UNIVERSITY OF SOUTHAMPTON

FACULTY OF SOCIAL SCIENCES

SCHOOL OF LAW

Container Carrier's Liability in International Multimodal Transport

by

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ABSTRACT

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International multimodal transport has been developed rapidly in recent 50 years and the worldwide use of containers made a valuable contribution. There are various effective international conventions for different modes of transport and this thesis focuses on the fundamental parts of the international multimodal transport, container carrier's liability regime. The central research question is has the current liability regime provided a sufficient framework for container carriers in international multimodal transport? The question can be divided into three issues. Firstly, how wide should the scope of application of the international unimodal conventions be to cover the period of liability of container carrier in international multimodal transport? Secondly, do the existing conventions provide a proper and satisfactory framework to govern container carrier's liability. Thirdly, if not, what solutions can be adopted.

In order to answer the above questions, the novelty of this thesis lies on experiences gained from recent case law in relation to container transport. This thesis does not only discover problems in the existing legal system but also provides feasible suggestions for container carrier's liability regime based on the Rotterdam Rules.

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CHAPTER 1 Introduction

1.1 The Importance of Container Transport

Freight has always been transferred by different modes of transport but its development had been severely restricted due to special vehicles and the roughness of road and storms at sea before the twentieth century.[1] Nowadays, cargo is conveyed worldwide irrespective of the boundaries and the total value of world merchandise in 2016 was 31.263 trillion dollars.[2] The global economic growth is attributable to the rapid circulation of goods and the cargo is commonly transported from the premises of a consignor in a country to the premises of a consignee in another country. During the transit, a carrier can use a variety of methods to carry the goods which may consist of a mixture of traditional modes of transport.[3] The law of carriage of goods is traditionally based on unimodal transport. However, the wide use of more than two modes of transport produces a new legal concept, international multimodal transport. One substantial contribution to the rapid development of international multimodal transport is the container revolution since the 1960s. The use of truck-trailer-sized containers from the mid-1970s onwards has largely minimised the time and expense of shifting cargo between different modes of transport.[4] A

[1] Arthur Donovan, 'Intermodal Transportation in Historical Perspective' (2000) 27 Transp L J 317, 317 and 322.
[2] World Trade Organisation, 'World Trade Statistical Review 2017', Tables A4 and A5. <https://www.wto.org/english/res_e/statis_e/wts2017_e/wts2017_e.pdf> accessed 20 Sep. 2020
[3] There are five traditional modes of transport: sea, road, rail, air and inland waterway.
[4] Arthur Donovan, 'Intermodal Transportation in Historical Perspective' (2000) 27 Transp L J 317, 318.

container facilitates seamless freight transport that responds to the demand for efficiency in contemporary commercial and transportation industries.[5] Apart from the container itself, the economic value of container transport reflects the importance of this thesis. Due to the common standard of a container, its volume, the Twenty-Foot Equivalent Unit ('TEU'), is used as a unit of measurement for assessing the capacity of container ships and container terminals. The volume of global container trade attained 152 million TEUs in 2018 compared to about 60 million TEUs in 2000 and the amount has increased nearly 2.5 times within the period of 15 years.[6] Europe is an important region for the distribution of global container trade and represented 18 percent of the total distribution in 2015.[7] These statistics show the economic value of container trade in Europe and around the world. Therefore, it is unavoidable to assess the legal framework of international multimodal transport in Europe which will be discussed in the following chapters.[8]

However, the rapid developments in terms of transport patterns and technology are not completely reflected in the current liability regime for container carriers.[9] Although the methodological changes in multimodal transport are remarkable, they are not reflected in the current liability

[5] Arthur Donovan, 'Intermodal Transportation in Historical Perspective' (2000) 27 Transp L J 317, 318.
[6] United Nations Conference on Trade and Development ('UNCTAD'), 'Review of Maritime Transport 2019' (UNCTAD/RMT/2019) Figure 1.5, p 12.
[7] United Nations Economic and Social Commission for Asia and Pacific ('UNESCAP'), 'Study on Regional Shipping and Port Development: Container Traffic Forecast 2007 Update', (26th December 2007), p 29 and 30.
[8] See chapters 2-5.
[9] UNCTAD, 'Multimodal Transport: The Feasibility of an International Instrument', (13 January 2003) UN Doc UNCTAD/SDTE/TLB/2003/1, para 11.

regime. For instance, the International Convention for the Safety of Life at Sea 1974 ('SOLAS') recognises several developments with regard to unseaworthiness and weight verification of containers. Besides, the container itself may cause new problems such as concealed loss or damage and container stuffing before the loading stage.[10]

1.2 The Concept of International Multimodal Transport

The most authoritative legal definition of international multimodal transport is provided by the United Nations Conference on a Convention on International Multimodal Transport 1980 (the 'MT Convention') which represents a model for any legislation designed to govern multimodal transport that has been enacted over the past thirty years at national, regional and sub-regional levels.[11] Therefore, this thesis adopts the definition in the MT Convention but due to the objectives of this thesis, there are some restrictions. 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'.[12] In this section, two constitutive factors of the concept of international multimodal transport will be discussed and this thesis makes some restrictions in order to achieve its purpose.

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[10] See the container stuffing issue in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKHL 61 in section 3.2.1.1.2.
[11] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwer, 2010) 62.
[12] Art 1.1 of the MT Convention.

One of the essential constitutive factors is the use of more than two different modes of transport. There are five traditional modes of transport but this thesis is limited in scope due to its purpose. **This thesis aims to evaluate the current liability regime of a container carrier in the context of international multimodal transport.** Despite the existence of several types of containers, the most common container is a twenty-foot length container.[13] Considering that the normal physical length of a container is not suitable for air transport, the modes of transport in this thesis excludes air and the concept of international multimodal transport does not cover a combination of air and other modes of transport. As there is no definition of the term 'mode of transport', this gap gives rise to the problem whether the lighter aboard ship ('LASH') service should be regarded as two different modes of transport. In the United States, the mother vessel and the barge are regulated by the Federal Maritime Commission as one mode while in Europe, the mother vessel would be governed by the sea regime and the barge would be regulated by the inland waterway regime. Given that this thesis will discuss the influence of an international convention for inland waterway which is ratified by European countries, the author will treat the LASH service as two different modes of transport.

A further constitutive factor is international carriage. The definition of international multimodal transport in the MT Convention only requires that

[13] See International Organisation for Standardisation ('ISO'), *ISO 668: Series 1 Freight Containers- Classification, Dimensions and Ratings* Ref ISO 668:2013, Table 1.

the entire journey is international but does not mention the requirement of internationality of segments. For instance, an international sea carriage from Shanghai to Rotterdam with a national road carriage from Rotterdam to Amsterdam could be seen as international multimodal transport in the MT Convention. The case is an international carriage with an incidental domestic leg by other modes of transport and it is not the object of this thesis. This thesis aims to answer the question whether an international convention governing the liability of the carrier in the context of international multimodal transport by containers is required. The legislative work is considered from an international level rather than national level because different countries are involved and one national law cannot adequately deal with this issue. In order to achieve the goal of this thesis, it is essential to consider different international conventions for different segments that require internationality for the whole journey and segments.

1.3 The Status Quo: the Lack of A Single Uniform Solution

It is important to underline the fact that the law of carriage of goods is traditionally based on only one mode of transport and that currently there is no mandatory convention applicable to international multimodal transport. This thesis aims to evaluate a carrier's liability in the context of international multimodal transport by containers and the starting point should be the current framework of carrier's liability in international unimodal conventions in the form of container transport. In order to achieve the purpose of this thesis, it is necessary to consider the effectiveness of

the international conventions relating to the carriage of goods by sea, road, rail and inland waterways.

The status of maritime conventions is somewhat complicated. In relation to sea carriage, there are three international conventions that are already in force. The first one is the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the 'Hague Rules'). The second one is the Protocol to Amend the international Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the 'Hague-Visby Rules'). The Hague and Hague-Visby Rules have received worldwide recognition to a large extent. The United Kingdom incorporated the Hague Rules into domestic law through the Carriage of Goods by Sea Act ('COGSA') 1924, and the Hague-Visby Rules through the COGSA 1971. The United Nations Convention on the Carriage of Goods by Sea 1978 (the 'Hamburg Rules') came into force in 1992 but has arguably been less successful in the sense that major shipping nations, such as the United Kingdom, have not ratified it. However, English law permits the parties to incorporate the Hamburg Rules into a contract of carriage on a voluntary basis and some relevant provisions of the Hamburg Rules will be analysed in this thesis. With regards to rail carriage, the original convention is the Convention concerning International carriage by Rail ('COTIF') in 1890 which has since been modified by several Protocols. The latest one is the Vilnius Protocol 1999 revising the COTIF and the Appendix B to the COTIF, namely Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the 'COTIF-CIM'). With the desire to standardise the conditions governing

contracts for the international carriage of goods by road, the Convention on the Contract for the International Carriage of Goods by Road (the 'CMR') was completed in 1956 and the United Kingdom incorporated it into domestic law by way of a Schedule to the Carriage of Goods by Road Act 1965. This Act came into force on 19 October 1967 and was amended by the Carriage by Air and Road Act 1979. The CMR was partly modelled on the COTIF because, in the context of combined transport, road and rail carriage were regarded as being in direct competition and hence it was considered necessary for the liability regimes to be assimilated as far as possible. Concerning inland waterways, the current legal regime is the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000 (the 'CMNI').

One essential pre-requisite is that these international unimodal conventions are applicable to international multimodal transport but the determination of applicable law is not an easy task. The applications of these conventions depend on the occurrence of loss of or damage to goods or delay but the widespread use of containers in international multimodal transport increases the difficulty in finding the precise location. Even if they could apply, the nature of these unimodal conventions result in their limited and uncertain applications to international multimodal transport. Furthermore, the carrier's liability varies dramatically in different international unimodal conventions, in particular in terms of the standard of liability and limitation of liability.

Apart from these international unimodal conventions, there is one convention made specially for international multimodal transport which is the United Nations Convention on International Multimodal Transport of Goods 1980 (the 'MT Convention'). Unfortunately, given the absence of sufficient ratifications, the MT Convention has not come into force for almost 40 years. In spite of its failure, the impact of the MT Convention on the legislative works in the field of international multimodal transport is considerable and it is necessary to look at how the MT Convention regulates a multimodal transport operator's liability. It is essential to consider the reasons why it failed and the lessons can be learnt. The latest attempt is the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (the 'Rotterdam Rules'). The Rotterdam Rules can apply to international multimodal transport but an international sea carriage is required. The sea-plus approach can be neglected if the volume of containers in maritime transport is considered.

1.4 The Objectives, Methodology and Structure

The primary objective of this thesis is to re-examine and assess the current liability regime for container carriers in international unimodal conventions and international multimodal conventions. The secondary objective is to evaluate solutions provided by the MT Convention and the Rotterdam Rules for container carriers in international multimodal transport. Hence, this thesis particularly concentrate on the container carrier's liability and provide further recommendations with regard to provisions of the Rotterdam Rules. The central research question addressed by this thesis is:

Has the current liability regime provided a sufficient framework for container carriers in international multimodal transport? More specifically, the question will be divided into three pieces. Firstly, how wide should the scope of application of a convention be to cover the period of liability of container carriers in international multimodal transport? Secondly, do the existing conventions provide a proper and satisfactory framework to govern the container carrier's liability? The liability regime consists of many issues but due to the objectives and limits of this thesis, the author discuss the framework from the following aspect: basis of liability, exceptions, burden of proof, liabilities of relevant third parties and limitation of liability. Thirdly, if not, what solutions can be adopted.

In order to solve these questions, this thesis adopts various research methods. The first one is that several methods of interpretation with regard to international conventions which established by the English courts are used in this thesis. One important principle is international uniformity. It is well established that even in a contact governed by English law, provisions deriving from an international convention are intended to have an internationally uniform effect and should be construed by broad principles of general acceptation, rather than principles of purely domestic application adopted by national courts.[14] Therefore, the foreign decisions should be considered to interpret international conventions. The American law is material on the construction of the Hague Rules since the words of these

[14] *Stag Line Ltd v Foscolo Mango Co Ltd* [1932] AC 328 (HL) 350 (Lord Macmillan).

Rules arise from the Harter Act enacted in the United States.[15] Judgments of other common law countries are referred when the English courts interpret the Hague and Hague-Visby Rules.[16] Besides, the English courts adopt the same principle in construing the CMR and refer to the expression of words of the CMR in other foreign languages and other European authorities.[17] Additionally, Lord Sumption pointed out in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*[18] that some common law principles such as the rules of proving negligence of the carrier in the carriage of goods can also apply to interpret the Hague and Hague-Visby Rules if they are common to civil law jurisdictions as well.[19] The author thinks this method is necessary because international uniformity is essential to the application of an international convention.

The next method to refer to *travaux préparatoires* of international conventions. *Travaux préparatoires* are not decisive but useful as throwing light on the general objectives and trend of discussion of the time.[20] The court believes that the evidence of *travaux préparatoires* is available only if they clearly and indisputably point to a definite legal intention,[21] which is

[15] Unless the language of the Hague and Hague-Visby Rules differs from the Harter Act. See *Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd (The 'Canadian Highlander')* [1929] AC 223 (HL) 230, 233 and 237.
[16] See in *Whitesea Shipping and Trading Co and Another v El Paso Rio Clara Ltda and Others (The 'Marielle Bolten')* [2009] EWHC 2552 (Comm), three Australian cases are considered.
[17] See *James Buchanan Co Ltd v Babco Forwarding and Shipping Ltd* [1978] AC 141 (HL) 151 and 161; *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350, [38]-[59].
[18] [2018] UKSC 61.
[19] Ibid, [16]. See further discussion on the burden of proof under the Hague and Hague-Visby Rules in section 3.2.1.3.
[20] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.098.
[21] *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) 278 (Lord Wilberforce).

said that 'only a bull's eye accounts and nothing less will do'.[22] These principles are also consistent with Arts 31 and 32 of the Vienna Convention on the Law of Treaties 1969 which was ratified by the United Kingdom in 1971.

Then, the principal research method in this thesis is the comparative analysis approach. This thesis aims to compare provisions of international unimodal and multimodal conventions in consideration of different scholastic arguments. Firstly, given that the sea carriage normally occupies the majority of the entire international multimodal transport by containers, it is necessary to compare the different liability frameworks of international sea conventions in the chronological order to discover the progress. Secondly, this thesis makes comparison among different international unimodal conventions to evaluate the differences. Furthermore, this thesis analyses underlying reasons why the differences exist and how to accommodate divergences in one liability regime regulating the container carrier's liability in international multimodal transport, namely the Rotterdam Rules.

Last but not the least, this thesis examines case caw, particularly English law applicable to existing international conventions and some common law rules to fill the gaps. In order to clarify the issues occurred in international multimodal transport, academic works including books and journals are also considered.

[22] *Effort Shipping Co Ltd v Linden Management SA and Others (The 'Giannis NK')* [1998] AC 605 (HL) 613 (Lord Steyn).

This thesis consists of nine chapters to answer the above three research questions. **Chapter 1** (this chapter) provides a general background of international multimodal transport in form of containers and some legal concepts arising from international multimodal transport. Besides, it briefly introduces why the subject of this thesis has been chosen and how the structure of this thesis is organised.

Chapter 2 discusses the scope of application issue under international unimodal conventions because it is a prerequisite for an unimodal convention to apply to international multimodal transport. Their unimodal natures determine that they apply to certain mode of transport in principle. However, the wide use of containers changes the traditional transport industry and these unimodal conventions are interpreted to cover additional journeys. The problem is even if applicable, there might be gaps or overlaps between different conventions. It is necessary to examine the scope of application provisions and evaluate how they can apply to international multimodal transport by containers.

Chapter 3, 4 and 5 will consider the container carrier's liability framework under international unimodal conventions which will be evaluated from the following three perspectives: the standard of liability, the person to whom the carrier is liable for and limitation of liability. The standards of carrier's liability in each convention is analysed from basis of liability, exceptions and burden of proof. Despite the apparent differences in different international unimodal conventions, the emphases of these three chapters

are to explore how these conventions accommodate international multimodal transport by containers.

Chapter 6 introduces both theoretical and practical liability approaches to the multimodal transport operator (the contractual carrier in international multimodal transport operator). The MT Convention and the Rotterdam Rules adopt different approaches albeit their modified natures. This chapter will analyse the pros and cons of two approaches and find a suitable liability system for container carrier international multimodal transport.

Chapter 7 deals with the first convention on international multimodal transport, the MT Convention. Despite its failure, it introduces some novel concepts in the field of international multimodal transport and affects the drafts of later contractual terms and the Rotterdam Rules.

Chapter 8 will consider the container's liability from the perspective of the international multimodal transport in the Rotterdam Rules. In order to answer the central question whether current regime governing container carrier's liability in international multimodal transport is satisfied, the Rotterdam Rules as the latest convention should be examined. In chapter 8, the author will provide suggestions for selected provisions of the Rotterdam Rules and explain why the author thinks the Rotterdam Rules provide an imperfect yet effective liability regime for container carrier in international multimodal transport.

Chapter 9 will review the author's conclusions for the three research questions and also contain summaries of all findings of the author.

CHAPTER 2 The Scopes of Application of International Unimodal Conventions

In order to consider the legal framework for the carrier's liability, the initial step is to examine the effectiveness of the current international unimodal conventions. The first issue is whether international unimodal conventions could apply to international multimodal transport. To determine the scopes of application of international unimodal conventions, three sub-issues are discussed in this section. The basic question is what basics of the international unimodal conventions are in determining the scopes of application. Normally, a contract is defined as the basis of the obligations of the parties.[23] But the situation of four international sea conventions is a little complicated because they adopt different approaches to define the contract of carriage.[24] Other unimodal conventions are based on carriage contract despite of subtle differences.[25]

This section will discuss whether the multimodal transport contract which is widely used in container transport can be covered by international unimodal conventions. Furthermore, the scope of application issue is generally considered from three perspectives: the meaning of the contract of carriage, the temporal and the territorial scope of application. An

[23] Berlingieri Francesco, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', paper delivered at the General Assembly of the International Association of Average Adjusters-AMD, Marrakesh, 5-6 November 2009, p 2.
[24] See the approach adopted by the Hague and Hague-Visby Rules in sections 2.1.1.1, the Hamburg Rules in section 2.1.2 and the Rotterdam Rules in section 8.1.1.2.
[25] See the interpretations of contracts of carriage of the CMR, COTIF-CIM and the CMNI in sections 2.2.1, 2.3 and 2.4.

additional special matter in relation to containers is deck cargo in international sea conventions which might be an exclusion.

The scope of application of international unimodal conventions will be discussed under the hypothetical case mentioned above: there is one multimodal transport contract covering the whole carriage. The central question whether the multimodal transport contract can be covered by international unimodal conventions is divided into two questions: **(a)** whether the international unimodal conventions can apply to a unimodal segment of in international multimodal transport; **(b)** if they can, whether there is conflict between different unimodal conventions.

2.1 The International Sea Conventions

During the preparation of the Rotterdam Rules, it was suggested that there are three main approaches adopted under international sea conventions to determine their scopes of application, namely documentary, contractual and trade approaches and each has its advantages and disadvantages.[26] The documentary approach is adopted by the Hague and Hague-Visby Rules and it would require the issuance certain types of documents covered by the contract of carriage to trigger the application.[27] The advantage of this approach is that the shipping industry is familiar with this approach and it promotes predictability and stability.[28] The major disadvantage of this

[26] These three approaches were summarised by the Working Group III (Transport Law) during the preparation of the Rotterdam Rules. See UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 83.
[27] Ibid, para. 84
[28] Ibid. But there is a problem that the terminology regarding documents differs between jurisdictions which will be discussed in section 2.1.1.1.

approach is that it cannot cover the new documents generated by the market.[29] But the English courts improve it to some extent through a wide interpretation method which will be discussed in section 2.1.1.1. By the time of drafting the Hamburg Rules, it was noticed by the Working Group that a further coverage of various types of uninform documents was necessary.[30] There was a consensus that the scope of application of the Hamburg Rules should extend to apply to 'all contracts of carriage by sea' except charter parties.[31] That approach was later called 'the contractual approach' because it requires the contract of carriage of goods for the application with exclusions of certain types of contracts of carriage.[32] One disadvantage of the contractual approach is to create possible definitional problems with regard to the 'contract of carriage' and excluded contracts.[33] The trade approach, proposed during the preparatory work of the Rotterdam Rules, would apply the convention on a mandatory basis to all contract in the 'liner trade'.[34] The approach reflects well-established trade practice but could also cause definitional problems of the relevant categories.[35]

2.1.1 The Hague Rules

[29] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 84.
[30] Joseph Sweeney, 'The UNCITRAL Draft Convention on Carriage of Goods by Sea Hamburg Rules (Part III)', (1976) 7 J Mar L & Com 487, 495.
[31] Ibid, 499.
[32] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc A/CN.9/572, para. 85.
[33] Ibid.
[34] Ibid, para. 86.
[35] Ibid. Therefore, a hybrid of those approaches is preferred by the Rotterdam Rules which will be discussed in section 8.1.1.2.

Considering that the provisions of the Hague and Hague-Visby Rules are similar to a large extent, the same provisions would be discussed in the section of the Hague Rules and the differences would be analysed separately in the section of the Hague-Visby Rules.[36] The scope of application of the Hague and Hague-Visby Rules will be discussed in four sub-issues: the contract of carriage, the temporal scope, the territorial scope and excluded cargo. The obvious change in the Hague-Visby Rules is the territorial scope.[37] Since the provisions in relation to other three matters are the same, they will be discussed in this section.

2.1.1.1 Contract of Carriage

The Hague and Hague-Visby Rules do not provide contain a definition of the contract of carriage but merely connect to documents issued thereunder: 'a contract of carriage covered by a bill of lading or any similar document of title in so far as such documents relate to carriage of goods by sea'.[38] Initially, the Hague and Hague-Visby Rules were drafted to regulate carriage of goods under a bill of lading only and intentionally excluded carriage of goods under charter parties.[39] However, the documentary approach under the Hague and Hague-Visby Rules has been changed in English law and the changes reflect in two aspects: the issues of actual documents are not needed although it is called the documentary approach;

[36] Chapters 3, 4 and 5 adopt the same structure.
[37] See section 2.1.2.
[38] Art I (a).
[39] Comité Maritime International ('CMI'), *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 90.

and the term 'bill of lading or similar document of title' is construed liberally to cover more documents.[40]

The key issue is whether the Hague and Hague-Visby Rules could apply to a multimodal transport contract. The documents issued under a multimodal transport contract can be divided into two categories: a series of documents covering various segments and one multimodal transport document. In the former situation, the sea documents could be issued under an international multimodal contract when the sea carriage is dominant.[41] It is common in the form of a sea carriage document because the containerised cargo is usually carried by an international sea leg which forms the largest proportion of the entire carriage.[42] As for the latter case, the question will be whether the multimodal transport document falls within 'bill of lading or similar document of title' in Art I (b) of the Hague and Hague-Visby Rules. This section will consider the application issue in each situation.

2.1.1.1.1 Sea Documents

The Hague and Hague-Visby Rules provide no definition of 'a bill of lading' other than linking it to 'any similar document of title'. Although there is no authoritative definition of a 'document of title' in English law, in a traditional common law sense, it means a document relating to goods the transfer of which operates as a transfer of constructive possession of the goods.[43] It

[40] See further discussion in section 2.1.1.1.1.
[41] See *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317 (QB), the bill of lading was issued for a carriage from the inland premise of the shipper to Jeddah in Saudi Arabia.
[42] Michael Bridge (ed.), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2019) para. 21.073.
[43] Ibid, para. 18.007.

may indicate that the draftsmen of these Rules were traditional order bill of lading only.[44] However, the English courts have a liberal construction for 'a contract of carriage covered by a bill of lading or similar document of title' in Art I (b) and widen the scope at common law.

The first point is the English courts think that the word 'covered' in Art I (b) reflects that bills of lading were not issued until after the ship was sailed.[45] Thus, the Hague and Hague-Visby Rules could apply when the contract of carriage contemplates the issue of a bill of lading even if no actual bill of lading is issued. In *Pyrene Co Ltd v Scindia Navigation Co Ltd*,[46] Devlin J accepted the facts that the contract of carriage is always concluded long before the bill of lading, which evidenced the terms of contract, is actual issued.[47] It was contemplated that a bill of lading would be issued which would contain the terms of contract of carriage and the issue of the bill of lading did not necessarily mark any stage of the development of the contract.[48] Therefore, the contract of carriage in this case fell within the Art I (b) of the Hague and Hague-Visby Rules and these Rules would apply when the contract of carriage contemplates the issue of a bill of lading.

The English court in a recent case goes further on the coverage of the Hague and Hague-Visby Rules. In *Kyokuyo Co Ltd v AP Moller-Maersk A/S*,[49] the carrier drew up and provided to the claimant a draft straight consigned

[44] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) para.19.17.
[45] *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB).
[46] [1954] 2 QB 402 (QB).
[47] Ibid, 419.
[48] Ibid.
[49] [2018] EWCA Civ 778.

bill of lading to cover 12 containers. However, to avoid delay in delivery, no bill of lading was ever issued and both parties agreed to issue three sea waybills instead. The issue in this case was whether the contract of carriage was within the definition of Art I (b) of the Hague and Hague-Visby Rules. The court ruled that if a contract of carriage provided for the issue of a bill of lading on demand when concluded but a document other than a bill of lading was issued by subsequent express agreements, the contract of contract was covered by a bill of lading and within the meaning of Art I (b).[50] The key element of Art I (b) is the contract of carriage provides to issue a bill of lading **when concluded**. Therefore, even though the parties expressly agreed to issue sea waybills instead, it did not alter the contract of carriage and the requirement of Art I (b) was satisfied.

The above two cases indicate that the English courts view the contemplation of issuing a bill of lading is the essential element to satisfy the requirement of Art I (b) of the Hague and Hague-Visby Rules even though either no bill of lading is actually issued or a sea waybill is issued instead. As mentioned above, the Hague-Visby Rules are incorporated into English law through the COGSA 1971 and this act may extend the scope of application by virtue of Section 1.[51] Art I (b) of the Hague-Visby Rules use the word 'covered' and the English courts construe it as 'provide'.[52] Section 1(4) of the COGSA 1971 provides that the Hague-Visby Rules apply if the

[50] [2018] EWCA Civ 778, [63].
[51] See section 1.3.
[52] See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB) and *Kyokuyo Co Ltd v AP Moller-Maersk A/S* [2018] EWCA Civ 778.

contract of carriage by sea expressly or by implication provides the issue of a bill of lading or any similar document of title. Section 1 (4) makes further explanation on Art I (b) from the perspective of domestic law in the United Kingdom and may extend the scope of application if the contract impliedly provides the issue of a bill of lading or any similar document of title. However, Section 1 (4) subjects to Section 1 (6) stating that the Hague-Visby Rules have the force of law in relation to a non-negotiable document only when the contract of carriage by sea contained or evidenced by such non-negotiable document expressly provides the application of the Hague-Visby Rules. The reason is such documents are generally used in short journeys such as cross-channel trips which are common in the United Kingdom where it is impractical or unnecessary to surrender the bill of lading to obtain the delivery of the goods. Nevertheless, a straight bill of lading is distinct from a non-negotiable document in Section 1 (6) of the COGSA 1971.

The English courts move forwards on the application of a straight bill of lading to the Hague and Hague-Visby Rules. In *J I Macwilliam Co Inc v Mediterranean Shipping Co SA (The 'Rafaela S')*,[53] the issue before the House of Lords was whether the straight bill of lading was 'a bill of lading and any similar document of title' in Art I (b) of the Hague and Hague-Visby Rules. The House of Lords affirmed that it should be within the definition. The issue is divided into two sub-issues: whether the straight bill of lading was a bill of lading and whether the straight bill of lading was a similar

[53] [2005] UKHL 11.

document of title. The House of Lords adopted an essential principle of interpretation with regard to the Hague and Hague-Visby Rules which was international uniformity and the goal of these Rules was considered.[54] As for the first sub-issue, it was held that the use of the straight bill of lading was widespread at the time of the draft of the Hague Rules which indicated that the intention of draftsmen did not exclude the straight bill of lading otherwise express words of exclusion should be included.[55] Besides, the straight bill of lading had all principal characteristics of a classic bill of lading except for the fact that it could only be transferred to a named consignee.[56] The transferability of the bill of lading has various meanings but Lord Rodger pointed out that in this context, the transferability of the bill of lading was irrelevant because the rights and liabilities of the shipper had been transferred to the named consignee with presentation and the named consignee needed the same protection of the Hague Rules as a consignee under a transferable bill of lading.[57] Another argument of the carrier was the printed terms of the straight bill of lading stated that the document was non-negotiable and it only became negotiable if the shipper agreed to add the words 'to order' after the consignee. The carrier claimed that only if the words 'to order' were added, the straight bill of lading was a bill of lading. But Lord Rodger held that, in spite of the printed terms, the appearance of the straight bill of lading suggested that the parties issuing and receiving it

[54] [2005] UKHL 11, [40]. See discussion of the interpretation approach in section 1.4.
[55] Ibid, [16] (Lord Bingham).
[56] Ibid, [46] (Lord Steyn).
[57] Ibid, [70].

treated it as a bill of lading no matter the words 'to order' was added or not.[58] All three judges who gave judgments believed that a straight bill of lading was a bill of lading in Art I (b).

Regarding the second sub-issue whether the straight bill of lading is any similar document of title, the House of Lords ruled that the meaning of document of title at common law should not be invoked and the crucial characteristic of document of title in Art I (b) was to regulate the relations between the carrier and the holder.[59] The holder's exclusive right to delivery of the goods, which is substantial to document of title, requires presentation. In that way, the straight bill of lading in this case has express requirement of presentation and it would be 'document of title' in Art I (b).[60] Moreover, with reference to the meaning of 'document of title' in the French text of the Hague and Hague-Visby Rules, the document of title should be read along with the qualifying words 'in so far as such document relates to carriage of goods by sea' and interpreted as 'any document entitling the holder to have the goods carried by sea'.[61] In summary, the straight bill of lading is 'similar document of title' under Art I (b) of the Hague and Hague-Visby Rules. Hence, for the purpose of the Hague and Hague-Visby Rules, the straight bill of lading is the 'bill of lading or any similar document of title'.

[58] [2005] UKHL 11, [58].
[59] Ibid, [44] and [76].
[60] Ibid, [20].
[61] Ibid, [75].

Despite that there is only one multimodal transport contract between the multimodal transport operator and the consignor, the multimodal transport operator can issue either one multimodal transport document covering the entire carriage or a series of documents for different international segments. To determine whether the Hague and Hague-Visby Rules apply to the multimodal transport contract, the discussion will be based on the above two distinguished situations. If a series of documents are issued, the situation is simpler. As long as the sea carriage document could been seen as 'a bill of lading or similar document of title' in Art 1 (b) which is discussed hereinbefore, the Hague and Hague-Visby Rules apply. The next matter whether documents issued to cover other segments could apply to the Hague and Hague-Visby Rules depends on the extension of respective unimodal conventions which will be discussed in the following sections.

2.1.1.1.2 Multimodal Transport Documents

The answer to one single multimodal transport document is complicated and uncertain. Although the containers are not necessarily carried by sea and the combination of land and inland waterway is used in practice, the involvement of a sea leg is more common and the names of sea documents are generally used.[62] Therefore, this section will discuss one multimodal transport document assuming an international sea leg is involved. The multimodal transport document could be either a negotiable or a non-negotiable form, i.e. multimodal transport bill of lading and multimodal

[62] Michael Bridge (ed.), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2019) para. 21.073.

transport sea waybill.[63] The document shares some similarities with the bill of lading but one argument against it being a document of title is that the multimodal transport document is a 'received' rather than a 'shipped' bill of lading since it is normally issued at the place of receipt inland.[64] Nevertheless, this gap in coverage can be overcome: if the received bill has been issued and the goods have been shipped, it can become a shipped bill from the date of shipment specified in the notation made by or on behalf of the carrier.[65]

The multimodal transport waybill is not 'a bill of lading or similar document of title' for the purpose of Art 1 (b) of the Hague and Hague-Visby Rules according to the decision in *J I Macwilliam Co Inc v Mediterranean Shipping Co SA (The 'Rafaela S')*.[66] But the Hague and Hague-Visby Rules apply to the sea segment when the multimodal transport contract contemplates that a 'bill of lading or similar document of title' will be issued. Therefore, if the issue of a multimodal transport bill of lading is provided by the multimodal transport contract, it could argue that the actual issue of a multimodal transport waybill would not affect the application of the Hague and Hague-Visby Rules if the decision of *Kyokuyo Co Ltd v AP Moller-Maersk A/S*[67] is followed.

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[63] See the Multimodal Transport Bill of Lading ('MULTIDOC') 2016 and the Multimodal Transport Waybill ('MULTIWAYBILL') 2016 are published by Baltic and International Maritime Council ('BIMCO'). <https://www.bimco.org/contracts-and-clauses/bimco-contracts> accessed 20 Sep. 2020

[64] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017), para. 8.801.

[65] The requirement is verified by Art III rule 7 of the Hague and Hague-Visby Rules.

[66] [2005] UKHL 11.

[67] [2018] EWCA Civ 778.

When the road or rail carriage is combined with the sea carriage, the inland carriage will not apply these Rules since Art I (b) requires the documents are in relation to 'carriage of goods by sea'.[68] The next scenario is where the multimodal transport document covers the sea and inland waterway carriage. The inland waterway document in the CMNI has a complicated status in that it can be classified as a bill of lading, a consignment note or other document used in trade.[69] When the sea carriage occupies a small portion and an inland waterway document may be issued to cover the whole multimodal transport carriage and to apply the Hague and Hague-Visby Rules, such document needs to fall within 'bill of lading or document of title' in Art I (b).

Provided an international sea carriage is involved, the discussion as to whether it is a bill of lading or a similar document of title for the purposes of the Hague and Hague-Visby Rules still depends on who issues the document.[70] If the single multimodal transport document is issued by the carrier responsible for the other modes of transport which would be in the form of consignment notes (although it is not common), the answer would depends on these unimodal conventions. If the single multimodal transport document is issued by a sea carrier, the discussion is the same as above.

Overall, the question whether a multimodal transport document is a 'bill of lading or a similar document of title' under the Hague and Hague-Visby

[68] *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317 (QB) 320. The temporal scope of the Hague and Hague-Visby Rules will be discussed in section 2.1.1.2.
[69] Art 1 (6) of the CMNI.
[70] Michael Bridge (ed.), *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2019) para. 21.083.

Rules does not have a straightforward answer. Even if the document falls within the definition of 'contract of carriage' in Art I (b) of the Hague and Hague-Visby Rules, there are several restrictions on applying the Hague and Hague-Visby Rules such as the temporal and territorial scopes of application in sections 2.1.1.2 and 2.1.1.3.

2.1.1.2 The Temporal Scope of Application

With regard to the temporal scope of application, the Hague and Hague-Visby Rules only cover the period from the time when the goods are loaded on to the time they are discharged from the ship which is called 'tackle to tackle' period.[71] In other words, in the absence of an agreement to widen the temporal scope of application of the Hague and Hague-Visby Rules, these Rules are barely applicable to other modes of transport. Even though English law allows parties to contractually extend the scope of application of the Hague and Hague-Visby Rules to some extent, there are significant restrictions. The traditional loading operation normally begins alongside the vessel but a main change made by the container transport is that containers are normally stuffed before loading onto a ship. Problem may arise when the stuffing could occur in an inland place such as the shipper's premise or in the carrier's container terminal.[72]

The problem is whether the Hague and Hague-Visby Rules cover the loading operation and, if so, how wide is the coverage of the loading operation. With regard to the loading operation, Devlin J in *Pyrene Co Ltd v Scindia*

[71] Art I (e).
[72] See *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317 (QB) and *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKHL 61.

Navigation Co Ltd [73] held that the parties are free to extend the period of the Hague and Hague-Visby Rules to the whole loading operation. He further observed that the function of Art I (e) was only to assist the definition of a contract for carriage in Art I (a) and the rights and liabilities under the Rules attached to a contract or part of a contract rather than a period of time.[74] Three years later, the majority of the House of Lords expressly supported the dictum of Devlin J in *Renton (GH) Co Ltd v Palmyra Trading Co of Panama*.[75] More recently, in *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Inc (The 'Jordan II')*,[76] the House of Lords further confirmed that an agreement which transferred liability for operations under Art III rule 2 of the Hague and Hague-Visby Rules from the carrier to the shipper was not void under Art III rule 8. Therefore, it can be concluded that the Hague and Hague-Visby Rules restrict the scope to a certain period from the time when the goods are 'loaded on' to the time they are 'discharged from' the ship. Nevertheless, the English courts permit the parties to extend or limit the coverage of the temporal scope of application of the Hague and Hague-Visby Rules by contractual agreements. As for the starting point, Bingham J in *Mayhew Foods v Overseas Containers Ltd*[77] held that even if the carriage started at an inland point, the Hague-Visby Rules applied from the time of shipment. In this case, the goods were stuffed into containers at Mayhew's premise and carried to the port of

[73] [1954] 2 QB 402 (QB).
[74] Ibid, 415-6.
[75] [1957] AC 149 (HL) 170 and 174.
[76] [2004] UKHL 49.
[77] [1984] 1 Lloyd's Rep 317 (QB).

loading two days later. The bill of lading indicated that the place of receipt of goods was Mayhew's premise and stated that it was subject to the Hague-Visby Rules. The Hague-Visby Rules are incorporated into English law in the Schedule to the COGSA 1971 and Section 1 (3) of COGSA 1971 provides that the Hague-Visby Rules have the force of law only in relation to and in connection with the carriage of goods by sea. Applying this provision, the judge held that the Hague-Visby Rules did not apply to inland transport prior to shipment on board a vessel.[78]

The next matter is whether the stuffing is a part of loading process. Devlin J said in *Pyrene Co Ltd v Scindia Navigation Co Ltd* [79] that the loading operation may depend not only upon different systems of law but upon the custom and practice of the port and the nature of cargo. In a recent case, *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*,[80] the cargo was loaded into the carrier's containers which were subsequently loaded onto the vessel. In cases where the carrier's obligation to stuff his own carriers is assumed, the contract of carriage is interpreted as including stuffing as part of loading. The trial judge held that the Hague Rules applied to the lining and stuffing of the containers as this formed part of the operation of loading despite the fact that this case was concerned with damage which occurred after the loading process.[81] He thought that if the

[78] [1984] 1 Lloyd's Rep 317 (QB) 320.
[79] [1954] 2 QB 402 (QB).
[80] [2015] EWHC 516 (Comm); [2016] EWCA Civ 1103; [2018] UKSC 61.
[81] [2015] EWHC 516 (Comm), [9]. The Court of Appeal reversed the judgment on other issues but supported the finding on temporal application of the Hague and Hague-Visby Rules. The Supreme Court affirmed the Court of Appeal's decision on this matter.

stuffing progress was subsequently followed by loading on to the vessel, the Hague Rules should apply even though there was an inevitably interval between the stuffing and loading operation.[82] But should there be any time limit for such an interval, like a few hours or a couple of days? And how to distinguish an interval between the stuffing and loading operation from storage? David Donaldson QC seems to imply that if the stuffing was performed by the carrier, the Hague and Hague-Visby Rules could apply anyway. In other words, as long as containers are stuffed in the carrier's container terminal, the Hague Rules are applicable. However, Bingham J in *Mayhew Foods v Overseas Containers Ltd*[83] believed that the Hague Rules did not apply to storage outside the port of shipment because that would be inland and not sea carriage. Based on the facts of above two cases, the problem arises in a situation where the containers are stuffed by the carrier or his agents and lying ashore for a few days before loading. The principle should be referred to *Pyrene Co Ltd v Scindia Navigation Co Ltd* [84] that the rights and liabilities under the Hague and Hague-Visby Rules attached to a contract of carriage of goods by sea, not to a limit of time. So the real question is whether the interval or storage is a part of a contract of carriage by sea or is a part of inland carriage contract. By following the reasoning in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*,[85] the author thinks it is arguable that the interval (storage) between stuffing and

[82] [2015] EWHC 516 (Comm), [9].
[83] [1984] 1 Lloyd's Rep 317 (QB).
[84] [1954] 2 QB 402 (QB).
[85] [2018] UKSC 61.

loading could be regarded as a part of the contract of carriage of goods by sea and the Hague and Hague-Visby Rules apply from the moment of stuffing provided the stuffing is done by the carrier. In this way, the application of the Hague and Hague-Visby Rules accommodate to the practice of container transport.

Another question is would the Hague and Hague-Visby Rules apply to transhipment in an international multimodal transport carriage? *Mayhew Foods v Overseas Containers Ltd*[86] decided that the Hague and Hague-Visby Rules apply once the goods were loaded onto the ship from the port of loading and remained continuously until the goods were discharged from the vessel at the port of discharge.[87] The tackle to tackle period was not intervened by the transhipment. Besides, in this case, the carrier had liberty to substitute vessels or transhipment and the shipper did have the knowledge of the port of transhipment. Bingham J pointed out that if the carrier exercised his contractual right to discharge, store and transhipment the goods en route, these were still operations 'in relation to and in connection with the carriage of goods by sea'.[88] Thus, transhipment between the port of loading and the port of discharge would still be a part contract of carriage of goods by sea and the Hague and Hague-Visby Rules apply through the whole transit. However, if the carrier for the first carriage before transhipment fixes the second voyage as an agent only, the Hague and Hague-Visby Rules will not apply. Bingham J distinguished the case *Captain*

[86] [1984] 1 Lloyd's Rep 317 (QB).
[87] Ibid, 320.
[88] Ibid.

v Far Eastern Steamship Co.[89] The goods were damaged during a lengthy period of storage in the port of transhipment and both parties knew the existence of transhipment. Two bills of lading were issued for separate voyage. It was held that the period of liability of the carrier ceased from the time when the goods were discharged from the first ship and thus, storage was not 'in relation to or in connection with the carriage of goods by sea'.[90] In international multimodal transport, it is common that one multimodal transport document covering the whole carriage and the carrier has the liberty to choose modes of transport or transhipment. Thus, the decision of *Mayhew Foods v Overseas Containers Ltd*[91] can apply.

However, the bill of lading may have a contractual term to exclude the pre-loading and after-discharge period in which the transhipment occurs. In *Trafigura Beheer and Another v Mediterranean Shipping Co* (*The 'MSC Amsterdam'*),[92] clause 4 (iii) of the bill of lading provided that 'when the goods are in the custody of the carrier and/or his subcontractors before loading and after discharge…whether pending transhipment, they are in such custody for the risk and account of Merchant without any liability of the carrier'. The judge confirmed that this clause clearly excluded the carrier's liability before loading or after discharge from the vessel. Despite that the issue in this case is misdelivery of the goods, not damage to the

[89] [1979] 1 Lloyd's Rep 595 (BCSC). This is a Canadian case.
[90] Ibid, 611-2.
[91] [1984] 1 Lloyd's Rep 317 (QB).
[92] [2007] EWCA Civ 794. This case will be fully considered in relation to Art X (c) in section 2.1.2.

goods during transhipment, it can be inferred that such term is valid and the Hague and Hague-Visby Rules do not apply.

2.1.1.3 The Territorial Scope of Application

Regarding the territorial application, the first geographical connecting factor is a test of internationality and the second connecting factor is the link with a Contracting State. The original Hague Rules apply to all bills of lading issued in any Contracting State but the United Kingdom restricts this to outward shipments only in section I of the Carriage of Goods by Sea Act ('COGSA') 1924 which is narrower than Art X of the Hague Rules.[93] However, Art X has been amended by the Hague-Visby Rules and the amendments will be discussed in section 3.1.1.2 of this thesis.

2.1.1.4 Deck Cargo

The definition of goods in the Hague and Hague-Visby Rules excludes deck cargo which 'by the contract of carriage is stated as being carried on deck and is so carried'.[94] The deck cargo exception may be regarded as narrow because the Hague and Hague-Visby Rules are only excluded when these two conditions are satisfied simultaneously.[95] The authorised deck cargo in the contract of carriage should be a bilateral agreement and a unilateral statement such as 'shipped on deck at shipper's risk' on the front of a bill of lading by the carrier is not sufficient to trigger the exclusion.[96] The fact

[93] The United Kingdom gave effect to the Hague Rules by the COGSA 1924. Art X was omitted in the schedule and Section I is the only provision regulating the scope of application. The United States, however, extends the ambit to both inward and outward shipments in S 1312 of Title 46(a) the COGSA in the United States.
[94] Art I (c).
[95] Lina Wiedenbach, *The Carrier's Liability for Deck Cargo: A Comparative Study on English and Nordic Law* (Springer 2015) 20.
[96] See *J Evans & Sons (Portsmouth) Ltd V Andrea Merzario Ltd* [1976] 1 WLR 1078 (QB).

that the cargo is carried on deck is easy to prove but the requirement of 'cargo which by the contract of carriage is stated as being carried on deck' is problematic.[97] In other words, the Hague and Hague-Visby Rules are not excluded merely because the goods are carried on deck.[98] Considering the containers used nowadays, the carrier generally does not specify on the transport document whether a certain container will be stowed on deck or not.[99] Besides, the deck exception is made on the basis of different risks and many container ships when full loaded expose a considerable number of containers to risks similar to deck stowage so that it may be easier to justify that containers carried on deck are legitimate.[100]

Given that the contract of carriage often authorises the carrier to carry cargo on deck, a mere liberty clause is not a sufficient statement in the contract of carriage. In *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) LD*,[101] there was a clause stating that 'the steamer has liberty to carry goods on deck'. Pilcher J held that the clause did not have that effect as a notification and a warning to the consignee or endorsee of the bill of lading and therefore it was not a statement of deck cargo on the face of the bill of lading.[102] However, modern liberty clauses are usually more complex and the stamp of deck carriage on a bill of lading is treated

[97] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 171.
[98] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.113.
[99] Lina Wiedenbach, *The Carrier's Liability for Deck Cargo: A Comparative Study on English and Nordic Law* (Springer 2015) 11.
[100] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.114.
[101] [1953] 2 QB 295 (QB).
[102] Ibid, 301.

as the statement of on-deck shipment by the English court even though it is often the result of a unilateral action by the carrier.[103] In *Sideridraulic System Spa and Another v BBC Chartering & Logistic GMBH & CO KG (The 'BBC Greenland')*, [104] the fixture recap for two shipments included a provision giving the carrier liberty to carry the tanks as deck cargo: 'shipment under/on deck in owners option, deck cargo at merchant risk and bill of lading to be marked accordingly'. On the front of the bill of lading for the second shipment, the master's remarks were stated 'All cargo loaded from open stowage area' and 'All cargo is carried on deck at shipper's/charterer's/receiver's risk as to risk inherent in such carriage'. The carrier's argument was that the master's remarks on the face of the bill constituted a statement of deck carriage under the Hague-Visby Rules, whereas the claimant argued that the master's remarks merely repeated the provision in the fixture recap that the carrier should have liberty to carry goods on deck. Smith J held that the master's remarks on the bill of lading were statements of deck cargo because the bill of lading was marked accordingly as deck cargo and the master's remarks were not pure repetition.[105]

As for the consequences of unauthorised deck carriage, it is treated as quasi-deviation at common law which means the carrier will be deprived his benefits from exceptions and limitation of liability. However, the results are different in the Hague Rules and the Hague-Visby Rules. One significant

[103] Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para. 10.83.
[104] [2011] EWHC 3106 (Comm).
[105] Ibid, [22].

case is *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* (*The 'Kapitan Petko Voivoda'*).[106] The Court of Appeal held that although the carrier was in breach of the contract, he could still rely on Art IV rule 5 of the Hague Rules to limit his liability because 'in any event' in Art IV rule 5 of the Hague and Hague-Visby Rules was interpreted broadly to relieve the carrier from liability for on-deck carriage.[107] And the carrier can also take advantage of time bar limit in Art III rule 6 of the Hague-Visby Rules since 'whatsoever' in Art III rule 6 of the Hague-Visby Rules could apply even when there was a fundamental breach.[108]

However, the judgment in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* (*The 'Kapitan Petko Voivoda'*)[109] does not achieve universal consensus. Professor William Tetley thinks the package limitation should be construed with reference to exceptions in Art IV rule 2 and the unauthorised deck carriage should be seen as a fundamental breach so that the carrier cannot invoke the limitation in Art IV rule 5 (a) of the Hague-Visby Rules.[110] But his opinion was not accepted by the Federal Court of Canada in *De Wolf Maritime Safety BV v Traffic-Tech International Inc.*[111] In this case, the containers were carried on deck without authorisation and the court held that the carrier could limit its liability by virtue of the wording 'in any event' in Art IV Rule 5 (a) of the Hague-Visby Rules which is the same as Art IV

[106] [2003] EWCA Civ 451.
[107] Ibid, [25].
[108] *Kenya Railways v Antares Co* (*The 'Antares') (Nos. 1 and 2*) [1987] 1 Lloyd's Rep 424 (CA) 429-430.
[109] [2003] EWCA Civ 451.
[110] See William Tetley, *Marine Cargo Claims* (4th edn, Editions Yvon Blais 2008) 1581 and 1587.
[111] 2017 FC 23.

