geschäftsbedingungen für den Internationalen Hupackverkehr (UIRR - Bedingungen) und der beteiligten Hupackgesellschaften Sono valide le norme della CIM e le condizioni generali dell'UIRR e delle società di ferroutage Transport is subject to the terms of business of the UIRR the piggy-back companies involved and to CIM conditions of carriage

㉕ Exemple pour / Ausfertigung für / Copia per / Copy for.

BLANC : Facturation ROSE : Transit
JAUNE FONCÉ : Centre destinataire VERT : Expéditeur
BLEU : Destinataire JAUNE CLAIR : Souche

㉖ Poids / Gewicht Peso / Weight Kg

㉗ Timbre en Compte avec le Trésor Autorisation du 7 juillet 1969

㉘ Codification de la case / Erläuterung zu Feld 25 Codificazioni della casella 25 / Code to box 25

㉙ A Type / Art / Genre / Material

0 Châssis / Sattelanhänger horizontal verladen / Telaio / Chassis
1 Semi-Remorque / Sattelanhänger Semirimocchio / Semi-trailer
Vehicule articulé / Sattelzug Autoarticolato / Articulated vehicle
2 ou / oder / od / or
Train routier / Lastzug Autotreno / Road train
3 Camion / Tracteur / 1 KW solo Zugmaschine / Camion / Tractor unit
Casse Mobile / Wechselbehälter Cassa Mobile / Swap body
4 12.19 ≤
5 9.51 ≤ 12.18 m
6 6.05 ≤ 6.30 m
7 6.31 ≤ 7.15 m
8 7.16 ≤ 8.30 m
9 8.31 ≤ 9.50 m

㉚ B Spécialisation / Aufiare-Art Specializzazioni / Specialised

0 Plateau / Offen Piatto / Flat
1 Savoyarde / Mit Plane Telonato / Tilt
2 Citerne / Tankaufbau Cisterna / Tank
3 Frigo / Thermosaufbau Furgonato / Box
4 Furgonato / Kofferaufbau Furgonato / Box
5 Sile

㉛ C Plein-Vide / Voll-Leer Pieno-Vuoto / Laden-Empty

0 Vide / Leer Vuoto / Empty
1 Plein / Voll Pieno / Laden
2 Emballages vides / Leereschachtel Imballaggi vuoti / Empty unit

㉜ D Jumeilage / Zusammengehörigkeit Abbinamento / Marriage

1 1° / 1. / I / 1 st
2 2° / 2. / II / 2 nd
3 3° / 3. / III / 3 rd

㉝ Observations / Vermerke / Osservazioni Remarks

㉞ Pays-Land-Paese Gare-Bahnhof-Station

㉟ Date d'expédition (jour-mois) Versanddatum (Tag-Monat) Date di spedizione (giorno-mese)

㊱ Antaggio-Emplate Antico No.

VOIR CONDITIONS GENERALES AU VERSO

Appendix 8: A sample of CIM Consignment Notes for Combined Transport

To be completed by the combined transport operator or the customer/forwarding haulier
A remplir par l'entreprise de transport combiné ou le client/remettant

X Mark the box applicable with a cross – Désigner par une croix ce qui convient
 (Boxes – Cases 20, 22, 23, 30, 52, 58)

Notwithstanding any clause to the contrary, carriage of goods shall be subject to the CIM Uniform Rules. In addition, the carrier's General Terms and Conditions of Carriage shall apply. Nonobstant toute clause contraire, le transport des marchandises est soumis aux Règles uniformes CIM. Sont en outre applicables les conditions générales de transport du transporteur.

Except as otherwise agreed, the haulage of empty wagons shall be subject to the CIM Uniform Rules. In addition the relevant contractual conditions of the railway undertaking shall apply. Sauf convention contraire, l'acheminement des wagons vides est soumis aux Règles uniformes CIM. Sont en outre applicables les conditions contractuelles de transport ferroviaire.

1 CIM Consignment Note for Combined Transport
 Lettre de voiture CIM transport combiné

2 Consignor (name, address) – Expéditeur (nom, adresse)

Signature

VAT no. / N° TVA

3 Consignee (name, address, country) / Destinataire (nom, adresse, pays)

E-Mail

Tel.