Rule 5 of the Hague Rules. And it is reasonable because there is no word in Art IV rule 5 (a) of Hague-Visby Rules indicates that the phrase 'in any event' refers to the exceptions in Art IV rule 2 only. It was pointed out the fact that the risk of on-deck carriage have been diminished considerably and 30 percent of containers are stowed on deck nowadays.[112] Therefore, in author's view, despite that there is no English case ruling on the effect of the phrase 'in any event' on the unauthorised deck carriage, it is pointed out in *Parsons Co and Others v CV Scheepvaartonderneming Happy Ranger and Others (The 'Happy Ranger')*[113] that the word 'in any event' should mean what it says and they are unlimited in scope so they can refer to events unlisted in Art IV rule 2.[114] Besides, it seems that there is no reason not to follow the Canada decision on the matter of unauthorised deck carriage in container transport with the decrease of the risk of on-deck carriage. Besides, the change in Art IV rule 5 (e) of the Hague-Visby Rules may restrict the carrier's benefit as he may lose his right to limit.[115]

To summarise, despite that the decision of *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* (*The 'Kapitan Petko Voivoda'*)[116] is in favor of the carrier to a large extent, the construction of the phrase 'in any event' Art

[112] 2017 FC 23, [13] and [18].
[113] [2002] EWCA Civ 694.
[114] Ibid, [38].
[115] However, the Canadian court did not decide whether the omission of deck carriage statement on the bill of lading amounted 'recklessness and intent of the carrier' in Art IV rule 5 (e) of the Hague-Visby Rules because the court thought it was a matter of fact not law and the court should not deal with it. See *De Wolf Maritime Safety BV v Traffic-Tech International Inc* 2017 FC 23, [57].
[116] [2003] EWCA Civ 451.

IV rule 5 of the Hague Rules should adopted to interpret the same phrase in Art IV rule 5 (a) of the Hague-Visby Rules.

2.1.2 The Hague-Visby Rules

The territorial scope of the Hague-Visby Rules is wider than the Hague Rules and the United Kingdom incorporated the Hague-Visby Rules into domestic law by adopting the COGSA 1971.[117] Moreover, section 1 (2) of the COGSA 1971 states that the Hague-Visby Rules 'shall have the force of law' while section 1 of the COGSA 1924 provides that the Hague Rules 'shall have effect in relation to and in connection with' outward shipments from the United Kingdom. The requirements of section 1 of the COGSA 1971 and Art X of the Hague-Visby Rules must be satisfied simultaneously. This change does not mean the Hague-Visby Rules will take effect only because the applicable law is English law and the court clarified this point in *Trafigura Beheer and Another v Mediterranean Shipping Co* (*The 'MSC Amsterdam'*).[118]

As for geographical internationality, Art X of the Hague-Visby Rules expressly states in its heading that these Rules apply to international carriage and the text refers to the intended international carriage rather than the actual carriage.[119] Arts X (a) of the Hague-Visby Rules is identical to Art X of the Hague Rules which provides that these Rules will apply if the

[117] Section 1 (3) and (6) and Art X.
[118] [2007] EWCA Civ 794. See further discussions below.
[119] Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019) para. 14.008.

bill of lading is issued in a contracting State. Art X (b) provides that these Rules will apply if the carriage is from a port in a contracting State.

The main amendment is found in Art X (c) which states that the Hague-Visby Rules will apply if the contract contained in or evidenced by a bill of lading provides that these Rules or the legislation of any state that gives effect to these Rules are to govern the contract. However, this new provision may cause confusion if the bill of lading is issued in a country that is not a contracting state under the Hague-Visby Rules but gives effect to these Rules.[120] In that situation, paragraph (c) becomes the key factor to determine the application of the Hague-Visby Rules. Nevertheless, the so-called paramount clause which incorporates the Hague and Hague-Visby Rules contractually has various forms and problems may arise where a party intends to incorporate the Rules where they 'apply compulsorily' because a foreign version of the Hague-Visby Rules is not compulsorily applicable under English law.[121] One remarkable case concerned with such issues is *Trafigura Beheer and Another v Mediterranean Shipping Co* (*The* '*MSC Amsterdam*').[122] In this case, the bill of lading was issued in South Africa which enacted the Hague-Visby Rules but did not sign the 1968 Protocol and thus it was not a contracting State of the Hague-Visby Rules. Clause 2 (a) of the bill of lading provided that English law governed the contract of carriage. The main issue was whether the Hague-Visby Rules

[120] Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', paper was delivered at the General Assembly of the AMD, Marrakesh 5-6 November 2009, p 3.
[121] Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para. 10.41.
[122] [2007] EWCA Civ 794.

applied and the decisive provision was Art (c). As for the first part of Art X (c), it was not clear because the bill of lading only provided that the Hague-Visby Rules applied if compulsorily applicable. For the second part of Art X (c), Longmore LJ held that 'it was not enough for the bill of lading to provide generally that the legislation of any State giving effect to the Hague-Visby Rules and it had to identify the legislation of a particular State' and its referrnce to English law was not sufficient.[123] Therefore, Art X (c) leads to a circular conclusion in the sense that Art X (c) applies if English law gives effect to the Hague-Visby Rules.[124] The situation would have been different if the action had been brought in South Africa where the Hague-Visby Rules were compulsorily applicable, or if clause 1 (a) of the bill of lading had contained a reference to the 'legislation of the port of shipment'.[125] The results are affected by the wording of the clause paramount and the *lex fori* (the law of the forum).

2.1.3 The Hamburg Rules

Unlike the Hague and Hague-Visby Rules, the Hamburg Rules abandon the reference to certain types of shipping documents and use the 'contract of carriage' as the basis of the carrier's liability, which is the so-called contractual approach. It consists a definition of a contract of carriage and certain restrictions.[126] Compared with the Hague and Hague-Visby Rules,

[123] [2007] EWCA Civ 794, [10] and [11].
[124] Paul Todd, 'Limiting Liability for Misdelivery' [2008] LMCLQ 214, 217.
[125] [2007] EWCA Civ 794, [10] and [18].
[126] The Hamburg Rules excluded a certain type of contract with sub-exception in Art 2 (3). See Joseph Sweeney, 'The UNCITRAL Draft Convention on Carriage of Goods by Sea Hamburg Rules (Part III)', (1976) 7 J Mar L & Com 487, 499.

the contractual approach saves a great deal of confusion in relation to the definition of documents. The question in relation to international multimodal transport is whether the multimodal transport contract is a contract of carriage in the Hamburg Rules. Art 1 (6) of the Hamburg Rules provides that the Rules only apply to the sea segment covered by a contract of carriage which involves other modes. The definition means that the multimodal transport contract may be within the ambit and can apply to the Hamburg Rules.

As for the carrier's period of liability, the Hamburg Rules apply during the time when the carrier is in charge of the goods at the port of loading and at the port of discharge.[127] Although the Hamburg Rules acknowledge their application to international multimodal transport, the Hamburg Rules are restricted to sea carriage only from the port of loading to the port of discharge which is also known as 'port to port' period. Nevertheless, the pre-loading and after-discharge issue under the Hague and Hague-Visby Rules is resolved. For example, on the basis of *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*,[128] the container was stuffed in the port before loading onto a ship. The Hamburg Rules would undoubtedly apply even if there is an interval between the stuffing and loading operation. On the other hand, the Hamburg Rules do not adequately address the concerns relating to operations outside the boundaries of the ports of loading and discharge such as storage, which is common in container

[127] Art 4 (1).
[128] [2018] UKSC 61.

transport.[129] The Hamburg Rules do not go that far. But with regard to transhipment issue, the Hamburg Rules would apply to the entire carriage by virtue of Arts 2 and 4 (1).[130]

Compared with the Hague and Hague-Visby Rules, Art 2 (1) of the Hamburg Rules extends the geographical scope by adding more connecting factors. The most evident change is the inclusion of inward shipments which could be the port of discharge as provided for in the contract of carriage by sea or the actual port of discharge within the optional ports provided for in the contract of carriage by sea.[131] Furthermore, the Hamburg Rules will apply if the document provides that the provisions of the convention or the legislation of any contracting State which gave effect to them are to govern the contract. [132] The English law allows the Hamburg Rules to be incorporated into the contract of carriage but such incorporation would only have a contractual effect.

With respect to deck cargo, the Hamburg Rules permit it if it is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.[133] Therefore, it is possible to establish that deck carriage (which is common in container transport) is a usage in trade and the Hamburg Rules would apply. The agreement between the shipper and the carrier must be inserted into a

[129] William Tetley, 'Bill of Lading and The Conflict of Laws' in European Institute of Maritime and Transport Law, *The Hamburg Rules: A Choice for the EEC?* (Maklu 1994) 88-9.
[130]
[131] Arts 2 (1) (b) and (c).
[132] Art 2 (1)(e).
[133] Art 9 (1).

transport document and in the absence of such an agreement the transport document cannot be used against a third party.[134] The consequences of unauthorised deck cargo are clear: 'the carrier will be liable for the loss damage or delay resulting solely from unauthorized carriage on deck' and the carrier may lose his right to limit liability because carriage of goods on deck contrary to an express agreement for carriage under deck is regarded as an act or omission of the carrier in Art 8.[135] In a way, the consequence of unauthorised deck carriage in the Hamburg Rules is more serious than that in the Hague Rules or the Hague-Visby Rules considering the carrier is unlikely to lose his right to limit.[136]

2.2 The International Road Convention: the CMR

2.2.1 Contract for Carriage of Goods by Road

As for the scope of application in the CMR, its basis is 'contract **for** the carriage of goods by road'. Art 1.1 of the CMR provides that it applies mandatorily to every contract for the carriage of goods by road and the nexus of application of the CMR is the contract of carriage rather than the carriage itself.[137] A geographical pre-condition of Art 1.1 is that the place of taking over and the place designated for delivery are in two different countries. It is regarded as a unilateral conflict rule that a connection with a Contracting State should be satisfied.[138] Whether the CMR could apply to a road segment of international multimodal transport varies in different

[134] Art 9 (2).
[135] Arts 9 (3) and (4).
[136] See 2.1.1.4.
[137] P G Fitzpatrick, 'Combined Transport and the CMR Convention' [1968] JBL 311, 312.
[138] Malcolm A Clarke, 'A Multimodal Mix-up' [2002] JBL 210, 215.

jurisdictions and the English courts prefer a liberal interpretation in comparison with European countries.[139] The question can be divided into two issues: one is whether a multimodal transport contract is regarded as a contract for the carriage of goods by road in the CMR and the other is whether the requirement of geographical internationality refers to the whole carriage.

A remarkable case dealing with the above matters in English law is *Quantum Co Inc and Others v Plane Trucking Ltd and Another*[140] because the Commercial Court and the Court of Appeal delivered two distinct judgments reflecting the current state of arguments on this matter. In this case Air France signed one single contract from Singapore to Dublin and performed the first air stage from Singapore to Paris. Plane Trucking as a subcontractor of Air France took the second road stage from Paris to Dublin via Manchester and the goods were stolen in England by its employees. Air France as the second defendant accepted liability but argued to limit its liability according to Art 11.7 of its contractual provision, while the claimants intended to apply the CMR in order to deprive Air France of the right to limit its liability by virtue of Art 25 of the CMR. The main issue was whether the CMR was applicable and the two different judgments will be compared as far as relevant.

As for the pre-condition factor, the place of taking over, Tomlinson J in the Commercial Court held that it must be the place at which the contractual

[139] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer 2010) 149.
[140] [2001] 1 All ER (Comm) 916 (QB); [2002] EWCA Civ 350.

carrier assumes liability for the goods and in this case Air France could not take over the goods at Paris since it had already assumed liability in Singapore.[141] This decision was criticised for its strict literal interpretation that Tomlinson J paid more attention to actual physical take-over rather than the contractual performance.[142] In the context of the CMR as a whole, a carrier can be liable without any actual performance and the actual physical take-over in Paris was not a presupposition of the application of the CMR to the road leg from Paris to Dublin.[143] The Court of Appeal took the view that the places of taking over and delivery of goods should be read as 'the places which the contract specifies for the taking over and delivery by the carrier in its capacity as international road carrier'.[144]

The next issue is whether a contract which involved other modes of transport could be treated as a contract for carriage of goods by road. Tomlinson J suggested that as the CMR should apply to the whole carriage or none, the CMR would not be applicable to a contract predominantly for carriage by air.[145] Furthermore, he insisted that the CMR might apply to the road stage started initially in an international multimodal transport, which seems inconsistent with his last view.[146] The Court of Appeal held that the meaning of 'for' indicates 'permitting' and therefore it is possible to cover

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[141] *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2001] 1 All ER (Comm) 916 (QB), [19].
[142] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 52.
[143] Malcolm A Clarke, 'A Multimodal Mix-up' [2002] JBL 210, 215.
[144] *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350, [33].
[145] *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2001] 1 All ER (Comm) 916 (QB), [19].
[146] Ibid.

carriage contracts with options to alternative modes of performance.[147] Mance LJ proposed four possibilities including a contractual liberty to carry the goods by road and in this case, Air France promised to carry by road but reserved his substitution right.[148] The Court of Appeal preferred a broad interpretation approach on whether there is a contract for carriage of goods by road in Art 1.1 and although Air France did not have a contractual obligation, he should consider actual performance under the contract and fall within Art 1.1.[149]

In summary, it was held by the Court of Appeal that a contract with a liberty for alternative modes of performance could be a contract for carriage of goods under Art 1.1 of the CMR. It follows that this convention would be applicable to an international road leg in the international multimodal transport.

Additionally, when the English court constructs an international convention such as the Hague and Hague–Visby Rules and the CMR, some foreign authorities have been considered in order to achieve harmony.[150] Several European authorities including Belgium, the Netherlands and Germany were considered in the judgment and there are some developments resulting in different views. However, the discrepancies among the above

[147] *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350, [16].
[148] Ibid, [15].
[149] Ibid, [23].
[150] Ibid, [38]. See the interpretation approach discussed in section 1.4.

jurisdictions increase uncertainty on the issue whether the CMR would directly apply to multimodal transport.[151]

Two Belgian cases which were referred to by the Court of Appeal concerned similar issues that the actual performance by road under the combined transport bill of lading would apply the CMR, but they focused on jurisdiction rather than the issue of application.[152] A Dutch case, *International Marine Insurance Agency Ltd v P & O Containers Ltd* (*The 'Resolution Bay'*),[153] supported the Court of Appeal's interpretation of the place of taking over. In this Dutch case, the goods were carried from New Zealand to Rotterdam by sea and then carried by road to Antwerp. A combined transport document was issued without mentioning the mode of transport to be used from Rotterdam to Antwerp, but the document contained a jurisdiction clause. The Dutch court found its jurisdiction if the claimants could prove that the damage occurred during the road stage and believed that the place of taking over of goods in Art 1.1 of the CMR is the place where the carrier has taken over the goods for carriage by road.

A case was considered by the German Federal Supreme Court ('BGH') and it was held that the CMR would apply to the road segment from Germany to Rotterdam but not to the sea leg as the goods were taken off wheels.[154] Furthermore the BGH ruled that the principle of overall consideration adopted by Tomlinson J was not applicable in this situation on two grounds.

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[151] Theodora Nikaki, 'Bring Multimodal Transport Law into the New Century: Is the Uniform Liability System the Way Forward' (2013) 78 J Air L & Com 69, 81.
[152] Ibid, [39]-[41].
[153] Rotterdam Rechtbank Oct 28 1999.
[154] Case No. I ZR 127/85 (24 June 1987).

First,, the theory does not apply in cases where the subject of the contract is the transport of goods using various means of transport from the outset. Second, it does not apply when different regulations on liability are specified as mandatory with regard to the means of transport used for various sections of the route. Nevertheless, the attitudes of the German and the Dutch courts have changed and they now adopt the view that the CMR should not apply directly to the international road segment of multimodal transport.[155]

In general, English law adopts a more liberal construction method towards the definition 'contract for carriage of goods by road' in Art 1 of the CMR. Consequently, the application of the CMR to the road segment in international multimodal transport is preferred by the English courts.

2.2.2 Art 2 of the CMR

The CMR will apply to other modes of transport by virtue of Art 2.1 but the extension of its scope is rather limited. The general rule under this provision is that the vehicle containing the goods is carried through the entire journey and that the goods are not unloaded from the vehicle. Art 2.1 only envisages one type of combined transport named mode-on-mode or roll-on/roll-off transport ('RORO') and the liability of the carrier would be regulated by the CMR throughout the carriage. The container itself is not a vehicle in Art 1.2 but regarded as goods and Art 2.1 does not apply when

[155] Esther-A. Zonnenberg-Mellenbergh, 'The Applicability of the CMR to Contracts of Multi modal Transport'. < http://legalknowledgeportal.com/wp-content/uploads/2012/08/1.-Multimodal-transport1.pdf> accessed 20 Sep. 2020

the container is unloaded from the vehicle.[156] However, if the container is carried by a semi-trailer and not unloaded for the purpose of onward shipment by other mode of transport, Art 2.1 will apply. Nevertheless, the CMR is excluded if three cumulative conditions in the proviso of Art 2.1 are met: (a) the loss of or damage to the goods or the delay occurs during the carriage by other modes of transport, (b) it is not caused by an act or omission of the road carrier and (c) it was caused only by some event which could only occur in the course of and by reason of the carriage by other means of transport. Provided these three conditions are satisfied, the liability of the non-road carrier would have been determined in accordance with the conditions prescribed by law for the carriage of goods by that means of transport if a separate contract had been made by the sender with the non-road carrier. Furthermore, Art 2.2 states that the rules apply even in the circumstances where the road carrier is also the carrier by the other means of transport.

These three cumulative conditions were examined in the case of *Thermos Engineers Ltd and Anhydro A/S v Ferrymasters Ltd*.[157] The top of the heat exchanger was damaged by the deckhead of the lower deck and Thermos Engineers, the claimant, argued that the CMR could not be applicable because these three requirements in Art 2.1 were not met. The core issue concerned the interpretation of the three conditions in Art 2.1. An important matter for the first requirement was when the road stage ended. The

[156] Andrew Messent and David Glass, *CMR: Contracts for the International Carriage of Goods by Road* (2nd edn, Informa 2017) para. 2.8.
[157] [1981] 1 WLR 1470 (QB).

claimant contented that the road stage ceased when the trailer and its load were secured on the ship whereas the defendant argued that the sea stage included the loading operation and referred to the decision of *Pyrene Co Ltd v Scindia Navigation Co Ltd*.[158] The judge was satisfied that the damage occurred during the sea stage.[159] The second condition was also met because the judge held that the damage was caused by those directly involved in the loading rather than the defendants or his agents.[160] The third condition was interpreted precisely that the emphasis should be whether the event could only have so occurred in the course of the other means of transport and not whether the LDD could only have occurred.[161] Other problems inherent in the following aspects of the provision are the interpretation of the words 'conditions prescribed by law' and the hypothetical contract made between the sender and the non-road carrier including the link between them.[162] As for the 'conditions prescribed by law', it depends on the degree of compulsion of relevant rules and whether all provisions relating to the application rules are relevant.[163] Regarding the issue of whether the hypothetical contract between the sender and the road carrier should be determined by the actual contract made between the road

[158] [1954] 2 QB 402 (QB).
[159] *Thermos Engineers Ltd and Anhydro A/S v Ferrymasters Ltd* [1981] 1 WLR 1470 (QB) 1476.
[160] In combination of Art 3 of the CMR, proviso applies only when the loss of, damage to or delay was caused neither by the road carrier nor by the sea carrier or their employees or agents. Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 43.
[161] *Thermos Engineers Ltd and Anhydro A/S v Ferrymasters Ltd* [1981] 1 WLR 1470 (QB) 1478.
[162] David A Glass, 'Article 2 of the CMR Convention: A Reappraisal' [2000] JBL 562, 569.
[163] Ibid, 566. See the discussions of scopes of application of the Hague and Hague-Visby Rules in sections 2.1.1 and 2.1.2, there are many situations in which these Rules can be excluded.

carrier and the non-road carrier, it might be unacceptable for the sender since he was not a party to the actual contract.[164] One suggestion made by Malcolm Clarke is that if a sea waybill is issued on the basis of the Hague and Hague-Visby Rules, the Rules will apply when the envisaged sea stage falls within their scope rather than the actual contract.[165] This is based on an analogy that the scope provisions of uniform law have been described as unilateral conflict rules and therefore once a case falls within the scope provisions of the Rules the rest of the Rules govern the case.[166]

In summary, although different judgments in different jurisdictions have been delivered on the issue whether the CMR could apply to an international road stage of a multimodal transport carriage, the consensus in the English courts appears to be that the scope of the CMR should be interpreted broadly. However, the conditions in Art 2 are rather complicated given this provision is restricted to certain circumstances.

2.3 The International Rail Convention: the COTIF-CIM

Regarding rail carriage, Art 1 (1) of the COTIF-CIM requires a contract of carriage of goods by rail for the application of the Convention and adopts the contractual approach comparable to the CMR. Although there seems to be no case law to indicate whether the COTIF-CIM could apply to an international rail leg of a multimodal transport carriage, it could be implied from the explanatory report that it should be interpreted in the same way

[164] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 48.
[165] Ibid, 49.
[166] Ibid.

as the scope of application of the CMR.[167] In English law, it seems that the COMTIF-CIM is applicable. However, there are differences relating to the geographical connecting factors in that the CMR requires one of the places of taking over and delivery to be in a Contracting State, whereas the COTIF-CIM requires both to be in Contracting States.[168] By virtue of Art 1 (3) and (4) of the COTIF-CIM, the Convention extends to other modes of transport when they are supplemental to transfrontier carriage by rail. As for the road segment, it is restricted to the domestic road carriage only to avoid any conflict with the CMR.[169] In the case of inland waterway carriage, it should be internal or transfrontier on registered lines if rail carriage is domestic and the latter situation would also apply to sea carriage. Nevertheless, the rail carriage and the complementary carriage by other means of transport should be the subject matter of the single contract and the essential element is the rail carriage.[170] In view of international multimodal transport, the multimodal transport contract usually does not state the component of international rail carriage in the whole multimodal transport carriage and it is difficult to determine whether the rail carriage is essential or not. Moreover, in a case where the containers are carried by rail and other

[167] Intergovernmental Organization for Carriage by Rail ('OTIF') Working Group CIM UR, 'Uniform Rules Concerning the Contract of International Carriage of goods by Rail (CIM) Explanatory Report', Doc. No. AG12/13 Add.5 (30 September 2015), para. 21.
[168] It is to avoid conflict with other Conventions in East Europe and Asia. See the status of Member States <http://www.cit-rail.org/en/rail-transport-law/smps-smgs/> accessed 20 Sep. 2020
[169] Malcolm A Clarke and David Yates, *Contract of Carriage by Land and Air* (Informa 2008) para. 2.485.
[170] 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', (1st January 2011) p 110.

modes of transport, it seems rare that the rail carriage is essential especially where a sea carriage is involved. Besides, the purpose of the extension of the COTIF-CIM is not to cover the entire international multimodal transport carriage but only the supplemental stages.

2.4 The International Inland Waterway Convention: the CMNI

The CMNI applies to the contract of carriage in which the carrier undertakes against the payment of freight to carry goods by inland waterway.[171] Meanwhile, the internationality of the port of loading or the place of taking over and the port of discharge or the place of delivery is also required and one of these should be located in a Contracting State.[172] The taking over and delivery of goods takes place on board of a vessel.[173] Art 2 (2) applies to the carriage of goods by inland waterway and sea. The CMNI applies to both the whole carriage if there is no trans-shipment unless (a) a maritime bill of lading has been issued in accordance with the applicable maritime law or (b) the sea stage covers a larger distance than the inland waterway stage.[174] Although Art 2 (2) aims to extend the scope of the CMNI to certain situations in which the sea carriage is collateral, the situation is generally opposite in container transport that the inland waterway carriage is normally ancillary to an international sea carriage.

2.5 Conclusion

[171] Art 2 (1). The definition of a contract of carriage is provided by Art 1 (1).
[172] Art 2 (1).
[173] Art 3 (2).
[174] Art 2 (2).

The question whether international unimodal conventions apply to international multimodal transport is considered from two aspects: whether they can apply to respective segments in the international multimodal transport and if so, whether there is conflict between different unimodal conventions assuming two different unimodal conventions applying to international multimodal transport.[175] For the first matter, this thesis discusses the definitions of 'contract of carriage', the temporal scopes and the territorial scopes in international unimodal conventions. And a unique issue in relation to containers in international sea conventions is analysed, the deck cargo.

In international sea conventions, the Hague and Hague-Visby Rules have relatively complicated conditions of application while the Hamburg Rules provide simpler provisions. Art I (b) of these Rules restricts their applications to certain types of document, namely bills of lading or similar documents of title. The English courts interpret the phrase liberally so that the Hague and Hague-Visby Rules would apply if a contract of carriage provides for the issue of a bill of lading on demand. It covers the cases in which the bill of lading is not actually issued or a straight bill of lading is issued with the requirement of presentation.[176] And whether the multimodal transport documents are applicable to these Rules depends on whether they fall within the definition of contract of carriage in Art I (b). In

[175] The requirement of internationality of at least two segments is established for the purposes of this thesis. See the definition of international multimodal transport in this thesis in section 1.2.
[176] See section 2.1.1.1.1.

general, if the international multimodal transport involves a sea carriage which is quite common for containers, the above cases decided by the English courts would apply and the multimodal transport sea waybill is not covered by the Hague and Hague-Visby Rules. The Hague and Hague-Visby Rules are unlikely applicable to inland carriage covered by the international multimodal transport. For inland waterway, there are more types of documents applicable to the CMNI and the requirement of being a bill of lading or document of title should be met. The definition of the contract of carriage in the Hamburg Rules has a broader scope and follows the traditional exception of charter parties.

The temporal scopes mainly affect the second conflict issue and the English courts interpret Art I (e) liberally to recognise contractual arrangements for the period of liability of the carrier. In container transport, the courts probably incline to extend its scope to some extent, i.e. the stuffing. The Hamburg Rules apply to sea carriage only as well but spread the scope to the port area. The pre-loading and after-discharge issue is resolved. The rules relating to the scope of application of the Hamburg Rules are more consistent with the other international unimodal conventions and, in the author's view, it is an advantage to achieve uniformity in international multimodal transport. The Hamburg Rules make an improvement to some degree but the limits are obvious. From the aspect of temporal scopes, three sea conventions are applicable to seg segments in international multimodal transport and restrict to sea carriages only.

The territorial scope of application in the Hague Rules is narrower than that in the Hague-Visby Rules. The English courts treat the substantial change in Art X (c) in the Hague-Visby Rules with discretion because an effective clause paramount needs careful interpretation due to its complicated draft. The Hamburg Rules mirror the Hague-Visby Rules with little extension by adding a connection factor of the port of discharge.

Another point which may have a negative impact on the scope of application of the Hague and Hague-Visby Rules is the deck cargo exclusion. This is especially problematic in the context of container transport and it has been illustrated by case law that the condition for stating deck carriage on the bill of lading could be fulfilled by a master's remark which is common and unilateral.

Thus, the question as to whether three sea conventions can apply to international multimodal transport does not have a straight answer and the application subject to several aspects.

The widest scope of application is provided by the CMR which clearly covers an international road segment of an international multimodal transport from the perspective of English law. In some circumstances, the CMR may apply to other modes of transport which mainly refer to sea carriage. If the same construction is adopted to interpret the contracts of carriage in the COTIF-CIM and the CMNI, these Conventions are applicable to the relevant leg of an international multimodal transport. One similarity of these two conventions is that they can extend their scope of application to ancillary carriage to other modes of transport but the conditions are not easily

satisfied in an international multimodal transport due to the natural geographical limitations of the two modes of transport. But the limited extension of non-maritime conventions could conflict with other conventions including sea conventions. These unimodal conventions do not have a specific provision to solve the potential conflict issues because of the unimodal nature. However, the author submits that the Rotterdam Rules provide an effective solution that it possible to solve the conflicts with non-sea unimodal conventions including the CMR, the COTIF-CIM and the CMNI. That method will be analysed in sections 8.5.

CHAPTER 3: The Liability of the Container Carrier under the International Unimodal Conventions

Provided that the requirements of scope of application were fulfilled, the next question is what the liability of the container carrier in international multimodal transport would be. This chapter will consider this question on the assumption that in the multimodal transport by containers, the multimodal transport operator (i.e. the contractual carrier) is liable for loss of or damage to goods or delay during the whole carriage. The real problem is how his liability be regulated by the international unimodal conventions. Given that the standards of carrier's liability are different in different unimodal conventions, this chapter will illustrate the distinctions.

The liability regime of the container carrier in international unimodal conventions will be considered in two circumstances: liability for loss of or damage to the goods and liability for delay. The differences are mainly in the Hague and Hague-Visby Rules which will be discussed in section 3.2. However, the standards of the carrier's liability in international unimodal conventions are divergent and manifest in the following aspects: the basis of liability, the exonerations and the burden of proof. The exceptions carriers can rely on vary dramatically in each convention depending on different risks in different modes of transport. In sea carriage, the changes of sea conventions on excepted perils are obvious and the underlying reasons why the changes occur are necessary for consideration. The influences of containers are mainly on the obligations of the carrier and probable increased risks in certain excepted perils which will be discussed

below. Accordingly, the rules of onus of proof are diverse which can reflect the level of carrier's liability. To understand why the differences exist in various modes and what the liability of container carrier in the international multimodal transport, the liability of the carrier at common law will be introduced first.

3.1 Liability of the Carrier at Common Law

At common law the law of carriage of goods is a branch of the law of bailment and bailment is a legal relationship distinct from the law of contract and tort regardless of modes of transport.[177] It exists whenever one person is voluntarily in possession of goods which belong to another and imposes certain obligations on every bailee.[178] The carrier's liability for loss of or damage to the goods is different from his liability for delay at common law. In the early stage, the ordinary bailee was strictly liable for any loss of or damage to the goods in his possession.[179] But *Coggs v Bernard*[180] overrides the strict liability of the ordinary bailee and held he was only liable if he had been negligent. But the judge distinguished the common carrier from the general bailee and believed that the common carrier of goods had a strict liability.[181] He also found the private carrier undertook a lower standard of liability than the common carrier.[182] The common carrier by land is strictly liable for loss of or damage to the goods

[177] Andrew Burrows, *English Private Law* (3rd edn, OUP 2013) para. 16.01.
[178] Ibid, paras. 16.01-2.
[179] *Southcote's case* 76 ER 1061 (KB).
[180] 92 ER 107 (KB).
[181] Ibid, 112. It was *obiter dictum.*
[182] Ibid, 113.

'by custom of realm' while the private carrier is treated as a general bailee, only liable for loss of or damage to the goods which is caused by his own negligence.[183] Nevertheless, most inland carriers in the United Kingdom are private carriers and therefore the old common rule of carrier's liability is of small importance.[184] The situation for a water carrier is slightly different because it is possible for the common law rules to apply though sea carriage without contract is a rare exception.[185] In *Liver Alkali Co v Johnson*,[186] Brett J held that by the custom of England 'every shipowner who carries goods for hire in his ship whether by inland navigation or coastways or abroad undertakes to carry them at his own absolute risk' no matter the carrier was common or private.[187] Compared with his liability for loss of or damage to the goods, the carrier, whether common or private, is only liable at common law for delay in delivering the goods if the delay is caused by his negligence.

Although the common law generally imposes a strict liability on the carrier, in the nineteenth century, railroads and shipowners took advantage of their bargaining powers and freedom of contract to insert clauses in consignment notes and bills of lading which purported to exonerate the carrier from

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183 Although the common carrier is strictly liable, there are four excepted perils at common law which are Act of God, Act of the King or Queen's enemy, inherent vice and fault or fraud on the part of the consignor or consignee. David A Glass and Chris Cashmore, *Introduction to the Law of Carriage of Goods* (Sweet & Maxwell 1989) paras. 1.03 and 1.28.

184 British Rail and other rail carriers are not common carriers by virtue of Section 43 of the Transport Act 1962. Road Haulage Association Limited Conditions of Carriage 1982 state that the carrier is not a common carrier.

185 Otto Kahn-Freund, *The Law of Carriage by Inland Transport* (3rd edn, Stevens & Sons 1956) 198.

186 (1873-74) LR 9 Ex 338.

187 Ibid, 344. Despite that the defendant in this case was not a common carrier, Brett J thought his liability was the same as a common carrier.

liability for loss or damage of goods due to numerous causes.[188] It is natural that such imbalance of power would result in statutory restrictions and the carrier's liability under each convention will be analysed below.[189]

3.2 Liability of Carrier in International Sea Conventions

3.2.1 The Hague and Hague-Visby Rules

The Hague and Hague-Visby Rules do not provide a specific provision dealing with the basis of carrier's liability and instead, there are two unique obligations of the sea carrier: to provide a seaworthy vessel and to take care of the cargo in Art III.[190] The 'presumed fault' of the carrier under the Hague and Hague-Visby Rules was mentioned by Wright J in *Gosse Millerd v Canadian Government Merchant Marine (The 'Canadian Highlander')*[191] that there was a prima facie breach of the carrier when the goods were discharged and not in the same good order and conditions as on shipment.[192] Lord Pearson supported Wright J's opinion and held there was an inference of a breach of obligation in Art III rule 2 when the goods were damaged at the destination after being received on board in apparent good order and condition which was acknowledged in the bill of lading.[193] This is closely related to the burden of proof issue in Art III rule 2 and will be

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[188] Stephen Zamora, 'Carrier Liability for Damage or Loss to Cargo in International Transport' (1975) 23 Am J Comp L 391, 400.
[189] The legislations at national level were the starting point. The first rail Act industry is the Railway and Canal Traffic Act 1854 in the United Kingdom and the first sea Act is the Harter Act 1893 in the United States. The law making at international level commenced later and the relevant international conventions will be discussed below.
[190] The obligations exist at common law and sea conventions but there are several changes on certain aspects in conventions.
[191] [1927] 2 KB 432 (KB).
[192] Ibid, 434. Although the judge's decision is criticised on other issues, his finding on the prima facie breach of the carrier has be approved by many cases later.
[193] *Albacora v Westcott & Laurence Line Ltd* [1966] SC (HL) 19, 30.

discussed in section 3.2.1.3. However, the cargo interests usually claim that the carrier is in breach of its two duties together. Besides, Art III rule 8 nullifies any clause in a contract of carriage relieving the carrier from the liability for loss or damage to goods arising from negligence, fault or failure in the duties and obligations provided in Art III or lessening liability otherwise than as provided in these Rules. In some sense, Art III rule 8 guarantees a compulsory minimum standard of liability provided by the Hague and Hague-Visby Rules. But the English courts interpret this provision broadly, especially the validity of the arrangement of performances in the contract of carriage under Art III rule 2.

One feature of the Hague and Hague-Visby Rules is that the carrier could rely on a long list of exceptions in Art IV rule 2 and this section will select several debatable excepted perils to discuss. The next issue in relation to the carrier's liability is the legal onus of proof and the burden varies depending on the factual circumstances.

3.2.1.1 Obligations the Carrier

3.2.1.1.1 Seaworthiness Obligation

The seaworthiness obligation of the carrier is implied by common law and the Hague and Hague-Visby Rules mirror it with alterations. Art III rule 1 requires the carrier to exercise due diligence to provide a seaworthy ship before and at the beginning of the voyage. This obligation was determined from three main aspects in paragraphs (a), (b) and (c) of Art III rule 1: vessel-worthiness, crew or documentation competence and cargo-worthiness.

The goods carried by containers may render the vessel unseaworthy under certain circumstances. In *Northern Shipping Co v Deutsche Seereederei GMBH and Others (The 'Kapitan Sakharov')*,[194] the court held that the stowage of dangerous chemicals in containers under deck rendered the vessel unseaworthy and the relevant international conventions for carriage of dangerous goods should apply to containers as well.[195] In a very recent case, *Alize 1954 and CMA CGM Libra v Allianz Elementar Versicherungs AG*,[196] the court reviewed the importance of seaworthiness obligation in Art III rule 1 of the Hague and Hague-Visby Rules and updated the standard of this duty with the development of shipping technology.

The related development to improve the safety of navigation is the recognition by the International Maritime Organisation ('IMO') in 1999 that voyage or passage plan should apply to all ships engaged on international voyages and the practice of passage plan was well-established in 2011 when the casualty in this case occurred.[197] The passage plan prepared by the master and the second officer did not notice the change of depths of the port. The container vessel was grounded finally. The cargo interests claimed that the inadequacy of the passage rendered the ship unseaworthy and the unseaworthiness arisen from the lack of due diligence.[198] Therefore, the carrier was in breach of Art III rule 1 of the Hague Rules.

[194] [2000] 2 Lloyd's Rep 255 (CA).
[195] Ibid, 266.
[196] [2019] EWHC 481 (Admlty); [2020] EWCA Civ 293.
[197] [2019] EWHC 481 (Admlty), [3].
[198] The burden of proof regarding seaworthiness will be discussed in section 3.2.1.3 below.

The trial judge, Teare J, held that even though there was no previous case ruling on the unseaworthiness of the vessel caused by a defective passage plan, the conventional test of determining seaworthiness in *McFadden v Blue Star Line*[199] could apply. The test was would a prudent owner, if he had known of the relevant defect, have required it to be made good before sending his ship to sea?[200] In this case, the issue was whether a prudent master, if he had known that his ship would commerce the voyage with a defective passage plan, would have required such defect to be made goods before setting off. The Court of Appeal affirmed Teare J's judgment that the defective passage plan rendered the ship unseaworthy and the standard of seaworthiness should increase with the improved knowledge of document required to be prepared prior to a voyage.[201] To summarize, in order to determine the criteria rendering a vessel seaworthy, recent developments of navigation rules should be considered under certain circumstances. And in the author's view, it is justified when such rules have been well-established in practice. Just like this case, the importance of a passage plan had been recognised at that time and if the judge did not consider the role of a defective passage plan in the safety of navigation, it would be unreasonable to discharge the carrier's liability.

Given that the carrier usually supplies containers to the shipper in practice, one problem in connection with containers is whether they are a part of ship in paragraph (c) so that the carrier needs to ensure the fitness for

[199] [1905] 1 KB 697 (KB).
[200] Ibid, 706.
[201] [2019] EWHC 481 (Admlty), [87]; [2020] EWCA Civ 293, [17].

carriage. The Hague and Hague-Visby Rules do not express provide for the cargo-worthiness of containers in Art III rule 1 and currently there is no English case ruling on this point. However, the relevant foreign judgments might be useful for the English courts as reference according to the interpretation principle of international uniformity which is discussed in section 1.4. A famous American case is *Houlden Co Ltd and Others v SS Red Jacket and American Export Lines Ltd (The 'Red Jacket')*.[202] The containers were supplied by the carrier for a house-to-house shipment but an investigator, who was arranged by the carrier, noticed the defective structure of the damaged containers and reported to the carrier before loading. The Court found that the containers were unfit to the carriage and such defection was a proximate cause to the damage.[203] And the carrier did not exercise due diligence to make the vessel seaworthy since he was aware of the problem of containers before loading.[204] Therefore, the District Court held the carrier failed to exercise due diligence to provide fit equipment to the vessel. Considering that the containers were supplied by the carrier and the vessel in this case was a container ship, containers should be regarded as a part of the vessel.[205] The Dutch Supreme Court had an interesting view regarding container being a part of the vessel. In *Nile Dutch Africa Lijin BV v Delta Lloyd Schadeverzekering NV (The 'NDS Provider')*,[206] the cargo were carried in containers with holes resulting from

[202] [1978] 1 Lloyd's Report 300 (US District Ct).
[203] Ibid, 309.
[204] Ibid, 306.
[205] Ibid, 310.
[206] NJ 2008/55.

rust and damaged by water due to the bad condition of containers. The Dutch Supreme Court found that Art III rule 1 (c) of the Hague and Hague-Viby Rules did not answer the question whether containers which were put at the disposal of the shipper by the carrier for carriage of goods should be considered as a part of the ship or in the same way as a part of the ship. The court believed that the aim of Art III rule 1 was that the vessel should protect the cargo from the dangers of the ship so that it was suitable to carry cargo. Therefore it was logical that containers provided by the carrier to carry the goods specifically for the carriage of goods should also be fit to carriage the cargo that had been placed in the containers. The court also referred to the seaworthiness obligation of the carrier under Art 14 (c) of the Rotterdam Rules that expressly includes any container supplied by the carrier in or upon which the goods are carried.[207] The judgment indicates that the Dutch Supreme Court drew an analogy between parts of the ship and containers and thus, Art III Rule 1 should apply in both situations.

As for the standard of duty of seaworthiness, it is 'due diligence' which is equivalent to the exercise of reasonable care and skill and the English court interpreted the phrase as 'lack of due diligence was negligence'.[208] Another remarkable feature of the seaworthiness obligation is that it is overriding and not delegable to servants or agents.[209] In other words, when the carrier

[207] See seaworthiness obligation in the Rotterdam Rules in section 8.2.2.2.
[208] *Union of India v NV Reederij Amsterdam (The 'Amstelslot')* [1963] 2 Lloyd's Rep 223 (HL) 235.
[209] Ibid. This case is closely related to the burden of proof of due diligence which will be discussed below.

delegates his duty to another person, he has to prove due diligence had been exercised not only by himself but his delegate.

Nevertheless, the carrier would not become liable until the vessel is in his 'orbit' or 'control'. The term 'orbit' is used co-extensively with ownership or service or control and the scope appear to be broad because the carrier commonly delegates this obligation to his agents, servants or independent contractors. In *Riverstone Meat Co Ltd v Lancashire Shipping Co Ltd (The 'Muncaster Castle')*, [210] the vessel was unseaworthy because of the negligence of the repairer and the House of Lords held that the carrier was liable for the repairer's negligence. In *Union of India v NV Reederij Amsterdam (The 'Amstelslot'),*[211] the reduction gear had a breakdown due to a fatigue crack which was caused by an unknown reason. The unseaworthiness of the ship was not in dispute and both parties agreed that the crack occurred before the voyage. The issue was whether a reasonable Lloyd's surveyor, exercising due diligence, would find the crack. The House of Lords held that the surveyor had taken reasonable steps to examine and exercised due diligence. [212] Therefore, if the carrier could prove that unseaworthiness could not be discovered by a reasonable supervisor who exercises proper care and skill, the carrier is not liable.

But the orbit of the carrier does not extend to ship builders. In *Parsons Co and Others v CV Scheepvaartonderneming Happy Ranger (The 'Happy*

[210] [1961] AC 807 (HL).
[211] [1963] 2 Lloyd's Rep 223 (HL).
[212] Ibid, 231.

Ranger'),[213] the hooks on the crane broke during loading because of a latent defect and it was common ground that the vessel was unseaworthy. The issue was whether the carrier or his agents acted with due diligence to make the vessel seaworthy after the delivery of the vessel by the shipbuilder within the meaning of Art III rule 1 of the Hague-Viby Rules. The judge found that the hook was never proof tested by Lloyd's to a sufficient load in order to justify its lifting capacity of a process vessel at all material times.[214] The judge thought that the carrier failed to prove that he exercised due diligence because the carrier knew that the hook had never been proof tested by Lloyd's prior to the delivery of the vessel and he did not test it either when the vessel was in his control.[215] The carrier was in breach of Art III rule 1 of the Hague-Visby Rules.

Another feature of this obligation is the duration, 'before and at the beginning of the voyage,' which is construed to cover the entire period starting from the time when the vessel is under the orbit of the carrier until the vessel sails.[216] The period of seaworthiness obligation has been changed in the Hamburg Rules and the Rotterdam Rules and becomes continuous.[217]

3.2.1.1.2 Due Care of Cargo

3.2.1.1.2.1 Meaning of Properly and Carefully

[213] [2006] EWHC 122 (Comm).
[214] Ibid, [42].
[215] Ibid, [44] and [54].
[216] See *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 (HL).
[217] See seaworthiness obligation in the Hamburg Rules in section 3.2.2.1 and in the Rotterdam Rules in section 8.2.2.2.

Art III rule 2 of the Hague and Hague-Visby Rules provides for due care of cargo that subject to Art IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. The meaning of 'properly and carefully' is illustrated by *Albacora v Westcott & Laurence Line Ltd*[218] that 'the obligation is to adopt a system which is sound in the light of all the knowledge which the carrier has or ought to have about the nature of the goods'.[219] The words in rule 2 seem to include all relevant operations of the carriage from loading to discharge but the English court held that this provision is 'to define not the service of the contract service but the terms on which that service is to be performed' and the parties can contract out of the obligations listed.[220] The loading and unloading operations can be contractually arranged and performed either by the cargo interests or the carrier.

There are two widely-used terms for containers to indicate which party has the liability to perform loading and discharge: Full Container Load ('FCL') and Less than Container Load ('LCL').[221] The FCL/LCL terms means the shipper is liable for stuffing the container and the carrier unpacks. The LCL/FCL terms means the containers are provided and stuffed with the bags by the carrier but unstuffed by the consignee after arrival at their

[218] [1966] SC (HL) 19.
[219] Ibid, 22 (Lord Reid). In this case, the carrier was not in breach of the obligation under Art III rule 2 of the Hague and Hague-Visby Rules because he was not expected to carry the goods in a refrigerated condition.
[220] See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB) which is discussed in section 2.1.1.2.
[221] Peter Brodie, *Commercial Shipping Handbook* (3rd edn, Informa 2014) 112.

destination.[222] In container transport, it is common for the carrier or stevedores who are sub-contracted by the carrier to line and stuff the containers, especially for hygroscopic cargo carried in unventilated containers. Therefore, if the lining and stuffing could be treated as part of loading, the carrier's duty of care for cargo may extend to the lining and stuffing process.[223]

The problem is what precaution should be taken and whether a general industry practice could render a sound system which meets the standard of duty in Art III rule 2. In *Volcafe Ltd and Others v Compania Sud Americana de Vapores*,[224] the bagged coffee was carried in unventilated containers and the stevedores used Kraft paper to line containers. On outturn the containers suffered some degree of damage from condensation because moisture in warm air rising from the stow had condensed on contact with the cold roof of the container and fallen on the bags. The claimant alleged that a single layer of Kraft paper was deficient and the damage was caused by the negligence of carrier in breach of Art III rule 2 of the Hague Rules. However, the carrier contended that the Kraft paper was lined in an ordinary and appropriate manner in absence of specific instructions from the shipper and he was not in breach of obligation under Art III rule 2. The relevant issue here is whether the carrier was in breach and the issue of burden of proof will be discussed in section 3.2.2.1.4. The High Court judge

[222] In *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKSC 61, the LCL/FCL terms are used and the carrier stuffed the containers before loading.
[223] See the temporal application issue of this case in section 2.1.1.2.
[224] [2015] EWHC 516 (Comm); [2016] EWCA Civ 1103; [2018] UKSC 61.

held that the sound system deployed by the carrier should prevent damage and the industry practice itself could not render a system sound without appropriate theoretical or empirical underpinning.[225] The Court of Appeal reversed the judgment on both points. Firstly, the requirement for a sound system was in accordance with the general practice of carriage of goods by sea and the High Court judge erred on this issue.[226] Furthermore, the general industry practice did not need the underpinning by theoretical calculation or empirical study to render a system sound.[227] The House of Lords did not rule this issue directly because this was not the issue before their Lordships. They held that whether it was a general industry practice to line containers in this way should be decided by the trial judge not the Court of Appeal.[228] The trial judge's decisions had been restored.

Therefore, since these operations are treated as a single loading process, the carrier is responsible for dressing and stuffing containers which are subsequently loaded on his vessel and the carrier should do such operations properly and carefully. Nevertheless, if the dressing and stuffing are not a part of a single loading process, the carrier does not have an obligation of care of cargo under the Hague and Hague-Visby Rules.

3.2.1.1.2.2 Contractual Arrangements in Art III rule 2

The other operations in Art III rule 2 such trimming and stowage are frequently transferred from the carrier to other parties and a typical

[225] [2015] EWHC 516 (Comm), [47] and [48].
[226] [2016] EWCA Civ 1103, [66] and [68].
[227] Ibid, [72].
[228] [2018] UKSC 61, [43].

contractual term, FIOST clause ('Free In and Out, Stowed and Trimmed'), is frequently introduced into the contract of carriage to shift those traditional carrier's obligations to the cargo interests.[229] A remarkable case is *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Inc. (The 'Jordan II')*.[230] The starting point is that, in order to transfer traditional obligations of the ship owners to the charterers in a charter party, the words have to be clear and unambiguous. If the FIOST term exists in the freight clause only it may be arguable that the term is not clear enough to transfer these obligations.[231] But in this case, because both clause 3 (the freight clause) and clause 17 (shippers/charterers/receivers to put the cargo on board trim and discharge cargo free of expense to the vessel) indicated the transfer of obligations, the Court of Appeal held that the effects of the two clauses together were successful to transfer responsibility.[232]

Stowage is another problem because 'in modern times the work of stowage is generally deputed to stevedores but that does not generally relieve the ship owners of their duty'.[233] The House of Lords in *Canadian Transport Co Ltd v Court Line Ltd*[234] held that the clause in the charter party that 'the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the captain' not only relieved the carrier of stowage, but also relieved its liability for bad stowage.[235] Furthermore, the

[229] Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011) para. 27.38.
[230] [2004] UKHL 49.
[231] Ibid, [24].
[232] Ibid, [32].
[233] *Canadian Transport Co Ltd v Court Line Ltd* [1940] AC 934 (HL) 943.
[234] [1940] AC 934 (HL).
[235] Ibid. But the carrier limits his liability corresponding to the extent that the master exercises supervision because of 'under the supervision of the captain'.

Court of Appeal in *Balli Trading Ltd v Afalona Shipping Co Ltd (The 'Coral')* [236] ruled that a similar clause in the charter party could be incorporated into the bill of lading by modification. The language 'clauses are directly germane to the shipment, carriage and delivery of goods' was wide enough to incorporate clause 8 'charterers are to load, stow and trim and discharge the cargo at their expense under the supervision of the captain in the charter party into the bill of lading.[237]

As for loss of or damage to the goods which occurs after discharge, Art III rule 2 of the Hague and Hague-Visby Rules uses "discharge" not "delivery" and thus it is argued that the carrier's liability ceases after discharge.[238] Besides, the parties can extend the carrier's duty in Art III rule 2 to delivery by contractual terms and it is easy to imply that these Rules continue after actual discharge until delivery even without such an agreement. [239] Generally speaking, in English law, the obligations of the carrier under Art III rule 2 of the Hague and Hague-Visby Rules can be transferred to the cargo interests by contractual agreements and they are not mandatory duties provided by these Rules. The interpretation method adopted by the English courts on Art III rule 2 is constantly related to Art III rule 8. In *Renton (GH) Co Ltd v Palmyra Trading Co of Panama*,[240] Lord Morton in the House of Lords contended that the duties imposed by the contract did not

[236] [1993] 1 Lloyd's Rep 1 (CA).
[237] Ibid, 7. The Court of Appeal manipulated 'the charterers' into 'shippers'.
[238] Nicholas Gaskell and others, *Bill of Lading: Law and Contracts* (LLP 2000) para. 14.85. But the carrier could be liable as a bailee after discharge.
[239] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.147.
[240] [1957] AC 149 (HL).

seek to relieve the carrier from any liability arising from failure in the duties and obligations imposed by Art III rule 2 and in this case, the liberty to discharge clause was not nullified by Art III rule 8.[241]

The distinct difference between two duties is the proviso in rule 2 that it is subject to Art IV while rule 1 is not. In *Maxine Footwear Co Ltd v Canadian Government Merchant Marine*,[242] Lord Somervell in the House of Lords held that 'Rule 1 is an overriding obligation and if it is not fulfilled, the nonfulfillment causes the damage the immunities of Article IV cannot be relied on'.[243] Nonetheless, the carrier may still have the right to limit his liability under Art IV rule 5 since the limitation of liability is different in character from an exception and the words 'in any event' are unlimited in scope.[244] Art III rule 2 subjects to Art IV including excepted perils in rule 2 may mean the carrier can rely on exceptions without disproving negligence.[245] But this view has been disapproved by the Supreme Court in *Volcafe Ltd v Compania Sud Smericana de Vapores SA*[246] which will be discussed in section 3.2.1.3.

3.2.1.2 Exceptions

The long list of exceptions in Art IV rule 2 of the Hague and Hague-Visby Rules includes excepted perils at common law and some common

[241] [1957] AC 149 (HL), 170.
[242] [1959] AC 589.
[243] Ibid, 613.
[244] *Parsons Corporation and Others v CV Scheepvaartonderneming Happy Ranger and Others (The 'Happy Ranger')* [2002] EWCA Civ 694, [38].
[245] See Art IV Rule 2 (q).
[246] [2018] UKSC 61.

contractual exceptions before the Hague Rules.[247] This section selects several controversial defences, notably paragraphs (a), (b), (m) and (q), to consider the effects on the liability of the carrier because the carrier may be not liable even if his negligence caused the loss of or damage to the goods in some excepted perils.

Art IV rule 2 (a) provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect or default of the master, pilot, or the servants of the carrier in the navigation or in the management of the ship. This defence has attracted numerous criticisms because it allows the negligent carrier to escape liability. Besides, it is claimed that the technologies developed in the shipping industry make this exception out of date and the following maritime conventions also approve its deletion.[248] The well-known nautical fault exception in the Hague and Hague-Visby Rules includes two aspects: navigation and management of the ship.[249] The management of the ship is more difficult to be distinguished from the duty in Art III rule 2 to take proper care of the cargo. The distinction had been drawn in *Gosse Millerd v Canadian Government Merchant Marine (The 'Canadian Highlander')*.[250] In the House of Lords, Viscount Sumner held that the use of tarpaulins during the repair was a precaution solely in the interest of the cargo and in consideration of

[247] The common contractual exceptions before the Hague Rules are (c) perils of the sea, (g) arrest or restraint of princes, (j) strike or lockouts and (n) insufficient packing.
[248] See defences of the Hamburg Rules in section 3.2.2.1 and exceptions of the Rotterdam Rules in section 8.2.4.1.
[249] Lachmi Singh, *The Law of Carriage of Goods by Sea* (Bloomsbury Professional 2011) para. 13.23.
[250] [1929] AC 223 (HL).

the rigorous construction of this exemption, the carrier could not rely on the defence of neglect in management of the ship in Art Rule 2 (a).[251] Furthermore, he believed that the interpretation method was consistent with the intention of the Hague Rules which was to provide legislative minimum protection for the cargo interests.[252]

Another common excepted peril available for the carrier to escape liability in the case of negligence is fire. Art IV rule 2 (b) provides that neither the carrier nor the ship is liable for loss or damage arising or resulting from fire unless caused by the actual fault or privity of the carrier. The carrier is not responsible for fire damage resulting from the negligent conduct of his servants or agents. It is unlikely for the carrier to be disentitled to rely on fire exception due to the difficulty on proof.[253] And in a recent case, the court held that even if fire was deliberately caused by an agent or servant of the carrier, the carrier could still rely on this exception. In *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The 'Lady M')*,[254] the fire was caused by the chief engineer deliberately or negligently. The issue was whether Art IV rule 2 (b) of the Hague-Visby Rules was available. The court contended that the phrase 'fire unless caused by the actual fault or privity of the carrier' should be construed plainly and it did not indicate how the fire was caused was relevant, either deliberately or negligently.[255] The

[251] [1929] AC 223 (HL) 240.
[252] Ibid, 237.
[253] The onus is on the cargo interests to prove the actual fault or privity of the carrier. It is more difficult to establish privity when the goods are carried by a shipping company.
[254] [2019] EWCA Civ 388.
[255] Ibid, [43].

same opinion is expressed in *Carver on Bills of Lading* that 'the word fault must obviously cover deliberate and reckless conduct as well as negligence'.[256] It was contended that in cases of barratry, the carrier's agents were acting contrary to the interests of the carrier and thus a deliberate act by a crew member to the prejudice of the carrier occurred without the actual fault or privity of the carrier.[257] Therefore, the carrier could rely on Art IV rule 2 (b) in this case.

These two excepted perils attract numerous disapprovals because they are inconsistent with the principle of fault liability and the carrier can escape liability even if he is negligent.[258] The exception list is a major change in the Hamburg Rules and the Rotterdam Rules retain the list without two notable fault exceptions.[259] These two typical maritime defences cannot be seen in other international unimodal conventions and should not be permissible in international multimodal transport.[260]

Having listed 16 specific exceptions, the Hague and Hague-Visby Rules conclude the catalogue in Art IV rule 2 with a 'catch-all' exception that the carrier is not liable for any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier. The main difference between the catch-all exception and the

[256] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.215.
[257] *Earle v Rowcroft* 103 ER 2.
[258] Samir Mankabody (ed.), *The Hamburg Rules on the Carriage of Goods by Sea* (A W Sijthoff International 1978) 138.
[259] See Hamburg Rules in section 3.2.2.1 and the Rotterdam Rules in section 8.2.4.1.
[260] See Maersk Line Multimodal Transport Bill of Lading clause 6.1: exceptions for carrier's responsibility in multimodal transport do not include these two defences.

above 16 excepted perils lies on the burden of proof which will be explained in next section 3.2.1.3.

Besides, due to the proviso in Art III rule 2, the problems arise when the exemptions conflict with the duty to care for the cargo in Art III rule 2. Lord Sumption pointed out in *Volcafe Ltd v Compania Sud Smericana de Vapores SA*[261] that some of exceptions in Art IV rule 2 refer to matters by their nature would constitute breaches of the carrier's duty to care for cargo and some refer to matter which may or may not be caused by such a breach.[262] The English courts deal with the issue by interpreting the excepted peril as 'an exception on exceptions'. [263] In *Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera (The 'Torenia')*,[264] the loss resulted from concurrent effects of a peril of the sea and a defect which was not an excepted peril. Hobhouse J held that the carrier was liable 'except the loss was by perils of the sea unless or except that loss was the result of the negligence of the servants of the owner'.[265]

The next mentioned exception is inherent vice which is a common excepted peril at common law and in other international unimodal conventions. The concept of inherent vice was initially examined in the context of marine insurance and there is similarity in treatment of inherent vice in contexts of marine insurance and carriage of goods by sea. [266] However, the

[261] [2018] UKSC 61.
[262] Ibid, [28].
[263] See *Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera (The 'Torenia')* [1983] 2 Lloyd's Rep 210 (QB).
[264] [1983] 2 Lloyd's Rep 210 (QB).
[265] Ibid, 217.
[266] Jeffrey Thomson, 'Defining Exceptions for Inherent Vice' [2019] LMCLQ 189, 192.

Supreme Court ruled that the inherent vice conception differ in scopes of two different contracts.[267] Lord Sumption pointed out that in carriage of goods by sea, 'if the carrier could and should have taken precautions which would have prevented some inherent characteristics of the cargo rom resulting in damage, that characteristic is not inherent vice'.[268] The same opinion is expressed in *Scrutton on Charterparties and Bills of Lading* that the inherent vice would vary depending on the degree of care of the carrier required by the contract.[269] In container transport, the containers used for packing goods increase the likelihood of condensation damage to a large degree since the containers are travel worldwide and the condensation damage would be caused due to the dramatical change of temperature. The moisture damage could be treated as inherent vice in Art IV rule 2 (m) of the Hague and Hague-Visby Rules if the damage occurs without the carrier's negligence. Nevertheless, in *Volcafe Ltd and Others v Compania Sud Smericana de Vapores SA,*[270] the carrier failed to prove he had exercised due diligence in Art III rule 2 and he could not rely on the inherent vice defence in Art IV rule 2 (m). The issue mainly relates to the burden of proof in Art IV rule 2 (m) which will be discussed in section 3.2.1.4.

Another excuse is reasonable deviation in Art IV rule 4. The carrier is not liable for loss of or damage to the goods resulting from any deviation in

[267] See *Volcafe Ltd and Others v Compania Sud Smericana de Vapores SA* [2018] UKSC 61.
[268] Ibid, [37].
[269] Bernard Eder and Others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019) para. 11.055.
[270] [2018] UKSC 61.

saving or attempting saving life or property at sea or any reasonable deviation.[271] The test of reasonable deviation is settled by Lord Atkin in *Stag Line Ltd v Foscolo Mango Co Ltd*[272] that it should be a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time.[273] Furthermore, it is common to contain a wide deviation clause in the contract of carriage and the Hague and Hague-Visby Rules do not invalidate such contractual terms. In this case, the charter party contained a clause (clause 6) to give the vessel liberty to call any ports in any order for bunkering or other purposes. Although the House of Lords did not rule on the exact meaning of a class 'other purposes', it should be construed by reference to the purpose of bunkering and the business purposes which would be contemplated by the parties as arising in the carrying out the contemplated voyage.[274] In this case, the vessel was deviated to land servants of the ship owners to adjust the machinery which was neither 'other purposes' in clause 6 nor reasonable deviation in the Hague Rules. Overall, the English courts do not interpret the deviation clause and reasonable deviation literally.

The consequences of unjustifiable deviation is that the carrier cannot rely on exceptions in Art IV rule 2 but may be entitled to limit his liability. There is no deviation case ruling on this point but in a recent deck cargo case, *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd* ('*The Kapitan Petko*

[271] The ambit of justifiable deviation in the Hague and Hague-Visby Rules is wider than the meaning at common law which only allows saving property.
[272] [1932] AC 328 (HL).
[273] Ibid, 344-5.
[274] Ibid, 334, 342 and 349.

Voivoda'),[275] the Court of Appeal held that the carrier could limit liability under the Hague Rules even the cargo was carried on deck because the words 'in any event' in Art IV rule 5 were unlimited in scope and applied to this situation. In that way, it could be assumed that the carrier is entitled to limit liability even if there was an unjustifiable deviation. Another issue regarding the consequence of geographical deviation is whether the carrier can rely on time limit in Art III rule 6 of the Hague and Hague-Visby Rules. In a recent case, *Dera Commercial Estate v Derya Inc (The 'Sur'),*[276] it was held that a geographical deviation did not preclude the carrier from relying on one year time bar in Art III rule 6 because the phrase 'in any event' was sufficient broad to apply to deviation case.[277]

3.2.1.3 Burden of Proof

Since the Hague and Hague-Visby Rules do not provide a specific provision for this issue, the principle of bailment applies because the bill of lading is the contract of carriage which is a species of the contract of bailment.[278] The cargo interest can set up a sustainable cause of action by proving the loss of or damage to goods and the contract of carriage. The prima facie breach of the carrier normally can be inferred from the condition of goods at arrival and the duties of carrier in Art III.[279] The burden shifts to the carrier to prove either the loss or damage without his fault or his fault is

[275] [2003] EWCA Civ 451
[276] [2018] EWHC 1673 (Comm).
[277] Ibid, [111].
[278] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 216.
[279] See *Gosse Millerd v Canadian Government Merchant Marine (The 'Canadian Highlander')* [1927] KB 432 (KB) 434. (Wright J) This is discussed in section 3.2.1.1.

excused by the Hague and Hague-Visby Rules.[280] As discussed above, there is a degree of overlap between Art III rule 2 and Art IV rule 2. In addition to the interpretation of the duty of care to cargo and the exceptions, the burden of proof issue is also essential. The question is whether the carrier need to disapprove negligence when he relies on exceptions in Art IV rule 2. The answer is positive and the Supreme Court made a clear judgment in a recent case *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*.[281]

The burden of proof issue can be dated back to the judgment of Wright J on *Gosse Millerd v Canadian Government Merchant Marine Ltd.*[282] He thought that the carrier should show that he had taken reasonable care of the goods and brought himself within the protection in Art IV rule 2 if there is loss of or damage to the goods within specified immunities.[283] The judgment was overturned by the majority of the Court of Appeal and the House of Lords reversed it on different grounds.[284] But whether the carrier needed to show negligence before relying on the defences was not the issue before the House of Lords. Later, in *Albacora v Westcott & Laurence Line Ltd,*[285] Lord Pearce doubted Wright J's view in relation to the burden of disproving negligence lay upon the carrier.[286] But the issue in that case was whether the carrier was in breach of Art III rule 2 and the House of Lords

[280] *Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera (The 'Torenia')* [1983] 2 Lloyd's Rep 210 (QB) 217.
[281] [2018] UKSC 61.
[282] [1927] 2 KB 432 (KB).
[283] Ibid, 435-6.
[284] [1928] 1 KB 717 (CA); [1929] AC 223 (HL).
[285] [1966] SC (HL) 19.
[286] Ibid, 27.

found he was not. The carrier did not need to rely on Art IV rule 2 and the burden of proof issue was not considered. Therefore, the assistance of Lord Pearson's dictum on the burden of proof is little.[287]

The burden of proof in Art III rule 2 and Art IV rule 2 of the Hague and Hague-Visby Rules was the main issue before the Supreme Court in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*.[288] In this case, the goods suffered condensation damage caused by containers and the cargo interests claimed the carrier was in breach of duty of care for cargo under Art III rule 2. The Carrier contended that the burden was on the cargo interests to prove the negligence of the carrier. Alternatively, the carrier argued that he can escape liability by relying on inherent vice defence in Art IV rule 2 (m). The trial judge, the Court of Appeal and the Supreme Court all ruled on the burden of proof matter in the Hague and Hague-Visby Rules and gave distinct judgments.

The High Court judge, David Donaldson QC, concluded that there was complete circularity between Art III rule 2 and Art IV Rule 2 (m) and the onus was on the carrier to establish inherent vice and to disprove negligence.[289] The Court of Appeal held that his judgment was contrast with the principles established by precedents at common law. Flaux J, who gave the leading judgment, held that after the carrier established a prima facie

[287] This view has supports. See Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019) para. 14-082. But the counterview is that such construction will render Art IV rule 2 (q) superfluous. See Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.243.
[288] [2018] UKSC 61.
[289] [2015] EWHC 516 (Comm), [17].

case for the application of the exception, the burden shifted to the cargo interests to establish negligence on the part of the carrier which will negative the operation of the exception.[290] Flaux J disagreed with the trial judge because he thought the trial judge deprived the exception in Art IV rule 2 (m) and he believed that the carrier did not need to disprove negligence before relying on exceptions in Art IV rule 2.[291] Flaux J's judgment followed the speech of Lord Pearson in *Albacora v Westcott & Laurence Line Ltd*[292] and the Supreme Court disapproved on several grounds. In the first place, *Albacora v Westcott & Laurence Line Ltd*[293] did not concern about the burden of proof issue.[294] Then, the statement of Lord Pearce departed from the basic principles governing the burden of proof borne by a bailee for carriage by sea.[295] Another problem of Flaux J's judgment regarding the burden of proof in Art IV rule 2 (m) was he thought the carrier only needed to prove that the cargo had an inherent propensity to deteriorate but did not need to prove that he took reasonable care to prevent that propensity from manifest itself. His understanding in relation to inherent vice exception was wrong because he did not consider the standard of care for cargo of the carrier would affect some inherent characteristics of cargo.[296] And in author's view, he treated the concepts of 'inherent vice' and 'inevitable damage' similarly in the contexts of both

[290] [2016] EWCA Civ 1103, [50].
[291] Ibid, [54].
[292] [1966] SC (HL) 19.
[293] Ibid.
[294] [2018] UKSC 61, [27].
[295] Ibid.
[296] Ibid, [39].

carriage by sea and marine insurance which is incorrect.[297] Lord Sumption ruled that in order to rely on Art IV rule 2 (m), the carrier must show either that he took reasonable care of the cargo or no matter what reasonable care might be taken, the damage occurred nonetheless.[298]

Although the carrier may have evidential burden of proving the lack of his negligence under Art III rule 2,[299] the Supreme Court now clearly points out that there is a legal burden of proof upon the carrier to disapprove his negligence before relying on Art III rule 2 (m).[300] However, such legal burden of proof may not be able to apply to other excepted perils in Art IV rule 2. Because, in author's view, the Supreme Court's decision on the burden of proof issue in Art IV rule 2 (m) is based on the concept of 'inherent vice' which involves a certain degree of reasonable care of the carrier. And I think the interpretation is reasonable and consistent with the development of maritime law. In the Rotterdam Rules, Art 17.3 (g) provides a defence named 'latent defects' and with the following phrase 'not discoverable by due diligence'.[301] This paragraph upholds the construction of 'inherent vice' by the Supreme Court and it also indicates that if the carrier intends to rely on this exception, he has to prove his exercise of due diligence.[302]

[297] See discussion of inherent vice exception Art IV rule 2 (m) in section 3.2.1.3.
[298] [2018] UKSC 61, [37].
[299] *Albacora v Westcott & Laurence Line Ltd* [1966] SC (HL) 19, 31.
[300] [2018] UKSC 61, [37].
[301] See exclusions in the Rotterdam Rules in section 8.2.4.
[302] Art 17.3.

Art IV rule 2 (q) expressly states that the carrier needs to prove neither the actual fault or privity of the carrier's part contributes to the loss or damage of the goods caused by any other cause. This defence will not be affected by *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*[303] because the exception in Art IV rule 2 (q) expressly imposes the burden of proof on the carrier which is not the issue in the case. And it is also in line with the burden of proof rule in Art 17.4 (b) of the Rotterdam Rules.[304]

The next matter is the onus of proof on unseaworthiness. Due to the overriding obligation of seaworthiness, the cargo owner normally claims the carrier is in breach so that the carrier is disentitled to rely on exceptions in Art IV rule 2.[305] The orthodox view in English law is that it is for the cargo owner to prove (a) that the vessel is unseaworthy and (b) that the unseaworthiness caused the damage.[306] After the establishment, the onus of proof rests on the carrier to disprove negligence, namely the exercise of due diligence.[307] However, it is argued by William Tetley that the burden of proving seaworthiness should be on the carrier because the carrier usually is the only party who has access to the full facts.[308] But the English court tend to favor the traditional view. In The '*Hellenic Dolphin*',[309] the cargo was damaged by sea water which was caused by the seam of the shell plating. One issue was whether the seam made the vessel unseaworthy

[303] [2018] UKSC 61.
[304] See burden of proof in the Rotterdam Rules in section 8.2.5.
[305] *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589.
[306] *Papera Trades Co Ltd v Hyundai Merchant Marine Co Ltd (The 'Eurasian Dream')* [2002] EWHC 118 (Comm), [123].
[307] Ibid.
[308] William Tetley, *Marine Cargo Claims* (4th edn, Editions Yvon Blais 2008) 884-5.
[309] [1978] 2 Lloyd's Rep 336 (QB).

before or at the beginning of the journey. Given that the cargo interests could not prove the indent was sustained at or before the loading, the judge held that the carrier was not liable.[310] It can be concluded that in some cases, the carrier is in a better position to prove the seaworthiness of the ship. But the English courts still impose the cargo interests the onus of proof of unseaworthiness. Even though the cargo interests succeed, the carrier would escape his liability anyway provided that he proves due diligence was exercised.

Other relevant matters are the order of proof where there is more than one cause and one is an excepted peril. The conventional statement is the carrier has the burden of proving the cause and therefore it does not suffice for the carrier merely to prove a cause is under Art IV rule 2.[311] The carrier only escapes liability to the extent that he can prove that the loss of or damage to the goods was caused by the excepted peril alone.[312] In many cases the mere fact that the cause of loss is inexplicable means the burden of the carrier cannot be discharged but he can escape liability by establishing some reasonable possible alternative explanations.[313]

3.2.2 The Hamburg Rules

3.2.2.1 The Carrier's Liability for Loss of or Damage to the Goods or Delay in Delivery

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[310] [1978] 2 Lloyd's Rep 336 (QB) 340.
[311] *Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera (The 'Torenia')* [1983] 2 Lloyd's Rep 210 (QB) 219.
[312] *Gosse Millerd v Canadian Government Merchant Marine (The 'Canadian Highlander')* [1929] AC 223 (HL).
[313] *Philips & Co (Smithfield) Ltd v Clan Line Steamers Ltd* (1943) 76 Lloyd's Rep 58 (KB) 61.

The Hamburg Rules replace the complicated liability pattern of the Hague and Hague-Visby Rules with one single provision and establish the principle of presumed fault.[314] The Hamburg Rules is the first maritime convention to govern the carrier's liability for delay in delivery.[315] Art 5 (2) defines the meaning of delay in delivery that the goods should be delivered to the carrier within the express contractual period or reasonable time. Considering that all other modes of transport are subject to liability for delay, the draftsmen of the Hamburg Rules added it in line with other unimodal conventions.[316] Art 5 (1) provides that the carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss of or damage to the goods or delay took place while the goods were in his charge.[317] An essential improvement in the Hamburg Rules is that Art 5 (1) expressly states the carrier's liability for delay whereas the Hague and Hague-Visby Rules do not cover this issue.[318]

As for two obligations in Art III of the Hague and Hague-Visby Rules, it is suggested that both duties are implied in Art 5.[319] And as a non-delegable duty of seaworthiness,[320] the Hamburg Rules should deal it with the same

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[314] Anthony Diamond, 'A Legal Analysis of the Hamburg Rules' in Lloyd's of London, *The Hamburg Rules: A One-Day seminar Organized by Lloyd's of London Press Ltd* (1978 LLP) 9.
[315] The carrier in the Hague and Hague-Visby Rules is not liable for delay in delivery.
[316] Art 17(1) of the CMR, Art 27(1) of the COTIF-CIM and Art 16 of the CMNI.
[317] In Explanatory Note by the UNCITRAL Secretary of the United Nations Convention on The Carriage of Goods by Sea 1978 (Hamburg) para 18, it clearly states that the liability is based on the principle of fault or neglect.
[318] John C Moore, 'The Hamburg Rules' (1978) 10 J Mar L & Com 1, 7.
[319] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 217.
[320] *Riverstone Meat Co Ltd v Lancashire Shipping Co Ltd (The 'Muncaster Castle')* [1961] AC 807 (HL).

method in the Hague and Hague-Visby Rules which is consistent with the principle of presumed fault or neglect. If so, the situation under the Hamburg Rules seems unchanged.[321] The substantial difference is the duration of the seaworthiness duty. It is continuous in the Hamburg Rules while it only exists before and at the beginning of the voyage in the Hague and Hague-Visby Rules.[322] The Hamburg Rules do not use the term 'deviation' but Art 5 (6) provides that the carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea. The general liability rule applies and the carrier is responsible for deviation unless he establishes that he or his servants or agents had taken all reasonable measures to avoid the occurrence and its consequences.[323] The lawful deviations in the Hamburg Rules are similar to that in the Hague and Hague-Visby Rules except a specific reference to 'reasonable measures' to save property.[324]

3.2.2.2 Defences

The only defence available for the carrier is to prove that he or his servants or agents took all reasonable measures to avoid the occurrence and its consequences.[325] The uniform test of liability is designed to obviate the

[321] R Glenn Bauer, 'Conflicting Liability Regimes: Hague-Visby v Hamburg Rules-A Case by Case Analysis' (1993) 24 J Mar L & Com 53, 60.
[322] Robert Force, 'A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About?' (1995) 70 Tul L Rev 2051, 2064.
[323] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 219.
[324] Ibid.
[325] The Hamburg Rules generally follow the pattern of the Warsaw Convention. See M J Shah, 'The Revision of The Hague Rules on Bills of Lading within the UN System Key Issues' in Samir Mankababy (ed.), *The Hamburg Rules on the Carriage of Goods by Sea* (A W Sijthoff 1978) 17-8.

uncertainty in the Hague and Hague-Visby Rules in relation to definition and extent of the exceptions.[326] The meaning of reasonable measures is doubtful as to whether the Hamburg Rules did not impose a higher liability on the carrier than that of ordinary reasonable care.[327]

Another great change in the Hamburg Rules is the abolition of the catalogue of excepted perils in Art IV rule 2 of the Hague and Hague-Visby Rules.[328] The list of exceptions in Art IV rule 2 in the Hague and Hague-Visby Rules has been criticized as a poor draft because except for paragraphs (a) and (b), the rest adds nothing to an understanding of the basis of the carrier's liability.[329] Since the structure was taken from bills of lading in the twentieth century and new exceptions had been added without paying attention to legal necessity, the list had caused difficulties in litigation.[330] When the Hamburg Rules were made, the new provision of the carrier's liability corresponds more to civil law than common law and the list was abrogated.[331] An alteration in the basis of the carrier's liability is the fire defence in Art 5 (4) that the carrier is liable for the fault or neglect on his part in the causation of fire or in measures to extinguish it but with the onus of proof on the cargo interests.[332] Under this circumstance, the

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[326] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 216-7.
[327] Anthony Diamond, 'A Legal Analysis of the Hamburg Rules' in Lloyd's of London, *The Hamburg Rules: A One-Day seminar Organized by Lloyd's of London Press Ltd* (LLP 1978) 11.
[328] John C Moore, 'The Hamburg Rules' (1978) 10 J Mar L & Com 1, 7.
[329] UNCTAD, 'The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention', UN Doc. TD/B/C.4/315/Rev.1, para. 109.
[330] Ibid.
[331] Robert Force, 'A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About?' (1995) 70 Tul L Rev 2051, 2069.
[332] Art 5 (4)(a). John C Moore, 'The Hamburg Rules' (1978) 10 J Mar L & Com 1, 7.

decision of *Glencore Energy UK Ltd and Another v Freeport Holding Ltd (The 'Lady M')*[333] will be different because the carrier would be liable for his servant's fault. The test in Art 5 (1) is dual and the first limb is to establish the occurrence which causes the loss of or damage to the goods or delay took place while the goods were in the carrier's charge.

3.2.2.3 Burden of Proof

The Hamburg Rules do not provide clearly on whom lies the burden of proof but the principle of presumed fault in the Hague and Hague-Visby Rules infers that the cargo interests has the onus.[334] And the damaged condition of the goods at arrival in combination with a clean bill of lading can be a prima facie case in which the occurrence had occurred while it is in the carrier's charge.[335] Art 5 (1) places upon the carrier the burden of proving his freedom from fault and he can only be exonerated if he proves all measures that could reasonably be required had been taken by him, his agents or servants.[336] The interpretation of 'reasonable measures' appears to be equivalent to 'reasonable care' in English law. In the case of fire defence, the cargo owner has to prove the fault or neglect on the carrier's part in the causation of fire or in measure to extinguish the fire.[337] Furthermore, the causation issue is addressed by Art 5 (7) that the carrier is liable only to the extent that the loss of or damage to the goods or delay

[333] [2019] EWCA Civ 388.
[334] The presumed fault was explained in section 3.2.1 above. Anthony Diamond, 'A Legal Analysis of the Hamburg Rules' in Lloyd's of London, *The Hamburg Rules: A One-Day seminar Organized by Lloyd's of London Press Ltd* (LLP 1978) 11.
[335] Ibid.
[336] Art 5 (1).
[337] Arts 5 (1) and (2).

is attributable to such fault provided that he can establish the proportion of loss attributable to other factors. But if he fails to discharge this burden of proof, he will be liable for the entire loss.[338] The position is identical with the Hague and Hague-Visby Rules as discussed above.

3.2.3 Conclusion

In summary, the two obligations under Art III of the Hague and Hague-Visby Rules set up the standard of the sea carrier's lability. The English courts take a tolerant attitude towards the contractual arrangements of performances under Art III rule 2 and recognise the validity of the transformation of liabilities in the contract which are generally not void by Art III rule 8. The defences available to the sea carrier in the Hague and Hague-Visby Rules are numerous and the carrier can escape liability in case of negligence. The burden of proof rule is considerably complicated, especially in the case of unseaworthiness. The cargo interests can raise a prima facie case by showing that the cargo which was shipped in good order and condition was damage on arrival. The carrier can rely on exceptions in Art IV rule 2 and he may need to disapprove negligence in some excepted perils which overlaps with the obligation in Art III rule 2.[339] Then, the cargo interests try to displace the exception by proving that the carrier is in breach the overriding obligation under Art III rule 1. The conventional view in English law is that the cargo interests establish that the vessel was unseaworthy and such unseaworthiness caused the damage and then, it is

[338] John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 220.
[339] See *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKSC 61 which is discussed in section 3.2.1.4 above.

for the carrier to prove he exercised due diligence to make the ship seaworthy. Besides, the carrier under the Hague and Hague-Visby Rules is only liable for loss of or damage to the goods and the Rules do not cover the liability of the carrier in the case of delay which is common in container transportation.

The Hamburg Rules made substantial changes with regard to the basis of the carrier's liability and altered the incomplete fault-based liability in the Hague and Hague-Visby Rules. The carrier's standard of care seems to be the same as the Hague and Hague-Visby Rules but he has less defences. Despite the fact that the Hamburg Rules came into force in 1992, there are only 34 Contracting States so far.[340] Given that the Hamburg Rules failed to achieve support by major shipping countries, the influences are difficult to estimate. The Rotterdam Rules are more likely to reflect the recent developments in international carriage of goods by sea and will be discussed in the chapter 8.

3.3 Liability of Carrier in International Road Convention: the CMR

3.3.1 Basis of Liability

Art 17 (1) is the fundamental provision regulating the carrier's liability that he is liable for loss of damage to the goods or delay in delivery. However the carrier can relieve if he proves the loss of or damage to the goods or delay was caused by one of the exceptions in paragraph (2) or (4).[341] The

[340] See the status of the Hamburg Rules <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html>. accessed 20 Sep. 2020

[341] Art 18 (1) states that the carrier is liable to prove one of the defences causes loss of damage to the goods or delay in delivery.

English courts regard the level of carrier's liability as utmost care which is based on the key defence 'unavoidable circumstances' in Art 17 (2). The meaning of utmost care was considered in *JJ Silber Ltd and Others v Islander Trucking Ltd*[342] and Mustill J construed the phrase 'could not avoid' as 'could not avoid even with the utmost care'.[343] Besides, the period of liability under Art 17 (1) starts from taking over to delivery and a similar issue of misdelivery occurred under the Hague and Hague-Visby Rules arises in the CMR.[344] It is claimed that the liability under Art 17 does not cease until the goods are handed over to the right person and consequently misdelivery is governed by the CMR.[345]

As for delay, the carrier is liable for 'delay in delivery' rather than delay.[346] The distinction must be made because the definition of delay in the CMR is that the date the goods are delivered exceeds the agreed time or the actual time which would be reasonable to be allowed a diligent carrier.[347] To interpret the length of 'reasonable time', the circumstances of the case and particularly in the case of partial loads, the time required for making up a complete loading in the normal way should be considered. Furthermore, Art 20 (1) provides for the situation where the goods may be treated as lost where they have not been delivered within thirty days following the expiry

[342] [1985] 2 Lloyd's Rep 243 (QB).
[343] Ibid, 247. See the unavoidable circumstances defence below in section 3.2.1.3.
[344] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 182.
[345] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 1.91.
[346] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 191.
[347] Art 19. Delay in the CMR does not include the case where the goods are not delivered at all which may be treated as lost. See Art 20 (1).

of the agreed time or within sixty days from the time when the carrier took over the goods. Arts 19 and 20 mainly impact on the issue of burden of proof which will be discussed below.

3.3.2 Defences

Arts 17 (2) and 17 (4) are defences available to the carrier and Art 18 specifically deals with the exceptions and burden of proof. The defences in two paragraphs of Art 17 have some similarities but the former concerns the general risks while the latter is about special risks.[348] The carrier is not liable if the loss of or damage to the goods or delay in delivery is caused by four situations: (i) the wrongful act or neglect of the claimant, (ii) the instructions of the claimant, (iii) the inherent vice of the goods and (iv) circumstances which the carrier cannot avoid and the consequences of which he was unable to prevent.[349] The normal example of wrongful act or neglect is that the claimant performs his duty to load, stow or discharge in a defective way.[350] However, this defence could be associated with one special risk under Art 17 (4) which is easier to prove.[351] The second one is the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier. The borderline between the wrongful act and instruction is unclear in a situation where the claimant

[348] The main difference about two kinds of risks lies on the onus of proof of the carrier in Art 18 which will be considered below in section 3.3.3.
[349] Art 17 (2).
[350] The person could be the consignor or consignee. Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 217.
[351] The difference lies on the burden of proof which will be discussed below in section 3.3.3.

fails to give a necessary instruction.[352] The inherent vice exception is normal in other modes of carriage of goods and the meaning is the same.[353] The essential defence in Art 17 (2) is the unavoidable circumstances. The leading case is *JJ Silber Ltd and Others v Islander Trucking Ltd*[354] where Mustill J considered five possibilities regarding the standard of the carrier's liability to avoid the loss of or damage to the goods or delay in delivery. He rejected four interpretations including absolute liability, the 'but-for' test approach, force majeure and reasonable care.[355] The trailer was seized by armed robbers whilst parked at a motorway tollgate in an area which was well lit. He held that Art 17 (2) set a standard which was between the extreme precaution and a duty no more than reasonable care and interpreted the words 'could not avoid' as 'could not avoid even with the utmost care'.[356] Thus, it was held that the carrier failed to exercise the utmost care either by ignoring parking in a more secure place as a useful mean to reduce the risk of robberies or spending extra expense to hire two drivers.[357] In *Michael Galley Footwear Ltd v Dominic Iaboni*,[358] two drivers of lorries parked outside a bar/restaurant within an area with a great risk of theft and the carried products, shoes, were easily sold in the market. When they were having their meal, thieves broke the alarm system and

[352] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 218.
[353] See Art 4 rule 2 (m) of the Hague and Hague-Visby Rules and Art 23.2 of the CIM. This exception is similar to Art 17 (4)(d) that risks inherent in the nature of certain goods but the difference lies on the onus of proof which will be discussed below。
[354] [1985] 2 Lloyd's Rep 243 (QB).
[355] Ibid, 245.
[356] Ibid, 247.
[357] Ibid, 250.
[358] [1985] 2 Lloyd's Rep 251 (QB).

drove the lorries with the shoes. Hodgson J believed there were two ways for the drivers to avoid the damage: (i) was driving further to a guarded parking; and (ii) had meal separately and left the other with the vehicles. He rejected the first one because it would break the relevant regulations and the carrier could not exonerate because of the latter solution.[359] In theft and robbery cases which are the usual risks in road carriage, the carrier intends to rely on unavoidable circumstances defence and the court should evaluate all circumstances. As to what factors should be taken into consideration, Hodgson J contended that the likelihood of the risk, the gravity of the consequences and the cost and the practicality of overcoming the risks were irrelevant as long as he could have avoided the circumstance and prevent the consequence.[360] The carrier would be liable even he behaved reasonably without negligence.[361] But Mustill J determined in *JJ Silber Ltd and Others v Islander Trucking Ltd*[362] that in an appropriate case, the financial practicability of the suggested precautions should be included and the exercise of the utmost care should include the cost of hiring another driver.[363]

Art 17 (4) contains special risks which are either a greater risk of damage caused by the cargo itself or within the sphere of the sender or consignee rather than the carrier.[364] The origin of this defence is Art 23 (3) of the CIM

[359] [1985] 2 Lloyd's Rep 251 (QB) 255.
[360] Ibid.
[361] Ibid.
[362] [1985] 2 Lloyd's Rep 243 (QB).
[363] Ibid, 247.
[364] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 1.106.

and the list can only be found in land carriage.[365] Paragraph (4) of Art 17 lists six grounds for relief of liability.[366] The first one is use of open unsheeted vehicles which has been expressly agreed and specified in the consignment notes. Art 18 (3) provides that the presumption in Art 17 (4)(a) cannot apply if there has been an abnormal shortage or a loss of any package. Because sub-paragraph (a) concerns the effects of weather and wastage in weight or bulk, anything more than normal wastage is outside this exception.[367] The requirement of an express agreement in this defence is clear: not only expressly agreed but also specified in the consignment note which is easier for the carrier to prove. The next one is defective packing. The carrier has an obligation to check the apparent condition of the goods and the packaging in Art 8 (1)(b) and the good condition will be presumed if the carrier fails to check and makes any reservation in the consignment note.[368] However, non-compliance with Art 8 (1)(b) is not a breach of duty. There seems no difficulty in proving sub-paragraph (b).[369] The carrier will also be relieved when the loss of or damage to the goods arises from the special risks inherent in handling, loading, stowage or unloading of the goods by the cargo owners or person acting on behalf of them.[370] The subject of Art 18 (4)(d) is sensitive goods and the nature of

[365] Malcolm A Clarke, 'International Carriage of Goods by Air and Land' in Andrew Burrows (ed.), *Principles of English Commercial Law* (OUP 2015) para. 4.76.
[366] Roland Loewe, 'Commentary on the convention of 19 May 1956 on the contract for the international carriage of goods by road: CMR' (1976) 11 ETL 311, paras. 159 and 160.
[367] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 255.
[368] Art 9 (2).
[369] Roland Loewe, 'Commentary on the convention of 19 May 1956 on the contract for the international carriage of goods by road: CMR' (1976) 11 ETL 503, para. 159.
[370] Art 18 (4)(c).

them particularly exposes to the loss of or damage to the goods. Moreover, the goods can be classified as sensitivity even they can be protected if carried properly and carefully.[371] However, the loss of or damage to the goods or delay in delivery must arise from the special risk and the relationship with the sensitivity of the goods is not enough.[372] Paragraph (e) provides exceptions for insufficiency of marks or numbers on the packages which is similar to paragraph (b) because of the carrier's check obligation.[373] The last one is the carriage of livestock and the carrier has a special onus of proof in Art 18 (5).

A common rebuttal from the cargo owners is the carrier has a residual duty of care in respect of the goods while they are in the carrier's charge. Although the CMR is silent in respect of the carrier's duty of care, it can be implied by the high standard of utmost care in Art 17.2.[374] To rebut the presumption that a special risk may attribute the damage, the cargo claimant may choose to establish that the carrier did not show sufficient care in the circumstances.

3.3.3 Burden of Proof

As for the burden of proof, the first step is made by the claimant to prove the breach of contract or the breach of the strict obligation of the carrier to deliver goods at destination in the same quantity and condition received

[371] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 268, 273.
[372] *W Donald & Son (Wholesale Wheat Contractors) Ltd v Continental Freeze Ltd* 1984 SLT 182 (QH) 183.
[373] Art 8 (1)(b).
[374] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 268.

and without delay.[375] The defences available to the carrier is exemptions of Arts 17 (2) or (4). To rely on Art 17 (2), the carrier needs to establish the loss of or damage to the goods or delay in delivery was caused by one of four situations.[376] As discussed above, the degree of care and skill is relatively high and it is a difficult task for the carrier to escape liability. Comparatively, Art 17 (4) is easier to prove because the carrier only needs to establish one of the special risks could attribute to the loss of or damage to the goods or delay in delivery and it is for the claimant to rebut the presumption by proving the loss of or damage to the goods is not in fact attributable either wholly or partly to one of these risks.[377] It is no more than a plausible hypothesis that the claimant normally tries to prove the actual cause but it suffices to suggest that the cause of the loss of or damage to the goods may not have been the special risk after all.[378] The issue of the burden of proof is frequently important but eventually the core question rests on the balance of likelihood or possibility. Nevertheless, before the carrier can rely on the exemptions of Arts 17 (4) (d) and (f), he has to prove all steps normally incumbent on him in the circumstances were taken and that he complied with any special instruction issued to him.[379] Art 18 (4) has a prerequisite for Art 17 (d) that the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat,

[375] Malcolm A Clarke, 'International Carriage of Goods by Air and Land' in Andrew Burrows (ed.), *Principles of English Commercial Law* (OUP 2015) para. 12.62.
[376] Art 18 (1).
[377] Art 18 (2).
[378] *Ulster Swift Ltd and Another v Taunton Meat Haulage Ltd v Fransen Transport NV (Third Party)* [1977] 1 WLR 625 (CA).
[379] Arts 18 (4) and (5).

cold, variations in temperature or the humidity of the air. Given that the vehicles referred to in paragraph 4 of Art 18 are expressly agreed in general, the carrier would be familiar with the nature of goods which are sensitive to weather conditions.[380] However, it does not help understand the level of the carrier's duty implied by the words 'all steps incumbent on him in the circumstances'.[381] In *Ulster Swift Ltd and Another v Taunton Meat Haulage Ltd and Fransen Transport NV (Third Party)*,[382] the pigs were eventually condemned which occurred during the transit and the carrier claimed no liability because the damage was caused by either inherent vice or risk 'inherent in the nature of refrigerated meat' and he took steps incumbent on them in the circumstances as specified in Art 18 (4)(d). Donaldson J found that the carrier had to prove that all steps incumbent in the circumstances had been taken and the carrier was liable despite that Donaldson J could not identify what that step was.[383] It was suggested that the carrier's duty under Art 18 (4) was strict because failure to perform the duty with regard to the equipment was a cause of the unexplained damage. The Court of Appeal confirmed Donaldson J's view and added that the standard of proof required by Art 18 (2) was higher than the standard of balance of probabilities.[384] However, in *Centrocoop Export Import SA and Others v Brit European Transport Ltd*,[385] Bingham J found that 'the carrier

[380] Roland Loewe, 'Commentary on the convention of 19 May 1956 on the contract for the international carriage of goods by road: CMR' (1976) 11 ETL 503, para. 172.
[381] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 279.
[382] [1977] 1 WLR 625 (CA).
[383] [1975] 2 Lloyd's Rep 502 (QB) 507.
[384] [1977] 1 WLR 625 (CA) 636.
[385] [1984] 2 Lloyd's Rep 618 (QB).

has shown to my satisfaction that he took all incumbent steps in the circumstances with respect to the choice, maintenance and use of the refrigerated unit employed on this contract and complied with the special instructions issued to him'.[386] This description is less than strict liability but still does not indicate clearly what level of care is under Art 18 (4).[387] It is suggested by Malcolm Clarke that Art 18 (4) should be construed in the context of the CMR as whole and consistent with Art 18 (2), namely utmost care.[388] Art 18 (5) is conditional on livestock defence in Art 17 (4)(f) in the same way as Art 18 (4). The similar words in these two paragraphs imply that the carrier undertakes the same level of duty.[389] As for the next stage, even if the carrier proves incumbent steps have been taken, the claimant still can defeat the defence by proving the loss or damage was not in fact attributable either wholly or partly to the sensitivity of the goods.[390]

The carrier can be relieved of his liability partly if there is more than one factor causing the loss of or damage to the goods or delay in delivery and one is exempted by Art 17.[391] The problem is to what extent the carrier needs to prove the event in Art 17 attributes to the loss of or damage to the goods or delay in delivery. In the sea carriage, the analogy is that the

[386] [1984] 2 Lloyd's Rep 618 (QB) 626.
[387] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 280.
[388] Ibid, 279.
[389] Ibid, 285.
[390] Art 18 (2).
[391] Art 17 (5).

burden is on the carrier but Art 17 (5) may impose the duty on the court to decide the proportion.[392]

Regarding the case of delay, the analysis should be made depending on which circumstance it falls in: one is delay in delivery and the other is to be treated as lost.[393] If the issue arises under Art 19, the first step should be taken by the claimant to prove that the goods have not been delivered within the time limit either agreed or a reasonable period.[394] If the issue arises under Art 20 (1), the carrier is presumed to be liable and only exonerated by virtue of Art 17 (2).[395] The importance of distinguishing two cases is reflected in not only the onus of proof but also the level of difficulty.[396]

In general, the carrier is presumed to be liable for loss of or damage to the goods or delay in delivery if the goods are damaged at the destination while in good order and condition from the place of taking over. The carrier can rely on exceptions in Art 17 (2) in case of loss of or damage to the goods or delay in delivery and cannot rely on exceptions in Art 17 (4) in case of delay in delivery. The standard established by Art 17 (2) is described as 'utmost care'. Besides, the requirements of proof with respect to defences are considerably higher than sea conventions.

3.4 Liability of Carrier in International Rail Convention: the COTIF-CIM

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[392] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 216.
[393] Arts 19 and 20 (1).
[394] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 193.
[395] Ibid.
[396] A C Hardingham, 'Combined Transport: The Delay Provisions of the CMR' [1979] LMCLQ 193, 194. Art 19 is more favourable to the carrier than Art 20.

3.4.1 Basis of Liability

Art 17 (1) of the COTIF-CIM states the fundamental obligation of delivery that the carrier must deliver the goods to the consignee at the place designated for delivery against payment and hand over the consignment note. Moreover, Art 23 (1) provides the basis of liability that the carrier is liable for loss of or damage to the goods which occurs between the time of taking over and delivery. The COTIF-CIM does not define the meaning of taking over and delivery which will be determined by the circumstances.[397] Although it does not have an express provision for delay, Art 29 (1) presumes the loss of goods if they are not delivered within thirty days after the expiry of the transit period.[398] The carrier can be relieved of liability to the extent that he proves that one of the exceptions in Arts 23 (2) and (3) caused the loss of or damage to the goods or delay.[399]

3.4.2 Defences

Arts 23 (2) and (3) provide the exceptions and Art 25 regulates the burden of proof. The exonerations are divided into two categories: the general risks and special risks which is a feature of inland carriage.[400] The carrier is not liable if the loss of or damage to the goods or delay is caused by (a) the fault of cargo interests, (b) an order of cargo interests other than as a result of the fault of the carrier, (c) inherent vice and (d) circumstances which the

[397] Indira Carr and Peter Stone, *International Trade Law* (5th edn, Routledge 2014) 343.
[398] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 2.549.
[399] Art 25.
[400] The CMR mirrors two kinds of risks in Art 18. Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 299.

carrier could not avoid and the consequences of which he was unable to prevent.[401] The defences of wrongful act or neglect and the instructions of the person entitled correspond to Art 17 (2) of the CMR and the defences of inherent vice and unavoidable circumstances have the same interpretations as in the CMR.[402] One thing should be distinguished is that the defect of containers is regarded as inherent vice rather than packing.[403] The special risks in Art 17 (3) are open wagons, inadequate package, loading by the consignor or discharge by the consignee, sensitive goods, insufficient marks, live animals and risk against which the contract requires an attendant to accompany the goods.[404] Given that the content of several special risks are the same as those in the CMR, this thesis will only discuss the different elements due to word limits. Arts 23 (2) and (3) only apply to the defences available to the loss of or damage to the goods not the delay. But considering that the delay in delivery may be seen as lost subject to specific requirements, the exemptions are applicable to delay.[405] The risk of using open wagons is to prevent vulnerable goods in open wagons from escaping chemicals or accidental fires in adjacent wagons.[406]

As for the inadequate packing, there is one different aspect between the CIM and the CMR that the risk in respect of packing remains with the

[401] Art 23 (2).
[402] The person entitled is an expression to replace 'the claimant'. Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 2.212.
[403] In the sea carriage, the container is normally treated as a package.
[404] The last one is a feature of the CIM and the rest is included by Art 18 (4) 17(4)? of the CMR.
[405] Art 29 (1).
[406] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 2.301.

consignor when the goods are accepted by the railway while it shifts to the road carrier in the CMR. Besides, the road carrier has the duty to check the apparent condition of the goods and their package while the railway does not.[407] However, at common law, the railway has the residual duty of care that if the defective packing which causes the damage is so obvious. If the railway do not take reasonable steps to arrest the loss or deterioration therefrom, he will not be excused for the damage which may subsequently result from the imperfect packing.[408] In *London and North Western Railway Co v Richard Hudson and Sons*,[409] the railway company was responsible for the damage either as a common carrier or under the contract of carriage by road under the circumstance where the damage was caused by imperfect packing performed by the forwarder on behalf of the consignee. Furthermore, it is suggested that the similar duty might be recognised under the COTIF-CIM.[410] Art 10 of the CMR and Art 14 of the COTIF-CIM provides that the sender is not liable for defective packing if the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservation concerning it. Despite that there is no recent English case ruling defective packing in the CMR or the COTIM-CIM, the above provisions seem to indicate that the residual duty of care of the carrier may apply and the carrier is liable if he failed to take remedies.

[407] Art 15 of the COTIF-CIM and Art 8 of the CMR.
[408] *London and North Western Railway Co v Richard Hudson and Sons* [1920] AC 324 (HL) 340.
[409] [1920] AC 324 (HL).
[410] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 2.136.