Fax

4 Documents attached – Annexes

5 Consignor's declarations / Déclarations de l'expéditeur

6 Consignor's reference – Référence expéditeur

7 Delivery point / Lieu de livraison

8 Station – Gare

9 Country – Pays

10 Commercial specification – Conditions commerciales

11 Information for the consignee – Informations pour le destinataire

12 No UTI / Type UTI / Length UTI / Net mass (weight) / Tare UTI / Description of the goods / N° UTI / Type UTI / Longueur UTI / Masse nette / Tare UTI / Désignation de la marchandise

13 Exceptional consignment / Transport exceptionnel

14 RID

15 NHM Code UTI 1

16 Gross mass (weight) UTI 1

17 Declaration of value / Déclaration de valeur

18 Interest in delivery / Intérêt à la livraison

19 Cash on delivery / Remboursement

20 Customs endorsements / Indications douanières

21 Examination / Vérification

22 Payment / Paiement

23 Route – Itinéraires

24 Customs procedures – Opérations douanières

25 Charges note / Bulletin d'affranchissement

26 Notification of payment no. / Avis d'encaissement N°

27 Formal report no. / Procès-verbal N°

28 Extension of transit time – Prolongation du délai de livraison

29 Carrier's declarations – Déclarations du transporteur

30 Other carriers – Autres transporteurs

31 Date of arrival – Date d'arrivée

32 Made available / Mise à disposition

33 Acknowledgement of receipt / Quitittance du destinataire

34 Consignment number / Identification de l'envoi

35 Country – Pays

36 Station – Gare

37 Undertaking / Entreprise

38 Consignee's reference / Exp. N°

39 Place and date completed – Lieu et date d'établissement

40 Date, signature

41 Original

42 Code for the principal / Code principal obligé

43 Signature

44 Arrival no. – Arrivage N°

45 Date of arrival – Date d'arrivée

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Appendix 9: A sample of letter of credit in SWIFT format

SAMPLE EXPORT LETTER OF CREDIT

7/20/2012 10:19:22	

Authentication Result:CORRECT	
Priority:N-Normal Message	

----- Message Header -----	
SWIFT Output	: FIN700-Issue of Documentary Credit
Sender	ABNASCSCAXXX
	ABN AMRO BANK N.V., SINGAPORE BRANCH
	SINGAPORE
Receiver	: FTBCUS3CXXX
	FIFTH THIRD BANK
	CINCINNATI, OH US