3.4.3 Burden of Proof

With regard to the burden of proof, the rail carrier bears the onus to prove the loss, damage or delay is caused by risks in Art 23 (2). The special rule in relation to special risks is that the rail carrier only needs to establish a plausible hypothesis that the risk is a possible cause of the loss of or damage to the goods.[411] The English court takes the same interpretation method as the CMR.[412] Where the carrier establishes a special risk, it is for the claimant to prove that the loss of or damage to the goods is not attributed either wholly or partly to one of these risks.[413] Usually the claimant tries to prove the actual cause but he is not obliged to and it suffices to provide evidence of another hypothesis plausible to suggest that the cause of loss or damage may not have been the special risks at all.[414] Furthermore, even though the carrier escapes his liability by virtue of Art 23 (3), he may still be liable if the claimant proves the carrier is in breach of his residual duty of care, especially in the cases of defective packing and loading by the consignor.[415] There are relevant provisions which relate to the establishment of special risks. The consignment note has the prima facie evidential value in regard to many aspects such as condition and package.[416] Besides, Art 11 provides that the consignor who loads the goods is entitled to require the carrier to examine the condition of the goods

[411] Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (3rd edn, Informa 2014) para. 2.325.
[412] Ibid.
[413] Art 25 (2).
[414] Malcolm A Clarke, 'Carriage of Goods by Air and Land' in Andrew Burrows, *Principles in English Commercial Law* (OUP 2015) para. 4.75.
[415] Ibid, para. 4.76.
[416] Art 12.

and package and he is obliged to proceed to the examination only if he has appropriate means of carrying it out. Therefore, if the consignor does not make such requirement or the carrier does not have appropriate means to check, it is arguable that the consignment note could lose the evidential value.

3.5 Liability of Carrier in International Inland Waterway Convention: the CMNI

The CMNI has a similar express provision for delivery obligation in Art 3 (1) and like the sea carrier, the inland waterway carrier needs to exercise due diligence to provide a seaworthy vessel.[417] In paragraph (6), authorized deck carriage is agreed by the shipper or in accordance with the usage of the particular trade or required by the statutory regulations which is identical with Art 9 of the Hamburg Rules. The carrier is liable for loss of or damage to the goods or delay which is caused between the time of taking over and delivery unless he can prove that the loss, damage or delay was caused by circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.[418] The carrier is also responsible for actions and omissions of the actual carrier, his agents and servants.[419] But he can escape his liability if he establishes that one of the exceptions in Art 18 (1) causes the loss of or damage to the goods or delay.

[417] Art 3 (3).
[418] Art 16 (1).
[419] Arts 17 (1) and (2).

The exonerations in the CMNI is a combination of the international conventions in relation to other modes of transport: (a) act or omissions of the cargo interests, (b) handling, loading, storage or discharge of the goods by the cargo interests, (c) deck cargo subject to certain requirements, (d) sensitive goods, (e) inadequate packing, (f) insufficient marking, (g) salvage and (h) live animals. And the burden of proof on the carrier is reduced in comparison with other international unimodal conventions: he only needs to prove the loss of or damage to the goods could be contributed to the risks and it is for the claimant to rebut the presumption. But the CMNI does not provide a clear answer for other issues such as concurrent causes.

3.6 Conclusion

In summary, all international unimodal conventions have a presumption of fault liability basis for the carrier in the case of loss of or damage to the goods but the differences lie in the standards of care. The sea conventions including the Hague and Hague-Visby Rules and the Hamburg Rules generally have a lower requirement of care whilst non-maritime conventions impose one standard less than strict liability but higher than merely reasonable care. The road and rail carriers need to exercise utmost care in the CMR and the COTIF-CIM. The inland waterway carrier has rather complicated liability regimes which is akin to the sea carrier. As for the liability for delay, the situations are rather complicated. The Hague and Hague-Visby Rules do not cover this issue, whereas the Hamburg Rules have express provisions with uncertain impact. The CMR is the only

convention which provides a clear definition of delay in delivery, whereas the COTIF-CIM and the CMNI just generally state that the carrier will be liable for delay. The original reason for the different carrier's liabilities in various modes of transport is that the risk in each mode of transport changes dramatically but the argument seems outdated.[420] It is suggested that the decisive factor is the strength of the negotiating positions of each party.[421]

With respect to the basis of liability, in the author's opinion, the liability of the container carrier in international multimodal transport varies substantially in each international unimodal convention. Although the principles of the basis of liability are similar, the liability regime of the container carrier depends not only on the basis of liability but also other factors such as exceptions, burden of proof and limitation of liability. The exceptions in four modes of transport regimes have diversities. The sea conventions, in general, have the widest scope of exonerations while the ranges in other international unimodal conventions are relatively restricted. But some of the excepted perils in international sea conventions could be inferred from the principle of presumed fault and therefore it is possible to delete the exception lists. The rail and road conventions have the same structure as two kinds of risks and the inland waterway convention mixes two methods. As for the burden of proof, there are several stages that the claimant and the carrier may shift the onus according to defences. The

[420] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.197.
[421] Ibid.

common starting point in English law is the claimant to prove the occurrence which caused the loss of or damage to the goods or delay took place while the goods were in the carrier's charge. The next essential stage for the carrier is to prove the loss of or damage to the goods or delay is caused by excepted perils or the fault of the consignor or consignee. In the sea carriage, the distinguished defence which affects the onus of proof in sea carriage is the seaworthiness obligation whilst in the road and rail carriage, the essential issue is what kind of risk it is. However, it is common that the carrier is not liable for the loss of or damage to the goods that is caused by one of excepted perils.

CHAPTER 4 Liability of Relevant Third Parties on behalf of the Carrier in International Unimodal Conventions

With the development of container transport involving multiple modes of transport, the consignor and consignee incline to deal with one person who assumes liability for performance of the whole carriage irrespective of whether it physically carries the goods.[422] The MT Convention provides the definition of the multimodal transport operator as the person who concludes the multimodal transport contract and assumes liability for performance of the contract.[423] The multimodal transport operator, i.e. the contractual carrier in the multimodal transport contract, may subcontract the performance wholly or partly to several sub-contractors. For the cargo interests, the multimodal transport operator is the convenient person to sue for breach of contract but when he is insolvent or is located in a remote foreign country, the actual carriers become alternative suable person who are not contractual parties to the carriage contract. The essential problems is whom to sue by the cargo interests and if sued, whether they can enjoy the same benefits of exceptions and limitation of liability as the carrier. First of all, the international unimodal conventions have their own definitions of carriers which means the concepts of the 'carrier' under these conventions may have various ambits and whether the cargo interests could sue the contractual carrier and actual carrier simultaneously based on these

[422] UNCTAD, 'Development of Multimodal Transport and Logistic Services', (15th July 2003) UN Doc TD/B/COM.3/EM.20/2, para 3.
[423] Art 1 (2) of the MT Convention.

conventions depends on the provisions. If the meaning of 'carrier' is restricted to the contractual carrier, the next option for the cargo interests in English law is to bring an action against the actual carriers in tort or bailment.

Other related parties who may encounter the same problem as the actual carrier is those employed by the multimodal transport operator as servants, agents and independent contractors to perform some parts of the multimodal transport contract. The multimodal transport operator usually concludes protection clauses in their contracts and the carriage contract with the cargo interests to prevent direct actions being brought against them in contract.[424] Due to the doctrine of privity in English law, the relevant third parties involved in performance of carriage may not be a party to the contract of carriage and can only be sued in tort or bailment rather than in contract. In that way, the applicable law becomes unpredictable because the cargo interests bypass the exemptions, the monetary limitations and the time bar provided by those conventions.

4.1 International Sea Conventions

This section will discuss two issues in international sea conventions: the identity of the carrier and liabilities of relevant third parties including agents, servants and independent contractors. As for the former question, the Hague Rules and the Hague-Visby Rules have the same provision. But with regard to the latter problem, the Hague Rules and the Hague-Visby Rules

[424] It is also the initial advantage of the multimodal transport operator to be the only person who is fully liable for the loss of or damage to the goods or delay in delivery under the multimodal transport contract.

are quite different. The Hamburg Rules impose a joint liability of the carrier and relevant parties, which is new in an international sea convention.

4.1.1 The Hague Rules

4.1.1.1 Identity of the Carrier

The identity of carrier problem arises in the carriage of goods by sea before the Hague Rules since the bill of lading does not always clearly identify the party who contracts to carry and deliver the goods.[425] The contracting carrier does not necessarily perform the contract and consequently, a bill of lading for goods on a charted vessel could be a contract with the ship owner or the charterer or both. If the intentions of parties are not clear, the general approach of English courts is to ask whether the charter party is demise.[426] If the charter party is demise, the possession of the vessel will pass to the charterer and the master will be an employee or agent of the demise charterer. Therefore, a bill of lading signed by a master will normally show a contract of carriage with the demise charterer. The uncertainty lies on the time charter when the time charterer issues a bill of lading and it is common for liner company to run chartered ships instead owned ones.[427] On one hand, the time charterer and the ship owner may have arrangements that the time charterer finds the shipper but the ship owner issues the bill of lading. On the other hand, the time charterer may prefer to issue his own bill of lading, for example a big line company's bill

[425] Anthony Rogers and others, *Cases and Materials on the Carriage of Goods by Sea* (5th edn, Routledge 2020) 276.
[426] Ibid.
[427] Haylin Low, 'Shipowner's Liabilities: Elder Dempster Revisited' (1998) 13 Austl & NZ Mar L J 32, 34.

of lading. Whether the ship owner or the time charterer is the contractual carrier depends on facts.[428] Besides, the existences of printed clauses such as definition of carrier clause, a demise clause and an identity of carrier clause on the back of the bill of lading increases the difficulty because they sometimes conflict with the information on the front. The most controversial terms are the demise clause and the identity of carrier clause. The demise clause in the bill of lading is to identify the ship owner or demise charterer as the carrier and later, the identity of carrier clause with the same effect is more acceptable because it is unambiguous to designate the ship as the carrier.[429] Historically, the demise clause is produced in the United Kingdom in an era when the time charterers were not entitled to limit liability as carriers under the Merchant Shipping Act 1894 and it is necessary, particularly for the liner companies who issue the bill of lading, to avoid being held liable as carriers.[430] The original reason for the validity of the demise turns to be moot because the charterers nowadays can limit liability by S 186 of the Merchant Shipping Act 1995.[431]

This section will start with the definition of carrier in the Hague and Hague-Visby Rules Then, it will discuss the effects of different signatures in English law and the changes of English courts. Thirdly, it will consider the influences

[428] Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para. 7.62.
[429] The effects of a demise clause and an identity of carrier clause will be discussed below in the case of *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [2003] UKHL 12.
[430] Lord Roskill, 'The Demise Clause' (1990) 106 LQR 403.
[431] The Merchant Shipping Act 1995 gave effect to the Convention on Limitation of Liability for Maritime Claims 1976 and the equivalent provision is Art 1.2.

of the printed clauses in the reverse of the bill of lading and how to identify the carrier assuming there are conflicts between the information on the front like the signature and printed clause on the back.

4.1.1.1.1 The definition of Carrier in the Hague Rules

Art I (a) of the Hague and Hague-Visby Rules provides that 'carrier' includes the owner or the charterer who enters into the contract of carriage with the shipper. The word 'includes' may suggest that other parties than the owner or the charterer could be carriers under the Hague Rules.[432] In *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin'),*[433] Rix LJ in the Court of Appeal suggests that the ship owner and the charterer could be jointly liable but the House of Lords clearly rejected his proposal The House of Lords currently prefer only one carrier existed in the Hague and Hague-Visby Rules.[434]

In multimodal transport, the multimodal transport operator, who normally enters into the contract of carriage with the consignor and undertakes liability during the whole carriage, is the contractual carrier. The question is whether the multimodal transport operator could fall within the definition of the carrier in Art I (a) of the Hague and Hague-Visby Rules. However, the identification of the carrier depends on the construction of the contract of carriage. And it becomes complicated when there are inconsistency among the information such as the signature, the precise drafted the

[432] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.103.
[433] [2003] UKHL 12. This case will be analysed in depth in next section 4.1.1.1.3.
[434] see [2001] EWCA Civ 56, [70]-[76]. (Rix LJ)

definition of the carrier clause and other clauses like the attestation clause, the demise clause and the identity of the carrier clause. In sections 4.1.1.1.2 and 4.1.1.1.3, this thesis will analyse the approach adopted by the English courts to identify the carrier under the bill of lading and evaluate whether such approach is legitimate.

4.1.1.1.2 Signature

The traditional signature 'on or for behalf of the master' binds the ship owner as a party of the contract of carriage but in nowadays, the agents of time charterers are entitled to sign the bill of lading issued by charterers either on the behalf of the master or on the behalf of charterers.[435] The effect of the former signature does not attract much doubt but the latter signature may change the traditional effect. And the situation becomes more complicated when the charterers, especially line companies, incline to issue the bill of lading in the line companies' form and sign the bill of lading 'as carrier'. The impact of changes of these words on identifying the carrier will be demonstrated by in this section.

One common used time charter form is New York Produce Exchange Form ('NYPE') and there is clause providing that the captain is to sign bills of ladings for cargo as presented. In *The 'Berkshire'*,[436] the court thought the effect of such a clause was well settled. On one hand, it authorised the charterer to present the bill of lading to the master for signature by him on behalf of the shipowner.[437] On the other hand, the charterer could sign the

[435] Paul Todd, *Principles of the Carriage of Goods by Sea* (Routledge 2016) 296.
[436] [1974] 1 Lloyd's Rep 185 (QB)(Admlty).
[437] Ibid, 188.

bill of lading himself on the same behalf.[438] In either way, the signature bound the ship owner as principal to the contract contained or evidenced by the bill of lading.[439]

Later, in *The 'Rewia'*,[440] the charterer, a line company, issued a bill of lading and signed 'for the master'. One issue was whether the bill of lading was a charterer's bill or an owner's bill. The cargo interests claimed that the bill of lading did not indicate that the charterer was not the carrier because it was the charterer's logo and there was no identity of carrier clause. The time charter was in NYPE form and clause 8 provided that the captain is to sign bills of lading for cargo as presented. In clause 53, the master will authorised charterers or their agents to sign bills of lading on his behalf. The court of Appeal held that even though the shipper did not know either the ship was chartered or the master was an agent of the ship owner, the signature by the charterer's agent for master bound the ship owner rather the charterer since the master was the servant of the ship owner.[441] Leggatt LJ further held that 'a bill of lading signed for the master cannot be a charterer's bill unless the contract was made with the charterer alone and the person signing had the authority to sign and did sign on behalf of the charterer not the ship owner'.[442]

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[438] [1974] 1 Lloyd's Rep 185 (QB)(Admlty) 188.
[439] Ibid. Besides, there was a demise clause which identifying the ship owner as the carrier which will be discussed in next section. Reading them together, the court ruled it was an owner's bill.
[440] [1991] 2 Lloyd's Rep 325 (CA).
[441] Ibid, 333.
[442] Ibid.

In *The 'Venezuela'*,[443] the situation was a little complicated. The bill of lading was not signed by the master but by the charterers' agent as 'general agents and as agents for the Master'. On the face of the bill of lading, although the captain's name was stated, there is nothing indicating that who was the ship's owner or the vessel was on time charter. On the reverse, there was a definition of carrier indicating the either time charterer or his agent is the carrier depending who was operating the vessel. Generally the charterers' agent had authority to sign the bill of lading on the charterer's normal form on behalf of the master. For example, the charterers' agents are entitled to sign on behalf of the charterers in intermediate ports. The judge held that if the charterers did not want to contract as the carrier, then the bill of lading issued by them should at least clearly indicate which company the shipper was entered into the contract of carriage.[444] Finally, the judge ruled that the signature bound the charterer.

The case in which the charterer signs the bill of lading 'as carrier' adds more difficulty in identifying the carrier in the contract of carriage. In *Fetim and Others v Oceanspeed Shipping Ltd (The 'Flecha')*,[445] the charterer was Continental Pacific Shipping ('CPS') used his own bill of lading and signed as carrier. On the front, there was an attestation clause 'Master will sign the bill of lading as presented'. On the reverse, there were a demise clause and an identity of carrier clause. Mr Justice Moore-Bick held that the

[443] [1980] 1 Lloyd's Rep 393 (QB)(Admlty).
[444] Ibid, 397. Another factor impacting the judge's decision is the definition of carrier in the bill of lading which will be discussed in next section 4.1.1.3.
[445] [1999] 1 Lloyd's Rep 612 (QB)(Admlty).

signature 'as carrier' was used loosely and in order to supersede the effect of attestation clause and the printed clauses, the form of signature needed to be sufficiently clear.[446] Therefore, as construing the bill of lading as a whole, the carrier was the ship owner. However, Mr Justice Moor-Bick's judgment was reversed by the House of Lords *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*[447] that the signature 'as carrier' on the face of bill of lading is critical to identify the carrier.

To sum up, the traditional view of English courts is that the form of signature is not determinative itself and in order to decide whether it is a charterer's bill or an owner's bill, the printed clauses are essential. But the House of Lords clarify the method for determining the carrier. The next section will evaluate the effect of the printed clauses, especially the demise clause and identity of carrier clause.

4.1.1.1.3 The Printed Clauses: the Definition of Carrier Clause, the Demise Clause and the Identity of Carrier Clause

The definition of carrier clause is often seen in the back of the bill of lading and sometimes, it is crucial to determine whether the ship owner or the charterer is the contractual carrier under the bill of lading under some circumstances. In *The 'Venezuela'*,[448] the carrier was defined as the either time charterer or his agent depending who was operating the vessel. Sheen J held that this term was essential to indicate that the charterer was the

[446] [1999] 1 Lloyd's Rep 612 (QB)(Admlty) 619.
[447] [2003] UKHL 12. This case will be analysed in next section 4.1.1.1.3.
[448] [1980] 1 Lloyd's Rep 393 (QB)(Admlty).

carrier in the bill of lading.[449] In *Sunrise Maritime Inc v Uvisco Ltd (The 'Hector')*,[450] the time charter was NYPE form with standard terms and the main difference was the typed words on the front of the bill of lading 'Carrier: US Express lines' which was the charterer ('USEL'). In the signature box, it was filled with USEL's agent's name 'as agent for and on behalf of the master'. The bill of lading applied the Hague Rules and there was an identity of carrier clause (clause 17) indicating the contract was with the ship owner. Rix J held that in the view of a third party holder of the bill of lading, the charterer was the carrier in either way.[451] On one hand, according to Art I (a) of the Hague Rules, the carrier is the ship owner or the charterer and the bill of lading stipulated that the carrier was the charterer.[452] And clause 17 said ship owner was the carrier and the only carrier expressly named on the bill of lading was the charterer.[453] Therefore, the bill of lading's holder could conclude that USEL was the ship owner and there was no conflict between clause 17 and the statement indicating USEL as carrier on the front of the bill of lading.[454] On the other hand, Rix J thought the stipulation on the face of the bill of lading should supersede the identity of carrier clause to protect the third party holder.[455] In either way, he believed that the charterer was the carrier. Rix J agreed with Sheen J's reasoning in *The 'Venezuela'* [456] that if a third party holder of the bill of lading who did not

[449] [1980] 1 Lloyd's Rep 393 (QB)(Admlty) 397.
[450] [1998] 2 Lloyd's Rep 287 (QB)(Comm).
[451] Ibid, 294.
[452] Ibid.
[453] Ibid.
[454] Ibid.
[455] Ibid.
[456] [1980] 1 Lloyd's Rep 392 (QB)(Admlty).

know the vessel was chartered, there was no inconsistency between the signature on behalf of the master and the identification of the charterer as the carrier. It seems that both judges prefer to protect the third party holder of the bill of lading without knowledge of the ownership condition of the vessel and the direct impression of the third party should be more important than a standard demise or identity of carrier clause in the back of the bill of lading when they construed the bill of lading as a whole. The direct impression is mainly influenced by information such as the company's logo, the carrier's name and the signature. Rix J further held that the signature 'for and on behalf of the master' was not determinative.[457] The importance of the definition of carrier clause is emphasized by the House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*[458] which will be discussed later.

The authoritative decision as to the validity of the demise clause is *The 'Berkshire'*.[459] In this case, only the ship owner, not the time charterer, was sued under a bill of lading containing a demise clause. The charterer's agents were Ocean Wide Shipping and Ocean Wide Shipping employed Ayers Steamships as sub-agents. A bill of lading was issued in Ocean Wide's printed form and Ayers signed as agents. The bill of lading was headed in capital letters 'Ocean Wide Shipping Co Ltd' and in the space for signature of the master or agent of the vessel, the words 'Ocean Wide Shipping and Ayers as Agents' were typed. There was a demise clause in the bill of lading

[457] [1998] 2 Lloyd's Rep 287 (QB)(Comm) 295-6.
[458] [2003] UKHL 12.
[459] [1974] 1 Lloyd's Rep 185 (QB)(Admlty).

that if the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued, this bill of lading shall take effect as a contract with the owner or demise charterer. The key issue is whether the contract contained in the bill of lading was a contract between the shipper and the ship owners. Brandon J divided into two points: whether the bill of lading purposes to be a contract with the ship owner and if so, whether the bill of lading was issued with the authorisation of the ship owner. As for the first sub-issue, he indicated that the ship owner was responsible because the bill of lading was intended, by the demise clause, to take effect as a contract between the shippers and the ship owners made on behalf of the ship owners by Ocean Wide as agent only.[460] With regard to the second point, as discussed in section 4.1.1.1.2, the signature bound the ship owner. This judgment recognised the validity of the demise clause in English law.

From the above decisions, it is unlikely to draw a consensus that which factor should be determinative. The printed clause on the back of bill of lading including the demise clause and the identity of carrier clause are so far effective. The problem is in order to show the contrary intentions of the parties, how clear the other parts of the bill of lading must be to supersede the printed clauses such as the demise clause and the identity of carrier clause.

A recent influential case is *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin').*[461] The vessel was time chartered to CPS which

[460] [1974] 1 Lloyd's Rep 185 (QB)(Admlty) 188.
[461] [2003] UKHL 12.

operated a liner service and the bills of lading were on the CPS form.[462] On their reverse, the bills had clause 33 (identity of carrier clause) and clause 35 which is known as the demise clause. Besides, clause 1 (c) provides the definition of the carrier stating that the carrier was the party on whose behalf the bills of lading had been signed. On the face of the bills was a signature box with the words 'As Agents for CPS as Carrier'. One essential issue in this case is whether the description of CPS as carrier on the face of the bill of lading sufficiently represents an assumption of personal liability as carrier to supersede the identity of carrier clause and the demise clause on the reverse.

The House of Lords concluded that they were charterer's bills mainly because of the so-called 'mercantile view' which was developed in depth by Lord Steyn restating that a reasonable person in the shipping trade would read the bill on its face.[463] Lord Hoffmann reinforced the approach and pointed out that the traditional approach adopted by the courts to construe the bill of lading as whole was wrong because a reasonable reader of a bill of lading did not read the bill of lading as a whole.[464] If the information on the face was sufficient, the reader did not turn to the terms on the reverse.[465] The House of Lords also thought that the mercantile view should also include the banks and therefore, the reference of the ICC Uniform

[462] The same lining company, CPS, was in *Fetim and Others v Oceanspeed Shipping Ltd (The 'Flecha')* [1999] 1 Lloyd's Rep 612 (QB)(Admlty) and the bill of lading form were similar.
[463] [2003] UKHL 12, [45] and [46].
[464] Ibid, [82].
[465] Ibid, [83].

Customs and Practice for Documentary Credit 1993 ('UCP 500') illustrated that the market practice was to look at the front of a bill of lading to discover the identity of the carrier rather the pre-printed terms on the back.[466] Art 23 (a) expressly requires the name of the carrier to appear on the face of the bill of lading and Art 23 (v) states that the bank will not examine terms and conditions on the back of the bill of lading. Despite the fact that the UCP 500 governs the relationships between the issuing bank and the beneficiary, these provisions suggest how the related parties in international trade would see the bill of lading.[467] Another ground for treating the descriptions on the front as the dominating factor was to follow the well-established rules decided by the English courts to promote commercial certainty.[468]

The House of Lords do not directly rule on the validity of the demise clause and the identity of carrier clause but repeatedly emphasise the 'mercantile approach' which gives greater weight to the terms on the face of the bill of lading, particularly the modes of signature, than printed terms on the reverse. It is argued by Professor William Tetley that the demise clause should be invalid under Art III rule 8 of the Hague and Hague-Visby Rules because the time charterer may attempt to avoid liability assuming that the charterer and the ship owner are jointly liable.[469] However, his view may not succeed in English law. First of all, the traditional interpretation of the

[466] [2003] UKHL 12, [16] (Lord Bingham), [47] (Lord Steyn) and [80] (Lord Hoffmann).
[467] Ibid.
[468] Ibid, [46].
[469] William Tetley, 'Case Comment: The House of Lords Decision in *The Starsin*' (2004) 35 JMLC 121, 122.

English courts is to regard the carrier as either the ship owner or the demise carrier and there is a single carrier only.[470] Then, according to the construction of the Hague and Hague-Visby Rules, the demise clause is treated as identifying the party liable under the carriage contract rather than excluding liability and therefore, Art III rule 8 does not nullify such clause.[471] Apart from violating Art III Rule 8, Professor William Tetley also thinks that the demise clause is invalid due to the infringement of the good faith principle in international commerce which is recognised by the Vienna Convention on the Law of Treaties 1969[472] and The UNIDROIT Principles of International Commercial Contracts 1994.[473] The demise clause is not a bona fide term of the contract evidenced by a bill of lading because the charter party which authorises the charterer to sign on behalf of the ship owner is not available to the holder of the bill of lading including consignees and endorsees and it is not consistent with the good faith principle if the Hague and Hague-Visby Rules are construed to permit the demise clause.[474] Furthermore the good faith principle is unlikely to be applicable to the carriage contract evidenced by the bill of lading in English law.

[470] The interpretation of the term 'carrier' at common law is the same as in Art I (a) of the Hague and Hague-Visby Rules.
[471] See the validlity of the performances in Art III rule 2 in section 3.2.1.1.2.
[472] Art 31 (1): a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
[473] The UNIDROIT adopted the third edition of the UNIDROIT Principles of International Commercial contracts in 2010 and the relevant article 1.7 does not change. Art 1.7 (1): each party must act in accordance with good faith and fair dealing in international trade.
[474] William Tetley*, Maritime Cargo Claims* (4th edn, 2008 Yvon Blais) 640.

The judgment is criticised for not reflecting real commercial concerns,[475] but the author thinks the approach is pragmatic given that the bill of lading is transferable and the need for the potential holder to identify the contractual carrier on the face of the bill of lading.[476] Another argument relied on by their Lordships in the House of Lords was UCP 500 which indicated the commercial construction of a commercial document. But the new version UCP 600[477] came into force on 1 July 2007 with different requirements for charter party bills of lading and may bring confusion to the identity of the carrier issue. The charter party bill of lading under Art 22 requires the signature by or on behalf of the master or owner or the charterer and the signature must indicate who the agent has signed for or and the name of the owner or charterer. The new provision is to add the charterer as a signatory. And unlike UCP 500, the name of the carrier is no longer needed and the charterer can sign without naming the contractual carrier. So it does not provide a clear answer for who is the contractual carrier. It could be claimed that the changes indicate that the market practice, which is to find the identity of contractual carrier on the face of the bill of lading, has been changed but the name of carrier still must appear on other transport documents including an ordinary bill of lading, non-sea transport documents and multimodal transport documents under the UCP 600. [478] Such requirements as to the identity of a non-sea carrier or a

[475] Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para 7.73.
[476] Julian Cooke and others, *Voyage Charters* (14th edn, Informa 2014) para 18.74.
[477] UCP 600 came into force on 1 July 2007.
[478] See Multimodal Transport Document (Art 19), Bill of Lading (Art 20), Air Transport Document (Art 23) and Rail or Inland Waterway Transport Documents (Art 24).

multimodal transport operator may reflect that the trend of market practice in other unimodal transport or international multimodal transport is consistent with the House of Lords' decision in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*.[479] Besides, the Rotterdam Rules have an explicit provision in identifying the carrier which correspond to the House of Lords' judgment.[480]

Rix LJ in the Court of Appeal raised another possibility with regard to the identity of carrier that the ship owner was jointly liable as an undisclosed principal since the time charterer issued the bills of lading on its behalf but he did not make a decision on this point because it was not a part of the appeal.[481] The House of Lords rejected this view. Lord Hoffmann believed that the signature of CPS contrasted with the suggestion that the time charterer contracted as an agent for the ship owner.[482] Lord Steyn added that the definition of the carrier clause 'the carrier is the party on whose behalf the bill of lading was signed' also pointed to a single carrier under the bill of lading.[483] The House of Lords rejected this argument because the form and terms of the bill of lading contemplated the existence of only one carrier but they did not say it was unsustainable in principle. There is support among the academics that there are two contractual carriers under the bill of lading, the ship owner and the charterer and former undertakes

[479] [2003] UKHL 12.
[480] See identity of the carrier issue in Rotterdam Rules in section 8.3.1.
[481] [2001] EWCA Civ 56, [70]-[76].
[482] [2003] UKHL 12, [85].
[483] Ibid, [49].

liability as an undisclosed principal.[484] But the opinion of two contractual carriers is only theoretical and the English courts are unlikely to accept it currently.

The identity of carrier in multimodal transport document could be dealt with by following the decision of House of Lords in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*.[485] The multimodal transport operator would be normally named in the multimodal transport document. Clause 2 of BIMCO MULTIDOC 95 has the definition of multimodal transport operator 'the person named on its face' which is consistent with the English courts.

Although the carrier is a single contractual carrier to be sued in English law and the Hague and Hague-Visby Rules, the cargo interests could bring actions in tort or bailment against the actual carrier or a third party who actually involves the performance of the carriage contract. The Hague and Hague-Visby Rules only deal with the contractual liability and the liabilities of relevant parties other than the contractual carrier will be discussed below and the Hague Rules and the Hague-Visby Rules have dramatic different provisions for that issue.

4.1.1.2 Liabilities of Relevant Third Parties as the Carrier

In carriage of goods by sea, there are numerous parties such as stevedores and port operators performing parts of contractual obligations for the

[484] Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (24th edn, Sweet & Maxwell 2019) para. 6-037, Julian Cooke and others, *Voyage Charters* (14th edn, Informa 2014) para 18.76 and Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para. 7.73.
[485] [2003] UKHL 12.

carrier but not being parties of the contract of carriage between the cargo interests and the carrier. Due to the doctrine of privity of contract, the non-contractual parties cannot be sued in contract or rely on terms in the contract of carriage.[486] Therefore, under the Hague Rules, it is common that the cargo interests sue the third parties in tort whereas third parties intend to avail themselves of terms of the contract of carriage between the carrier and the shipper.[487]

An old English case established the liability of the ship owner, is *Elder Dempster Co Ltd v Paterson Zochonis Co Ltd*.[488] The Court of Appeal thought that although the ship owner was not a party of the contract of carriage, he could rely on the exclusion clause in the bill of lading.[489] It was contended that the ship owner was an agent of the charterer and should claim the same protection as the charterer under the bill of lading.[490] Otherwise the cargo interests can simply sue the ship owner and avoid the exceptions in the bill of lading. But the House of Lords in *Midland Silicones Ltd v Scruttons Ltd*[491] rejected that view and believed that the agency theory would be inconsistent with the doctrine of privity of contract. Lord

[486] *Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd* [1915] AC 847 (HL) 853 (Viscount Haldane).
[487] CMI, *The Travaux préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 596.
[488] [1924] AC 522 (HL).
[489] But the majority of the Court of Appeal found that the exclusion clause did not include unseaworthiness which was the cause of damage in this case and both the charterer and the ship owner failed.
[490] [1924] AC 522 (HL) 534 (Viscount Cave).
[491] [1962] AC 446 (HL).

Reid thought the word 'agent' was used accurately in legal sense and the ship owner should not be seen as an agent of the charterer.[492]

With regard to the stevedores, the House of Lords decided in *Midland Silicones Ltd v Scruttons Ltd*[493] that the Hague Rules could not apply. In this case, Clause 4 of the bill of lading provided 'any person other than the owner or demise charterer is the carrier or bailee of the goods, all rights, exemptions, immunities and limitations of liability provided by law and all terms of the bill of lading shall be available to it or such person.' The House of Lords held that the stevedores were not the carrier because of clause 1 of the bill of lading and Art I (a) of the Hague Rules.[494] And for the matter of bailment, they did not consider in length but affirmed the trial judge's decision that they were not bailees since the stevedores were not entitled to have possession of the goods during unloading.[495] Another possibility for the stevedores to rely on limitation in the bill of lading was that the carrier contracted as agents of the stevedores but this argument was rejected. The House of Lords ruled that the stevedores were independent contractors rather than undisclosed principals.[496] The third argument was an implied contract between the stevedores and the cargo interests so that the stevedores would have the benefits of immunity clause in the bill of lading but the House of Lords believed that the implied contract did not exist

[492] [1962] AC 446 (HL) 478.
[493] Ibid.
[494] Ibid, 466.
[495] [1959] 2 QB 171 (QB).
[496] [1962] AC 446 (HL) 466.

because the cargo interests could not know from the bill of lading that the stevedores would enjoy limitation as the carrier.[497]

To summarise, the Hague Rules do not apply to the agents or independent contractors of the carrier including the ship owners and the stevedores. Consequently, the relevant parties adopt other methods to enjoy the benefits of exceptions and limitations under the Hague Rules, namely the Himalaya clause and bailment on terms which will be discussed in next two sub-sections.

4.1.1.2.1 Himalaya Clause

The Himalaya clause was named after the case *Alder v Dickson*[498] in which a passenger suffered injury on a cruise ship and the liner company, Himalaya, tried to rely on a clause to exclude his liability for the negligence of his servant. The court ruled that the passenger could sue the servant of the liner company and since then, a clause called the Himalaya clause is drafted to create a separate contract between the cargo interests and the carrier's agent with an incorporation of exclusions and limitation between the cargo interests and the carrier. Although the House of Lords ruled that the stevedores were not entitled to enjoy the limitation of liability of the Hague Rules, their Lordships did not deny the application of the Himalaya clause. Despite that there is no universal form of the Himalaya clause but it normally aims to protect employees of the carrier or independent contractors employed by the carrier. The validity of the Himalaya clause

[497] [1962] AC 446 (HL) 466.
[498] [1955] 1 QB 158 (CA).

under the Hague Rules was considered by the English courts in two famous cases, *New Zealand Shipping v A M Satterthwaite Co Ltd (The 'Eurymedon')*[499] and *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The 'New York Star').*[500]

The House of Lords decision in *Midland Silicones Ltd v Scruttons Ltd*[501] affirms the principle that a third party cannot sue based on a contract in which he is not a party even though the contract is expressed for his benefit. However, Lord Reid suggested a possibility that one of the contracting parties acted as an agent for the third party with four requirements.[502] Firstly, the bill of lading makes it clear that the stevedores is intended to be protected by the provisions in it which limit liability; secondly, the bill of lading makes it clear that the carrier is also contracting as an agent for the stevedores that these provisions should apply to the stevedores; thirdly, the carrier has authority from the stevedores to do so or later ratification by the stevedores and fourthly, the consideration issue is overcome.[503]

In *New Zealand Shipping v A M Satterthwaite Co Ltd (The 'Eurymedon')*,[504] the Hague Rules applied to the bill of lading and the following words were printed on the first page of the bill of lading 'in accepting this bill of lading, the shipper, the consignee and the owner of the goods, and the holder of this bill of lading agree to be bound by all of its conditions, exceptions and

[499] [1975] AC 154 (PC)(New Zealand).
[500] [1981] 1 WLR 138 (PC)(Australia).
[501] [1962] AC 446 (HL).
[502] Ibid, 474.
[503] Ibid.
[504] [1975] AC 154 (PC)(New Zealand).

provisions whether written, printed or stamped on the front or back'. On the reverse of the bill of lading, clause 1 was a Himalaya clause with a wide scope. It provided that 'no servant or agent of the carrier (including every independent contractor from time employed by the carrier) shall in any circumstances whatsoever be under liability whatsoever to the shipper, consignee or owner of the goods or any holder of the bill of lading…from the act neglect or default on his part while acting in the course of or in connection with his employment…and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled shall also be available and shall extend to protect every such agent or servant of the carrier…'.[505] The question was whether the stevedores could rely on time limit in Art III rule 6 of the Hague Rules and the majority of Privy Council (three to two) ruled in favor of the stevedores. Lord Wilberforce, who gave the leading judgment, believed that the question in this case was whether those four conditions proposed by Lord Reid *Midland Silicones Ltd v Scruttons Ltd*[506] were met.

Clause 1 of the bill of lading would suffice for the first and second propositions.[507] As for the third condition, the stevedores' company in this case was owned by the carrier and the carrier habitually contracted for the stevedores.[508] With regard to the fourth requirement, consideration, Lord Wilberforce thought that the bill of lading was initially unilateral and became

[505] [1975] AC 154 (PC)(New Zealand) 165.
[506] [1962] AC 446 (HL).
[507] [1975] AC 154 (PC)(New Zealand) 166.
[508] Ibid.

mutual between the shipper and the stevedores through the carrier as an agent.[509] And the consideration for the agreement by the shipper was the performance of discharge by the stevedores for the benefit of the shipper and the stevedores should enjoy the benefit of the exemptions and limitations in the bill of lading.[510]

In *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The 'New York Star')*,[511] there was the same Himalaya clause in the bill of lading (clause 2) but the difference was that clause 5 stated that the carrier was liable as bailee after discharge. Lord Wilberforce found that the carrier would be acting as a bailee at the time the loss occurred, not an independent contractor employed by the carrier.[512] Therefore, his liability was not governed by any clause of this contract. However, clause 5 clearly stated that even the carrier's period of liability ceased, the immunity could still apply such as fire and theft. Consequently, if stevedores acted in the course of employment during the period after discharge, they could enjoy the same immunities as the carrier by virtue of clause 2.[513]

In combination of these two decisions, the validity of the Himalaya clause in English law has been established and by virtue of such a clause, third parties like agents, servants or independent contractors are seen as a party to the contract of carriage. Nevertheless, not all clauses in the bill of lading

[509] [1975] AC 154 (PC)(New Zealand) 167-8.
[510] Ibid, 168.
[511] [1981] 1 WLR 138 (PC)(Australia).
[512] Ibid, 145.
[513] Ibid, 148.

can be covered by the Himalaya clause and if such a clause is invalid, the third parties still cannot rely on it.[514]

In the case of *The 'Mahkutai'*,[515] the ship owner time chartered the vessel to the carrier and the carrier concluded a voyage charter with the shipper. The bill of lading was issued under the time charter with the Himalaya clause and an exclusive jurisdiction clause. The Himalaya clause entitled any servant, agent or subcontractor of the carrier to rely on 'exceptions, limitations, provisions, conditions and liberties benefiting the carrier'. The question was whether the ship owner, although not a party of the contract of carriage, could invoke a jurisdiction clause against the cargo interests by virtue of the Himalaya clause. Lord Goff found that the jurisdiction clause should be distinguished from terms like exceptions and limitations which benefited the carrier only because it was a clause creating mutual rights and obligations that both parties agreed to solve disputes in relevant jurisdictions.[516]

There is another situation where the relevant third parties cannot rely on a Himalaya clause which is invalid by Art III rule 8 of the Hague and Hague-Visby Rules. In nowadays, the Himalaya clauses are drafted to cover more than a paragraph which entitles the relevant third parties to benefit from the contract of carriage as the carrier and a general exemption clause and

[514] See *The 'Mahkutai'* [1996] AC 650 (PC)(Hong Kong) and *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [2003] UKHL 12.
[515] [1996] AC 650 (PC)(Hong Kong).
[516] Ibid, 666.

a circular indemnity clause are commonly included.[517] These new changes might be void under Art III rule 8 of the Hague and Hague-Visby Rules.

In *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*,[518] clause 5 of the bill of lading (a Himalaya clause) was very lengthy and their Lordships divided it into four parts for analysis. Part 1 was 'it is expressed agreed that no servant, agent of the carrier (…including every independent contractor from time to time employed by the carrier) shall be whatsoever under any liability to the shipper…'. The question was whether it was a total exemption of liability clause applicable to servants, agents or independent contractors of the carrier or it was a covenant not to sue enforceable only by the carrier. The lower courts held it was a covenant not to sue and the ship owner cannot invoke it because only the carrier can enforce it.[519] But the House of Lords reversed the judgment on this point ruling that it was an exemption of liability clause rather than a covenant not to sue.[520] The analysis of clause 5 can be divided into two questions: whether the ship owner was an agent, servant or independent contractor in clause 5 and whether the ship owner can exclude his liability by virtue of it. As for the first point, their Lordships affirmed Colman J's judgment that the ship owner was an independent contractor without

[517] See clause 5 in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [2003] UKHL 12 which will be discussed in below.
[518] [2003] UKHL 12.
[519] [2000] 1 Lloyd's Rep 85 (QB) 99-100; [2002] EWCA Civ 56, [116], [169] and [201].
[520] [2003] UKHL 12, [24], [55], [100], [145] and [195].

further discussion.[521] Regarding the second question, the House of Lords treated Part 1 of clause 5 as a total exemption of liability clause and Part 2 was a traditional Himalaya clause entitling the ship owner to benefit from exceptions and limitations available to the carrier under the Hague Rules. The problem was whether the protection available to the ship owner under Part 1 was limited to those available to the carrier under the Hague Rules in Part 2. The trial judge thought once the ship owner was an independent contractor and became a party to the contract of carriage to this extent, he could not reply on a total exclusion of liability because he could not have a wider exclusion of liability not available to the carrier.[522] All three judges of the Court of Appeal agreed but their decisions were reversed by the House of Lords. It was held that Part 1 was a total exemption and the Himalaya clause in Part 2 did not restrict the application of Part 1.[523] However, when the ship owner became a party of the contract of carriage through Part 3 of the Himalaya clause, the Hague Rules applied and the Part 1 should subject to Art III rule 8.[524] Therefore, the total exemption was invalidated by Art III rule 8 and the ship owner could not rely on it.

A circular indemnity clause normally involves a covenant not to sue the relevant third parties and reimburse the carrier if the cargo interests causes

[521] Colman J held that an independent contractor means a third party with whom a party to a contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract and in this case, the ship owner was employed by the carrier as an independent contractor. [2000] 1 Lloyd's Rep 85 (QB) 99.
[522] Ibid, 100.
[523] [2003] UKHL 12, [30], [103], [145] and [195].
[524] Ibid, [34].

loss by doing so.[525] A covenant not to sue would be like 'the merchant undertakes that no claim shall be made against any servant, agent or subcontractor of the carrier…' and an indemnity clause would be like 'if such claim should nevertheless be made, the merchant shall indemnify the carrier against all consequences…'.[526] The judge recognised the validity of a circular indemnity clause in *Nippon Yusen Kaisha v International Import and Export Co Ltd (The 'Elbe Maru').*[527] But in that case, the sub-contractor of the carrier was the road carrier and the Hague Rules did not apply and therefore, the validity of the circular indemnity clause under the Hague and Hague-Visby Rules is unclear. The effectiveness of this clause was considered in *Whitesea Shipping and Trading Co and Another v El Paso Rio Clara Ltda and Others (The 'Marielle Bolten')*.[528] A circular indemnity clause could be found in paragraphs (i)(ii) of clause 3 (b) of the bill of lading which were similar to sample clauses above. The issue were whether the time charterers, sub-charterers and managers could invoke it as sub-contractors and whether it was invalid under Art III rule 8 of the Hague Rules. Firstly, the relevant third parties all fell within the definition of sub-contractor in clause 1 (f) of the bill of lading as they were performing 'services incidental to the goods and/or the carriage of goods'. Secondly, the judge found that clause 3 (b)(i) was a covenant not to sue and unlike a total exemption

[525] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9-201.
[526] See clause 4 (2) in *Nippon Yusen Kaisha v International Import and Export Co Ltd (The 'Elbe Maru')* [1978] 1 Lloyd's Rep 206 (QB)(Comm) and clause 4 (ii) in *The 'Mahkutai'* [1996] AC 650 (PC)(Hong Kong).
[527] [1978] 1 Lloyd's Rep 206 (QB)(Comm).
[528] [2009] EWHC 2552 (Comm).

clause, it only granted the carrier, not other parties such as the relevant third parties, an exceptional right to enforce a prohibition on any suit by holders of the bill of lading.[529] Accordingly, it was not 'a covenant relieving the carrier from liability' in Art III rule 8. Moreover, the relevant third parties were not parties to the contract of carriage by virtue of clause 3 and the Hague Rules did not apply.[530] It should be noticed that this case was distinguished from *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [531] in which the Himalaya clause had a clear paragraph, Part 3 of clause 5, stating that the sub-contractors are parties to the contract of carriage. The decision of *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*[532] that ship owner being a party to the contract of carriage subject to the Hague Rules was mainly based on the existence of Part 3 of clause 5. Although Lord Hobhouse believe that the actual performance of carrying the goods brought the ship owner as a contracting carrier but that was his obiter.[533] Besides, the majority of the House of Lords held that the Himalaya clause created a collateral contract between the ship owner and the cargo interests which was not a contract of carriage in the Hague Rules. Nevertheless, by virtue of Part 3 of clause 5, the relevant parties could be treated as parties to the contract to the extent of benefits in the Himalaya clause, which were incorporated into a contract of carriage and invalidated by Art III rule 8 of

[529] [2009] EWHC 2552 (Comm), [30].
[530] Ibid, [42].
[531] [2003] UKSC 12.
[532] Ibid.
[533] Ibid, [154].

the Hague Rules.[534] In this case, there was no such deeming provision in this case and the sub-contractors did not undertake the actual carriage but incidental performance to the carriage of goods. In summary, the circular indemnity clause would not invalidated by Art III rule 8 of the Hague and Hague-Visby Rules.

The validity of the Himalaya clause is preserved in the Contracts (Rights of Third Parties) Act 1999. The effect of section 6(5) is that third party rights are not generally conferred by this Act in the case of international unimodal convention regulating carriage of goods by sea, road, rail or air but the proviso in section 6 (5) particularly enables the Himalaya clause.[535] If the third parties intend to rely on the Himalaya clause by virtue of this Act, they have to show that the clause purports to confer a benefit on them and the name of the third party must be expressly identified in the contract but the reference to a member of a class such as sub-contractors would suffice.[536]

To conclude, the Hague Rules do not apply to relevant third parties in principle but these parties could draw a Himalaya clause to benefit from exceptions and limitations under the Hague Rules or contractual exceptions and limitations, which are not invalidated by Art III rule 8 of the Hague Rules. However, the Hague-Visby Rules made a significant change regarding the privity of contract issue and adds a Himalaya provision with restrictions which will be discussed in section 4.1.2.

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[534] [2003] UKSC 12, [209].
[535] See the explanatory notes of Contract (Rights of Third Parties) Act 1999, para. 26.
[536] Sections 1 (1) and (3).

4.1.1.2.2 Sub-bailment on Terms

Nevertheless, there was an another approach of dealing with the relationship between the cargo interests and the relevant parties other than the carrier in English law, bailment on terms. In a charter party bill of lading, the ship owner could be treated either as a bailee (like in the *Elder Dempster Co Ltd v Paterson Zochonis Co Ltd* [537]) for the shipper or as a sub-bailee for the charterer. The English courts prefer the second view. The sub-bailment on terms approach was established in *The* '*Pioneer Container*'.[538]

In this case, the ship owner, being a subcontractor of the carrier, performed parts of the carriage. There was a clause in the bill of lading between the carrier and the cargo owner authorising the carrier to sub-contact the whole or any part of the carriage of the goods 'on any terms'. The issue was whether the ship owner can rely on an exclusive jurisdiction clause in the feeder bill of lading between him and the carrier against the cargo owner. Firstly, Lord Goff noticed that there was a sub-bailment on terms between the ship owner and the carrier. The ship owner was held as a sub-bailee for reward when he received the goods and both the cargo owners and the bailee (the carrier) concurrently had the rights of a bailor against the sub-bailee according to the nature of the sub-bailment.[539] Then, the question in this case became whether the sub-bailee (ship owner) can invoke the terms of the sub-bailment including the exclusive jurisdiction clause against the

[537] [1924] AC 522 (HL).
[538] [1994] 2 AC 324 (PC)(Hong Kong).
[539] Ibid, 338.

cargo owners. The judge followed the principle established by Lord Denning MR in *Morris v CW Martin & Sons Ltd*[540] that 'the cargo owner was to be bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise'.[541] The clause entitling the carrier to sub-contract on any terms was treated as an express consent of the cargo which was undoubted. Furthermore, Lord Goff added the requirement of the sub-bailee's consent that the ship owner became a sub-bailee only when he was aware that the cargo owner other than the carrier was interested in the goods.[542] To conclude, the essential element of a sub-bailment is mutual consent of the bailor and sub-bailee. Lord Hobhouse supported the sub-bailment on terms approach in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*[543] and held that there was a bailment on terms between the shipper and the time charterer and a sub-bailment on terms between the charterer and the ship owner.[544]

Another problem was whether the express consent of the cargo owner was wide enough incorporate a jurisdiction clause and the English courts held that 'only terms which are unusual or so unreasonable that they could not reasonably be understood to fall within such consent are likely to be held to be excluded'.[545] Thus, being a common clause in the container trade, the

[540] [1966] 1 QB 716 (CA).
[541] Ibid, 729.
[542] [1994] 2 AC 324 (PC)(Hong Kong) 342.
[543] [2003] UKHL 12.
[544] Ibid, [133].
[545] *The 'Pioneer Container'* [1994] 2 AC 324 (PC)(Hong Kong) 346.

jurisdiction clause was incorporated through the wide consent.[546] However, the Himalaya clause and terms of the sub-bailment can both apply. The mere fact that a Himalaya clause is effective does not deprive the sub-bailee's right to rely on terms of the sub-bailment against the cargo owner.[547] If they are consistent, the sub-bailee can invoke either regime and the result might be the same. However, if there are inconsistency between two regimes, the expression provisions of the bill of lading will supersede terms of the sub-bailment.[548] In *The 'Mahkutai'*,[549] the ship owner claimed that he received the goods into possession on the terms of the bill of lading including the exclusive jurisdiction clause. Lord Goff found that since the Himalaya clause could not cover the jurisdiction clause, the terms of the bailment should not include it in order to be consistent with the express terms of the bill of lading.[550]

In international multimodal transport, the approach of sub-bailment on terms meets some challenges. Firstly, in *The Pioneer Container*,[551] the head bailees (carriers) and the sub-bailees (sub-carriers) both had the actual possession of the goods. But in international multimodal transport, it is normal that the head bailees do not have physical possession of the goods and they do not perform the contract at all.[552] The English courts held that

[546] But in this case, the coverage of terms of sub-bailment was affected by the scope of the Himalaya clause which will be discussed in the next paragraph.
[547] *The 'Pioneer Container'* [1994] 2 AC 324 (PC)(Hong Kong) 344.
[548] See *The 'Mahkutai'* [1996] AC 650 (PC)(Hong Kong).
[549] [1996] AC 650 (PC)(Hong Kong).
[550] Ibid, 668.
[551] [1994] 2 AC 324 (PC)(Hong Kong).
[552] Richard L Kilpatrick, 'Privity and Sub-contracting in International Multimodal Transport: Diverging Solutions' (2019) 7 JBL 481, 489.

sub-bailment on terms doctrine applied regardless of no actual possession by the head bailees.[553] Secondly, the multimodal transport documents may authorise the multimodal transport operator to sub-contract liberally.[554] Such consent could be argued to have the same effect as the wide consent 'on any terms'. Moreover, the reasonable test should apply to determine whether the terms of sub-bailment could be covered by such consent.[555] Even if there is no express consent, an implied consent could be made when the conditions were in accordance with the current industry practice.[556] And if following *The 'Mahkutai'*,[557] the jurisdiction clause will be excluded.

4.1.2 Art IV bis of the Hague-Visby Rules

There are several changes in the Hague-Visby Rules with regard to the carrier's non-contractual liability and the protection of his agents and servants. Art IV bis (1) states that the carrier can have the defences and limits of liability under the Hague-Visby Rules whether he is sued in contract or in tort and the object is to ensure that the cargo interest is 'no better off by suing in tort than he would be if he sued in contract'.[558] But the difficulty is that it is not clear whether the actions in contract and in tort against the carrier need to be brought either or both. If both actions are required, the result is the same at common law. If the answer is the first one, the Hague-

[553] In *Spectra international Plc v Hayesoak Ltd and Others* [1997] 1 Lloyd's Rep 153 (CLCC)(BL), the sub-bailee, lorry company could rely on the terms of contract between the head bailee and consignor. The Head bailee never had possession.
[554] See BIMCO MULTIDOC 2016.
[555] *The 'Pioneer Container'* [1994] 2 AC 324 (PC)(Hong Kong).
[556] In *Spectra international Plc v Hayesoak Ltd and Others* [1997] 1 Lloyd's Rep 153 CLCC)(BL), the judge held the consent could be implied since the conditions were usually used in the trade and the consignor was aware that the sub-contract might occur.
[557] [1996] AC 650 (PC)(Hong Kong).
[558] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 248.

Visby Rules could apply to a case in which the carrier is sued by someone who is not a party to the carriage contract provided that the carrier falls within the definition in Art I (a).[559]

Paragraph (2) protects the carrier's agents and servants by entitling them to invoke the same defences and limits of liability available to the carrier under the Hague-Visby Rules. This provision intends to apply in cases where the carrier would incur vicarious liability for his servants or agents acting in the course of their employment which is the main reason to exclude the independent contractors.[560] Besides, the carrier could indemnify the independent contractors and if not, the independent contractors may add third party insurance costs into their charges.[561] Even if the Hague-Visby Rules do not apply to the independent contractors, the contractual Himalaya clause normally provides the servants, agents and subcontractors the same protection afforded to the carrier by the Hague-Visby Rules, especially the defences and limits of liability.[562]

To conclude, the agents and servants of the carrier can rely on Art IV bis rule 2 to enjoy the same protection as the carrier under the Hague-Visby Rules and do not need a contractual Himalaya clause. The approach of sub-bailment on terms is still available provided the Hague-Visby Rules cannot apply to the agent or servant of the carrier. As for the independent

[559] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 249. This provision gives some additional protection to the carrier against claims in tort but has restrictions. It does not apply to the actual carrier.
[560] CMI, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 598.
[561] Ibid, 601.
[562] A classic Himalaya clause can be found in clause 15 of CONLINEBILL 2016.

contractors, they cannot apply to the Hague-Visby Rules and the alternatives available in English law such as bailment are also applicable to them, which are discussed in sections 4.1.1.2.1 and 4.1.1.2.2 above.

4.1.3 The Hamburg Rules

The Hamburg Rules solve the identity of carrier problem by defining the carrier and the actual carrier. The carrier is any person by whom or in whose name a contract of carriage by sea has been concluded with a shipper.[563] Then the actual carrier is any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier and includes any other person to whom such performance has been entrusted.[564] Besides, the Hamburg Rules require the name of the carrier on the bill of lading and the signature of the carrier or a person acting on his behalf.[565] The signature by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.[566] These provisions weaken the role of the demise clause and the identity of carrier clause that the bill of lading signed for the master binds only the ship owner not the charterer.[567] Furthermore, even if the ship owner issues the bill of lading, the charterer may still be liable jointly as the actual carrier to the extent to which the charterer performs at least part of carriage.[568] The declined view of joint liability in *Homburg Houtimport BV v Agrosin Private Ltd and Others*

[563] Art 1 (1).
[564] Art 1 (2).
[565] Arts 15 (1)(c) and (j).
[566] Art 14 (2).
[567] William A Tetley, 'The Demise of the Demise Clause?' (1988) 44 McGill L J 807, 843.
[568] Ibid.

(The 'Starsin') [569] is approved by the Hamburg Rules and later, the Rotterdam Rules.

Additionally, the phrases 'actual carrier' and 'performing carrier' are always mentioned interchangeably. Art 10 (2) states that the Hamburg Rules apply to the actual carrier who performs the carriage. The actual carrier in the Hamburg Rules may include other intermediary persons in consecutive charter parties who may not physically carry the goods.[570] It is suggested by Jam Ramberg that such intermediary persons are not liable under the Hamburg Rules when the carriage has not been performed by them as required by Art 10 (2).[571] The actual carrier in the Hamburg Rules seems to include more categories of person who is entrusted by the carrier to perform the carriage. The joint and several liabilities for the 'members of the family of the carriers' designs for the interests of the shipper but the consequences may be unpleasant because the shipper has to pay an increased total risk cost, which consists of cargo insurance premiums and freight.[572] However, the actual carrier concept and his joint liability under the Hamburg Rules facilitates the actions brought by the cargo interests in an international multimodal transport in which the performance of multiple carriers may be employed.

4.2 International Road Convention: the CMR

[569] [2003] UKHL 12.
[570] Jam Ramberg, 'The Vanishing Bill of Lading & The Hamburg Rules' (1979) 27 Am J Comp L 391, 393.
[571] Ibid.
[572] Ibid, 405.

The CMR governs the contract for carriage arising out of the carriage of goods including contracts between carriers and senders and contracts between carrier and sub-carriers.[573] Although the CMR does not contain the definition of the carrier, Megaw LJ of the Court of Appeal stated in *Ulster Swift Ltd and Another v Taunton Meat Haulage Ltd and Fransen Transport NV (Third Party)*[574] that the whole scheme of the convention implied that a person who contracts to carry the goods was the carrier even though he subcontracted the performance of the whole carriage to someone else.[575] In this case, Taunton as the defendant subcontracted the whole carriage to a third party, Fransen Transport. The Court of Appeal held that Taunton was the carrier under the CMR.

As for the liability of the person who performs the carriage, Art 3 provides that the carrier is liable for the acts and omissions of his agent, servant or other person of whose service he uses for the performance of the carriage when they were acting within their scopes of employment. It further provides that the successive carriers are jointly liable for the performance of the whole operation if there is one carriage contract.[576] It is suggested that when a carrier concludes a contract of carriage but does not perform by himself, Art 34 does not apply.[577] But the English courts construe this provision differently and take a broad interpretation. In *Ulster Swift Ltd and*

[573] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 151.
[574] [1977] 1 WLR 625 (CA).
[575] Ibid, 629.
[576] Art 34. If the contracting carrier issues separate consignment notes to each sub-carrier, the sub-carrier is not contractually liable to the cargo interests under the CMR.
[577] Roland Loewe, 'Commentary on the convention of 19 May 1956 on the contract for the international carriage of goods by road: CMR' (1976) 11 ETL 503, para. 276.

Another v Taunton Meat Haulage Ltd and Fransen Transport NV (Third Party),[578] the court decided that the successive carriage could cover a case where the entire transport was performed by Taunton, who performed through the agency of Fransen and performed by Fransen who was actually carrying the goods.[579] In other words, both Taunton and Fransen were successive carriers despite that Taunton has subcontracted the entire carriage. A successive carrier becomes a party to the contract of carriage by reason of his acceptance of goods and the consignment note and the latter carrier is required to enter the name and address on the second copy of the consignment note which enables the consignee to know who to sue.[580] But when the name of the latter carrier is not a prerequisite to be a successive carrier and the acceptance of the consignment note does not restrict to physical acceptance.

In *SGS-Ates Componenti Elttronici SPA v Grappo Ltd British Road Services Ltd and Furtrans BV*,[581] British Road Services Ltd (the second defendant) contracted with SGS to carry the goods from the Heathrow Airport, the United Kingdom to Catania, Italy and performed the first leg of the journey from Heathrow to Rotterdam by himself. And then he subcontracted the second part of the journey to the third defendant who in turn subcontracted the second segment to a Dutch carrier. In the consignment note, the name and address of third defendant were entered under the heading of

[578] [1977] 1 Lloyd's Rep 346 (CA).
[579] Ibid, 538.
[580] Art 35. Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 172.
[581] [1978] 1 Lloyd's Rep 281 (QB).

successive carrier but the name of the Dutch carrier did not appear. The issue is whether the third defendant or the Dutch carrier was the last carrier in Art 36. Goff J held that the acceptance of consignment note should be given their natural and ordinary meaning and the consignment note was accepted when it was taken by the carrier himself or through his agent or agent with a view to carrying out the next part of carriage pursuant to the terms of the consignment note.[582] Assuming the entry of the name and the address of the successive carrier was a re-condition, the successive carrier could escape liability under the CMR simply by omitting his name and address on the consignment note which would be ridiculous.[583] Thus, the third defendant in this case was not the last carrier.

The right of action given by Art 36 is against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss of or damage to the goods or delay occurred. The claimant may bring an action against whichever of these carriers it is most convenient to sue in successive carriage and several carriers can be sued concurrently. Even if one segment is purely domestic, the carrier who performs that part of the transit is liable under Art 34.[584] The performing carrier may not be easy to identify when the goods are carried in containers but it is presumed that the carrier is the one who is in charge of the goods

[582] [1978] 1 Lloyd's Rep 281 (QB) 284.
[583] Ibid, 184-5.
[584] *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd and Others* [1981] 1 WLR 1363 (CA), the damage occurred at the second stage of the journey in the Netherlands and the fourth defendant who carried the goods was liable under CMR.

at the time that loss to or damage of goods was discovered.[585] Art 36 restricts the cargo interests' range of defendants and the carrier who has paid compensation has the right of recourse against other carriers who have taken part in the carriage subject to apportionment of liability in paragraphs (a) to (c).[586] Chapter VII contemplates two kinds of legal proceeding: the first one is actions brought by a sender or consignee against one or more successive carriers and the second one is actions in which one carrier seeks to recover indemnity or contribution from one or more other carriers involved in the carriage.[587] In the latter situation, the carrier may make claim before the country in which the carriers concerned is ordinarily residents, or has his principal place of business or agency through which the contract of carriage was made.[588] In *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd and Others*,[589] Davis Freight Forwarding Ltd was liable as the first carrier in Art 34 and sued by the cargo interests in England. It intended to serve third party notices against his Dutch sub-contractors, naming as the second, third and fourth defendants. Brandon LJ held the words 'carriers concerned' did not include Davis himself and the recourse action against other successive carriers can only be brought in certain countries provided by Art 39 (2).[590]

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[585] Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 168.
[586] Art 37.
[587] *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd and Others* [1981] 1 WLR 1363 (CA) 1371.
[588] Art 39 (2).
[589] [1981] 1 WLR 1363 (CA).
[590] Ibid, 1373 and 1374. The latter point is the obiter of Brandon LJ's judgment and Eveleigh LJ left this issue open.

4.3 International Rail Convention: the COTIF-CIM

The definition of the carrier under the COTIF-CIM covers a wide scope which contains both the contracting carrier and the successive carrier. Art 3 (a) of the COTIF-CIM states the definition of the carrier which refers to the contracting carrier who has concluded the contract of carriage with the consignor or the successive carrier who is liable based on the contract. As for successive carriers, the carriage is governed by a single contract and each successive carrier becomes a party to the contract of carriage by taking over the goods with the consignment note with collective responsibility for the entire carriage.[591] Distinguished from the CMR, the connecting factor is the act of taking over the goods rather than acceptance of the goods.[592] An action is permitted only where the carrier due to deliver the goods is entered on the consignment note with his consent even if he has received neither the goods nor the consignment note.[593] The substitute carrier is the person who has not concluded the contract of carriage but to whom the carrier referred to in letter has entrusted, in whole or in part, the performance of the carriage by rail.[594] Unlike the successive carrier who is attached to the collective liability for the entire carriage, the substitute carrier is liable as the carrier under the COTIF-CIM and he is in a joint liability with the carrier for the part he performed.[595] Like the CMR, the

[591] Art 26.
[592] A carrier who taking over the goods with the consignment note is the successive carrier while a carrier entrusted with the performance and taking over the goods without the consignment note is the substitute carrier. See David A Glass, 'Successive Carriage and the New CIM Rules: A Successful Succession?' [2003] BLI 72, 82.
[593] Art 45 (2).
[594] Art 3 (c).
[595] Art 27 (4).

cargo interests can sue the first carrier, the last carrier or the carrier having performed the part of the carriage where the loss of or damage to the goods or delay occurs.[596] And the action against the substitute carrier can also be brought under the COTIF-CIM.[597] But the difference is that the right to choose between more than one carrier is extinguished as soon as the cargo interests bring action against any one of them.[598] The recourse action available to the carrier who has paid the compensation is provided by Art 50 and Art 51 has procedure requirements for recourse claims between carriers.

4.4 International Inland Waterway Convention: the CMNI

The English law may have the same attitude towards the identity of carrier issue in the CMNI since it does not have the requirement for the name of the carrier on the transport document. The CMNI has the definitions of the carrier and the actual carrier. The carrier means any person by whom or in whose name the contract of carriage has been concluded with a shipper and the actual carrier means any person other than a servant or agent of the carrier to whom the performance of the carriage or part of the carriage has been entrusted by the carrier.[599] The carrier is required to inform the shipper when he entrusts his performance to an actual carrier which means the shipper is aware of the identity of the actual carrier.[600] Besides, the

[596] Art 45 (1).
[597] Art 45 (6).
[598] Art 45 (7).
[599] Arts 1 (2) and (3).
[600] Art 4 (3). By virtue of Art 36 of the CMR, the action can be brought against several successive carriers at the same time.

carrier still remains liable for the whole transit whether he has liberty to entrust an actual carrier or not and the actual carrier has joint liability with the carrier for his performed carriage.[601] The carrier is also liable for the acts and omissions of his servant and agent when they were acting within their scopes of employment and they are entitled to invoke the same exemptions and limits of liability as the carrier and the actual carrier.[602]

4.5 Conclusion

The carrier in the international unimodal conventions is generally defined as the contractual carrier. The identity of the carrier in the Hague and Hague-Visby Rules is not an easy task considering the information in the bill of lading may conflict. There are several factors that affect identifying of the carrier: the definition of the carrier in the bill of lading or in the Hague and Hague-Visby Rules, the demise clause, the identity of carrier clause and the signature. The most direct indication to the holder of the bill of lading is the information on the front of the bill of lading. However, the name of the carrier is not required on the face of a bill of lading and the signatures with various forms may not have the effect of indicating who is the carrier, especially with the involvement of time charterers and their agents. In nowadays, the lining companies usually time charter vessels and issue the bills of lading under their companies' forms. It arises the question whether the charterer or the ship owner is the carrier in the bill of lading.

[601] Arts 4 (2) and (5).
[602] Arts 17 (1) and (3).

And the validities of the demise clause and identity of carrier clause are necessary to be considered.

The House of Lords give a clear judgment regarding this issue.[603] Despite that their Lordships do not directly recognise the validities of the demise clause and the identity of carrier clause in English law, they abandoned the traditional construction approach which is to treat the bill of lading as whole. Instead, the information on the front of the bill of lading was put greater weight on to indicate the intention of parties provided it is inconsistent with the reversed printed clauses. The other conventions except for the CMNI all have an express condition of the name of carrier on the transport documents.

As for the liabilities of relevant third parties, the Hague Rules do not have an express provision and the Hague-Visby Rules improve on this issue by adding Art IV bis. It provides the vicarious liability of the carrier and allow the carrier's servants and agents to enjoy the benefits of exceptions and limitation of liability as the carrier. Generally, the carrier is liable if they act within their scopes of employment and they can avail themselves of the defences and limits of liability which the carrier is entitled to invoke. The Hague-Visby Rules specifically exclude independent contractors.

However, the alternatives for the relevant parties to be a party of the contract of carriage in English law are the Himalaya clause and sub-bailment on terms in the case where the Hague Rules or the Hague-Visby

[603] *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [2003] UKHL 12.

Rules cannot apply. The contractual Himalaya clause is more useful for the carrier's agents, servants and independent contractors under the Hague Rules since there is no provision. Given that the Hague-Visby Rules apply the agents and servants of the carrier, the Himalaya clause is mainly available to independent contractors. However, in international multimodal transport, the employment of independent contractors by the multimodal transport operator is common and thus, the Himalaya clause could still be important in international multimodal transport. With regard to sub-bailment on terms, it facilitates relevant third parties when the contractual way is unavailable in English law.

The Hamburg Rules distinguish the servants and agents of the carrier from the actual carrier. The carrier is liable for the act and omission of the actual carrier and of his servants and agents acting within their scopes of employment. The road and rail conventions do not distinguish the actual carriers from the servants and agents of the carrier. Besides, the CMR and the CMNI have provisions for successive carriers and provide a wider range of carriers to be sued by the cargo interests which is subject to certain circumstances. The joint liability of the carrier and the ship owner does not apply to the Hague and Hague-Visby Rules but other conventions such as the Hamburg Rules, the COTIF-CIM and the CMNI provide the joint liability approach. In the CMR and the COTIF-CIM, the carrier has collective liability with the successive carriers for the entire performance but not all successive carriers the cargo interests can sue.

CHAPTER 5 Limitation of Liability in International Unimodal Conventions

Historically, the limitation of liability is an essential tool to allocate the risks between parties in the carriage contract of goods and it is a convenient utility for the carrier to estimate his liability. In international multimodal transport, the multimodal transport operator needs certainty to predicate to what extent he is able to limit his liability. Each international unimodal convention has provisions for limitation of liability but with differences. The limitation of liability issue in this section is divided into three sub-matters: the claims in which the carrier is entitled to claim limits, the calculation method and the situations where the carrier loses his right to limit. With regard to limitation of liability of these conventions, this thesis aims to analyse the underlying reasons for differences with regard to three aspects and discuss the possibility of a uniform rule for international multimodal transport.

5.1 International Sea Conventions

The monetary limit in international sea conventions has two calculation methods: one is package or unit limitation which has been used since the Hague Rules and the second one is kilogramme of gross weight limitation which was firstly produced by the Hague-Visby Rules. The Hamburg Rules copy the pattern in Hague-Visby Rules but increase the amount. The two collateral bases are unique in sea and inland waterway carriage.

5.1.1 The Hague Rules

Art IV rule 5 of the Hague Rules provides that neither the carrier or the ship is liable for loss or damage to the goods in an amount exceeding 100 pound per package or unit.[604] And the person who is entitled to limit his liability under the Hague and Hague-Visby Rules includes the ship owner who does not fall within the definition of the carrier in Art I (a).[605] The right to limit liability in the Hague and Hague-Visby Rules is only available for claims in respect of loss of or damage to or in connection with goods and does not cover delay.[606] The limitation amount is 100 pounds sterling per package or unit and Art X explains the monetary units are gold value. There are two issues with regard to the monetary amount: one is the meaning of package or unit and the second is the value of 100 pounds sterling of gold value'.

5.1.1.1 Meaning of Package or Unit

The carrier is only entitled to limit under the Hague Rules if the cargo can be classified as a 'package or unit'. Containers are the usual method to carry the goods in international multimodal transport and the problem of containerisation is whether the container itself or the smaller package within the container is a package or unit in Art IV rule 5 of the Hague Rules which could result dramatically different calculations.[607] In *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd (The 'River Gurara')*,[608] the goods were damaged due to the negligence

[604] Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
[605] 'Carrier includes the owner or the charterer who enters the contract of carriage with a shipper'.
[606] It is consistent with the defences in Art IV rule 2 which do not apply to delay.
[607] Richard Aikens and others, *Bills of Lading* (2nd edn, 2015 Informa) para.10.323.
[608] [1996] 2 Lloyd's Rep 53 (QB); [1998] QB 610 (CA).

of the carrier and the cargo owners sued on the bills of lading issued in the same form which was subject to the Hague Rules. In the description box, a container was 'said to contain' ('STC') a number of separate items, such as pallets, crates and cases. The issue is which were the packages on which the limit is to be calculated, the containers or the individual items within them. The carrier claimed that the containers were the packages while the cargo owners argued the smaller individual items were. The trial judge, Colman J, analysed the meaning of a 'package' in Art IV rule 5 as a starting point and interpreted the word within the whole scheme of the Hague Rules. Under Art III rule 3, the carrier is, on demand of the shipper, obliged to issue a bill of lading with information such as the number of packages or quantity or weight and the description is prima facie evidence.[609] In container transport, the shipper or his agent stowed with the contents of the containers before delivering to the carrier and it is the commonplace for the bill of lading being qualifying with the words 'weight, number and quantity unknown' or 'said to contain'. Colman J held that in this case, the qualification could be prima facie evidence to identify the packages under Art IV rule 5.[610] Then he contended that the carrier's limit of liability should be calculated based on the description on the bills of lading and the parties could agree on the meaning of 'package'. A container could be a package if the description was unclear whether they were separately packed for

[609] Art III rule 4. There is a proviso in Art III rule 3 stating that the carrier is not bound to state such information when he has reasonable suspicion on the accuracy of such statement or has no reasonable means of checking.
[610] [1996] 2 Lloyd's Rep 53 (QB).

transportation.[611] However, if the description was like 'X containers STC Y cases of goods', individual cases were the packages not the containers and in the case where many separately packed items were described on the bills of lading, like X containers STC Y pallets STC Z bounds, the smallest category, Z, would be the package.[612]

The Court of Appeal affirmed the decision of Colman J but Philips LJ (with whom Mummery LJ agreed) considered that the judge erred in holding the basis of limitation under the Hague Rules depended on the agreement of the parties as to what constituted a 'package'.[613] The object of limitation provision which was to prevent ship owners imposing unrealistically low limits of liability and by allowing the parties to treat a container as a 'package' would entitle the carrier to evade the minimum limit under Art IV rule 5.[614] Then, Philip J examined the effects of descriptions of the cargo in the bill of lading in depth. The statements describing the cargo did not constitute an agreement between the parties but could at least be prima facie evidence as to what was within the containers which would also be the basis of calculation of the limit of liability.[615] But where the carrier discharged the onus of displaying the evidential effect of the bill of lading or the cargo owners established a claim to damages by reference to evidence extrinsic to the bill of lading, the limit would be calculated based on what the goods had actually been loaded, not the description on the bills

[611] [1996] 2 Lloyd's Rep 53 (QB) 62.
[612] Ibid, 62 and 63.
[613] [1998] QB 610 (CA) 624.
[614] Ibid.
[615] Ibid, 626.

of lading.[616] And the qualification 'said to contain' did not alter the evidential effect of the description.[617]

Another issue in this case is that clause 9 (B) of the bill of lading provided that the container is a package or unit even though it has been used to consolidate goods and the number of packages or units had been enumerated on the bill of lading. Colman J held that clause 9 (B) nullified the effect of express enumeration of individual packages under Art IV rule 5 and it would therefore lessen the liability of the carrier by reducing the number of packages.[618] Thus clause 9 (B) was void by Art III rule 8 of the Hague Rules. The clauses purporting to settle what is a package or unit should be invalidated under the Hague-Visby Rules by following the Court of Appeal decision of *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd (The 'River Gurara')*.[619]

5.1.1.2 Gold Value

The next issue is the value of 100 pounds sterling of gold value. The money unit is the gold value and the Contracting States can reserve the right to translate the sum into their currency.[620] The problem arises as to whether the amount is 100 pounds sterling or the value of 100 gold sovereigns in English law. In *The 'Rosa S'*,[621] the carrier admitted his breach of contractual duty under the bill of lading which subject to the Hague Rules

[616] [1998] QB 610 (CA) 625.
[617] Ibid, 627.
[618] [1996] 2 Lloyd's Rep 53 (QB) 63.
[619] [1998] QB 610 (CA).
[620] Art IX. For example, section 4 of the United States COGSA 1936 states that the limit is 500 dollars per package or unit and the inflation of gold value does not affect the calculation of limitation in the United States.
[621] [1989] QB 419 (QB).

and the dispute was what was the limit of the carrier's liability. The cargo owners submitted that Art IV rule 5 should be read with Art IX so that the amount of limit was 100 pounds sterling gold value and the gold content of 100 pounds sterling was in 1924 defined as a matter of English law by Coinage Act 1870, as being 732.238 grammes of fine gold.[622] The relevant date for the assessment of the defendant's liability was the date of the delivery of the goods which gave a value of gold in sterling as being 6630.50 and the carrier converted into Kenyan pounds, 6491.25. The carrier claimed that the correct limit was 100 pounds sterling in today's money or its equivalent in Kenyan currency. Hobhouse J found that the true construction of Art IV rule 5 was the gold value of 100 pounds not its nominal or paper value.[623] Furthermore, the monetary gold was referred to monetary unit which had a defined gold content and it was the value of quantity and fineness of gold that was the measure of value. [624]

The Hague Rules do not restrict the carrier's right to limit and the word 'in any event' is suggested to that it is unlikely for the carrier to lose the right of limit, even in case of unauthorised deck cargo.[625]

5.1.2 The Hague-Visby Rules

Art IV rule 5 of the Hague-Visby Rules adds 4 new paragraphs and introduces a significant change in accordance with containerisation. The Hague-Visby Rules add another calculation by reference to the weight of

[622] [1989] QB 419 (QB) 423.
[623] Ibid, 424.
[624] Ibid, 428.
[625] Patrick Friggs and others, *Limitation of Liability for Maritime Claims* (4th edn, Informa 2005) 120.

goods respectively and it is the higher of two figures. The monetary limit in 1968 Protocol is 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is higher and a franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. The gold franc provided stability and uniformity as long as members of the International Monetary Fund ('IMF') had an obligation to maintain the market value of currencies within narrow margins of a par value fixed in terms of gold but after 1971 most currencies were allowed to float and par values no longer reflect the changes in market rates of national currencies.[626] the IMF created Special Drawing Rights ('SDR') to achieve international uniformity with regard to maximum liability accepted universally.[627] Besides, the SDR reflects the value of a basket containing the main international currencies and in doing so, the effects of a sharp inflation or currency devaluation of one particular national currency are overcome.[628]

In order to deal with these challenges, an amendment to the Hague-Visby Rules is made in 1979 and the limitation of liability raises to 666.67 SDRs per package or unit or 2 SDRs per kilo of gross weight of goods lost or damaged, whichever is higher.[629] The new weight limit in Art IV rule 5 (a)

[626] Miss L Bristow, 'Gold Franc-Replacement of Unit of Account' [1978] 1 LMCLQ 31, 31.
[627] CMI, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 586.
[628] Marc A Huybrechts, 'Package Limitation as an Essential Feature of the Modern Maritime Transport Treaties: A Critical Analysis' in David Rhidian Thomas (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (2010 Informa) para. 7.26.
[629] Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (21st December 1979).

is introduced for cases where there are no packages or units or where the package or unit weighs more than 333.333 kilogramme.[630] Considering that the alternative limitation based on weight and the SDR as unit of account are adopted in other international unimodal conventions, the Hague-Visby Rules achieve international uniformity to some degree by corresponding with other transport regimes.

The answer as to whether the Hague Rules or Hague-Visby Rules provide a higher limit depends on the circumstances. There is no mechanism for calculating the limit in a case where goods cannot be classified as packages or units in the Hague Rules. In *Vinnlustodin HF and Another v Sea Tank Shipping AS (The 'Aqasia')*,[631] the Court of Appeal confirmed that the word 'unit' in Art IV rule 5 of the Hague Rules limitation was not apt to apply to bulk cargo. In the case of package limits, the difference between two Rules could be dramatic and the limits under the Hague-Visby Rules are not always higher. In *Parson Co and Others v CV Scheepvaartonderneming Happy Ranger and Others (The 'Happy Ranger')*,[632] the carrier limited liability to 100 pounds per package as if the Hague Rules were incorporated by the clause paramount whilst the cargo interests claimed 2.4 million dollars by Hague-Visby Rules. Furthermore, In *Yemgas Fzco and Others v Superior Pescadores SA (The 'Superior Pescadores')*,[633] in the case of bill of lading No 4, Hague Rules applied to four of the six packages with a higher

[630] Richard Aikens and others, *Bills of Lading* (2nd edn, 2015 Informa) para.10.333.
[631] [2018] EWCA Civ 276.
[632] [2002] EWCA Civ 694.
[633] [2016] EWCA Civ 101.

limitation figure while for the remaining two packages the Hague Visby limit was higher. The effect of the two different limitation formulae provide that (at current values) the Hague Rules limit is higher for packages weighing up to about 10 tonnes while the Hague-Visby Rules limit is higher for package weighing more than that.[634] The two formulae are useful in cases where the container itself is regarded as a package or unit. The amount of limitation will decrease to a large extent and it can be calculated on the base of gross weight of the goods damaged.[635]

Paragraph (c) was drafted to solve the problems of containers. The container is a package or unit unless the bill of lading enumerates the number of packages or units as packed in the container. In the Hague-Visby Rules, Art IV rule 5 (c) adopts the contrary approach of the Hague Rules and it depends on the enumeration on the bill of lading rather than the number of packages actually shipped. The enumeration of its contents on the bill of lading means setting out of numbers on the face of the bill of lading but there is another requirement for enumeration of packages or units 'as packed'. The English courts do not have a clear ruling on the this point until recently. In a recent case *Kyokuyo Co Ltd v AP Moller Maersk A/S*,[636] the tuna loins and bags of tuna parts were loaded into containers and one issue was whether the individual tuna loins were units under Art IV rule 5 (c) of the Hague-Visby Rules. Flaux LJ affirmed that the enumeration did not entail further description in the bill of lading as to how

[634] [2016] EWCA Civ 101, [7].
[635] *Kyokuyo Co Ltd v AP Moller Maersk A/S* [2017] EWCA Civ 778.
[636] [2017] EWCA Civ 778.

the packages or units were actually packed in the container and the words 'as packed' were simply descriptive.[637] One essential method of analysis is to give the provision a purposive construction. Diplock LJ said in *The travaux préparatoires of the Hague and Hague-Visby Rules* that the purpose of the container clause was to look at the face of the bill of lading and saw did it contain any figures of numbers of packages other than the containers themselves.[638] Flaux LJ thought that the speech of Diplock LJ supported the descriptive function of the words 'as packed' because it was simple for the shipper to limit liability at maximum from the face of the bill of lading and the carrier could adjust his freight rates to take account of that.[639] Thus, there is no additional requirement that the physical goods must be described 'as packed'. With regard to the effect of 'said to contain' on enumeration in Art IV rule 5 (c), it does not negate the effect of enumeration by following Philips LJ's judgment of *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd (The 'River Gurara')*.[640] But if the enumeration is incorrect, for example, the bill of lading describes 'a container STC 500 cases' but 25 cases are never shipped, it is suggested that the number should be inconclusive for limitation purposes and Art IV rule 5 (c) applies only to those enumerated packages 'for which there is liability'.[641]

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[637] [2017] EWCA Civ 778, [81] and [82].
[638] CMI, *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* (CMI Headquarters 1997) 571.
[639] [2017] EWCA Civ 778, [87].
[640] [1996] 2 Lloyd's Rep 53 (QB); [1998] QB 610 (CA). Richard Aikens and others, *Bills of Lading* (2nd edn, Informa 2015) para. 10.328.
[641] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 243. And in this case, the limitation is based on 475 packages.

Another change is the express provision (e) for the loss of the carrier's right to limit. The carrier or the ship cannot limit liability when the damage is proved to result from an act or omission of the carrier done with the intent to cause damage or recklessly and with knowledge that damage would probably result. The servant or agent of the carrier could limit their liabilities as the carrier by virtue of Art IV bis rule 2. The problem arises as to the rule of breaking the limit is whether it is confined to the personal act or omission of the carrier or the carrier will lose his right if such action or omission is done by his servants or agents. In *Browner International Ltd v Monarch Shipping Co Ltd (The 'European Enterprise')*,[642] Steyn J construed the word 'carrier' in Art IV rule 5 (e) restrictively based on two commercial reasons. The sea carrier had limited control over the acts and omissions of his servants and agents which justified a narrow interpretation.[643] Besides, the limitation provision was utilized to obtain insurance and a fairly narrow breaking of the limitation provision served a rational commercial purpose.[644] Therefore the carrier loses the right only the act or omission is done by the carrier or the alter ego of the carrier if he is a company. But the agents or servants of the carrier would also lose their rights if such act or omission is done with intent to cause damage or recklessness with an actual awareness of the probable consequences.[645]

[642] [1989] 2 Lloyd's Rep 185 (QB).
[643] Ibid, 191.
[644] Ibid.
[645] Art IV bis (4).

The second issue is the criteria. The phrases 'intent to cause damage' and 'recklessness with an actual awareness of the probable consequences' appear to demand that the carrier has a subjective intention.[646] The 'intent to cause damage' is not problematic but the meaning of the latter phrase is not clear. The term 'recklessness' was interpreted as more than mere negligence or inadvertence and it meant to act deliberately with an unjustifiable risk.[647] The requirement of an actual knowledge of probable damage of the carrier is a difficult task for the cargo interests to prove in comparison with the constructive knowledge which means if a person is shown to know the fact, he knows the fact from the legal perspective. [648] It is harder to prove the actual knowledge because the evidence of the actual status of such person, i.e. the carrier, may not be easily acquired by the cargo interests. In together, 'recklessness with an actual awareness of the probable consequences' seems to refer to an extreme high standard of negligence and the reasoning of such high level is to upheld the ceiling of limits. [649] Nevertheless, there was a recent case with regard to fire exception in Art IV rule (b) of the Hague and Hague-Visby Rules and one

[646] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 245. Duygu Damar, *Wilful Misconduct in International Transport Law* (Springer 2011) 122.
[647] See *Albert E Reed Co v London Rochester Trading Co Ltd* [1954] 2 Lloyd's Rep 463 (QB), the judge held that the barge company was reckless when he knew the unseaworthiness of the barge and deliberately carried with an unjustifiable risk of the kind of cargo being damaged.
[648] Ibid, 475.
[649] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 246.

issue was to determine whether the fire was caused intentionally and recklessly.[650]

In *Glencore Energy UK Ltd and Another v Freeport Holding Ltd (The 'Lady M')*,[651] the Court of Appeal considered whether the deliberate conduct of the engineer in starting the fire constituted barratry and whether it would deprive the carrier from relying on Art IV rule 2 (b) of the Hague and Hague-Visby Rules. The meaning of 'barratry' was referred to 'including every wrongful act wilfully committed by the master or crew to the prejudice of the owner'.[652] In this case, the trial judge thought that although the deliberate conduct of the engineer was barratry undoubtedly, recklessness as to whether it was a breach of duty was sufficient.[653] Accordingly, in a situation where stevedores caused damage during discharge with the knowledge that the cargo was likely damaged and with indifference to that consequence, the stevedores should be deprived their rights to limit liabilities. However, this case concerns the fire exception in Art IV rule 2 (b) of the Hague and Hague-Visby Rules and the Court of Appeal did not decide the meaning of recklessness because the carrier could still rely on the fire exception even if the fire was caused intentionally. Therefore, the judgment on the point of recklessness is obiter but this decision might still be useful in determining 'recklessness' with regard to the attitude of consequences.

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[650] *Glencore Energy UK Ltd and Another v Freeport Holding Ltd (The 'Lady M')* [2019] EWCA Civ 388. The issue of this case was fire exception in Art IV rule 2 (b) of the Hague and Hague-Visby Rules which is discussed in section 3.2.1.2.
[651] [2019] EWCA Civ 388.
[652] See paragraph 11 of Rules for the Construction of Policy in Schedule 1 of the Marine Insurance Act 1906.
[653] [2019] EWCA Civ 388, [20]

Therefore, the foresight of the probable consequences may be required by the English courts as a subjective element and the carrier would not loss his right. Moreover, the extent of the knowledge that damage would 'probably' result requires a high degree of recklessness which means the carrier is entitled to limit his liability even if he ought to have known that damage would probably result.[654] But since the burden is on the cargo interests, it is a formidable task to prove.

5.1.3 The Hamburg Rules

The person who has the right of limitation under the Hamburg Rules includes the carrier, his servant or agent and the actual carrier.[655] In comparison with the Hague and Hague-Visby Rules, the Hamburg Rules add a new limitation provision for delay and provide a higher amount for loss of or damage to the goods. The figure increases to 835 SDR per package or unit or 2.5 per kilo of gross weight of the goods lost or damaged, whichever is higher.[656] Despite that the increase is about 25 percent, it is argued that the real values of limitation, due to the world inflation, is 60 percentage of the limit under the Hague-Visby Rules in 1968.[657] The liability for delay in delivery is 2.5 times the freight payable for the goods delayed and no exceed than the total freight payable under the contract of carriage.[658] Like the Hague-Visby Rules, there is a similar provision in the Hamburg Rules

[654] Anthony Diamond, 'The Hague-Visby Rules' [1978] LMCLQ 225, 246.
[655] Arts 6 (1), 7 (2) and 10 (5).
[656] Art 6 (1)(a).
[657] Erling Selvig, 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1980) 12 J Mar L Com 299, 307.
[658] Art 6 (1)(b).

to solve the issue whether a container is a package for the limitation purpose. Art 5 (2) provides that a container is a package unless when a container is used to consolidate goods, the packages or units enumerated in the bill of lading are deemed packages. The situation in which the carrier may lose the benefit of the limitation is similar with Art IV rule 5 (e) of the Hague-Visby Rules but the carrier could lose the right even if the act or omission is done by his agents or servants with the intent to cause such loss, damage or delay or recklessly and with the knowledge that such loss, damage or delay would probably result.[659] It establishes an easier way for the cargo interests to deprive the benefit of limitation of the carrier because the carrier will lose his right to limit when such act is done by his agents or servants.

5.2 International Road Convention: the CMR

Art 23.3 of the original text of the CMR in 1956 provides that the limitation of liability of loss of or damage to the goods does not exceed than 25 Francs per kilogramme of gross weight short and 'franc' means the gold franc weighing 10/31 a gram and being of millesimal fineness 900. Due to the same monetary change of sea conventions in 1970s, a Protocol replaced francs with the SDR which is 8.33 SDR per kilogramme of gross weight short. As for delay, Art 23.5 states that the compensation does not exceed the carriage charges. Art 23.3 sets as ceiling on the amount of compensation which could be disregarded in cases where the sender makes declaration of the value for the goods exceeding the amount in Art 23.3 or

[659] John C Moore, 'The Hamburg Rules' (1978) 10 J Mar & L Com 1, 8.

the sender agrees on a fixed amount of a special interest in delivery.[660] The loss of the carrier's right to limit is restricted to wilful misconduct which is done by himself or his agents, servants or by any person of whose services it makes use for performance of the carriage when such agents, servants or other persons act within their scopes of employment.[661] In *Sidney G Jones Ltd and Others v Martin Bencher Ltd and Others*,[662] the cargo was damaged when the driver drove off the road. Popplewell J found that the driver was aware that the permissible driving period in Art 7 of the EEC Regulations and he chose to deliberately ignore it.[663] The driver also knew that his ignorance exposed him and other road users to a greater risk. The judge decided that the 'wilful misconduct' required a subjective element which included a deliberate act or omission in relation to which the person knew or was reckless as to whether damage would result.[664] In this case, the conduct of the driver was within the definition of 'wilful misconduct' and the carrier lost the benefit of limitation.

5.3 International Rail Convention: the COTIF-CIM

The compensations for loss of and damage to the goods are stated in two provisions and the maximum amount is 17 SDR per kilogramme of gross mass short.[665] The limitation of liability with reference to weight is identical with the CMR which allows the carrier to estimate his potential liability

[660] Arts 24 and 26.
[661] Art 29.
[662] [1986] 1 Lloyd's Rep 54 (QB).
[663] Ibid, 58.
[664] Ibid, 59.
[665] Arts 30 and 32.

without having to open the packaging of the cargo.[666] The COTIF-CIM has a rather high limitation for delay in which the compensation is no higher than 4 times carriage charge.[667] The limits under Arts 30 and 32 might be inoperative when the consignor agree to declare a higher value of the goods or an interest in the delivery.[668] As for the loss of the right to invoke the limits, the situation is similar with the Hague-Visby Rules. Art 36 provides that if the loss or damage results from an act or omission which the carrier has committed either with the intent to cause such loss or damage or recklessly and with knowledge that such loss or damage would probably result. The formula of wilful misconduct is phased out since 1996 and replaced with the words 'loss or damage would probably result'. It is suggested that an objective approach instead of a subjective approach is used.[669] But if following the interpretation of 'recklessness with the actual knowledge of probable consequences' in Art IV rule 5 (e) of the Hague-Visby Rules, this opinion should be rejected and the subjective approach is still adopted by the English courts.[670]

5.4 International Inland Waterway Convention: the CMNI

The person entitled to limit liability includes the carrier, the actual carrier and his agents or servants.[671] Art 20 has an explicit rule for calculating the limitation. In paragraph (1), the carrier is no liable for amounts exceeding

[666] Malcolm A Clarke and David Yates, *Contract of Carriage by Land and Air* (2nd edn, 2008 Informa) para. 2.346.
[667] Art 33.
[668] Art 35.
[669] Malcolm A Clarke and David Yates, *Contract of Carriage by Land and Air* (2nd edn, 2008 Informa) para. 2.563.
[670] See section 5.1.2.
[671] Arts 17.3 and 20.

than 666.67 SDRs per package or unit or 2 SDRs per kilogramme of weight specified in the document of the lost or damaged goods, whichever is higher.[672] In the case of containerisation, the package is a container unless the package or shipping unit is enumerated in the transport document.[673] When the package is a container, the amount is 1500 SDRs for the container without the goods contained or 25000 SDRs with the goods.[674] In the event of delay, the ceiling is the same amount as the freight.[675] The maximum limitation does not apply where the nature and a higher value of goods have been expressed in the transport document and the carrier does not refute those specifications or higher figures have been expressly agreed.[676] The carrier or the actual carrier lose the right to limit if he caused the damage by an act or omission either with the intent to cause such damage or recklessly and with the knowledge that such damage would probably result.[677] Compared with the Hague-Visby Rules, the word 'such' is added and whether the damage complained is required to be the same kind of damage known to be the probable result is uncertain.[678] His servants and agents will lose their rights for the same reason but the carrier

[672] The carrier may claim a higher limit if the nature and value of the goods are declared on the transport document by mutual consent.
[673] Art 20.2.
[674] Art 20.1.
[675] Art 20.3.
[676] Art 20.4.
[677] Art 21.q.
[678] The word in used in air conventions and the leading judge, Eveleigh LJ, gave an affirmative answer in *Goldman v Thai Airway International Ltd* [1983] 1 WLR 1186 (CA) because the loss of right to limit was designed to cover damage to both cargo and person. In that way, it can be implied that the damage anticipated does not need to the same kind if the limitation claim refers to cargo only.

or the actual carrier might be entitled to limit even if the damage is caused by action and omission of his servants and agents.

5.5 Conclusion

The persons who could invoke limitation under the unimodal conventions generally include the carrier and his agents or servants except the Hague Rules. The apparent difference is the amount and the discussions are divided into two kinds of claims, loss of or damage to the goods and delay. For the lost or damaged goods, there are two mechanisms to calculate limits: with reference to package or unit and shortage of weight. All conventions with a water leg have two methods to formulate a higher limit except the Hague Rules and the CMR and the COTIF-CIM only have the weight limit. In the case of lost or damaged goods, the conventions involved with a water carriage have a relative lower limitation whilst the COTIF-CIM has the highest ceiling, 17 SDRs per kilogram of gross weight short. Among three marine conventions, the measure of value in the Hague Rules is construed as the monetary gold in English law which has been replaced by a new international unit of account, SDR. The Hague-Visby Rules and the CMNI have the same amount, either 666.67 SDRs per package or unit or 2 SDRs per kilogram of weight lost or damaged goods, whichever is higher. However, with regard to containers, the CMNI lists two specific figures while the Hague-Visby Rules depend on the enumeration of the bill of lading. Later, the Hamburg Rules increase 25 percent in comparison to the Hague-Visby Rules which is rejected by the major shipping countries. The CMNI has the similar rule for limitation of liability as the Hague-Visby Rules but

adds an additional calculation for containers. The limitation of the CMR is in intermediate level, 8.33 SDRs per kilogram of lost or damaged goods. The COTIF- CIM has the highest amount, 17 SDRs per kilogram of gross mass short.

All but the Hague and Hague-Visby Rules allow to limit liability in the case of delay. The calculation is based on the freight payable for the delayed goods. The Hamburg Rules restrict to an amount equivalent to two and half times of such freight and the rest do not have such limitation. But the maximum recover under conventions are the same, the total freight of the carriage. As for the loss of benefit of limitation, it usually requires a higher degree of fault than the basis of carrier's liability. It is unlikely to break the limit in the Hague Rules due to the wide words used in the limitation provision. The lower level of fault is recklessly with the knowledge that damage would probably result which is commonly required by the Hague-Visby Rules, the Hamburg Rules, the COTIF-CIM and the CMNI. The higher degree of fault is wilful misconduct. Normally the person is deprived of the right to limit if the act or omission is done by himself but in the CMR, the carrier loses his right even if such act or omission is done by his agents, servants or other person of whose services he makes use to perform the carriage. In that way, it is relatively easy to forbid the carrier from evoking the limit under the CMR because he would lose his right to limit due the faults of his agents or servants.

CHAPTER 6 Liability systems in International Multimodal Transport

6.1 The Need for a Liability System

Assuming that the whole carriage of international multimodal transport is separately governed by unimodal conventions, the liability of the multimodal transport operator depends on the stage of transport where the loss of or damage to the goods or delay occurs which means that the application of mandatory rules is fragmentary and unpredictable.[679] Moreover, each convention provides its minimum protection for the carrier and nullifies the contractual terms which decreases the liability of the carrier under the mandatory rules,[680] the liability of the multimodal transport operator would be substantially different under various segments.[681] Besides, given that non-maritime conventions extend their ambits to other modes of transport in certain circumstances and English law allows contractual parties to allocate their responsibilities by virtue of the freedom of contract principle as discussed in chapter 3, it is highly possible that two different conventions apply simultaneously provided all conditions were met or there is no available mandatory rules due to the restricted application of conventions.

[679] Directorate-General for Transport (DG VII), *Intermodal Transportation and Carrier Liability* (Publications Office 1999) para. 3.
[680] See Art III rule 8 of the Hague and Hague-Visby Rules, Art 23 (1) of the Hamburg Rules, Art 41 of the CMR, Art 5 of the COTIF-CIM and Art 25 (1) of the CMNI.
[681] The analyses about the essential aspects of the multimodal transport operator's liability is in chapters 7 and 8.

However, in the case of non-localised or continuous damage or the boundary stages between two modes of transport, the application of a unimodal convention is problematic and uncertain.[682] The desire for a set of rules for international multimodal transport has been expressed by numerous organisations and this thesis will analyse two possible solutions: one is a mandatory international convention and the other is contractual rules. This chapter will consider two conventions: the MT Convention and the Rotterdam Rules. Due to the lack of an effective convention, there are various forms of contractual rules for international multimodal transport but the disadvantage is non-uniformity. In this chapter the liability frameworks for the multimodal transport operator in the MT Convention and in the Rotterdam Rules will be explored. The aim is to suggest a practicable liability system for international multimodal operator in an international convention.

6.2 Liability Systems for the Multimodal Transport Operator

6.2.1 Theoretical Liability Systems

A key issue in international multimodal transport is the conflicts with mandatory regimes in force either currently or in the future. There are three liability approaches for the multimodal transport operator in theory, namely unimodal, network and modified liability systems.

6.2.1.1 Uniform Liability System

[682] UNCTAD, 'The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention', UN Doc. TD/B/C.4/315/Rev.1, para. 81.