----- Message Text -----	
:27 :Sequence of Total	: 1/1
:40A:Form of Documentary Credit:	IRREVOCABLE
:20 :Documentary Credit Number	: L960477
:31C:Date of Issue	: 120720
:40E:Applicable Rules	: UCP600
:31D:Date and Place of Expiry	: 120831 IN U.S.A.
:50 :Applicant	: ABC COMPANY
	21 ANY STREET
	SINGAPORE 659539
:59 :Beneficiary	: KENT COMPANY
	52 LOIS LANE
	METROPOLIS, IN 48182
	USA
:32B:Currency Code, Amount	: USD10,000.00
:41D:Available with... by...	: ANY BANK
	BY NEGOTIATION
:42C:Drafts at	: SIGHT
:42D:Drawee	: ABN AMRO BANK N.V., SINGAPORE BRANCH
:43P:Partial Shipments	: NOT ALLOWED
:43T:Transshipment	: ALLOWED
:44A:Place of Taking in Charge/	
Dispatch from.../	
Place of Receipt	: METROPOLIS, IN
:44B:Place of Final Destination/	
for Transportation to.../	
Place of Delivery	: SINGAPORE
:44E:Port of Loading/	
Airport of Departure	: USA PORT
:44F:Port of Discharge/	
Airport of Destination	: SINGAPORE
:44C:Latest Date of Shipment	: 120803
:45A:Description of Goods	: 1 (ONE) UNIT - PORTABLE CHILLER, MODEL : MX-7, SAYR 415/
	50 AS PER APPLICANT'S P/O NO. 2075 FCA METROPOLIS, IN
:46A:Documents Required	: ++ BENEFICIARY'S SIGNED COMMERCIAL INVOICE IN ONE ORIGINAL
	AND THREE COPIES
	++ FULL SET MULTIMODAL TRANSPORT DOCUMENT AND ONE N.N. COPY
	MADE OUT TO ORDER OF SHIPPER BLANK ENDORSED MARKED FREIGHT
	COLLECT AND NOTIFY APPLICANT INDICATING THIS CREDIT NUMBER.
	++CERTIFICATE OF USA ORIGIN IN ONE ORIGINAL AND ONE COPY
	ISSUED BY BENEFICIARY/CHAMBER OF COMMERCE
	++ PACKING LIST IN ONE ORIGINAL AND ONE COPY
:47A:Additional Conditions	: +ALL DOCUMENTS MUST BE DISPATCHED TO US IN ONE LOT BY
	REGISTERED AIRMAIL + INSURANCE WILL BE COVERED BY APPLICANT
:71B:Charges	: ALL BANK CHARGES AND COMMISSIONS OUTSIDE SINGAPORE INCLUDING
	REIMBURSEMENT CHARGES ARE FOR BENEFICIARY'S ACCOUNT
:48 :Period for Presentation	: 28 DAYS
:49 :Confirmation Instructions	: WITHOUT
:53A:Reimbursing Bank	: ABN AMRO BANK N.V.
	NEW YORK, NY
:78 :Instr to Nominated Bank	: REIMBURSEMENT: PLEASE REIMBURSE YOURSELVES TO THE DEBIT
	OF OUR ACCOUNT WITH ABN AMRO BANK NV, NEW YORK, UNDER TESTED
	TELEX ADVICE TO US. A DISCREPANCY FEE OF USD40.00 (OR ITS

EQUIVALENT) SHALL BE DEDUCTED FROM THE REIMBURSEMENT CLAIM/
 PROCEEDS UPON EACH PRESENTATION OF DISCREPANT DOCUMENTS AND
 THE LEVY OF THE DISCREPANCY FEE DOES NOT IN ANY WAY ALTER THE
 TERMS AND CONDITIONS OF THIS CREDIT.

----- Message Trailer -----

CHK: 05257AASDC1E
 PKI Signature: MAC-Equivalent
 *End of Message

MT 700 Format Specifications

MT 700 Issue of a Documentary Credit

Status	Tag	Field Name	Content/Options
M	27	Sequence of Total	1!n/1!n
M	40A	Form of Documentary Credit	24x
M	20	Documentary Credit Number	16x
O	23	Reference to Pre-Advice	16x
O	31C	Date of Issue	6!n
M	31D	Date and Place of Expiry	6!n29x
O	51a	Applicant Bank	A or D
M	50	Applicant	4*35x
M	59	Beneficiary	[/34x] 4*35x
M	32B	Currency Code, Amount	3!a15d
O	39A	Percentage Credit Amount Tolerance	2n/2n
O	39B	Maximum Credit Amount	13x
O	39C	Additional Amounts Covered	4*35x
M	41a	Available With ... By ...	A or D
O	42C	Drafts at ...	3*35x
O	42a	Drawee	A or D
O	42M	Mixed Payment Details	4*35x
O	42P	Deferred Payment Details	4*35x
O	43P	Partial Shipments	1*35x
O	43T	Transshipment	1*35x
O	44A	Loading on Board/Dispatch/Taking in Charge at/from ...	1*65x
O	44B	For Transportation to...	1*65x
O	44C	Latest Date of Shipment	6!n
O	44D	Shipment Period	6*65x
O	45A	Description of Goods and/or Services	100*65x
O	46A	Documents Required	100*65x
O	47A	Additional Conditions	100*65x
O	71B	Charges	6*35x
O	48	Period for Presentation	4*35x
M	49	Confirmation Instructions	7!x
O	53a	Reimbursing Bank	A or D
O	78	Instructions to the Paying/Accepting/Negotiating Bank	12*65x
O	57a	'Advise Through' Bank	A, B or D
O	72	Sender to Receiver Information	6*35x

M = Mandatory O = Optional

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