The uniform liability system means that the multimodal transport operator would undertake his liability at the same level wherever the loss of or damage to the goods or delay occurs.[683] This approach adds legal predictability to a large degree for the cargo interests because the liability of the multimodal transport operator would remain at the same degree during the whole transit.[684] In contrast with the network liability system, the unlocalized and continuous damage issues would be solved.[685] However, the disadvantage of this approach is that it is difficult to negotiate because the same limitation of liability regardless of the mode of transport is not an easy task.[686] Besides another major problem is that there might be a potential resource gap between the multimodal transport operator and the actual carrier since the applicable law varies.[687] Therefore if an international convention uses this approach, the conflict with the current international conventions is inevitable.[688]

6.2.1.2 Network Liability System

The network liability system was invented to resolve the conflict of conventions and it functions as a link to existing unimodal transport conventions.[689] The liability of the multimodal transport operator is determined by particular unimodal transport rules relevant to the stage

[683] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.144.
[684] Ibid, para. 2.162.
[685] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwers 2010) 29.
[686] See comparisons among different unimodal conventions in chapters 2-5.
[687] Ibid.
[688] Jerome Racine, 'International Multimodal Transport: A Legal Labyrinth' in Arnold Kean (ed.), *Essays in Air Law* (Martinus Nijhoff Publishers 1982) 225.
[689] Ibid, 226.

where the loss of or damage to the goods or delay occurs. The benefits of the network liability system are that it is able to avoid conflicting with the existing conventions and it is closer to the contractual rules currently accepted by the industry.[690] Moreover there would be no resource gap between the multimodal transport operator and the actual carrier.[691] Unfortunately the shortcomings of the network liability system are evident as it only works for localized damage, but concealed damage is a common phenomenon due to the wide use of containers.[692] In that way, the multimodal transport operator is not liable unless there is a default provision for his liability in the contract.

6.2.1.3 Modified Liability System

Since the pure uniform and network liability systems have their apparent drawbacks respectively, the modified system is preferred by many international rules as a compromise.[693] It could be either a uniform-oriented or network-oriented liability system and this characteristic could be more effective by taking advantage of benefits of both liability system.[694] But it may increase complexity and reduce legal predictability.[695] The MT Convention and the Rotterdam Rules both adopt the modified liability

[690] Bevan Marten, 'Multimodal Transport Reform and the European Union: A Treaty Changed Approach' (2012) 36 Tul Mar L J 741, 758.
[691] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwers 2010) 28.
[692] Christopher Hancock, 'Multimodal Transport under the Convention' in David Rhidian Thomas (ed.), *An Analysis of the Rotterdam Rules* (Lawtext 2009) 41.
[693] Ibid.
[694] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwers 2010) 30.
[695] UNCTAD, 'Multimodal Transport: The Feasibility of An International Legal Instrument' (13 January 2003) UN Doc. UNCTAD/SDTE/TLB/2003/1, para. 53.

approach and in the next section, the detailed provisions will be discussed and compared.

6.2.2 Liability Systems in Practice

6.2.2.1 Modified Uniform Liability System in the MT Convention

The MT Convention adopts a 'uniform' liability system for the loss of or damage to the goods or delay except with two-tier limits of liability, which is seen as a modified uniform liability system.[696] Art 18 provides the limitation of the multimodal transport operator's liability for loss of or damage to the goods or delay and Art 19 sets up a higher limit under other international conventions or mandatory national law for localised loss of or damage to the goods.[697] Art 18 (1) lays down two basic rules depending on whether a sea transport is involved or not. When a water leg is included, the multimodal transport operator's liability for loss of or damage to the goods does not exceed 920 SDRs per package or other shipping unit or 2.75 per kilogram of gross weight of goods, whichever is higher.[698] The packages enumerated in the multimodal transport document as packed in a container are deemed packages or shipping units or otherwise the containers will be treated as packages.[699] Group B representing the developed countries was only willing to accept a ten percent increase over the Hamburg limit whenever a sea leg was included in multimodal carriage

[696] Anthony Diamond, 'Legal Aspects of the Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, C14.
[697] The amount under Art 18 does not prevent parties to agree a higher limit fixed in multimodal transport document. See Art 18 (6).
[698] Art 18 (1).
[699] Art 18 (2).

whilst the rest proposed to increase the Hamburg Rules by about fifteen percent.[700] Subject to the pressure of a failed conference, the concession was made to the compromise formula in Art 18. If the international multimodal transport does not involve carriage by sea or inland waterway, the amount would be no more than 8.33 SDR per kilogram of gross weight of goods which is the limit in the CMR.[701] The reference of involvement of sea or inland waterway transport 'according to contract' in Art 18.3 is problematic: does it mean the multimodal transport needs to expressly state the used of water carriage or merely provides for it? The author thinks the interpretation approach in *Quantum Co Inc and Others v Plane Trucking Ltd and Another*[702] which is used to determine the adoption of more than two different modes of transport should be followed. The implicit interpretation is that if the multimodal transport contract does not permit such carriage or where it is permitted but not actually used, the amount will the CMR limit.[703]

Another standard is that where the loss of or damage to the goods occurred during one particular stage, an international convention or mandatory national law providing a higher limit for that leg of transport apply to such stage.[704] The application of this provision seems quite narrow because it does not apply where the loss of or damage to the goods occurs during

[700] William Driscoll and Paul Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 Tul L Rev 193, 237-8.
[701] Art 18 (3).
[702] [2002] EWCA Civ 350. See section 2.2.1.
[703] David Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, LLP 2012) para. 3.109. The interpretation of uses more than two modes of transport will be discussed in section 7.2.1.1 hereinafter.
[704] Art 19.

numerous stages which means it does not apply to continuous damage.[705] One further point is Art 19 contrasts an applicable international convention with a mandatory national law. Presumably the intention is that an international convention becomes applicable even where it contemplates optional rather than compulsory application.[706]

As for the limits for delay, the MT Convention adopted the same amount as the Hamburg Rules which is two and half times the freight of goods delayed, no more than the total freight payable under the contract of carriage.[707] The right to limit is lost by the multimodal transport operator and the right of servants, agents or other person whose services used for performance of the multimodal transport contract by the intentional or reckless acts.[708]

6.2.2.2 Limited Network Liability System in the Rotterdam Rules

The Rotterdam Rules adopt a so-called limited network liability approach to regulate the liability of the multimodal transport operator and the approach consists of Arts 26 and 82 which raises concerns of the Working Group during preparations and of the academics. Since the Rotterdam Rules could apply to door-to-door transport, Art 26 aims to deal with the application rules when the loss of or damage to the goods or an event causing delay in delivery occurs solely before loading or after discharge whereas Art 82 address the conflict issue with other international conventions.

6.2.2.2.1 Carriage preceding or subsequent to Sea Carriage: Article 26

[705] David Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, LLP 2012) para. 3.110.
[706] Ibid, para.3.112.
[707] Art 18 (4).
[708] Art 20 (2).

The applicable rules for carriage preceding or subsequent to sea carriage attracted the attention of the draftsmen at the beginning of drafting work.[709] Given that the possible conflicts between the Rotterdam Rules and other international conventions governing inland transport, the draftsmen thought that it was necessary to make provisions providing a network liability system but as minimal as possible.[710] Thus Art 26 pertains to the applications of other international instruments when the loss of or damage to goods or an event or circumstance causing a delay in delivery occurs solely before loading onto the ship and after discharge from the ship. One essential precondition of Art 26 is that the carrier's period of responsibility does not restrict to a period beginning with loading and ending to discharge because this provision would be not triggered when the parties could contractually limit to pure sea carriage.[711] This precondition seems redundant to the multimodal transport operator because his period of liability normally starts from receipt of the goods and ends until delivery. Another premise is that the loss of or damage to the goods or an event or circumstance causing the delay in delivery occurs 'solely before loading or after charge' which means that Article 26 only applies when the loss or damage or the event causing delay in delivery should be localised to pre-

[709] UNCITRAL Woking Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 4.2.1.
[710] Ibid, para. 49.
[711] Ralph De Wit, 'Minimal Music: Multimodal Transport including A Maritime Leg under the Rotterdam Rules' in David Rhidian Thomas (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 5.16.

loading or post-discharge period.[712] In other words, the Rotterdam Rules will prevail when the loss of or damage to the goods is unlocalised, i.e. occurs during different stages or was progressive or where it cannot be proved where the loss of or damage to the goods occurred.[713] And those situations are highly likely because a considerable percentage of cargo damage is non-localised (especially in international multimodal transport carried by containers) due to the difficulty to identify the accurate location of the damage.[714] In these circumstances the liability of the multimodal transport operator will be determined by the Rotterdam Rules as the sea carrier. Provided that all conditions are satisfied, certain provisions of other international instruments for other modes of transport will apply. As for the applicable rules governing other modes of transport, it was intensely argued during the negotiations that national law should be included but strong support was shown for its deletion because that the reference to national law went against the uniformity goal of the convention and it might increase the unpredictability of both shippers and carriers in determining their liabilities.[715] In light of the support of both retaining and removing the phrase 'national law', a compromise proposal was suggested that Contracting States that wish to apply their national law to inland damage

[712] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 4.019.
[713] Ibid.
[714] Carl Hans, 'Future Developments in the Regulatory Aspects of International Multimodal Transport of Goods' in International Union of Marine Insurance Conference Berlin 1999.
[715] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Nineteenth Session', (25 June-12 July 2007) 40th session UN Doc. A/CN.9/621, para. 188.

could make a declaration specifically in accordance with Art 91.[716] Nevertheless, the aim of uniformity and harmonisation prevails and the reference to national law was completed deleted.[717] Another issue is what term should be used for applicable law, either international conventions or international instruments. The difference is that mandatory regulations of regional economic organizations are regarded as international instruments but not international conventions.[718] In view of Art 82, the use of 'international instruments' mainly refer to regulations of European Union. Additionally, it contains not only the current international instruments but also some instruments made in the future.[719] Therefore, the Rotterdam Rules apply even if the loss of or damage to the goods or an event causing delay in delivery occurs during ancillary inland transport.

Other international instruments would apply if three requirements listed in paragraphs (a) to (c) of Article 26 are met. The first one is that a separate and direct contract had been made between the shipper and the carrier for the particular stage of carriage where the loss of or damage to the goods or an event causing delay in delivery occurs, which is called hypothetical

[716] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Nineteenth Session', (25 June-12 July 2007) 40th session UN Doc. A/CN.9/621, para. 189.
[717] United Nations General Assembly ('UNGA'), 'Report of the United Nations Commission on International Trade Law Forty-First Session (16 June-3 July 2008) 63rd session UN Supp. No. 17 (A/63/17), para. 96.
[718] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (16-27 April 2007) 19th session UN Doc. A/CN.9/WG.III/WP.81, Art 26.
[719] Güner-Özbek Meltem Deniz, 'Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Conventions' in Güner-Özbek Meltem Deniz (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the Rotterdam Rules* (Springer 2011) 129.

contract approach imported from Article 2 in CMR.[720] Originally the conflict of laws approach was proposed in paragraph (a) that the provisions of international instruments apply to all or any of the carrier's activities under the contract of carriage but it was argued that other international instruments might never apply given different scope of application provisions of various unimodal conventions.[721] In order to avoid operations of scope provisions, the hypothetical contract approach was adopted. But what constitutes a separate and direct contract between the shipper and the carrier in respect of the particular stage of carriage does not mentioned in *travaux préparatoires*. If following the construction of the hypothetical contract approach in Art 2 of the CMR,[722] the actual contract made between the performing party who performs the particular stage and the multimodal transport operator could be regarded as the hypothetical contract between the shipper and the carrier in paragraph (a).

The second condition set out in paragraph (b) is applicable provisions of international instruments should be directly related with carrier liability, limitation of liability or time for suit.[723] These three matters are fundamental of the carrier's liability regime and other provisions of the

[720] Güner-Özbek Meltem Deniz, 'Extended Scope of the Rotterdam Rules: Maritime Plus and Conflict of the Extension with the Extensions of Other Transport Law Conventions' in Güner-Özbek Meltem Deniz (ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An appraisal of the Rotterdam Rules* (Springer 2011) 128.

[721] UNCITRAL, 'Report of Working Group III (Transport Law) on the work of its Eighteenth Session' (25 June-12 July 2007) 40th session UN Doc. A/CN.9/616, para. 224.

[722] See section 2.2.2.

[723] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 52.

Rotterdam Rules including jurisdictions, shipper's liability and transport documents will concurrently apply with other unimodal conventions. Anthony Diamond argued that the limited aspects could create undesirable uncertainty in practice because before the shipment the parties will need to know what kind of transport document should be issued as required either by the Rotterdam Rules or by some applicable conventions.[724] However, Francesco Berlingieri disagrees that the parties do know what documents the carrier must issue: a document which enables its holder to collect the goods at the place of destination.[725] For example, the shipper makes a contract of carriage to carry two containers from Berlin to Chicago with the multimodal transport operator who sub-contracts the road carriage from Berlin to Rotterdam to Truck company, the sea carriage from Rotterdam to New York to Ocean Line and the rail leg from New York to Chicago to Train Company. Assuming Germany is a Contracting State of the Rotterdam Rules, the multimodal transport operator and Ocean Line should issue a transport document in compliance with the Rotterdam Rules and the Truck company must know to issue a CMR consignment note to cover the road segment. However, if the road carriage is subcontracted by the sea carrier rather than the multimodal transport operator, Anthony Diamond thinks it would create uncertainty for the parties to issue transport documents because assuming the contract of carriage falls within the definitions under the Rotterdam Rules and the CMR. The argument of

[724] Anthony Diamond, 'The Rotterdam Rules' [2009] LMCLQ 445, 457.
[725] Francesco Berlingieri, 'Revisiting the Rotterdam Rules' [2010] LMCLQ 583, 586.

Anthony Diamond seems unreasonable because the CMR can only apply to other modes of transport in restricted conditions under Art 2.1. Therefore, the sea carrier would prefer to issue a transport document which complies with the Rotterdam Rules to cover the initial road carriage. Besides, one pre-condition to trigger Art 26 is that the loss of or damage of the goods or an event causing delay in delivery occurs solely before loading or after discharge and the matter what transport documents should be issued by parties clearly is raised before the occurrence of the damage. In other words, the draftsmen do not aim to solve such problems with Art 26 and Art 82 is the provision dealing with conflicts between the Rotterdam Rules and the CMR which will be discussed in the next section. The restriction in paragraph (b) is also a reflection that the Rotterdam Rules adopt a 'limited' network liability system because it supersedes other international instruments for certain aspects.[726] Although it may lead to conflicts, the reason given by the draftsmen for the limited exceptions is some aspects of the contract of carriage should be regulated continuously by the same type of provisions.[727] For instance, the bill of lading holder and the possessor of the consignment note are dramatically different and under a full network liability approach some parts of transport will be covered by consignment note under the CMR or COTIF/CIM which deprives the

[726] Ralph De Wit, 'Minimal Music: Multimodal Transport including A Maritime Leg under the Rotterdam Rules' in Thomas Rhidian (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 5.41.
[727] Gertjan van der Ziel, 'Multimodal Aspects of the Rotterdam Rules' [2009] ULR 981, 984 and 985.

protection obtained from the bill of lading.[728] Besides, the conflicts of provisions which indirectly affect the carrier's liability may be negligible because they are outside the fundamental scope of transport conventions.[729]

The third requirement set out in Article 26 (c) is that the provisions of applicable international instruments should be mandatory. It intends to deal with carriage of goods by other modes of transport by the very terms of their scope of application but this presupposition may be not interpreted in such method.[730] This requirement does not attract much criticism because if the provisions can be departed from the contract, it is unnecessary for the Rotterdam Rules to give priority to non-mandatory clauses.

6.2.2.2.2 Conflict with Other Conventions: Article 82

Although the limited network approach provided by Art 26 does eliminate the conflict over other conventions to a large extent, the Rotterdam Rules are inevitably incompatible with other international instruments.[731] Therefore Article 82 was drafted to provide a complicated solution concerning with other modes of transport governed by other international

[728] Gertjan van der Ziel, 'Multimodal Aspects of the Rotterdam Rules' [2009] ULR 981, 984 and 985. The bill of lading is a basis of documentary credit enables the seller to be protected from insolvency of the buyer under a sale contract

[729] Francesco Berlingieri, 'The Rotterdam Rules: The Maritime Plus Approach to Uniformity' [2009] EJCCL 49, 51.

[730] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea] -Relation with Other Conventions' (6-17 November 2006) 18th session UN Doc. A/CN.9/WGIII/WP.78, paras. 39 and 40.

[731] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 4.031.

conventions.[732] The distinction between Articles 26 and 82 should be emphasised. Firstly, Art 26 applies for cases in where loss of or damage to or an event causing delay in delivery occurs solely pre-loading or after-discharge period whereas Art 82 does not have such preconditions. Secondly, Article 82 only refers to international conventions in force at the time of entry into force of the Rotterdam Rules while Article 26 is not so limited.[733] Thirdly, Article 82 allows a contractual party located in a State to apply both non-mandatory provisions and compulsory provisions relating to matters other than carrier liability, limitation of liability and time for suit.[734] During the preparation, it was suggested that Article 26 was sufficient to supply a sound solution to the problem and adding a conflict provision may cause confusion.[735] Nevertheless, Ultimately the draftsmen made a provision to avoid conflicting with the Montreal Convention although the combination of air and sea transport is rare for container transport.[736] Moreover, it was recommended that other conventions such as the CMR or COTIF-CIM should also be contained.[737]

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[732] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Twenty-First Session'(16 June-11 July 2008) 41st session UN Doc. A/CN.9/645, paras.257 and 258.
[733] Christopher Hancock, 'Multimodal Transport under the Convention' in David Rhidian Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - the Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 48.
[734] Michael Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 4.033.
[735] Ibid, para. 233.
[736] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Nineteenth Session', (25 June-12 July 2007) 40th session UN Doc. A/CN.9/621, para. 204.
[737] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twentieth Session'(16 June-11 July 2008) 41st session UN Doc. A/CN.9/642, para. 228.

Article 82 (a) refers to international conventions governing air carriage. Given that the multimodal transport in this thesis does not consider air transport due to the use of containers, the operation of paragraph (a) will not be discussed. The relationship between the Rotterdam Rules and other international conventions in terms of regulating road carriage like the CMR is addressed by Article 86 (b).[738] It does not prevent the Rotterdam Rules from applying to any part of a contract of carriage governed by the CMR, which is narrower than the scope in paragraph (a) of Article 86.[739] It only excludes the Rotterdam Rules to the extent that provisions of the CMR apply to the carriage of goods remaining on a road cargo vehicle carried on board a ship. Thus, Article 2 of the CMR would apply to an entire international road carriage including a roll-on roll-off sea carriage and accordingly the Rotterdam Rules would be precluded.[740] The confusion may be raised if the loss or damage is non-localised, the pre- and on-carriage by road may be applied to the CMR in virtue of Article 1 and 2 while the Rotterdam Rules would apply via Article 26.[741] Additionally, the CMR would apply the sea carriage through Article 82 that makes the CMR yield to the Rotterdam Rules if mandatorily applicable.[742] Therefore, the reasonable explanation of Article 82(b) should be that it would yield to the multimodal

[738] Anthony Diamond, 'The Next Sea Convention?' [2008] LMCLQ 135, 142.
[739] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 4.039.
[740] Christopher Hancock, 'Multimodal Transport and the New UN Convention on the Carriage of Goods' (2008) 14 JIML 484, 494.
[741] Ralph De Wit, 'Minimal Music: Multimodal Transport including A Maritime Leg under the Rotterdam Rules' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 5.63.
[742] Ibid.

transport of other international conventions wherever the conflicts are caused.[743] The Working Group held that specific solutions to specific conflicts with unimodal transport conventions would be considered and that would not largely change Article 82.[744] The potential conflicts with the COTIF-CIM and the CMNI are so limited because of their scopes of application.[745] Article 1(4) of the COTIF-CIM provides that the convention only applies to sea carriage which is supplemental to the rail carriage and the sea carriage is performed on services included in the 'CIM list of maritime and inland waterway services' subject to Article 24 (1) of the COTIF-CIM. There are few such routes [746] and Article 82 (c) of the Rotterdam Rules gives precedence o the COTIF-CIM provisions in these situations. Besides, Article 82 (d) offers safeguard relating to the CMNI relating to carriage by sea and inland waterway without transhipment. Nevertheless, the CMNI by virtue of its Article 2(a) would cover the entire contract of carriage including the international sea leg under certain following circumstances: a maritime bill of lading has been issued or the

[743] Ralph De Wit, 'Minimal Music: Multimodal Transport including A Maritime Leg under the Rotterdam Rules' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 5.64.
[744] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twentieth Session'(16 June-11 July 2008) 41st session UN Doc. A/CN.9/642, para. 231.
[745] Christopher Hancock, 'Multimodal Transport under the Convention' in David Rhidian Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - the Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 50.
[746] < http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/07_liste_CIM/A_70-03_501_2012_28_02_2012_fde.pdf > accessed 20 Sep. 2020

distance at the sea is the greater. In order to solve this problem, paragraph (d) provides preference to the CMNI provisions.[747]

Although the opposites of covering door-to-door transport account for a large percentage in an UNCTAD survey,[748] it was held that this decision met the technology developments in the modern transport field and the Rotterdam Rules appears to be right to grasp this opportunity to deal with the current status.[749] Moreover, despite of potential problems in relation to issues of liability and limitation, the limited network solution under the Rotterdam Rules seems to be efficient in the massive of cases concerning with other international transport conventions if Article 82(b) would be construed liberally.[750]

6.2.2.3 Limited Network System in Contractual Terms

The limited network approach is also taken by several standard contractual terms. The widely-used one is the UNCTAD/ICC Rules 1992 which is reflected in limitation of liability of the multimodal transport operator in case of loss of or damage to the goods. If the goods are carried by sea and inland waterways, the amount is the same of the Hague-Visby Rules, no exceeding 666.67 SDR per package or unit or 2 SDR per kilogram of gross

[747] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para 4.045.
[748] UNCTAD, 'Multimodal Transport: The Feasibility of An International Legal Instrument' (13 January 2003) UN Doc. UNCTAD/SDTE/TLB/2003/1, para. 34.
[749] Christopher Hancock, 'Multimodal Transport and the New UN Convention on the Carriage of Goods' (2008) 14 JIML 484, 495.
[750] Ralph De Wit, 'Minimal Music: Multimodal Transport including A Maritime Leg under the Rotterdam Rules' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 5.63.

weight of goods lost or damage, whichever is higher.[751] If the goods are carried by other modes of transport, the amount is same as the CMR, no exceeding 8.33 SDR per kilogram of gross weight of goods lost or damaged.[752] However, when the loss of or damage to the goods can be localised to a particular stage of transport in which a mandatory applicable international convention or national law provides a different limit of liability, the amount will be calculated accordingly provided a separate contract had been made for that particular stage.[753]

6.2.3 Proposed Liability Approach

In theory, the modified liability approach is clearly preferable and the practical applications in the MT Convention, the Rotterdam Rules and contractual terms indicate that the modified network liability system is preferable by the shipping industry and relatively operative. The next issue is which modified network approach adopted in the Rotterdam Rules or the contractual terms is more pragmatic. In an international multimodal transport with a sea carriage, the Rotterdam Rules apply as default and subject to limited conditions, other international unimodal conventions apply with regard to three substantial matters of carrier liability regime: carrier liability, limitation of liability and time for suit. The contractual terms only provide a different limitation of liability for non-water carriage and due to its non-mandatory nature, they will be superseded by either international conventions or national law. The amount of limit in the contractual terms

[751] Rule 6.1.
[752] Rule 6.3.
[753] Rule 6.4.

just indicates the methods some shipping companies handle the compensation issue and have little help to form a model of the liability system of the multimodal transport operator. The lengthy suggestions with regard to the limited liability system in the Rotterdam Rules from the aspect of container carriers in international multimodal transport will be made in section 8.5.1.

CHAPTER 7 The MT Convention

7.1 Historical background

In order to understand the underpinning of the MT Convention, it is necessary to consider the historical conventions. Several organizations devoted to draft legal rules for international multimodal transport before the MT Convention and the established starting point is the 1961 UNIDROIT draft although attention to multimodal transport began much earlier.[754] The 1961 UNIDROIT Draft introduced the notion of combined transport document and the multimodal transport operator's liability was based on the pure network principle.[755] Another novelty was the inclusion of a liability rule for delay in delivery. But the 1961 UNIDROIT draft attracted criticism because it failed to provide a coherent solution for the contractual liability of the multimodal transport operator.[756] At the same time, the CMI undertook to examine the maritime aspects of multimodal transport and prepared six drafts in 1966 which culminated with the Genoa Draft Convention in 1967.[757] The Genoa Draft Convention provided a uniform liability system for the multimodal transport operator. Strict liability was opposed by the German and Dutch Maritime Law Associations and a year later, a new modified Draft Convention on Combined Transport, called the

[754] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) paras. 2.171-2.190.
[755] David Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, LLP 2012) para. 1.32.
[756] Robert Wijffels, 'Legal Aspects of Carriage in Containers' 1976 ETL 331, 341.
[757] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.184.

'Tokyo Rules' was presented.[758] The Tokyo Rules had a mandatory requirement with at least one sea leg or inland waterway carriage and the liability of the multimodal transport operator was based on the modified network approach.[759] In the case of localised damage, the multimodal transport operator and the cargo interests have the right to invoke the law which applies to that particular mode of transport.[760] If the occurrence of the damage cannot be traced, it was presumed that the damage was caused during the sea carriage and the Hague Rules or a national maritime law would apply. Due to the two parallel drafting rules by two private organisations, the Inland Transport Committee of the UNECE decided to reconcile the two drafts and published the 'Rome Draft' as a result in January 1970.[761] In order to create a binding convention as soon as possible, the International Maritime Consultative Organisation sponsored a series of meetings to refine the Rome Draft but produced the Draft Convention on the Combined Transport of Goods ('TCM Draft Convention') in 1971 instead.[762] The TCM Draft Convention was to be adopted at the 1972 Container Conference but it never happened because the developing countries opposed further development of the convention.[763] However, the effort was not entirely wasted and its text was subsequently used in

[758] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.185.
[759] Art I (2).
[760] Art VIII.
[761] Eugene A Massey, 'Prospects for A New Intermodal Legal Regime: A Critical Look at the TCM' (1971) 3 J Mar L & Com 725, 728.
[762] UNECE/TRANS/374.
[763] Neil R McGilchrist, 'In Perspective- International Chamber of Commerce Uniform Rules for A Combined Transport Document' [1974] 1 LMCLQ 25, 25.

contractual terms such as the FIATA Combined Transport Bill of Lading 1970, the BIMCO COMBICONBILL 1971, and the ICC Uniform Rules for a Combined Transport Document.[764] Given that the TCM Draft Convention was voluntarily applicable and only parties agreeing to use it would be bound,[765] its purpose as a model contract has been achieved to a large extent.[766] This section will consider the scope of application and the liability regime of the multimodal transport operator under the TCM Draft Convention and explore the reasons why it has not been adopted. Since the ICC Uniform Rules for a Combined Transport Document were accepted by the major shipping countries, the changes that had been made in comparison with the TCM Draft Convention will be discussed.

The TCM Draft Convention applies to any document entitled 'Combined Transport Document' governed by this convention and evidencing a contract for the carriage of goods by at least two different modes of transport. It follows the Hague and Hague-Visby Rules with the documentary approach and the problem arises as to the evidence of two modes of transport. Firstly, it is not realistic for the multimodal transport operator to list the certain modes of transport before the goods are transited because the availability of transportation service is variable.[767] This requirement limits the usefulness of the TCM Draft Convention. The second issue is what if the actual carriage involves only one mode either

[764] It was issued in 1973 as publication No. 273 and modified in 1975.
[765] Art 1 (3).
[766] CMI Newsletter October 1975, issue 1, p 3.
[767] Eugene A Massey, 'Prospects for A New Intermodal Legal Regime: A Critical Look at the TCM' (1971) 3 J Mar L & Com 725, 733.

because of a change of plans after the combined transport document has been issued or because of fraud or misrepresentation. The unanimous view of the representatives was that the failure to use two modes of transport would not affect the validity of the combined transport document.[768] However, the position of the TCM Draft Convention is not reasonable considering that it may conflict with the mandatory unimodal conventions if only one mode of transport is used. The liability of the multimodal transport operator for loss of or damage to the goods under Art 9 is a mixture of the Hague and Hague-Visby Rules and the CMR. The basic liability of the multimodal transport operator in the TCM Draft Convention was the liability for fault which was indicated by defence (h).[769] But other defences and the burden of proof were mainly modelled on the CMR.[770] The multimodal transport operator is liable for delay in delivery and the defences under Art 9 are not available.[771] Art 9 is the half of the liability regime and the other half is in Art 12 which deals with the situation where the loss, damage or delay occurred solely during one particular stage of transport. This provision adopted the network liability approach and the TCM Draft Convention was superseded subject to several conditions. Firstly,

[768] Eugene A Massey, 'Prospects for A New Intermodal Legal Regime: A Critical Look at the TCM' (1971) 3 J Mar L & Com 725, 733.
[769] Art 9 (2)(h) of the TCM Draft Convention: any cause or event which the CTO could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence which was same as Art III rule 2 of the Hague and Hague-Visby Rules.
[770] Paragraphs (a), (b) and (e) of Art 9 (2) patterned Art 17.2 of the CMR and defences (c), (d) and (f) and the burden of proof were akin to Art 18.4 (b), (c) and (e) of the CMR. Only (g) the strike exemption was copied Art IV rule 2 (j) of the Hague and Hague-Visby Rules.
[771] Delay in delivery means the multimodal transport operator has not made the goods available for delivery to the consignee within the agreed time limit or reasonable time regarding to the circumstances.

any international convention or national law would apply if it is mandatorily applicable or it is incorporated in a document which is evidence of a separate and direct contract made by the claimant with the multimodal transport operator in respect of the particular stage.[772] The separate contract required is a condition of applying the network approach under Art 2.1 of the CMR in the case of roll-on roll-off transport.[773] Provided that no other international convention or national law would apply by virtue of paragraph (a), the international convention in relation to the particular carriage of goods where the loss of or damage to the goods or delay occurred applies when the multimodal transport document expressly stated that such convention applies to such mode of transport.[774] Otherwise, the liability of the multimodal transport operator is determined by the inland waterway contract of carriage entered into between the multimodal transport operator and his subcontractors assuming that two former paragraphs do not apply and the multimodal transport document had express statement.[775]

The shortcoming of the network liability approach established by Art 12 is that this provision only applies to cases where the loss of or damage to the goods or delay occurred solely during one particular stage of transport. In other words, Art 9 will apply to cases where the place of the loss of or

[772] Art 12 (1)(a).
[773] See the scope of application of the CMR section 2.2.
[774] Art 12 (1)(b).
[775] Art 12 (1)(c).

damage to the goods or delay cannot be determined.[776] The network liability system aroused the opposition of Australia, Canada and the United States and an alternative, a stricter liability for the multimodal transport operator, was proposed.[777] The due diligence standard under Art 9 (2)(i) is replaced by a higher level of liability. The multimodal transport operator is not liable if he proves that the loss of or damage to the goods or delay was caused by circumstances which he could not avoid and the consequences of which he was unable to prevent and Art 12 is eliminated.[778] In order to obtain the support of the maritime interests, two defences, error of navigation and fire were added only if the loss of or damage to the goods occurs during carriage by water.[779]

7.1.1 ICC Uniform Rules for Combined Transport Document

The two versions of the ICC Rules for Combined Transport Document are mostly identical except for liability for delay. With regard to the scope of application, the ICC Uniform Rules for Combined Transport Document are voluntary but with an expression on the face of a combined transport document 'subject to Uniform Rules for a Combined Transport Document (ICC Brochure No. 273)'.[780] The issue of a multimodal transport document is regarded as a reflection of the intention to contract for multimodal transport which is different from the approach in the TCM Draft

[776] Eugene A Massey, 'Prospects for A New Intermodal Legal Regime: A Critical Look at the TCM' (1971) 3 J Mar L & Com 725, 744.
[777] Ibid, 745.
[778] The alternative is under Art 9A. The standard was modelled Art 17.2 of the CMR.
[779] Arts 9A bis (b) and (c).
[780] Rules 2 (c).

Convention.[781] The essential elements of the multimodal transport contract have been discussed above and one issue is the use of more than one mode of transport. The principle of the Rules is to apply to multimodal transport contract but Rule 1 (a) clearly states that the Rules could apply even where the goods are in fact carried by a single mode of transport. Therefore, the issue of whether the contract shows an intention which is classified as multimodal transport is irrelevant unless it is proved that the Rules are not intended to apply to the contract as actually performed.[782]

The liability regime of the multimodal transport operator in the Rules is comprehensive. The liability for loss of or damage to the goods is divided to two categories: concealed loss of or damage to the goods or delay in delivery and the stage of transport where the loss of or damage to the goods or delay in delivery is known. For the first situation, the liability of the multimodal transport operator is no more than 30 francs[783] per kilo of gross weight of the goods lost or damaged unless a higher value for the goods is declared and stated in the multimodal transport document with the consent of the multimodal transport operator.[784] It is a catch-all provision with limitation of liability for unknown loss of or damage to the goods and the amount is the same basic limit as Art IV rule 5 of the Hague-Visby Rules before amendment of the SDR Protocol.[785] In the 1973 version,

[781] The TCM Draft Convention requires a combined transport document as defined in Art 1 (2) to be issued otherwise this Convention does not apply.
[782] David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, 2012 Informa) para. 3.49.
[783] Francs means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.
[784] The multimodal transport operator shall not be liable for an amount greater than the actual loss to the person entitled to make the claim. See Rule 11 (c).
[785] There is no package limitation or container formula in the Rules.

the multimodal transport operator is liable for delay if the claimant proves the damage has resulted but the multimodal transport operator is not liable for delay when the stage of transport where a delay occurred is known in the 1975 version. And the liability for delay is governed by international convention or national law which applies to such mode of transport.[786] The multimodal transport operator will be deprived of the right to limit if he is proved that the loss of or damage to the goods resulted from an act or omission of the multimodal transport operator done with intent to cause damage or recklessly and with knowledge that damage would probably result.[787]

The basic liability of the multimodal transport operator is fault based and the exclusions are similar to Art 9 of the TCM Draft Convention.[788] Since container transportation usually involves more than two different modes of transport, the cause of loss of or damage to the goods or delay may not be localised to a particular stage of transport. In this scenario, the issue of onus of proof is essential when the multimodal transport operator aims to claim multiple exceptions. The burden is placed on the multimodal transport operator to prove one or more exemptions caused the loss of or damage to the goods.[789] The difference is the onus of proof in respect of special risks

[786] Rule 14. The condition is the claimant had made a separate and direct contract with the multimodal transport operator as operator of that stage of transport and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable.
[787] Rule 17.
[788] The basis is reflected in defence (f) of Rule 12 that the multimodal transport operator needs to exercise reasonable diligence. In comparison with the TCM Draft Convention, the ICC Uniform Rules for Combined Transport deleted two defences: instruction of the cargo interests and special risk of insufficient packing.
[789] Rule 12.

in paragraphs (b) to (d) of Rule 11. The multimodal transport operator only needs to prove that the loss of or damage to the goods was attributed to one of the special risks and it is for the claimant to prove that the loss of or damage to the goods was not caused either wholly or partly by one or more of those causes or events. The onus of proof rule followed Art 18.2 of the CMR but the question arises as to the standard of proof of the claimant to rebut the presumption. Malcolm Clarke suggests that it may suffice that the claimant suggests another hypothesis which could have caused the damage under Art 18.4 of the CMR.[790] However, in the context of contractual terms, the English courts rules that claimant has a higher standard of proof than merely suggesting another plausible cause. In *Exportadora Valle De Colina SA v AP Moller-Maersk A/S*,[791] the grapes were in reefer containers to keep at a constant temperature during carriage but rapid deterioration of the grapes was found on outturn. The issue in this case is the high temperatures which caused physical damage of the goods. The containers were carried on the terms of Maersk's standard bill of lading which adopted a similar liability regime of the multimodal transport operator in the TCM Draft Convention and ICC Uniform Rules for a Combined Transport Document. Clause 6 is headed as carrier's responsibility in multimodal transport. Clause 6.1 applies in the case where the stage of carriage where loss of or damage to the goods occurred is unknown and, in this case, Flaux J found that the regime in clause 6.1

[790] Malcom A Clarke*, International Carriage of Goods by Road: CMR* (6th edn, Informa 2014) 252.
[791] [2010] EWHC 3224 (Comm).

applied. Exemptions and burden of proof under clause 6.1 mirrored Art 9 (3) of the TCM Draft Convention and Rule 12 of the ICC Uniform Rules for A Combined Transport Document. Maersk as carrier claimed that the loss of or damage to the goods was caused by one or more of the following causes: (iii) insufficient or defective packing, (iv) bag stowage and (v) inherent vice. The phrase 'could be attributed to' in clause 6.1 (b) meant that he needed only to prove that one or more of those excluded matters relied upon could plausibly have caused the damage and if Maersk did show the exclusions could plausibly have caused the damage, he was presumed to be not liable for the damage unless the claimant can rebut it. The debate was whether it was sufficient to rebut the presumption that the claimant produced evidence to suggest another hypothesis plausible to reduce the plausibility of the alleged cause or whether the claimant had to prove that the exceptions did not cause the damage. Flaux J held that once Maersk set up one of these causes or events as a plausible explanation, it was for the claimant to show on a balance of possibilities that the cause or event did not cause the loss of or damage to the goods.[792] However, the judge further stated that this issue was not necessary to be settled because even on the higher balance of possibilities test, he was satisfied that the claimant had proved that none of the three matters relied upon by the carrier was causative of the damage claimed.[793] He also ruled that the clause in the bill of lading contract operated no differently from any other contract of

[792] *Exportadora Valle De Colina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm), [26].
[793] Ibid, [114]-[123].

bailment or the Hague and Hague-Visby Rules that once the claimant established a prima facie case, it was for the multimodal transport operator to demonstrate that the damage was due to one of the exclusions and if he could not do so, he would be liable.[794] In summary, the English courts followed the same approach which has been used at common law to construe provisions with regards to the burden of proof in the ICC Uniform Rules for A Combined Transport Document. In these Rules, once the claimant establishes that the loss of or damage to the goods had occurred whilst the cargo was in the custody of the multimodal transport operator even if the stage at which it occurred is not known, it is for the multimodal transport operator to prove that the loss of or damage to the goods was attributed to one of the special exceptions. And the claimant can rebut the presumption by showing on a balance of probabilities the exceptions did not attribute to the loss of or damage to the goods. In other words, the ICC Uniform Rules for A Combined Transport Document provides greater opportunities for the multimodal transport operator to relieve from liability of special risks. Massey criticised that it ran directly contrary to common law principles that a party wishing to avail himself a defence had the burden of proof on that issue.[795] Although Flaux J did not make a direct decision on this point, it can be concluded that English law recognises the contractual allocation of burden of proof.

[794] *Exportadora Valle De Colina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm), [183].
[795] Eugene A Massey, 'Prospects for A New International Regime: A Critical Look at the TCM' (1971) 3 J Mar L & Com 725, 742-3.

When the stage of transport where the loss of or damage to the goods or delay occurred is known, Rule 13 provides a clear network principle so that the liability of the multimodal transport operator is to be governed by such compulsory rules as applied in respect of the relevant mode of transport.[796] Failing the application of such a compulsory regime, the contractual terms in the ICC Uniform Rules for A Combined Transport Document apply. A substantial change in the 1975 Rules is the new provision of liability for delay. In the 1973 version, Rule 14 generally states that the multimodal transport operator is liable for delay and compensation does not exceed the freight payable for the goods concerned or the value of such goods as determined in accordance with Rule 11, whichever is the lesser. The 1975 version added a definition of delay in delivery in Rule 15 an express period, 90 days after the expiry of a time limited agreed or after the time it would be reasonable to be allowed for diligent completion of the combined transport operation. The multimodal transport operator is only liable for delay when the stage of transport where the delay occurred is known and governed by international convention or national law.[797] The limit of liability for delay is no more than the amount of freight for that stage of transport which is not contrary to any applicable international convention or national law.

7.2 Provisions of the MT Convention

[796] Rule 13 will not be discussed in detail because it is identical to Art 12 of the TCM Draft Convention which has been fully considered earlier in this section.
[797] Paragraph (b) of Rule 14 requires a separate contract between the claimant and the multimodal transport operator that is evidenced by any particular document which applies to such international convention or national law.

The TCM Draft Convention was submitted to the 1972 Geneva UN/IMCO Container conference in 1972 but failed to win the approval of the developing countries because they contended that the present international transport regimes favoured the carrier insofar as liability was concerned.[798] The UNCTAD and UNCITRAL were recommended to take further steps towards reforms and the intergovernmental Preparatory Group was founded.

7.2.1 Scope of Application

7.2.1.1 Concept of Multimodal Transport Contract

The MT Convention gave the first authorised definition of 'international multimodal transport' which is the carriage of goods by at least two different modes of transport based on one 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.[799] The MT Convention uses the concept of multimodal transport contract but does not provide a clear answer for the constitutional elements of a multimodal transport contract.[800] The issue as to the use of at least two modes of transport in multimodal transport contract is similar to the general issue in the carriage of goods but the situation in international multimodal transport seems more complicated since the contract remains open for the multimodal transport operator to select the

[798] Stephen Zamora, 'Carrier Liability for Damage or Loss to Cargo in International Transport' (1975) 23 Am J Comp L 391, 395.
[799] Art 1 (1).
[800] Art 2.

mode of transport.[801] Although Art 8 (m) requires the multimodal transport document to state the modes of transport, paragraph (2) in the same provision indicates that the absence of such information does not affect the legal nature of the multimodal transport document. It is doubtful whether the application of the MT Convention depends on the contemplation of using more than two modes of transport or depends on actual performance. In *Quantum Co Inc and Others v Plane Trucking Ltd and Another*,[802] the contract recorded in an air waybill envisaged carriage by air to Paris and thereafter by road but permitted alternative modes of transport at the carrier's option. The Court of Appeal held that the contract for the carriage of goods by road under Art 1 of the CMR embraced a contract which provided for or permitted the international carriage of goods by road on one sector of a large contract assuming the place of taking over and delivery of the goods under Art 1.1 were in two different countries of which at least one is a Contracting country. If the same approach is taken as in *Quantum Co Inc and Others v Plane Trucking Ltd and Another*,[803] a contract could be seen as being for multimodal transport whenever the actual performance falls within the scope of application of the MT Convention provided the geographic condition were satisfied.[804]

7.2.1.2 Exclusions of International Multimodal Transport

[801] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.208.
[802] [2002] EWCA Civ 350. See section 2.2.1.
[803] Ibid.
[804] The preliminary condition of its application is either the place of taking charge of goods or the place of delivery is located in a Contracting State.

The international multimodal transport in the MT Convention excludes the operation of picking-up and delivery of goods under a unimodal transport contract and carriage of goods falling within Art 2 of the CMR and Art 2 of the Berne Convention concerning the Carriage of Goods by Rail 1970 which is largely replaced by the COTIF-CIM.[805] A comparable exception of operations of picking-up and delivery of goods under a unimodal transport contract can be found in the TCM Draft Convention and both provisions were the result of insistence of air transport interests.[806] Some comments are expressed in respect of the first exception that the distinction between picking-up and delivery under a unimodal transport contract and under a multimodal transport contract is unclear.[807] But if construed liberally, the subsidiary carriage can be distinguished by two obvious characteristics: it is local and normally impossible to select other modes of transport and the exemption is not unreasonable.[808]

The second exemption is to exclude the extended applications of the international road and rail conventions to international multimodal transport. The issue of conflict with other unimodal conventions arises

[805] Art 1 of the COTIF-CIM provides that when the international carriage is under one single contract involving other modes of transport as supplement to rail, this convention will apply. Arts 1 and 30 (4). Furthermore, it is argued that these two conventions are merely examples because of the words 'such as' and it is possible to include other conventions. For the purpose of this thesis, the sea conventions and the CMNI are unlikely to be covered by Art 30 (4) due to their restricted scopes of application.

[806] Art 1 of the TCM Draft Convention excludes picking-up, delivery and trans-shipment of goods carried under an air transport contract. See Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.216.

[807] Anthony Diamond, 'Legal Aspects of the Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, C4.

[808] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.216.

inevitably no matter what liability system of the multimodal transport operator is and the MT Convention solving the conflict issue with Art 30 (4). The exemption of the carriage referred to in Art 1 of the COTIF-CIM does not invoke much controversy because the aim of this rail convention is to cover subsidiary carriage which is not the subject of a multimodal transport contract.[809] The debate mostly rests on Art 2 of the CMR. The CMR applies to the whole carriage where goods are carried by another mode of transport and goods are not unloaded from the vehicle which is known as RORO transport. Since the definition of vehicle in Art 1 (1) does not include containers, in order to apply the CMR to containerisation, the containers cannot be unloaded from the vehicle otherwise the MT Convention will cover the whole carriage.[810] The exemption seems to be justified since this special form of transport is not the common type of the international multimodal transport.[811]

The reference in Art 30 (4) to the CMR applies only to the States which are bound to apply the provisions of such conventions to such carriage of goods.[812] In the States which are not parties to the CMR, the MT Convention will apply to all international multimodal transport regardless of whether it

[809] The MT Convention expressly states that the international multimodal transport in this convention is based on one multimodal transport contract

[810] Andrew Messent and David Glass, *Hill & Messent CMR: Contracts for the International Carriage of Goods by Road* (3rd edn, LLP 2000) para. 2.7.

[811] the RORO transport is usually used in short sea traffic. See Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.223.

[812] Anthony Diamond, 'Legal Aspects of the Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, C7.

is RORO or not.[813] The conflict between the MT Convention and the CMR will arise only when the States are parties to both conventions.[814] It is held that the conflict is regionally limited albeit that the transportation activities are intensive since the Member States of the CMR are mostly located in Europe and the Middle East.[815] Besides, by regarding Art 2 of the CMR as a provision dealing with a special type of multimodal transport, it is reasonable that the CMR supersedes the MT Convention based on the principle of *lex specialis derogate generali*.[816] Some criticism has been expressed that the conditions of this provision exempting a State from applying the MT Convention in favor of the CMR are too narrow.[817] In other words, the entry into force of the MT Convention restricts the CMR to its mandatory scope of application. It is claimed that the containerised cargo usually is not carried by RORO transport because the RORO carriage between the United Kingdom and European countries is normally carried on the CMR terms for the whole or for the land portion of the transit.[818] The MT Convention will compulsorily apply to non-RORO transport instead of voluntary incorporation of the CMR and the learned author, Anthony Diamond, thought that it would no longer give the CMR a wider or more

[813] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.224.
[814] See < https://www.unece.org/trans/maps/un-transport-agreements-and-conventions-25.html> accessed 20 Sep. 2020
[815] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.222.
[816] Ibid, para. 2.224.
[817] Anthony Diamond, 'Legal Aspects of the Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, C7.
[818] Ibid, C9.

consistent operation.[819] However, given that the author did not clearly state what portion of containerised cargo is actually carried on CMR conditions during the whole transit, the pragmatic effect of voluntary application of the CMR in non-RORO transport appears to be unclear.[820] Thus, the question is whether the reduction of the operation of Art 2 of the CMR is so disappointed and what the differences would be if the MT Convention comes into force. Art 2 of the CMR provides some degree of certainty as to what liability regime will apply to the different stages of transport but it does not mean that the CMR is the perfect solution since the complicated preconditions for network liability framework in Art 2 attracts numerous criticisms.[821] It is therefore submitted that the compulsory application of the MT Convention to non-RORO carriage could be improvement on predictability. As for the consequence of Art 2 of the CMR, assuming the pre-conditions are fulfilled, the most likely application law would be international sea conventions which have much lower standards of liability otherwise the CMR would apply.[822] If the MT Convention comes into force, the multimodal transport operator's liability is governed by Art 16 so that he is liable for loss of or damage to the goods or delay unless he proves that all reasonable measures required had been taken to avoid the occurrence which caused such loss of or damage to the goods or delay.

[819] Anthony Diamond, 'Legal Aspects of the Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, C7.
[820] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.231.
[821] See section 2.2.2.
[822] Ibid.

Apart from the basis of liability, the exceptions, burden of proof rules and the limitation of liability would also affect the level of liability of the multimodal transport operator.[823] Therefore, it is not simple to conclude whether the MT Convention favours the multimodal transport operator.

Another question against Art 30 (4) is what connection between a private party to a contract of carriage and a State Party to the CMR and the COTIF-CIM is needed to make conventions apply to the private party's contract. The same learned author, Ralph De Wit implicates four possibilities of interpreting the meaning of connection.[824] However, the problem can be solved by following the same construction approach with regard to the connection factor in the unimodal conventions, namely the location within Member States where the transit begins or ends.[825]

7.2.2 Liability of Multimodal Transport Operator

The basic liability is presumed fault which is clarified in the preamble to the MT Convention. The multimodal transport operator is liable for loss of or damage to the goods as well as delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge unless he can show that he or his agents, servants or any other person whose services he uses in the performance of the contract took all reasonable measures required to avoid the occurrence and its

[823] The liability regime of the multimodal transport operator will be discussed in the next section.
[824] Ralph De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para. 2.236.
[825] Ibid.

consequences.[826] The onus of proof is the so-called reversed burden of proof and the multimodal transport operator needs to prove there is no fault on his part. In case of concurrent causes, it is still for the multimodal transport operator to establish that the neglect on his part does not attribute to the loss of or damage to the goods or delay.[827] The language is modelled on Art 5 (1) of the Hamburg Rules and the standard of liability is argued to be the same as due diligence. The concept of delay in delivery in Art 16 (2) is copied from the CMR that the goods are not delivered within express time or in the absence of such agreement, within a reasonable time required by a diligent multimodal transport operator having regard to all the circumstances of the case. The goods will be treated as lost if the goods are not delivered after 90 consecutive days following paragraph (2).[828]

7.2.3 Identity of Carrier and Liability of Relevant Parties

The MT Convention only covers the claims between the cargo interests and the multimodal transport operator who acts as principal to conclude the multimodal transport contract. The identification of the multimodal transport operator is determined by the multimodal transport document which requires the signature of the multimodal transport operator or a person having his authority.[829] The multimodal transport operator can subcontract the whole carriage to his subcontractors or perform part of the transit. But the only suable person is the multimodal transport operator and

[826] Art 16 (1).
[827] Art 17.
[828] Art 16 (3).
[829] Art 8 (1)(k).

his relationship with subcontractors is not covered by the MT Convention. With respect to vicarious liability, the multimodal transport operator is liable for the act or omission of his agents, servants or any other person of whose services he makes use for the performance of the multimodal transport contract.[830]

7.2.4 Limitation of Liability

The conflict of interests between the developed and the developing countries manifests in multiple aspects and a fundamental consideration is the liability system of the multimodal transport operator. The uniform liability system established in the MT Convention was favoured by the developing countries while the developed countries who provide most liner services prefer the network liability system that narrows the recourse gap between the multimodal transport and his subcontractors.[831] Consequently, a modified uniform liability approach was adopted.

7.2.5 Influence of the MT Convention

The entry into force of the MT Convention requires thirty States to ratify and it is not likely to be effective in the future due to the small number of signatories up to the present.[832] There are many factors investigated in academia contributing to the pending status of the MT Convention. Firstly, the negotiation of this convention is different from other transport

[830] Art 15.
[831] M G Graham, 'The Economic and Commercial Implications of the Multimodal Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, F5.
[832] See < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en> accessed 20 Sep. 2020

conventions. The preparation of the MT Convention was supervised by the UNCTAD which was created within the United Nations to respond to the demands of developing countries to increase their share of industrial and commercial advances taking place worldwide.[833] Unlike other organisations for example the UNCITRAL and the IMO, it is neither technically nor legally oriented but focuses on economic issues in essentially a political context.[834] Thus it is argued that the MT Convention was not initiated by the desire of transport industries and the victory was merely political which is why the MT Convention has obtained signatures largely from the developing countries in the UNCTAD with a small share in trade.[835] In spite of its non-enforcement, the MT Convention should not be regarded as a failure given its impact on legislation in the area of international multimodal transport for both regional and national law.[836] Furthermore, after twelve years, the UNCTAD in joint efforts with the ICC created a new set of rules for international multimodal transport which resembles the liability regime of the multimodal transport operator in the MT Convention to a large degree.[837] The widespread use of contractual rules did indicate the attitude of transport industries had changed and the relevant provisions of the MT Convention should not be seen as impractical.

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[833]William Driscoll and Paul Larsen, 'The Convention on International Multimodal Transport of Goods' (1982) 57 Tul L Rev 193, 200.
[834] Ibid, 199.
[835] Matthew Marshall, 'Insurance and the Multimodal Convention' in *Multimodal Transport the 1980 UN Convention: Paper of One-Day Seminar University of Southampton Faculty of Law 12th September 1980*, D10.
[836] Ellen Eftestol-Wihelmsson, *European Sustainable Carriage of Goods: The Role of Contract Law (IMLI Studies in International Maritime Law)* (Routledge 2015) 16.
[837] The UNCTAD/ICC Rules for Multimodal Transport Documents 1992 will be considered hereinafter.

The failure of the MT Convention indicates that the idea to regulate the liability of the multimodal transport operator in one international convention is infeasible and the answer seem to lie within the next attempt, the Rotterdam Rules. In spite of the maritime nature, the Rotterdam Rules can cover the entire carriage of an international multimodal transport and has specific provisions to solve possible conflicts with other international unimodal conventions. In the next chapter, it will illustrate how the Rotterdam Rules operate in hypothetic scenarios and discover whether the Rotterdam Rules provide a solution for regulating container carrier's liability in international multimodal transport.

CHAPTER 8 The Rotterdam Rules

The CMI was invited by the UNCITRAL to review the laws in the field of carriage of goods by sea and propose a new international convention to achieve greater uniformity of laws.[838] The UNCITRAL set up the Working Group III (Transport Law) (hereinafter 'the Working Group') to examine the first draft in 2002 and finally approved the content in July 2008. The Rotterdam Rules[839] is the latest convention that could apply to international multimodal transport. However, the Rotterdam Rules have the maritime characteristic and thus the application to international multimodal transport is subject to conditions. The preliminary matter is the scope of application of the Rotterdam Rules which was a controversial from the beginning of the preparatory work. The substantial character of the liability system under the Rotterdam Rules is the so-called limited network liability approach. Besides, the key components such as basis of liability, exceptions and the burden of proof will be discussed. Another change is to divide the person who is involved in performing the whole transit into two kinds: maritime and non-maritime performing party. The last issue is the limitation of liability.

8.1 Scope of Application

The first question is whether it is a convention for the international multimodal transport convention or merely the carriage of goods by sea.

[838] UNGA, 'Report of the United Nations Commission on International Trade Law on the Work of its Thirty-second Session' (17 May-4 June 1999) 54th session UN Doc Supp. No. 17 (A/54/17), para. 415.
[839] Official text in < http://www.uncitral.org/pdf/english/workinggroups/wg_3/CTCRotterdamRulesE.pdf> accessed 20 Sep. 2020

Furthermore, the relative issues including geographical connections and the exclusions have been intensely debated.

8.1.1 Contract of Carriage

The contract of carriage is defined as a contract of carriage in which the carrier against the payment of freight undertakes to carry goods from one place to another and it shall provide for carriage by sea and may provide for carriage by other modes of transport.[840] The definition is essential to determine the scope of application and has been highly arguable during the preparation. This provision is fundamental to the character of the Rotterdam Rules: whether the Rules are like the previous maritime conventions to cover only sea carriage or have a wider scope to accommodate the door-to-door carriage nowadays. One distinction should be noted that a door-to-door carriage is not definitely an international multimodal transport because based on the definition of international multimodal transport in the MT Convention, it refers to carry the goods by at least two different modes of transport on the basis of one multimodal transport contract and one multimodal transport document.[841]

8.1.1.1 Door-to-door Approach

With a view to establishing the need for uniform rules in the area of the international carriage of goods by sea, the UNCITRAL decided to gather information based on a broader range including sea carriage and international multimodal transport from an early stage of its preparatory

[840] Art 1 (1).
[841] Jose M Alcantara, 'The New Regime and Multimodal Transport' [2002] LMCLQ 399, 400.

work in 1996.[842] The CMI, in cooperation with the Secretariat, took steps on the exploratory work and set up an International Subcommittee to analyse the information.[843] At its thirty-forth session, the UNCITRAL requested the CMI to present a report which identified the possible scope of application of a future instrument on the carriage of goods and the door-to-door transport obtained considerable support.[844] The Working Group was mandated to initiate the port-to-port transport operation but was open to consider the desirability and feasibility of dealing with door-to-door transport.[845] There were debates over whether the draft instrument should be restricted to port-to-port transport or whether it should apply to the whole door-to-door transit period during the deliberation of the Working Group and it was stated that the door-to-door approach was aiming at constituting a maritime regime that took into account the reality that the maritime carriage of goods was frequently preceded or followed by land carriage instead of a multimodal regime.[846] It was also pointed out that the draft instrument should respond to the reality that containerised traffic in the liner trade that was usually structured as door-to-door operations.[847] Therefore, the Working Group suggested to continue discussions of the

[842] UNGA, 'Report of the United Nations Commission on International Trade Law on the Work of its Twenty-ninth Session' (28 May-14 June 1996) 51st session UN Doc Supp. No 17 (A/51/17) para. 211.
[843] UNCITRAL, 'Transport Law: Possible Future Work' (31 March 2000) 33rd session UN Doc. A/CN.9/476, para. 12.
[844] UNCITRAL, 'Possible Future Work on Transport Law' (2 May 2001) 34th session UN Doc. A/CN.9/497, para. 26.
[845] UNGA, 'Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session' (25 June-13 July 2001) 56th session UN Doc Supp. No 17 (A/56/17) para. 345.
[846] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session (15-26 April 2002)' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 28.
[847] Ibid, para. 30.

draft instrument on the presumption that it would cover door-to-door transit.[848] One year later, the Working Group decided to adopt the door-to-door approach after further consideration of the current industry position and desirability of a door-to-door regime.[849] As for the cargo itself, unlike bulk cargo, the general cargo are almost completely carried by containers which attributes to the possibility of door-to-door transport.[850] It was pointed out that world port container throughput reached 225.3 million TEUs in 2000 and the figure grew nearly 3.5 times to 793.26 million TEUs in 2018.[851] The massive volume of container trade indicates that the door-to-door carriage is quite common and the Rotterdam Rules should accommodate to the shipping practice.

Whether the extended scope of application to door-to-door transport will raise the issue of conflict between the Rotterdam Rules and other international unimodal conventions will be discussed in section 8.5.1.

8.1.1.2 Definition of Contract of Carriage

In the preliminary draft submitted by the CMI in 2002, the contract of carriage means 'a contract under which a carrier against the payment of freight undertakes to carry goods wholly or partly by sea from one place to another and it includes carriage preceding or subsequent to carriage by sea

[848] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session (15-26 April 2002)' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 32.
[849] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]', (24 March-4 April 2003) 11th session UN Doc. A/CN.9/WG.III/WP.29.
[850] Ibid, para. 16.
[851] UNCTAD, 'Review of Maritime Transport 2019' (UNCTAD/RMT/2019) Table 1.11, p 14.

if such carriage is covered by the same contract'.[852] The concept extends to a limited type of international multimodal transport that other modes of transport are the supplement to the main sea carriage and all are covered by a single contract.[853] However, the words 'carriage preceding or subsequent to carriage by sea' has been removed later which suggests that there is no requirement for other modes of transport to be ancillary to the sea carriage. The deletion of the phrase is justified because the fundamental element of a contract of carriage in the Rotterdam Rules should be simple, the contract of carriage covering a sea carriage regardless the distance and proportion of the sea carriage in the whole transit. It was unnecessary to demand that the carriage by sea was the main mode of transport as long as the contract of carriage provides for the carriage by sea.[854]

One concern was expressed that the Rotterdam Rules may inappropriately exclude contracts that did not specify or imply the sea carriage but leave it open whether a part of the carriage would be undertaken by sea or which segment would be sea transport.[855] In response, a second proposal was made with a new paragraph (ii) that a contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage

[852] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 1.5.
[853] Jose M Alcantara, 'The New Regime and Multimodal Transport' [2002] LMCLQ 399, 402.
[854] Art 5 has additional geographical conditions.
[855] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 62.

provided that the goods are actually carried by sea.[856] In spite of much support for that proposal, the Working Group decided that the new paragraph should be deleted because if interpreted flexibly, the original definition of the contract of carriage could cover the situation.[857] Besides, it was held that the key to determine the scope of application of the Rotterdam Rules was the contract of carriage, not the actual carriage of goods.[858] At the sixteenth session in 2005, the third consolidated draft of the convention adopted the final definition and the key context did not change.[859]

One condition to determine whether a contract of carriage is within the definition under Art 1.1 of the Rotterdam Rules is the contract should provide for carriage of goods by sea. The issue of evidence of 'provide for carriage by sea' which is similar to the problem of 'use more than two modes of transport' arises under the MT Convention. The election of modes of transport often remains open in the contract of carriage and the problem arises in respect of what constitutes 'provide for carriage by sea'. It is pointed out that the Rotterdam Rules may apply as long as the contract provides for carriage by sea either expressly or implicitly even if the goods were not actually so carried.[860] Since many contracts of carriage allow the

[856] Art 1 (a). UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 68.
[857] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fifteenth Session' (18-28 April 2005) 38th session UN Doc. A/CN.9/576, paras. 33 and 52.
[858] Ibid, para. 33.
[859] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December 2005) 16th session UN Doc. A/CN.9/WG.III/WP 56, Art 1 (a).
[860] UNGA, 'Report of the United Nations Commission on International Trade Law Forty-First Session (16 June-3 July 2008) 63rd session UN Supp. No. 17 (A/63/17), para. 23.

means of transport to be left entirely or partly open, the sea carriage may be implicated by a mode-specific election clause and therefore the Rotterdam rules apply. But in a case where the broad liberty clause does not specify sea carriage, it is argued that the Rotterdam Rules are uncertain to apply because the contract lacks clarity on providing for carriage by sea.[861] However, it is objected that the application of the Rotterdam Rules could depend on whether the carrier chooses to carry the goods by sea or not.[862] It is suggested that an option to carry by sea in contract and the fact that the goods are actually carried by sea could be read in together as if the contract provided for that part of the carriage to be carried by sea.[863] If following the decision of *Quantum Co Inc and Others v Plane Trucking Ltd and Another*,[864] in a case that the contract of carriage with a liberty clause that the carrier could choose the means of transport and the carrier elect for carriage by sea, the contract of carriage could be treated as 'providing for carriage by sea'. The application of the Rotterdam Rules should not only depend on the contractual terms at the moment when contract is concluded but also the actual operation of the contractual terms. The occurrence of an international carriage of goods by sea pursuant to contract is more significant. Therefore, the author agrees with the proposal of a second paragraph (ii) which is consistent with the attitude of English

[861] Anthony Diamond, 'The Rotterdam Rules' [2009] LMCLQ 445, 452.
[862] Francesco Berlingieri, 'Revisiting the Rotterdam Rules' [2010] LMCLQ 583, 585.
[863] Ibid.
[864] [2002] EWCA Civ 350.

courts towards the interpretation of contract for carriage of goods by road in the CMR.[865]

8.1.2 Geographical Scope of Application: Art 5

The geographical connections are related factors determining the scope of application of the Rotterdam Rules. The geographical requirements are one of the following four places is located in a Contracting State: the place of receipt, the place of delivery, the port of loading or the port of discharge and both the entire transit and the sea segment should be international.[866] The factors were connected with the door-to-door transport and discussed together during the preparation work.

8.1.2.1 Internationality

The internationality of overall carriage was required since the first preliminary draft. The place of receipt and the place of delivery should in different States and one of them is located in a Contracting State.[867] It was considered that the Rotterdam Rules should apply when the internationality characterised the overall contract of carriage, irrespective of whether certain segments of the carriage were purely domestic or not.[868] It was suggested the Rotterdam Rules should only apply to those carriages where the maritime leg involved cross-border transport but the prevailing view was the internationality should be assessed in respect of the whole

[865] See *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350.
[866] Art 5.1.
[867] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 3.1.
[868] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session' (15-26 April 2002) 35th session UN Doc. A/CN.9/510, para. 33.

carriage.[869] Accordingly, three variations of paragraph 1 of draft Art 2 were proposed.[870] Variant B 1 bis stated that the Rotterdam Rules should apply to non-maritime carriage when the goods were unloaded from the means of transport with which land segment was performed during the sea leg.[871] But it obtained limited support because the distinction between this type of transport and others seemed outdated.[872] Besides, in container transport that type of transport is rare. Variant A was based on broad sphere of application and avoided relying on technical notions such as the port of loading and the port of discharge.[873] In spite of substantial support, it was pointed out that the focus of the Rotterdam Rules on maritime transport should be reflected in the scope of application provisions.[874] An opposite option, Variant C, provides that the Rotterdam Rules apply to contract of carriage in which the port of loading and the port of discharge are in different States.[875] It was suggested that all three variants needed to be replaced by a revised proposal based on a combination of Variants A and C.[876] The new proposal did not refer to internationality of the carriage and only required one of the geographical connections to be in a Contracting

[869] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Eleventh Session', (30 June-11 July 2003) 36th session UN Doc. A/CN.9/526, para. 243.
[870] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]', (6-17 October 2003) 12th session UN Doc. A/CN.9/WG.III/WP.32, p 12-4.
[871] It aimed to exclude a type of transport, namely the RORO transport in the Art 2 of the CMR and avoid possible conflicts.
[872] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session', (14 June-2 July 2004) 37th session UN Doc. A/CN.9/544, para. 54.
[873] It requires the place of receipt or the place of delivery to be located in a Contracting State.
[874] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session', (14 June-2 July 2004) 37th session UN Doc. A/CN.9/544, para. 56.
[875] Ibid, para. 52.
[876] Ibid, para. 56.

State to trigger the application of the Rotterdam Rules.[877] Nevertheless, it was commented that a sea carriage involved cross-border transport and the test of internationality of the whole transit should be both expressed in draft article 2.[878] Subsequently, double internationality was adopted so that the Rotterdam Rules applied to 'contract of carriage in which the contractual place of receipt and the contractual place of delivery are in different States and the contractual port of loading and the contractual port of discharge are in different States'.[879] It was concerned that the draft article did not sufficiently clarify the requirement of internationality of a sea leg of the carriage and the language was modified as 'the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States'.[880] The added phrases emphasise the sea carriage aspect and enhance clarity.[881] Double internationality does not attract much criticism because when the internationality of sea carriage condition is satisfied, the whole carriage is usually an international one.

8.1.2.2 Connection Factors

To trigger the geographical application of the Rotterdam Rules, one of the following places should be located in a Contracting State according to the

[877] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session', (14 June-2 July 2004) 37th session UN Doc. A/CN.9/544, para. 68.
[878] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 107.
[879] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]: Scope of Application Provisions', (18-28 April 2005) 15th session UN Doc. A/CN.9/WG.III/WP.44, para. 2.
[880] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Fifteenth Session,' (4-15 July 2005) 38th session UN Doc. A/CN.9/576, para. 52.
[881] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (16-27 April 2007) 19th session UN Doc. A/CN.9/WG.III/WP.81, Art 5 (1).

contract of carriage: the place of receipt, the port of loading, the place of delivery or the port of discharge.[882] The geographical connections 'the place of receipt and the place of delivery' are consistent with the door-to-door approach and used to determine the internationality of the whole carriage. [883] These two connections are generally agreed during the following discussions but the factors 'the port of loading and the port of discharge' attracted more argument. It was doubted that they, as well as any intermediary port, would not necessarily be known to the shipper.[884] But the retention of the port of loading and the port of discharge in the final content reflects that the Rotterdam Rules focus on maritime transport and it is consistent with the adoption of those connecting factors as a basis for jurisdiction in claims against a carrier.[885] And they are expected in the same sea carriage to avoid unexpected application of the Rotterdam Rules in a case where multiple ports of loading and discharge are involved.

The first draft included more connections than the final text: (c) the actual place of delivery, (d) the place of formation of the contract of carriage or the place where the transport document is issued, and (e) the contract of carriage provides that the Rotterdam Rules or the law of the State giving effect to the Rotterdam Rules are to govern the contract.[886] Doubts were

[882] Art 5.
[883] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 34.
[884] Ibid.
[885] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Seventeenth Session,' (19 June- 7 July 2006) 39th session UN Doc. A/CN.9/594, para. 123.
[886] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, paras. (c), (d) and (e) of Art 3.1.

firstly expressed as to whether the place of conclusion of the contract or the place of issuance of the transport document should be regarded as relevant for determining the sphere of application. It was widely held that connections in paragraph (d) were irrelevant to the performance of the contract and if electronic documents were involved, the place of conclusion of the contract was difficult or impossible to determine in modern transport practice.[887] The traditional maritime connection factor, the place where the transport document is issued, has disappeared for the same reason. The connection 'actual place of delivery' in paragraph (a) was objected because it might be uncertain whether the Rotterdam Rules would apply or not when the goods were received by the carrier.[888] The most debatable factor was paragraph (e) which is in accord with paragraph (c) of Art X of the Hague-Visby Rules. Art X (c) widens the limited geographical scope of application of the Hague-Visby Rules, especially for the cross-traders carrying goods through States not party to these Rules.[889] But this argument did not persuade to retain this paragraph because it could lead to legal difficulties. The counterview is that Art X (c) of the Hague-Visby Rules itself does not have a common understanding with regard to its interpretation.[890] The question whether the provision is a choice of law rule which enables the application of the Convention by the force of law or whether it is simply a

[887] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 34.
[888] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 33.
[889] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fifteenth Session' (18-28 April 2005) 38th session UN Doc. A/CN.9/576, para. 61.
[890] Ibid.

voluntary incorporation of the Convention into a contract depends on the different jurisdictions.[891] The English courts prefer to treat it as a voluntary incorporation but Art X (c) of the Hague-Visby Rules have the force of law due to section 2 of COSGA 1971. Thus, the enforcement of Art X (c) of the Hague-Visby Rules in English law has no controversy and the argument is purely academic. At common law, the Rotterdam Rules could be incorporated into a contract of carriage by a paramount clause without the force of law. It was concerned that the law giving effect to the Rotterdam Rules might differ from the provisions of the Rotterdam Rules which could create further conflicts.[892] The Working Group decided to delete this paragraph.

The four connecting factors, 'the port of loading', 'the port of discharge', 'the place of receipt' and 'the place of discharge', are normally required in the multimodal transport document.[893] One of the above four places located in a contracting State of the Rotterdam Rules widens the scope of application in comparison with three previous maritime conventions.

8.1.3 Temporal Scope of Application

The temporal scope of application is reflected in period of liability of the carrier in Art 12. The period of liability of the carrier is consistent with the issue of door-to-door transport. It begins when a carrier or a performing party receives the goods for carriage and ends when the goods are

[891] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Seventeenth Session', (19 June-7 July 2006) 39th session UN Doc. A/CN.9/594, para. 125 (a).
[892] Ibid, para. 125 (e).
[893] Arts 36.3 (c) and (d).

delivered. The phrase 'a performing party' includes a third party who receives or delivers the goods at carrier's request or under the carrier's control and it fills the gap when the goods are stowed in a warehouse owned by the carrier before loading or after discharge. The matter of period of liability of the carrier has been be fully considered in section 8.1.1.

8.1.4 Exclusions

Given that some contracts qualifying as the contract of carriage under the Rotterdam Rules are neither unnecessary nor desirable to apply mandatory law, it was widely agreed that certain exceptions should be made.[894] The Rotterdam Rules use a combination of three approaches including trade approach.[895] The Rotterdam Rules are not applicable to contracts in liner transportation including charter parties and other contracts for the use of ship or of space.[896] For the contracts in non-liner transport, the general rule is that the Rotterdam Rules do not apply except when there are no above contracts and a transport document or electronic record is issued.[897] Another relevant provision is Art 7 that extends the sphere of application of the Rotterdam Rules to certain parties that are not original parties to the excluded contracts in Art 6.

The first preliminary draft stated that the Rotterdam Rules did not apply to charter parties, contracts of affreightment, volume contracts or similar

[894] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 37.
[895] Three approaches are discussed in section 2.1.1. UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 83.
[896] Art 6.1.
[897] Art 6.2.

agreements.[898] Charter parties have a long history of being excluded from mandatory law and widespread support exists for the exclusion of similar notions such as volume contracts, towage contracts and similar service agreements.[899] Diverging views were expressed as to the legislative technique to be used in excluding the contracts that should not be covered by the Rotterdam Rules and the prevailing one was to identify specific types of contracts that should be excluded mandatorily.[900] It was concluded that a hybrid of the trade approach, the contractual approach and the documentary approach was adopted and the exclusions were divided into liner services and non-liner services.[901] The traditional excluded contracts were retained in draft Art 3.1 (Art 6.2 in the final text) which referred to charter parties, volume contracts, contracts of affreightment and similar contracts providing for the future carriage of goods in a series of shipments in liner operations and other contracts in non-liner services.[902] The exclusions were redrafted as 'charter parties or contracts for the use of the ship or of any space thereon' and this paragraph was assented without modifications since then.[903] It was suggested that the traditional exceptions

[898] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 3.3.1.
[899] Ibid, para. 37.
[900] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 78.
[901] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 89.
[902] Ibid, Art 3.
[903] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December April 2005) 16th session UN Doc. A/CN.9/WG.III/WP.56, paras. (a) and (b) of Art 9 (1).
[903] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 105.

should be complemented by specifically identifying types of contracts in respect of which the Rotterdam Rules should not be mandatory.[904] The contracts including 'volume contracts, contracts of affreightment and similar contracts providing for the future carriage of goods in a series of shipments in liner operations' should be removed from the exclusions and relocated to provisions regulating the freedom of contract issue.[905] The list of exclusions of certain contracts in liner operation does not cover the volume contracts and the Rotterdam Rules apply if they are contracts of carriage in liner transportation.[906] On the other hand, volume contracts that are used for the purposes of non-liner transportation would thus be excluded.[907]

A new paragraph was added in draft Art 3 as an exception to contracts in non-liner services that the Rotterdam Rules shall apply under two conditions: the relationship was not between the parties to a charter party or similar agreement and the carrier issued a negotiable transport

[904] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 78.
[905] Ibid.
[906] Art 80 (2) permits the deterioration of volume contracts subject to several conditions: (a) it contains a prominent statement stating that it derogates from the Rotterdam Rules, (b) it is individually negotiated or prominently specifies the sections of the volume contract containing the derogations, (c) the shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Rotterdam Rules without derogations and (d) the derogation is neither incorporated by reference from another document nor included in a contract adhesion that is not subject to negotiation.
[907] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of A Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (3-13 April 2006) 17th session UN Doc. A/CN.9/WG.III/WP.61, para. 31.

document or an electronic record.[908] The substance of on-demand carriage retained and a better language was used for understanding.[909] The Rotterdam Rules apply to non-liner transportation if there is no contract in Art 9.1 and the transport document or an electronic transport record is the evidence of the contract of carriage and the evidence of the carrier's or performing party's receipt of the goods.[910] The two conditions are cumulative and the documentary approach reflected in Art 6.2 (b) is designed to safeguard the Rotterdam Rules from finding a narrower application than the Hague-Visby Rules.[911] The requirement of evidential functions was removed from the final text.[912]

The Rotterdam Rules provide protection to certain third parties to a contract which was not within the scope of application. Two alternative approaches were proposed to establish the parties to whom the Rotterdam Rules would apply. One was based on the issuance of a transport document or an electronic transport record and the other was based on listing the third parties without requiring such documents.[913] The mandatory protection of

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[908] The document should evidence the carrier's or a performing party's receipt of the goods and evidence or contain the contract of carriage. UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]: Scope of Application Provisions', (18-28 April 2005) 15th session UN Doc. A/CN.9/WG.III/WP.44, Art 3 (2).

[909] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (3-13 April 2006) 17th session UN Doc. A/CN.9/WG.III/WP.61, para. 29.

[910] Ibid, Art 9 (2) and para. 23.

[911] Michael F Sturley, 'Scope of Application' in Alexander von Ziegler and others (eds.), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Kluwer Law International 2010), 39.

[912] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twenty-First Session', (16 June-11 July 2008) 41st session UN Doc. A/CN.9/645, Art 7.

[913] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Seventeenth Session', (19 June-7 July 2006) 39th session UN Doc. A/CN.9/594, para. 136.

third parties covers all types of documents regardless of whether they are negotiable or not.[914] It was intended to ensure that transactions covered by the Hague and Hague-Visby Rules would continue to be governed by the Rotterdam Rules so that the current level of coverage would not be reduced, in particular, common carriage in non-liner trades where a document was issued.[915] The Working Group decided to adopt this approach because it could better serve the future needs of commercial practice by removing its reliance on a document or electronic record.[916] The third parties include the consignee, controlling party or holder.

8.2 Liability Regime

Chapter 5 of the Rotterdam Rules provides the mechanism for determining the carrier's liability when a cargo claimant seeks to recover from the carrier for loss of or damage to the goods or delay. The fundamental provision in this chapter or maybe of the entire convention is Article 17, which provides the basis of the carrier's liability, mainly referring to the exceptions and the allocation of the burden of proof.[917] The structure of this Article basically adopts the traditional approach of the Hague and Hague-Visby Rules.[918] However, this Article has a variety of changes by reference to the Hague

[914] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, Art 5 and para. 92.
[915] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]: Scope of Application Provisions', (18-28 April 2005) 15th session UN Doc. A/CN.9/WG.III/WP.44, para. 4.
[916] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Seventeenth Session,' (19 June-7 July 2006) 39th session UN Doc. A/CN.9/594, para. 137.
[917] Adamsson Joakim, 'The Rotterdam Rules: A Transport Convention for the Future?' (Master thesis, Lund University 2011) 58.
[918] Clark Hulian and Thomson Jeffrey, 'Exclusions of Liability' in David Thomas Rhidian (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 8.2.

and Hague-Visby Rules that should be construed explicitly.[919] Additionally, the onus of proof established in paragraphs (4) and (5) is more complicated. Moreover, this section would consider the changes in comparison with the Hague and Hague-Visby Rules and the Hamburg Rules.

8.2.1 Period of Liability

The general rule for the period of liability of the carrier is to begin when the carrier or performing party receives the goods for the carriage and end when the goods are delivered.[920] But the parties have the freedom to agree the carrier's period of liability which cannot be shorter than the period beginning from loading and ending on discharge.[921] The English courts construe loading and discharge operations in Art 1 (e) of the Hague and Hague-Visby Rules flexibly.[922] The reservation of paragraph 3 is consistent with the interpretation of the Hague and Hague-Visby Rules in English law.[923] The second paragraph of Art 12 is for the case where the law or regulation of the place of receipt or the place of delivery requires that the goods are handed over to an authority or third party from whom the carrier may collect them. The time begins when the carrier collects the goods from the authority or other third party and ends when the carrier hands over the goods to the authority or other third party.

8.2.2 Obligations of the Carrier

[919] Anthony Diamond, 'The Rotterdam Rules' [2009] LMCLQ 445, 472.
[920] Art 14.2.
[921] Art 14.3: the time of receipt should be earlier than the beginning of initial loading under the contract of carriage and the time of deliver cannot be later than the completion of unloading under the contract of carriage.
[922] *Pyrene Co Ltd and Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB).
[923] *G H Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] AC 149 (HL).

The Rotterdam Rules are the first maritime convention to expressly provide the basic obligation of the carrier which is to carry the goods to the destination and deliver to the consignee.[924] Another dramatic character is to re-introduce the seaworthiness and due diligence obligations under the Hague and Hague-Visby Rules but the contents of two obligations in the Rotterdam Rules have been changed in some respects.

8.2.2.1 Duty of Care for Cargo

8.2.2.1.1 New Obligations: Receive and Delivery

Art 13 states that the carrier should properly and carefully receives, loads, handles, stows, carries, keeps, cares for, unloads and delivers the goods during its period of liability but the shipper, the documentary shipper or the consignee can perform parts including loading, handling, stowing, and unloading provided such an agreement is referred to in the contracts particulars. The standard of duty is directly incorporated from Art III rule 2 of the Hague and Hague-Visby Rules because such wording originating from the Hague and Hague-Visby Rules had enjoyed the extensive interpretation worldwide.[925] But this provision has two more obligations to correspond with the period of liability: to receive and deliver the goods. The obligation of the carrier to receive the goods during the period of liability eliminates the problem of stuffing containers before loading rising from *Volcafe Ltd*

[924] Art 11. Berlingieri Francesco, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', paper delivered at the General Assembly of the International Association of Average Adjusters-AMD, Marrakesh, 5-6 November 2009, 6.
[925] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 117.

and Others v Compania Sud Americana de Vapores SA.[926] If the containers are stuffed by a performing party no matter how long before loading, the carrier should perform it properly and carefully under the Rotterdam Rules. The obligation to deliver the goods under the Rotterdam Rules lasts the period of liability which cannot end earlier than before completion of final unloading under the contract of carriage.[927] Assuming the final unloading under the contract of carriage means unloading at the primary destination, a term allowing delivery somewhere else must be invalid.[928] A claim for misdelivery of the cargo could fall within the sphere of the Rotterdam Rules while the Hague and Hague-Visby Rules do not provide for misdelivery.[929] Unlike the seaworthiness obligation only applies to sea voyage, the duty of care of the cargo is a continuing nature throughout the period of liability of the carrier under the Rotterdam Rules. In other words, the carrier is required to care the cargo properly and carefully when he employs other modes of transport. As for the nature of this duty, it is personal to the carrier which means that the carrier is liable for the breach of this duty caused by the acts or omissions of other person listed in Art 18.

8.2.2.1.2 The FIOST Clause

The more controversial issue is paragraph 2 of Art 13 that the carrier and the shipper may agree that loading, handling, stowing or unloading of the

[926] [2018] EWSC 61.
[927] Art 12.3 (b).
[928] Andrew Tettenborn, 'Freedom of Contract and the Rotterdam Rules: Framework for Negotiation or One-size-fit-all' in David Rhidian Thomas (ed.), *The Carriage of Goods under the Rotterdam Rules* (Informa 2010) para. 4.24.
[929] The period of contract of carriage in the Hague and Hague-Visby Rules ends when the goods are discharged from the ship, see Art 1 (e).

goods is performed by the shipper, the documentary shipper or the consignee and such agreement should be referred to in contract particulars. Although the FIOST clause is generally used in the charter party, the problem arises under the Hague and Hague-Visby Rules due to its incorporation into the bill of lading.[930] In English law, the obligation to care the cargo is construed liberally that the carrier is not obliged to perform all operations under Art III rule 2 and the services could be referred to the consignor or consignee by contractual arrangements.[931] In *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Inc. (The 'Jordan II')*,[932] the FIOST clause was incorporated from the charter party into the bill of lading by a general incorporation term 'the bills incorporated all terms and conditions liberties and exceptions of the charter party'. The House of Lords held that it would not be nullified by Art III rule 2 of the Hague and Hague-Visby Rules because this provision did not define the scope of the contract service but the terms upon which the agreed service was to be performed.[933] In the Rotterdam Rules, Art 13.2 expressly allows the carrier to transfer the operations of loading, handling, stowing and unloading to the shipper, the documentary shipper or the consignee and requires that such agreement should be referred to in the contracts particulars. One point remains obscure which is whether the general incorporation term in the bill of lading

[930] Andrew Tettenborn, 'Freedom of Contract and the Rotterdam Rules: Framework for Negotiation or One-size-fit-all' in David Rhidian Thomas (ed.), *The Carriage of Goods under the Rotterdam Rules* (Informa 2010) para. 4.22.
[931] See *G H Renton & Co Ltd v Palmyra Trading Corporation* [1957] AC 149 (HL) and *Jindal Iron and Steel Ltd v Islamic Solidarity Shipping Inc (The 'Jordan II')* [2004] UKHL 49.
[932] [2004] UKHL 49.
[933] Ibid, [30].

satisfies the requirement 'such agreement should be referred to in the contract particulars'.[934] The Rotterdam Rules gives a definition of 'contract particulars' which is any information relating to the contract of carriage or to the goods including terms, notations, signatures and endorsements that is in a transport document or an electronic transport record.[935] The reasonable explanation is a general incorporation such as 'the bills incorporated all terms and conditions liberties and exceptions of the charter party' will satisfy the pre-condition 'an agreement referred to in the contract particulars'. And the FIOST clause is valid as being incorporated from the charter party to the bill of lading in which the Rotterdam Rules apply.

8.2.2.2 Descriptions of Cargo

The use of containers affects transport industry in numerous aspects and in a UK P&I club research, one of the main factors attributing the loss of or damage of the container cargo is poor stowage which occupies about 20 percentage of the claims.[936] The descriptions of container cargo are prima facie evidence of the breach of due care for cargo under Art 13.[937] The shipper could but not compulsorily provide accurate information like the quantity and weight of goods in containers.[938] Due to the nature of containers, the carrier may not have reasonable measures to check the

[934] Andrew Nicholas, 'The Duties of Carriers under the Convention: Care and Seaworthiness' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 6.12.
[935] Art 1.23.
[936] UK P&I Club, 'Container Matters: The Container Revolution of 1960s was deemed to b e the solution of limited cargo damage but has experience proved otherwise?', p 2. <https://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/LP_News/Container%20Matters.pdf> accessed 20 Sep. 2020
[937] Art 41.1 (a).
[938] Art 36.1.

contents and therefore, the Rotterdam Rules permit the carrier to qualify such information.[939] The words of reservation such as 'said to contain' have been widely used by the carrier to indicate that it does not guarantee the accuracy of such information. Under the Hague and Hague-Visby Rules, if there is loss of or damage to the goods caused by inaccuracies, the carrier is not liable and can be indemnified from the shipper.[940] The Rotterdam Rules follow the Hague and Hague-Visby Rules and require the shipper to indemnify the carrier against the loss of or damage to goods resulting from the inaccurate information.[941]

Another development of the Rotterdam Rules is to have Art 40 dealing with situation where the carrier should or may qualify the information to indicate that it is not liable for its accuracy of the information as furnished by the shipper. Besides, Arts 40.3 and 40.4 are the non-mandatory qualification of the carrier for containerised and non-containerised cargo. When the goods are carried in an open container or when the goods are in a closed container and the carrier or a performing party actually inspect them,[942] the carrier may qualify if it has no reasonable means of checking the descriptions or it has reasonable ground to believe the information is incorrect.[943] For closed container cargo, the information in paragraphs (a),

[939] The right to qualify in Art 40 is divided into two circumstances: the mandatory qualification for misleading statement in paragraph 1 and the carrier may qualify in paragraphs 3 and 4.
[940] Art III rule 5.
[941] Art 39.1.
[942] Art 40.3.
[943] The ways to qualify for two situations are different: (a) in absence of means of checking, the carrier may indicate which information it is unable to check or (b) the carrier may include a clause stating the correct information it reasonably considers.

(b) and (c) of Art 36.1 may be qualified by the carrier if the carrier or a performing party does not actually inspect the goods and had no actual knowledge of the contents.[944] Professor Anthony Diamond thought that the reservation clauses such as 'contents unknown' and 'said to contain' cannot be regarded as qualifications but the author think it is unreasonable. Although Art 40.3 provides express methods for qualification and Art 40.4 does not, it does not mean that the carrier cannot use the traditional printed reservation clauses to qualify descriptions under Art 36.1. If the conditions in Arts 40.3 and 40.4 are satisfied, the Rotterdam Rules do not prevent the carrier from using those words to indicate the carrier assumes no liability for inaccurate descriptions. The carrier may qualify the weight of the container if neither the carrier nor a performing party weighed the container and there is no agreement between the shipper and the carrier to weigh prior to shipment or there is no means of checking the weight.[945] A new rule could affect the weight description under the Rotterdam Rules is that the IMO has implemented a SOLAS amendment to require containers and contents to be weighed prior loading which comes into force on 1 July 2019.[946] The reason for the new amendment is that misdeclared container weight had attributed to incidents with cargo damage and personal

[944] Art 36.1 (a) descriptions of goods as appropriate for transport, (b) leading marks for identification of goods and (c) quantity of goods.
[945] Art 40.4 (b).
[946] See full texts <http://www.worldshipping.org/industry-issues/safety/SOLAS_CHAPTER_VI_Regulation_2_Paragraphs_4-6.pdf> accessed 20 Sep. 2020

injury.[947] Art 36.1 of the Rotterdam Rules requires the shipper to provide the weight of goods but does not have sanction to the shipper if it fails. The influence of the SOLAS amendment will be analysed in depth in section 8.5.3.2.3.

8.2.2.3 Seaworthiness

It is observed that the seaworthiness duty is a feature of maritime transport and does not suit for other modes of transport.[948] Given the Rotterdam Rules have a broad scope of application as door-to-door application, the working group thought that this provision should only apply to carriage by sea which had been expressed by its heading.[949] Considering that the meaning and contents of this obligation in the Hague and Hague-Visby Rules has been discussed in section 3.2.1, this section will not repeat since they do not change in the Rotterdam Rules. The main difference is that the obligation to provide a seaworthy vessel in the Rotterdam Rules is continuous while it only attaches before and at the beginning of the voyage in the Hague and Hague-Visby Rules.[950] Support was widely expressed that the continuous seaworthiness obligation was consistent with the improved

[947] In 2002, a formal proposal was submitted to IMO which illustrates several examples of incidents involving incorrect container weights. <http://www.worldshipping.org/industry-issues/safety/Overweight_Containers_DSC_Submission_July_2011.pdf> accessed 20 Sep. 2020

[948] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 132.

[949] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]', (6-17 October 2003) 12th session UN Doc. A/CN.9/WG.III/WP.32, Art 13.

[950] Art 14 of the Rotterdam Rules and Art III rule 1 of the Hague and Hague-Visby Rules. Francesco Berlingieri, *A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules*, paper delivered at the General Assembly of the International Association of Average Adjusters-AMD, Marrakesh, 5-6 November 2009, p 6.

communication and tracking systems in the shipping industry.[951] The extension of the seaworthiness obligation is in line with the safe operation regulation, the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the 'ISM Code') which also requires the master to main a seaworthy state during the voyage.[952] The ISM Code is mandatorily applied to certain shipping companies due to Chapter IX of the International Convention for the Safety of Life at Sea 1974. If the Rotterdam Rules are adopted in the future, the liability of the carrier in relation to the continuous duty of seaworthiness is not substantially greater than the level of responsibility that carriers have been undertaken in practice over recent years. A substantial change is the duty of the carrier to keep the ship seaworthy is no longer an overriding obligation under the Rotterdam Rules because it is subject to the carrier's exemptions.[953]

As for the aspect of the obligation, another new difference made in order to adapt to container transport is that the carrier's duty to provide a seaworthy vessel includes to make and keep 'any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation'.[954] This provision is important since the carrier normally supply the containers either by leasing or owning the containers. One matter is the duty with respect to the container does not

[951] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 43.
[952] Art 10.
[953] Margetson Nick, 'Some Remarks on the Allocation of the Burden of Proof under the Rotterdam Rules as Compared to the Hague (Visby) Rules' in David Thomas Rhidian (ed.) *The Carriage of Goods by Sea under The Rotterdam Rules* (Informa 2010) para. 10.62.
[954] Art 14 (c).

apply to a case where the container is supplied by the shipper although it is rare.[955]

8.2.2.4 Deck Cargo

The carrier is normally obliged to carry the goods under the deck and deck carriage will only be permitted in certain situations. The Rotterdam Rules authorise the carrier to carry the goods on deck in three circumstances: (a) such carriage is required by law, (b) the goods are carried in or on containers or vehicles that are fit for deck carriage and the decks are specially fitted to carry such containers or vehicles, or (c) the carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.[956] In the cases of (a) and (c), the carrier is not liable for loss of or damage to the goods or delay in delivery caused by special risks involved in deck carriage.[957] Nevertheless, the concept 'special risks' is not defined by the Rotterdam Rules and the preparatory work. But if the special risks are analogous to weather risks on deck, the deck carriage in accordance with (a) or (c) has one more exemption. In the case of (c), it may be invoked as against a third party who has a negotiable transport document or electronic record in good faith only if the contract particulars state that the goods may be carried on deck.[958] The apparent modification is made to co-habit with the

[955] Andrew Nicholas, 'The Duties of Carriers under the Convention: Care and Seaworthiness' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 6.8.
[956] Arts 25.1 (a), (b) and (c).
[957] Art 25.2.
[958] Art 25.4.

contemporary shipping practice where container cargo carried on deck, is much more common. But there are two additional conditions for containers on deck: one is the goods in containers should be suitable for deck carriage and the decks are specially fit for carrying containers. The Rotterdam Rule apply to deck cargo which means the scope of application of the Rotterdam Rules is much wider.

With regard to the consequence of unauthorised deck cargo, it reflects in two ways of remedy: exceptions and limitation of liability. In English law, the consequence of unauthorised deck carriage in Hague and Hague-Visby Rules is ruled in *Daewoo Heavy Industries Ltd of Korea & Anor v klipriver Shipping Ltd of Cyprus & Anor ('The Kapitan Petko Voivoda')* .[959] The issue whether the carrier is precluded from relying on defences in Art IV rule 2 of the Hague and Hague-Visby Rules is not appealed and the trial judge ruled that it was unlikely that the carrier was able to reply upon the defences but depending on facts. Langley J of the Court of Appeal further observed that if an exemption would not cause the loss and the cargo was carried under deck, the carrier could not rely on that exemption.[960] But if the events giving rise to defences in Art IV rule 2 applied no matter it was a deck carriage or not, the carrier was able to rely on such defences.[961] Art 25.3 of the Rotterdam Rules is consistent with the English law that the carrier cannot rely on defences if the loss of or damage to the goods or delay is solely caused by unauthorised deck carriage. In other words, if the

[959] [2003] EWCA Civ 451. See section 3.4.1.1.
[960] Ibid, [27].
[961] Ibid, [24].

loss of or damage to the goods or delay is not solely caused by unauthorised deck cargo, the carrier is permitted to exclude liability by defences in Art 17. The important finding in *Daewoo Heavy Industries Ltd of Korea & Anor v klipriver Shipping Ltd of Cyprus & Anor ('The Kapitan Petko Voivoda')* [962] is that even if the carrier was in breach of the obligation to stow on deck, the limitation of liability in Art IV rule 5 of the Hague and Hague-Visby Rules may still apply. The Rotterdam Rules, however, change the rule. Art 25.5 provides that if there is an express agreement between the carrier and the shipper to carry goods under deck, the carrier loses the right to limit his liability if the loss of or damage to the goods or delay is solely caused by deck carriage. The underlying reason for this provision is that the breach of an express agreement to carry under deck could be seen as a reckless act which will deprive the benefit of limitation of liability from the carrier.[963] One problem is Art 25.5 does not state whether the express agreement should be stated on the transport document or electronic record.

8.2.3 The basis of liability

The carrier is liable for the loss of or damage to the goods or delay in delivery if the claimant proves the loss of or damage to the goods or delay or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility.[964] The carrier can escape all or part of liability if he establishes that the cause or one of the causes

[962] [2003] EWCA Civ 451.
[963] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Thirteenth Session' (24 May 2004) 17th session UN Doc. A/CN.9/552, para. 113.
[964] Art 17.1.

of the loss of or damage to the goods or delay is either not attributable to its fault or the person who performs on behalf of the carrier in Art 18 or one or more of the exceptions listed in Art 17.3 caused or contributed to the loss, damage or delay.[965] It was largely agreed that the basis of liability of the carrier under the Rotterdam Rules should be presumed fault rather than strict liability but the problem was raised how to establish the initial presumption.[966] The actual wording in the preliminary draft was that the carrier was liable for the loss of or damage to the goods as well as for delay in delivery if the occurrence that caused the loss of or damage to the goods or delay took place during the period of the carrier's liability unless the carrier proved neither his fault or that of the person who performed on behalf of the carrier caused or contributed to the loss of or damage to the goods or delay.[967] It is similar to a combination of Art 5.1 of the Hamburg Rules and Art IV rule 2 (q) of the Hague and Hague-Visby Rules.[968] Later, on the twelfth session, the basis of liability provision was reviewed and the first presumption of the claimant was amended as he 'proves either the loss, damage or delay or the occurrence that caused or contributed to the loss, damage or delay took place during the period of the carrier's

[965] Art 17.2.
[966] UNCITRAL, 'Report of the Working Group on Transport Law on the Work of its Ninth Session' (7 May 2002) 35th session UN Doc. A/CN.9/510, para. 44.
[967] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 6.1.1.
[968] Ibid, para. 67.

responsibility'.[969] In the case of continuing damage or delay, the carrier is presumed to be responsible if the claimant establishes a factual matter, either the loss of or damage to the goods or delay or the occurrence that caused or contributed to it. The carrier's onus of proof did not change to rebut the initial presumption. The underline approach was that the carrier should be liable for unexplained losses but the carrier should have an opportunity to prove the cause of damage.[970] The principles remained to a large extent and a concern was raised with regard to the carrier's liability to indicate that he is only partly at fault.[971] A clear and separate paragraph was proposed that the carrier is relieved of all or part of liability if he proves the cause or one of the causes of the loss of or damage to the goods or delay is not attributable to his fault or that of the person who performs on behalf of the carrier.[972] The main difference is reflected by the onus of proof which will be discussed hereinafter. The substance of paragraphs 1 and 2 of Art 17 were retained with replacing the 'occurrence' by 'event or circumstance' in order to gain greater clarity.[973]

8.2.4 Excepted Perils

[969] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]: Provisional Redraft of the Articles of the Draft Instrument Considered in the Report of Working Group III of its Twelfth Session (A/CN.9/544)', (3-14 May 2004) 12th session UN Doc. A/CN.9/WG.III/WP.36, Art 14 .1.
[970] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 90.
[971] Ibid, para. 104.
[972] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December April 2005) 16th session UN Doc. A/CN.9/WG.III/WP.56, Art 17 (2).
[973] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (16-27 April 2007) 19th session UN Doc. A/CN.9/WG.III/WP.81, Art 17 (1).

There are two issues: whether the Rotterdam Rules need to keep a list of exonerations and if so, what exceptions the Rotterdam Rules should have. It was stated that such a catalogue might possibly diminish the liability of the carrier and it would be more satisfactory to refer to exonerations in cases involving events that were inevitable and unpredictable in nature.[974] But the supporter of its retention expressed that it could be a useful role in preserving the existing body of the case law that had developed with the widespread use of the Hague and Hague-Visby Rules and it did not harm the countries in which it was not needed.[975] There were discussions on whether the excepted perils should be exonerations from liability or whether they should appear as presumptions only. The basis for the second approach is that certain events are typical situations where the carrier is not at fault and that it is justifiable for the burden of proof to be reversed where the carrier proves such an event.[976] Although the presumption approach was preferable, it was suggested that the legal outcome would be the same with either approach since under the exoneration approach, the carrier's right to rely on an exemption could still be deprived if the cargo claimant could prove the carrier's fault.[977]

8.2.4.1 The Nautical Fault and Fire Defences

[974] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Tenth Session' (7 October 2002) 36th session UN Doc. A/CN.9/525, para. 39.
[975] Ibid.
[976] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 74.
[977] The carrier's right to rely on an exemption could still be lost if the claimant could prove the carrier's fault. See UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 87.

The nautical fault and fire were two traditional maritime exceptions provided in the Hague and Hague-Visby Rules.[978] These two defences attracted much discussion from both academic and practical aspects since the very beginning of the preparatory work.[979] And they are also closely connected with general average which is the most venerable concept of traditional maritime law.[980] But they are inconsistent with the principle of vicarious liability and regarded as privileges for shipowners. In the final context, the Rotterdam Rules remove the nautical fault exoneration but retain the fire defence.

The general view regarding the navigation error defence during the preparation of the Rotterdam Rules was that its deletion would be an important step towards modernising and harmonising international transport law.[981] However, the opponents expressed that the deletion would considerably change the allocation of risks between sea carriers and cargo interests which would have an economic impact on insurance practice.[982] The author believes that the effects of the removal of the nautical fault exception are not considerable. With respect to the elimination of the nautical fault exception, the Rotterdam Rules are

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[978] Art IV rule 2 (a): the carrier is not liable for loss or damage arising from the act or neglect or default of the master, pilot or servants of the carrier in the navigation or in the management of the ship. Art IV rule 2 (b): the carrier is not liable for fire unless caused by actual fault or privity of the carrier.

[979] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 6.1.2.

[980] Erling Selvig, 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 J Mar L Com 299, 310.

[981] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Tenth Session' (7 October 2002) 36th session UN Doc. A/CN.9/525, para. 36.

[982] Ibid.

consistent with the Hamburg Rules and the MT Convention. Claims of the nautical fault defence are not solved with litigation and there is no accurate statistic gathering from case law. Besides, the nautical fault exception is a kind of human error which is a major contributing factor in marine accidents. By analysing the accident reports, the amount of loss caused by human error has been decreased.[983] In that way, the technological development in the navigation and management also favors its omission. As for the influence on the insurance market, the choice among different coverages is directly related to the insurance premium payable and the main clauses used worldwide are the Institute Cargo Clauses A, B and C which covers ranging from all risks with the A Clauses to very limited perils with the C Clauses. The cheapest and most frequently chosen one is Institute Cargo Clauses C which does not include the nautical fault. The changes of allocation of risk affecting in financial aspects reflect in the movement of insurance premiums and freight rates. There are two types of insurance in sea carriage: cargo insurance and carrier's liability insurance and they are different in risks to be insured against.[984] Liability insurance covers the costs incurred by a carrier when goods are either lost or damaged while cargo insurance covers economic losses resulting from the loss of or damage to the goods.[985] They are obtained in basically independent

[983] Yue-Lin Zhao and Zheng-Liang Hu, 'Impression on Carrier's Liability, Obligations and Other Marine Legal Systems with Elimination of Nautical Fault Exception' (2002) 1 Journal of Dalian Maritime University (Social Science Edition) 1, 2.
[984] Eun Sup Lee, 'The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules' (2002) 15 The Transnational Lawyer 241, 248.
[985] Ibid.

markets that cargo insurance is provided by ordinary insurance companies while liability insurance is usually arranged in the shipowner's P&I Clubs.[986] The Rotterdam Rules keep the fire defence as in the Hague and Hague-Visby Rules but make some modifications to accommodate the door-to-door transport under the Rotterdam Rules by limiting its operations to a maritime defence.[987]

In the Rotterdam Rules, the carrier is not liable if the loss of or damage to the goods or delay in delivery is caused by the fire on the ship.[988] In the Hague and Hague-Visby Rules, the carrier is not liable unless the fire is caused by his privity and the onus is on the cargo claimant. [989] The Hague and Hague-Visby Rules not only reduce the carrier's liability under certain circumstances but also impose the burden of proof on the cargo claimant.[990] During the preparation work at the fourteenth session, the Working Group considered either to retain the entire words of sub-paragraph b of Art IV rule 2 of the Hague and Hague-Visby Rules or to remove the fire exception completely.[991] Support was expressed in favour of the second option that it was inappropriate in a multimodal instrument given that the exception did not apply in other modes of transport.[992] A fallback proposal was made

[986] Erling Selvg, 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 J Mar L Com 299, 310.
[987] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 87.
[988] Art 17.3 (f).
[989] Art IV rule 2 (b).
[990] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 71.
[991] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 59.
[992] Ibid, para. 60.

that the fire exception should be limited to 'fire on the ship' and delete the remainder of text which was the acceptable compromise concluded by the Working Group.[993]

Another difference in the Rotterdam Rules is that subparagraph (f) clarifies that the fault of the carrier is not a personal one and the carrier is responsible for the acts of its agents or servants.[994] This change is consistent with the principle of vicarious liability which is established by Art 18.

8.2.4.2 List

The rest of the exonerations in paragraph 3 of Art 17 of the Rotterdam Rules was in an approximately familiar order in which they appeared in Art IV rule 2 of the Hague and Hague-Visby Rules on the basis of valuable case law generated by these Rules.[995] Apart from the deletion of the nautical fault defence, another important change is the elimination of the catch-all exception in Art IV rule 2 (q) of the Hague and Hague-Visby Rules. The carrier is not liable if he proves that neither the actual fault or privity of the carrier nor the fault or neglect of his servants or agents contributed to the loss of or damage to the goods. Despite that this exception has rarely been successfully invoked, it is not the reason for its removal and this sub-

[993] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 62.
[994] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 126.
[995] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 78.

paragraph has been merged into the principal basis of liability for the carrier in Art 17.1.[996]

8.2.5 Burden of Proof

The Hague-Visby Rules do not contain a general rule for the burden of proof whilst the Rotterdam Rules regulate this matter precisely in Article 17.[997] The progress of the burden of proof under the Rotterdam Rules is more explicit and comprehensive than that under the Hague and Hague-Visby Rules. For the first step, the cargo claimant has a prima facie case by establishing that the occurrence of the loss of or damage to the goods or delay in delivery is within the period of the carrier's liability.[998] The carrier would be liable for unexplained losses suffered during his period of responsibility.[999] In the second step, the carrier can rebut the presumption by proving either that the cause of the loss, damage or delay is not attributable to his fault or the fault of any person in Article 18 or the excepted perils listed in Article 17.3 caused or contributed to loss of damage to the goods or delay.[1000] In step three, the cargo claimant has the opportunity to prove that an unlisted peril contributed to loss of damage to the goods or delay and that the carrier caused it by a breach of his duty.[1001] Once the cargo claimant has shown that there were multiple causes, the

[996] Francesco Berlingieri, 'Background Paper on Basis of the Carriers Liability' *CMI Yearbook 2004* 140, 144.
[997] Margetson Nick, 'Some Remarks on the Allocation of the Burden of Proof under the Rotterdam Rules as Compared to the Hague (Visby) Rules' in David Rhidian Thomas (ed.) *The Carriage of Goods by Sea under The Rotterdam Rules* (Informa 2010) para. 10.2.
[998] Art 17.1.
[999] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 88.
[1000] Art 17.2.
[1001] Art 17.4.

analysis proceeds to step four in which liability for the damage is apportioned between the different causes. The first three steps of this approach had worked well since their inception in the Hague and Hague-Visby Rules and the substantial change is the burden of proof and allocation of liability for loss due to concurrent causes.[1002]

In addition to the proceeding of the burden of proof, the Rotterdam Rules have a special paragraph in Art 17 to deal with loss of damage to the goods or delay in delivery caused by a breach of the seaworthiness obligation of the carrier. The cargo claimant is required to prove that loss of damage to the goods or delay in delivery was or was probably caused by or contributed to by the unseaworthiness condition.[1003] The standard for the carrier is higher that he needs to prove either that an unseaworthy condition did not actually cause the loss of or damage to the goods or delay or that he complied with his due diligence obligation.[1004] Under the Hague and Hague-Visby Rules, there is no universal rule for the question who needs to prove the unseaworthiness and in English law, it is for the cargo claimant to establish that the unseaworthiness caused the loss of or damage to the goods.[1005] The Working Group of the Rotterdam Rules considered two alternatives with respect to this matter. The first alternative was that the cargo claimant only needed to prove the existence of unseaworthiness and

[1002] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]', (29 November -10 December 2004) 14th session UN Doc. A/CN.9/WG.III/WP.41, para. 19.
[1003] Art 17.5 (a).
[1004] Art 17.5 (b).
[1005] See section 3.2.1.1.

it was for the carrier to prove the causation between the unseaworthiness and the loss of or damage to the goods or delay.[1006] The second alternative required the cargo claimant to prove that the loss of or damage to the goods or delay was actually caused by unseaworthiness on the part of carrier.[1007] A compromise position was achieved by reducing the burden on the cargo claimant to prove causation and it was advised that the cargo claimant should prove both that the unseaworthiness existed and that it caused or probably caused or contributed to the loss of or damage to the goods or delay.[1008] However Art 17.5 does not define exactly the meaning of 'probably caused' since the Rotterdam Rules leave such procedural issues to national law.[1009] If the breach of seaworthiness obligation is a contributory cause, the carrier is liable in full once under the Hague and Hague-Visby Rules while the carrier would be liable for the part of loss.[1010] Art 17.6 deals with the apportionment of the carrier's liability in the multiple causation cases. The carrier is liable only for the part of the loss of or damage to the goods or delay that is attributable to the event or circumstance for which he is liable. This provision does not provide who bears the burden of proof but if the principle in *Gosse Millerd v Canadian*

[1006] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 130.
[1007] Ibid.
[1008] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 29.
[1009] Ibid, para.24.
[1010] Regina Asariotis, 'Loss due to a Combination of Causes: Burden of Proof and Commercial Risk Allocation' in David Rhidian Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - the Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 156.

Government Merchant Marine[1011] is followed, the burden is on the carrier to prove the amount of the loss for which he is not liable. In the first preliminary draft of the Rotterdam Rules, there were two options to the allocation of responsibility in multiple causes which was among the more controversial aspects of Art 17.[1012] The first alternative resembles Art 5 (7) of the Hamburg Rules which imposes the full burden on the carrier to prove the extent in which he was not liable for the loss of or damage to the goods or delay.[1013] The second option is a novelty provision in which the burden of proof is shared and each party bears the risk of non-persuasion.[1014] The carrier is liable to the extent that the cargo claimant proves that the loss of or damage to the goods or delay was attributable to an event for which the carrier was responsible and the carrier escapes the liability to the extent that he proved the loss of or damage to the goods or delay was attributable to an event for which he was not responsible. And there is a fall-back provision in the second option which divided the liability into half-half in absence of evidence of the apportionment. Various redrafts were made to clarify this issue and the final substantive discussion was agreed at the fourteenth session which gave the courts discretion to determine liability.[1015] The fall-back provision was also eliminated because the carrier

[1011] [1929] AC 223 (HL), 241 (Viscount Summer).
[1012] UNCITRAL Woking Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Art 6.1.4.
[1013] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 5.103.
[1014] Ibid, para. 5.90.
[1015] UNCITRAL, 'Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session', (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 75.

might only have an incentive to adduce evidence if the proportion of his liability was more than fifty percent and the cargo claimant would bear the risk associated with a lack of evidence.[1016]

8.3 Identity of the Carrier, the Performing Party and the Maritime Performing Party

In multimodal transport, the multimodal transport operator is the contracting carrier who may not involve any actual performance of the carriage and there are various parties to perform or undertake to perform the contract in different stages of transport. For example, the consignor makes a contract with the multimodal transport operator to carry the cargo from Berlin to Chicago via Antwerp and New York. The multimodal transport operator subcontracts the road carriage in Europe to a truck company, the sea leg from Antwerp to New York to an ocean carrier and the American domestic part to a US railroad. The question is who might be liable under the Rotterdam Rules. The definition of the carrier in the Rotterdam Rules is a person who enters into a contract of carriage with the shipper.[1017] In this case, the multimodal transport operator is liable as the carrier under the Rotterdam Rules regardless where the loss of or damage to the goods or delay in delivery occurred. The second question is would the truck company, the ocean carrier and the railroad be liable under the Rotterdam Rules? The positions of these parties under the Rotterdam Rules are different: they all

[1016] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]', (29 November -10 December 2005) 14th session UN Doc. A/CN.9/WG.III/WP.41, para. 19.
[1017] Art 1.5.

are treated as performing parties by virtue of Art 1.6 but they are not all liable. The truck company and the ocean carrier could be seen as the maritime performing parties and whether they are liable under the Rotterdam Rules depends on the requirements which will be discussed in section 8.3.2. But the railroad could be a performing party and is not liable under the Rotterdam Rules. The differences will be analysed in depth in section 8.3.2.

8.3.1 Identity of the Carrier

Another matter which is common in maritime conventions is the identity of the carrier. In practice, especially in case of multimodal transport, it is normal for the carrier to include third parties in execution his obligations from the contract of carriage.[1018] The definition of the carrier under the Rotterdam Rules is so broad to cover a shipowner, ship operator, charterer, freight forwarder who acts as a principal and the multimodal transport operator could fall within the definition of the carrier.[1019] In cases where the information with regard to the identity of the carrier in the transport document or electronic transport record is inconsistent, Art 37 states rules to facilitate the identification of the carrier and its intention is to help identify the carrier in certain situations, not to redefine the carrier. In other words, if the name of carrier A is misprinted as B, the carrier will still be A

[1018] Nikola Mandic and Vesna Skorupan Wolff, 'Maritime Performing Party under the Rotterdam Rules 2009' (2015) 4 Transaction on Maritime Science 132, 133.
[1019] Ibid.

because the contract with the shipper is made with A.[1020] Paragraph 1 of Art 37 provides that the name of the carrier in the contract particulars has priority over other inconsistent information in the transport document or electronic transport record and this article seems more necessary when a demise clause or an identity of the carrier clause to claim that he is not the carrier is contained. This provision is consistent with the judgment of the House of Lords of the United Kingdom in *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*.[1021] In absence of identification of the carrier in paragraph 1, the registered ship owner is presumed to be the carrier when the contract particulars stipulate that the goods have been loaded on board a named ship.[1022] The ship owner could rebut the presumption by either proving that the vessel is under a bareboat charter at the time of carriage and indicates the name and address of the charterer or identifying the name and address of the carrier.[1023]

8.3.2 Performing Party

8.3.2.1 Definition

The Hague Rules do not address the problem of performing party at all and the Hague-Visby Rules bring in a new provision to solve the Himalaya issue but only apply to certain persons like the servant or agent of the carrier.[1024] The Hamburg Rules make the first effort to deal with the issue by

[1020] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 7.045.
[1021] [2003] UKHL 12.
[1022] Art 37.2.
[1023] The bareboat charterer may rebut the presumption of being the carrier in the same manner.
[1024] Art IV bis.

introducing 'actual carrier' concept which refers to any person has been entrusted by the carrier to perform wholly or partly the carriage of goods and includes any person to whom such performance has been entrusted.[1025] The actual carrier includes servants, agents and subcontractors to whom the carrier has delegated the performance of the contract of the carriage.[1026] But in the case where the carrier might undertake to obtain an export certificate for the consignor and subcontracted to a domestic company, the problem arises as to whether the domestic company should be regarded as the actual carrier under the Hamburg Rules considering the obligation is auxiliary to the contract of carriage. The obligations of the actual carrier need a clearer range which is improved in the Rotterdam Rules. One of the multimodal aspects of the Rotterdam Rules is regulating the liability of more person in line with the carrier, the maritime performing party and introducing a new concept, the performing party.[1027] The performing party means a person other than carrier that performs or undertakes to perform the carrier's contractual obligations in Art 13 except for keep at the carrier's request or under the carrier's supervision or control.[1028] The performing party concept in the Rotterdam Rules aims to expand the range of suable parties on the cargo side although the final text of the Rotterdam Rules restricts to the sub-category, the maritime

[1025] Art 1 (2).
[1026] Michael F Sturley, 'The Performing Parties' in *CMI Yearbook 2003* 230, 233.
[1027] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 4.025.
[1028] Art 1.6 (a).

performing party.[1029] The maritime party is a sub-category based on a geographical approach which is introduced to correspond with the maritime nature of the Rotterdam Rules.[1030] The definition of the performing party is a highly controversial aspect.

In the preliminary draft, the concept of performing party covered any person other than the carrier that physically performed the core carrier's responsibilities under the contract of carriage for carriage, handling, custody and storage and the liability regime of the performing party was the same as the carrier's.[1031] Thus the ocean carriers, inland carriers, stevedores and terminal operators could be seen as performing parties.[1032] A more inclusive definition was drafted as 'any person other than carrier performs or undertakes to perform the carrier's responsibilities under the contract of carriage for the carriage, handling, custody or storage' which covered not only the carrier's immediate sub-contractors but also the entire subsidiary persons that performing the contract such as the sub-contractors' sub-contractors.[1033] A wide support was expressed for the inclusive definition because the narrow concept would allow performing parties who promised to perform but either failed to perform or delegated to the

[1029] Art 19.1.
[1030] Art 1.7: a maritime performing party is a perform party who performs or undertakes to perform the carrier's obligations during the period from the port of loading to the port of discharge.
[1031] UNCITRAL Woking Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, Arts 1.17 and 6.3.
[1032] Ibid, para. 16.
[1033] Ibid, para. 19.

contractual performance to other parties escape liability.[1034] In this session, the Working Group adopted the phrase 'undertake to perform physically' to exclude remote perform parties but the word 'physically' was deleted later because the list of functions indicates that the performing party is required to take some concrete action.[1035] And it permitted a direct action against the performing party who was at fault without requiring a multiplicity of actions to work through the chain of contacts.[1036] Furthermore, the Working Group thought that the functions of the performing party should be paralleled specific obligations of the carrier rather than restricted to listed performances and inserted the phrase 'with respect to'.[1037] Another condition is that the performing party should act at the carrier's request or under the carrier's supervision or control. It reinforces the importance of the performing parties' functions without regard to contractual arrangements.[1038] Accordingly, the definition of a performing party excludes any person who is retained by a shipper, a documentary shipper, the controlling party or the consignee.[1039] This paragraph is justified because it is unreasonable for the carrier to take liability for the actions of

[1034] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 36.
[1035] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (16-27 April 2007) 19th session UN Doc. A/CN.9/WG.III/WP.81, Art 1.6.
[1036] Ibid.
[1037] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December April 2005) 16th session UN Doc. A/CN.9/WG.III/WP.56, Art 1 (e).
[1038] UNCITRAL Woking Group III (Transport Law), 'Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea', (15-26 April 2002) 9th session UN Doc. A/CN.9/WG.III/WP.21, para. 19.
[1039] Art 1.6 (b).

performing parties selected by others.[1040] But the result is unclear in a case where the shipper delegates the loading operation to the carrier and then, the carrier subcontracts it to a stevedore company. It is arguable that the stevedore company is not a performing party because it is indirectly retained by the shipper through the carrier. Although the Rotterdam Rules do not impose liability on the non-maritime performing party, the broader term of 'performing party' is still used because it is useful to define the scope of persons whose acts or omissions are attributable to the carrier.[1041] An important relevant matter is the period of liability of the carrier under the Rotterdam Rules begins when the performing party receives the goods for carriage.[1042]

8.3.2.2 Vicarious Liability of the Carrier

The performing party does not have liability under the Rotterdam Rules but the carrier is vicarious liable for his acts or omission. The carrier is liable for the breach of obligation caused by the acts or omissions of any performing party and other person that performs or undertakes to perform any of carrier's obligations under the contract of carriage to the extent that the person acts at the carrier's request or under the carrier's supervision or control.[1043] Sub-paraph (d) is synonymous with the perform party but fall out of the definition under the Rotterdam Rules. Another sub-group

[1040] Nicholas Bond, 'The Maritime Performing Party and the Scope of the Rotterdam Rules' (2014) 28 ANZ Mar L J 95, 107.
[1041] Tomotaka Fujita, 'Performing Parties and Himalaya Protection' in Colloquium on the Rotterdam Rules (21 September 2009), p 4.
[1042] Art 12.1.
[1043] Arts 18 (a) and (d). This provision is the so-called himalaya protection which also includes master or crew of the ship and employee of the carrier or a performing party.

whom the carrier is vicarious liable for employees of the carrier and the maritime performing party. The basic idea of protecting employees of the carrier from tort-based cargo claims in relation to acts and omissions done within the scope of their employment has become a common feature to all modern transport law conventions.[1044] The basic rationale is that if persons who are economically dependent upon the carrier are not allowed to rely on the defences available to the carrier, then the ultimate financial burden of the claim is likely to be borne by the carrier which would undermine the risk allocation that the Rotterdam Rules intend to establish.[1045] Under Art 4 of the Rotterdam Rules the defences and limitations of liability provided by this convention to the carrier also apply to (b) the master, crew or any other person that performs services on board the ship and (c) employees of the carrier or a maritime performing party irrespective of whether these persons acted within the scope of their employment or not.[1046] The former focus on the service relationship towards the ship while the latter focus on the employment relation with the carrier or the maritime performing party.[1047] The modern seafarers are often employed under a placement service agreement to work on board of the ship and the category (b) avoids debate about whether their employer qualifies as a maritime performing

[1044] Art IV bis of The Hague-Visby Rules, Art 7.2 of the Hamburg Rules. Art 28.2 of the CMR, Art 41.2 of the COTIF-CIM, Art 17.3 of the CMNI, and Art 15 of the MT Convention.
[1045] Tomataka Fujita, 'The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications' (2009) 44 Tex. Int'l L J 349, 370.
[1046] The Hamburg Rules protect the servants and agents of the carrier and the actual carrier but expressly requires that their acts and omissions should be done within their scopes of employment.
[1047] Frank Smeele, 'The Maritime Performing Party in the Rotterdam Rules 2009' [2010] European Journal of Commercial Contract Law 1, 13.

party under Art 1.7 of the Rotterdam Rules or not. The Rotterdam Rules provide a wider protection than previous conventions for the seafarers and employees of the carrier and maritime performing parties because the Rotterdam Rules do not impose liability on the persons listed in Arts 18 (b) and (c).[1048] In other words, they cannot be held liable for their acts or omissions causing loss of or damage to or delay in delivery of the cargo.

8.3.3 Maritime Performing Party

8.3.3.1 Definition

The concept of the maritime performing party was proposed to adjust the definition of the performing party and the distinction between the maritime and non-maritime performing party is based on a geographical area, port.[1049] Therefore the inland movements within a port should fall within the definition of the maritime performing party.[1050] But the proponent of the definition 'the carrier's obligations' does not clearly show whether the functions of the maritime performing party also concentrate the core obligations pertaining to the carrier. In a hypothetical case, could a shipyard who undertakes to make and keep the vessel seaworthy be a maritime performing party under the Rotterdam Rules? The seaworthiness obligation is not listed in the list of functions contained in definitions of the performing party and the maritime performing party. But if construed by virtue of the drafter's intention, the functions of the performing party

[1048] Art 19.4.
[1049] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, para. 30.
[1050] Ibid, para. 31.

should follow the core obligations of the carrier and thus the seaworthiness obligation should be covered by the definition of the performing party. As for the maritime performing party, considering it is a subcategory of a performing party, it is unreasonable to impose more functions on the maritime performing party. And the shipyard could be both the performing party and the maritime performing party. Another reason is the period of liability of the carrier under the Rotterdam Rules begins when the carrier or the performing party receive the goods for carriage.[1051] If the shipyard is not the performing party, the period will not start when the vessel arrives the shipyard. It will be absurd that the carrier becomes liable when the ship transfers from the shipyard to his control.

8.3.3.2 Liability of the Maritime Performing Party

The Rotterdam Rules restrict the liability regime to the maritime performing party subject to two conditions and it is simply plausible that the maritime performing party is entitled to the same defences and limits of liability as the carrier under this convention. [1052] The two conditions are the geographical requirement and the occurrence that caused the loss of, damage to the goods or delay in delivery.[1053] The geographical requirement is to connect a Contracting State with one of the following places where the maritime performing party receives or delivers the goods or performs his activities in a port.[1054] The geographical connection with a Contracting

[1051] Art 12.1.
[1052] Arts 4.1 and 19.1.
[1053] Art 19.1.
[1054] Art 19.1 (a).

State was added because the maritime performing party may perform totally outside Contracting States which was inconsistent with the geographical requirements for the Rotterdam Rules to apply.[1055] There were doubts with regard to the places of receipt and delivery of the goods in a Contracting State. The words 'initially' and 'finally' were inserted before received and delivered as clarifications to avoid the application of the Rotterdam Rules to maritime performing parties that carried goods from a non-contracting State to a non-contracting State but transhipped at a port of a non-contracting State.[1056] However the words were deleted and the phrases are identical with the terms of geographical scope of application in Art 5.1. However, it creates conflicts with another provision dealing with the defences and limits of maritime performing parties. Art 4.1 provides an extended protection to the maritime performing party or employees of the maritime performing party whether claim in contract, in tort or otherwise. This provision does not have restriction of geographical connections for the maritime performing party which may create a problem whether the defences and limits under the Rotterdam Rules are available to maritime performing parties who do not receive, deliver or perform in a Contracting State. One possibility is that Art 4.1 entitles all maritime performing parties to the defences and limitation of liability under the Rotterdam Rules irrespective of a connection with a Contracting State which makes Art 19.1

[1055] UNCITRAL Working Group III (Transport Law), 'Transport Law: Preparation of A Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (3-13 April 2006) 17th session UN Doc. A/CN.9/WG.III/WP.61, para. 45.
[1056] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Seventeenth Session,' (19 June-7 July 2006) 39th session UN Doc. A/CN.9/594, para. 142.

redundant.[1057] Another possibility is that Art 4.1 is limited by Art 19.1 that only the maritime performing party receives or delivers in a Contracting State or performs in a port of a Contracting State can have the defences and limits of liability of the Rotterdam Rules.[1058] Given the draft history of liability of the performing party, the second interpretation is preferable. During the preparation, Art 4.1 was under the heading non-contractual claims which aimed to ensure that the Rotterdam Rules was not circumvented by a party taking a non-contractual claim.[1059] The purpose was distinct from Art 19 which aims to extend the himalaya protection. The second interpretation is more likely taken by the drafters. In certain circumstances, the maritime performing party will be liable no matter which interpretation method is adopted. the maritime performing party without a connection with a Contracting State could still has defences and limits of liability of the Rotterdam Rules by means of a Himalaya clause even if Art 4.1 does not.[1060]

As for the occurrence of the loss of or damage to the goods or delay, the Working Group decided that the maritime performing party should undertake the same standard of liability as the contracting carrier only if it took place in his custody and at any other time to the extent that he was

[1057] Theodora Nikaki, 'The Statutory Himalaya Type Protection under the Rotterdam Rules: Capable of Filling the Gaps?' [2009] JBL 403, 411.
[1058] Nicholas Bond, 'The Maritime Performing Party and the Scope of the Rotterdam Rules' (2014) 28 ANZ Mar L J 95, 113.
[1059] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Tenth Session' (7 October 2002) 36th session UN Doc. A/CN.9/525, para. 101.
[1060] Nicholas Bond, 'The Maritime Performing Party and the Scope of the Rotterdam Rules' (2014) 28 ANZ Mar L J 95, 113.

participating in the performance of the contract of carriage.[1061] Then the Working Group modified the phrase 'in custody' by insert that 'during the period between the arrival of the goods at the port of loading and the discharge of the goods at the port of discharge' before the sentence 'when the maritime performing party has the custody of the goods'.[1062] This change corresponds to the maritime element in the definition of the maritime performing party.

8.3.3.3 Joint Liability

Another change is that the carrier and the maritime performing party's liability for the loss of or damage to the goods or delay in delivery are several but only up to the limits provided for under the Rotterdam Rules.[1063] It implies that the cargo claimant has the right to pursue his cargo claim to the full amount against each suable defendant but can recover the damage compensation only once. The joint liability was proposed in the Hamburg Rules that the liability of the carrier and the actual carrier are joint and several.[1064]

8.4 Limitation of Liability

Chapter 12 is headed as 'limitation of liability' and contains three provisions addressing the limits of liability for loss, damage or delay and the situation where the right to limit will be deprived. The system of limited liability

[1061] UNCITRAL, 'Report of Working Group III (Transport Law) on the Work of its Twelfth Session' (6-17 October 2003) 37th session UN Doc. A/CN.9/544, paras. 161 and 162.
[1062] This draft article was maintained in the final context. UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December 2005) 16th session UN Doc. A/CN.9/WG.III/WP 56, Art 56.
[1063] Art 20.1.
[1064] Art 10.4.

profits to both carrier and cargo interests and is normally contained in international conventions governing every mode of transport.[1065] The persons who are entitled to limit liability under the Rotterdam Rules include the carrier, a maritime performing party, the seamen and the employees of the carrier or of a maritime performing party.[1066]

The situations where the carrier could claim limitation have been changed. In the Hague and the Hague-Visby Rules, the limits are available when the loss of or damage to the goods is to or 'in connection with' the goods.[1067] The words 'in connection with' is broad to cover the loss of or damage to the goods resulting from breach of the carrier's obligations under Art III and delay in delivery where it results from such breach.[1068] But misdelivery is not covered by the Hague and Hague-Visby Rules due to the temporal scope of application. In the Hamburg Rules and the MT Convention,[1069] the carrier could limit his liability when the loss 'resulted from' loss of or damage to the goods. Despite of differences in expression, the claims covered should be same except that the Hamburg Rules and the MT Convention allow the carrier to claim limitation for misdelivery. In the Rotterdam Rules, the carrier's right to limit his liability 'for breaches of its obligations' and it was considered that such phrase made the references 'to

[1065] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) paras. 5.218 and 5.219.
[1066] Art 4.
[1067] Art IV (5).
[1068] Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.256.
[1069] Art 6 (1)(a) of the Hamburg Rules and Art 18 of the MT Convention.

or in connection with goods' superfluous.[1070] The deliberate change extends the scopes of claims subject to limitation to includes misdelivery.[1071] Furthermore, the claims for delay in Art 60 are divided into two kinds: physical loss of or damage to the goods due to delay and economic loss due to delay and the calculation methods are different which will be discussed below.

The Rotterdam Rules adopt the two bases to calculate the limit: package or shipping unit and weight. The Rotterdam Rules use the term 'shipping unit' rather than 'unit' which is consistent with the English Court's interpretation of unit in the Hague and Hague-Visby Rules.[1072] In American cases, unit in the Hague and Hague-Visby Rules is construed as 'freight unit' which is rejected by the English courts. Art 59.2 is a paragraph to define what constitutes a package or shipping unit in container transport and the language mirrors Art IV rule 5 (c) of the Hague-Visby Rules. The enumeration on contract particulars determines the package or shipping unit for limitation under Art 59 and in English law, the construction with regard to enumeration in Art IV rule 5 of the Hague-Visby Rules should be followed. In an example, the description '1 container said to contain 206 frozen tuna loins and 406 bags of other parts' is satisfied the requirement

[1070] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December April 2005) 16th session UN Doc. A/CN.9/WG.III/WP.56, footnote 212.
[1071] Steven Girvin, 'The Right of the Carrier to Exclude and Limit Liability' in Rhidian D Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - the Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 130.
[1072] *Kyokuyo Co Ltd v AP Moller Maersk A/S* [2017] EWCA Civ 778.

in Art 59 'package or shipping unit…enumerated in contract particulars as packed' and consists of 206 shipping units and 460 packages.[1073]

The easy way to compare the level of limitation of liability is the monetary amount. In comparison with the previous three international maritime conventions and the MT Convention, the amount of package limitation for loss or damage in the Rotterdam Rules has generally increased to a relative high level by reason of Art 59, achieving 875 SDRs per package or unit and 3 SDRs per kilogram respectively.[1074] Like the Hamburg Rules and the MT Convention, the Rotterdam Rules provides the limit for economic loss due to delay.[1075] The maximum amounts are identical which should not be more than two and one-half times the freight payable on the goods delayed.[1076] In other words, this method of calculation for the limit of economic loss due to delay in sea carriage has been well recognised and should be followed without amendment. The calculation for physical loss of or damage to the goods due to delay is in accordance with Art 22.

There was an argument that the Rotterdam Rules should adopt an appropriate level of limitation since the scope might extend to multimodal transport and the amounts of limits in other international unimodal conventions are dramatically higher than the limits of the Hague-Visby Rules, for example 8.33 SDRs per kilogram of lost or damaged goods in the

[1073] The example is based on the facts in *Kyokuyo Co Ltd v AP Moller Maersk A/S* [2017] EWCA Civ 778.
[1074] M A Huybrechts, 'Package Limitation as an Essential Feature of the Modern Maritime Transport Treaties: A Critical Analysis' in Rhidian D Thomas (ed.), *The Carriage of Goods by Sea under the Rotterdam Rules* (Informa 2010) para. 7.17.
[1075] Art 6 (1)(b) of the Hamburg Rules and Art 18.4 of the MT Convention.
[1076] Art 60 of the Rotterdam Rules.

CMR and 17 SDRs of gross mass short in the COTIF-CIM. However, the opponents held that the level of the Hague-Visby Rules had been proven to be satisfactory and the modification would radically alter the existing liability system. The final consequence is the product of compromise that the limits are little higher than the Hamburg Rules and subject to double limitation in Arts 59 (1) and 60.[1077] In container transport, the packages limitation under the Rotterdam Rules could be much lower than the weight-based calculation in the CMR and COTIF-CIM. If the bill of lading stated a total weight of 18,740 kg for 260 tuna loins, the figure for package limitation under the Rotterdam Rules is much lower than the weight limitation in the CMR, 156104.2 SDRs and 180250 SDRs respectively.[1078] Another relative issue is the loss of the carrier's right to limit his liability provided in Art 61. The limitation can be broken if the claimant could prove that the loss of or damage to the goods or delay was contributable to a personal action or omission with intent or recklessness and with the knowledge that he would probably result. The phrases in previous maritime conventions are similar and the act or omission of carrier in Art IV r 5 (e) of the Hague-Visby Rules refers to the act or omission of the carrier himself which does not include his agents and servants.[1079] The Rotterdam Rules add the word 'personal' to indicate that it requires an act or omission by

[1077] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) para. 5.234.
[1078] It is the facts of *Kyokuyo Co Ltd v AP Moller Maersk A/S* [2017] EWCA Civ 778.
[1079] It was held in *Browner International Ltd v Monarch Shipping Co Ltd (The 'European Enterprise')* [1989] 2 Lloyd's Rep 185 (QB). Art 8 of the Hamburg Rules.

someone who can be identified as carrier and misconduct by an agent or employee would be unlikely to break the limits of the carrier's liability but could deprive the right to limit of the agent or employee.[1080] Besides, the claimant needs to prove not only the intent or recklessness with the knowledge but also the correspondent consequential damages. [1081] Therefore, the ceiling to broke the limitation of liability is quite high which to some extent, increases the predictability of the standard of the carrier's liability.

8.5 Recommendation for the Rotterdam Rules

The previous sections in this chapter illustrate how the Rotterdam Rules were draft in relation to the carrier's liability regime in the view of international multimodal transport by containers and how to achieve consensuses. This section will focus on discussion how these provisions adjust to container transport and if there are problems, what suggestions the author could make.

The application to international multimodal transport is approved at the beginning of preparatory work. One distinguish feature is the so-called limited liability approach in the Rotterdam which is specifically designed for international multimodal transport and two provisions (Arts 26 and 82) consisting of this approach will be discussed in the first sub-section. Then,

[1080] Stephen Girvin, 'The Right of the Carrier to Exclude and Limit Liability' in Rhidian D Thomas (ed.), *A New Convention for the Carriage of Goods by Sea - the Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext 2009) 137.

[1081] Michael F Sturley and others, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) paras. 5.256-8.

the wide scope of application to international multimodal transport is reflected in many aspects and the definitions of the contract of carriage, the carrier, the performing party and the maritime performing party are the fundament. The carrier's liability will be especially considered from the aspect of the multimodal transport operator and some provisions affecting container transport will be discussed in depth. There are some developments after the Rotterdam Rules and in this section, the author will emphases on how the Rotterdam Rules accommodate these challenges and propose suggestions.

8.5.1 Limited Liability Approach in the Rotterdam Rules

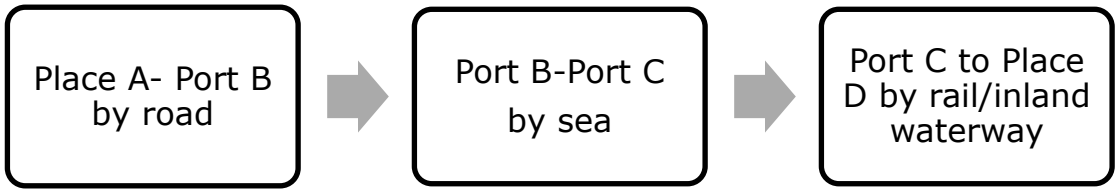
The limited liability approach is briefly explained in section 6.2.1.3 to show what modified liability system is adopted in practice. In this section, the application of Arts 26 and 82 will be discussed in a hypothesis for international multimodal transport below, especially from the aspect of the influences of containers. Then, if the author thinks these two provisions could be improved by some changes, the author's proposals with regard to Arts 26 and 82 will be presented.

8.5.1.1 Art 82

The Rotterdam Rules adopt a limited network approach to regulate the multimodal transport operator's liability which consists of Arts 26 and 82. Art 26 deals with the localised damage and Art 82 deals with general conflicts with other international unimodal conventions including the CMR, COTIF-CIM and CMNI. The difference is that Art 82 addresses the conflicts no matter whether the damage is localised or not and this provision gives

priority to these conventions when they can cover the whole international multimodal transport under special combinations of two different modes of transport. But from the perspective of international multimodal transport by containers, the application of Art 82 is further limited.

The pre-condition of Art 26 is the loss of or damage to the goods or event causing delay in delivery occurs solely before loading or after discharge. It is clear to explain which convention could apply by virtue of Arts 26 and 82 under several hypothetical situations based on the carriage in the following chart.



In case (a), where both the first and the last carriages are domestic, the liability of the multimodal transport operator is governed by the Rotterdam Rules from place A to place D provided the geographical condition is satisfied. Arts 26 and 82 are inapplicable because there is no international convention governing carriage by other modes. And according to the limited definition of international multimodal transport in thesis,[1082] case (a) is not the object of thesis.

Case (b) is either the first or the last carriage is international. according to Art 26, (i) if the loss of or damage to the goods or event causing delay in delivery occurs solely at carriage by road, rail or inland waterway and accordingly the CMR, the COTIF-CIM or the CMNI could apply, the liability

[1082] See the restriction of dual internationality in section 1.2 above.

of the multimodal transport operator is governed by the CMR, the COTIF-CIM or the CMNI respectively; (ii) if the loss of or damage to the goods or event causing delay in delivery cannot be localised to one of these international unimodal legs, the Rotterdam Rules apply to the multimodal transport operator.

However, Art 82 states that the CMR, the COTIF-CIM or the CMNI can supersede the Rotterdam Rules under special types of international multimodal transport regardless whether the occurrence can be established to a particular stage or not. Nevertheless, the author thinks Art 82 is superfluous to some extent from the perspective of international multimodal transport by containers. Art 82 (a) is for international air conventions which are not discussed due to the object of the thesis.[1083]

For Art 82 (b), the CMR supersedes the Rotterdam Rules if the goods remain loaded on the vehicle carried on board a ship, namely the RORO transport.[1084] Art 2.1 of the CMR provides that the CMR applies to the entire RORO transport provided all pre-requisites were met. Professor Anthony Diamond argues that Art 82 (b) only prevents the Rotterdam Rules from applying to a part of the RORO transport for the period while the goods remain loaded on a vehicle carried on board a ship.[1085] In other words, he thinks that the Rotterdam Rules can apply to a period of time when the goods are not loaded on vehicle in the RORO transport. In the author's opinion, his argument misunderstands the meaning of RORO transport

[1083] See the restricted definition of 'mode of transport' in section 1.2.
[1084] The RORO transport is in Art 2.1 of the CMR which is discussed in section 2.2.2.
[1085] Anthony Diamond, 'The Rotterdam Rules' [2009] LMCLQ 445, 454.

because according to the CMR, the RORO transport means the goods are unloaded from the vehicle during the whole carriage. If the goods are unloaded at any point, it is not the RORO transport. Therefore, there is no way that the Rotterdam Rules can apply to a period of time when the goods are unloaded from the vehicle in the RORO transport. However, this special type of transportation is not suitable for standard containers. If for special containers like trailers, the application is possible. In international multimodal transport, the containers are widely used and Art 82 (b) focus on a unique type of international multimodal transport which does not apply to general containers. In order to cover international multimodal transport to the largest level, the conflict provision should not exclude the application of container transport. Art 82 (b) does not reduce any conflict with the CMR from the perspective of international multimodal transport by containers. Therefore, in case (b) carried by containers, the application of the CMR is unlikely to have priority over the Rotterdam Rules by virtue of Art 82 (b).

With regard to Art 82 (c), it provides that the COTIR-CIM has priority when carriage of goods by sea is supplement to international carriage by rail which is consistent with Art 1.3 of the COTIF-CIM. However, by virtue of Art 1.4 of the COTIF-CIM, the list of line services consisting of rail and sea are very limited.[1086] Art 82 (c) is necessary when the Rotterdam Rules apply to those routes. Some comments focus on whether a sea carriage could be the supplement carriage by rail in Art 1.3. The problem seems to be pure

[1086] See < http://otif.org/fileadmin/new/3-Reference-Text/3E-Railway-Contract-Law/3E3-CIM-Listes-of-maritimes-and-inalnd-waterway/Cartes_finales_CIM_24.04.2017.pdf> accessed 20 Sep. 2020

academic because in practice, the sea carriage as a supplement of rail carriage is restricted to certain geographical areas and the COTIF has listed clearly.

As for Art 82 (d), the CMNI applies over the Rotterdam Rules if the goods are carriage by sea and inland waterway without transhipment. But according to Art 1.2 of the CMNI, even if there is no transhipment, the Rotterdam Rules will apply if (a) a maritime bill of lading is issued or (b) the distance of sea carriage is longer. Thus, the Rotterdam Rules will ultimately apply after following Art 82 (d). In order to avoid trouble to check Art 1.2 of the CMNI, Art 82 (d) should be amended by reference to the CMNI. Although the distance criterion appears to be contrast with the basis of contract of carriage which is generally use to determine the scope of application, the Rotterdam Rules should use the same language to avoid conflict.

8.5.1.1.1 Suggestion for Art 82

In summary, Art 82 (a) will not be discussed because air transport is not included for the object of this thesis, namely international multimodal transport by containers. Art 82 (b) had little impact on container transport because the priority of the CMR will only apply to a certain type of transport which seems unlikely to involve general containers. Thus there is no need for change under Art 82 (b). Art 82 (c) is for the COTIF-CIM and it can apply to containers. However, the application has rather geographical limits and therefore, in comparison with the total trade of containers, the influence of Art 82 (c) can be neglected. There is only one paragraph in Art

82 the author thinks may need to change. In order to be consistent with the CMNI, the proposed change in relation to Art 82 (d) is to add: '**However**, this Convention should prevail if (a) a maritime bill of lading is issued or (b) the distance of sea carriage is longer'.

8.5.1.2 Art 26

The author think that the pre-requisite of 'solely occurrence' of the loss of or damage to the goods or event causing delay in delivery in other international unimodal legs in Art 26 is justified because of the following reasons. Firstly, this requirement indicates the application of the Rotterdam Rules and direct to other international unimodal instruments when they are applicable. If the multimodal transport contract falls within the definition of the contract of carriage under the Rotterdam Rules, the liability of the multimodal transport operator is governed the Rotterdam Rules. To exclude the application of the Rotterdam Rules, it is reasonable that the applications of other international unimodal conventions should be clear. Moreover, the occurrence of loss of or damage to the goods or eventing causing delay in delivery in non-sea carriage is a factual issue and proving the 'sole occurrence' is to ensure the application of the Rotterdam Rules to the largest extent. Despite that Art 26 does not mention who bears the burden to prove the sole occurrence, the logical method is the person who wants to claim the application of other international instruments. Considering the multimodal transport operator is liable for non-localised damage according to the Rotterdam Rules, it is likely that the cargo claimant has incentive to rely on other international instruments to supersede the Rotterdam Rules.

The phrase 'international instruments' includes regional regulations in the future which increases flexibility from the linguistic aspect.

The 'limited' network approach also reflects in Art 26 (b) that only provisions of other international unimodal instruments providing for three issues, the liability of the carrier, limitation of liability and time for suit can prevail the Rotterdam Rules. This restriction achieve great support at the initial stage of the Rotterdam Rules. The author believes that the above three matters in other international unimodal instruments are fundamental to the liability of the multimodal transport operator and should apply. Other provisions which may have indirect influence such as documents and jurisdiction are specially designed for unique unimodal transport rather than an international multimodal transport covered by the Rotterdam Rules. Even for the document issue, the multimodal transport operator would prefer to issue a multimodal transport document rather than a special document used in one particular mode of transport (especially inland transport) such as the consignment note to cover international multimodal transport. Therefore, the author thinks the limited matters in the limited network approach is satisfied and there is no need to apply other provisions to solve most conflict issues in practice.

Another condition to apply other international unimodal instruments would apply is the shipper has a direct and separate contract with the carrier with respect to the particular stage.[1087] In case (b) mentioned above, the contract of carriage by road, rail or inland waterway is not made 'directly'

[1087] Art 26 (a).

to the shipper but normally by the multimodal transport operator who acts as an agent of the shipper. If the phrase 'direct and separate contract' is construed strictly, the shipper has to make a direct and separate contract with every actual carrier who performs a specific stage. This interpretation does not conform to the definition of 'international multimodal transport' which requires only one multimodal transport contract is made between the shipper and the multimodal transport operator. Besides, it is not in line with the practice in international multimodal transport by containers that the shipper is unaware of and not interested in who actually perform the segments. Thus, 'a direct and separate contract' should be interpreted broadly as a hypothetical contract made between the multimodal transport operator on behalf of the shipper and the carrier in respect of the particular stage in which the loss of or damage of the goods or event causing delay occurs. The construction is more explicit in proposed Art 26 (a) as below.

Art 26 (c) aims to emphasise the mandatory nature of those provisions under international instruments. There should be no much doubt about this requirement because if applicable provisions of international instruments can be departed from the contract, either the multimodal transport contract or the Rotterdam Rules can apply. And it is unnecessary to give priority to those international instruments.

8.5.1.2.1 Suggestion

The author believes that in order to clarify the hypothetical contract between the shipper and the performing parties in respect of particular stages, 8.5.1.2 Art 26 (a) should add the phrase 'or an agent of the shipper'

after the shipper. In that way, it will cover the situation where the multimodal transport operator concludes separate contracts for non-sea carriages with his performing parties. Overall, the limited network approach in the Rotterdam Rules is feasible in international multimodal transport by containers and there is little changes should be made as proposed.

8.5.2 Scope of application

8.5.2.1 Contract of Carriage in Art 1.1

The Rotterdam Rules can apply to a multimodal transport contract if it falls within the definition of contract of carriage in Art 1.1. The contract of carriage is based on door-to-door transport and needs to provide for sea carriage. The requirement of a sea leg corresponds to the fact that the majority of containerised cargo carried in international multimodal transport involves an international sea leg.[1088] Although that international multimodal transport in the MT Convention only requires the use of at least two different modes of transport without a mention of sea carriage particularly, worldwide container trade involving a sea carriage is common and the requirement of a sea carriage in the definition of the contract of carriage does not restrict the application of the Rotterdam Rules to international multimodal transport by containers. Besides, even if containers carried internationally by non-sea carriage which is rare, there are international conventions covering such unimodal transport including

[1088] World container port throughout in 2018 (793.26 TEUs) is about 5 times of global container trade (152 TEUs) which indicates the importance of sea carriage for containerised cargo. See UNCTAD, 'Review of Maritime Transport 2019' (UNCTAD/RMT/2019) Figure 1.5 and Table 1.11.

the CMR, the COTIF-CIM and the CMNI provided such segments are international.[1089] Despite that the Rotterdam Rules adopt the so-called maritime-plus approach which is literally narrower than the MT Convention, the author thinks it is adequate and legitimate for international multimodal transport by containers in practice.

The problem arising from the definition of the contract of carriage in the Rotterdam Rules is how to determine whether the contract of carriage provides for a sea carriage. The language of Art 1.1 is not clear. The author approves of the decision of *Quantum Co Inc and Others v Plane Trucking Ltd and Another*[1090] that both the contractual terms and the actual carriage by sea need to be taken into consideration because of the following reasons. Firstly, the multimodal transport contract normally gives the multimodal transport operator the liberty to choose how to perform without specifying the modes of transport and whether the multimodal transport contracts provides for a sea carriage is unclear at the time when the contract is concluded.[1091] Even though the sea carriage can be implied by the entries of port of loading and port of discharge on the transport document, the absence of such information does not affect the validity of the transport document in the Rotterdam Rules.[1092] If the phrase 'provide for' is

[1089] Containers carried by international multimodal transport without a sea leg can apply to these conventions either (a) the carriage falls within certain types of international multimodal transport by virtue of provisions and these conventions apply to the whole multimodal transport or (b) these conventions apply separately to each mode of transport. In either way, there is no need for the Rotterdam Rules.
[1090] [2002] EWCA Civ 350.
[1091] See BIMCO MULTIDOC 2016 term 6.1: the multimodal transport operator is entitled to perform the transport in any reasonable manner and by any reasonable means, methods and routes.
[1092] Art 39.

interpreted literally and needs to specify by contractual terms, many multimodal transport contracts do not fall within the definition of contract of carriage under Art 1.1 of the Rotterdam Rules which are inconsistent with practice. Secondly, apart from Art 1, the liability of the carrier under the Rotterdam Rules attaches to actual carriage by sea. For example, the special obligations of the carrier under sea voyage in Art 14 can only be triggered when an actual sea leg is involved. Therefore, it is consistent with the object of the Rotterdam Rules if the actual sea carriage is considered to determine whether the multimodal transport contract is within the definition of contract of carriage under Art 1.1 of the Rotterdam Rules.

8.5.2.1.1 Suggestion

In order to clarify how to interpret the contract of carriage 'provides for carriage by sea', the author suggests Art 1.1 should add the following sentences:

Proposed Art 1.1: **add** 'the contract of carriage provides for carriage by sea if (a) the carriage by sea is unspecified and (b) a sea carriage is actually performed'.

8.5.2.2 Geographical Scopes of Application

As for geographical scope, there are two factors: internationality of the carriage and connection with a Contracting State. The internationality of the whole transit is a common condition under the MT Convention and the Rotterdam Rules. The internationality requirement for the entire transport is necessary but the Rotterdam Rules add one more condition, the internationality of the sea carriage. The author thinks that the dual

internationality requirement in Art 5 will not cause controversy because when an international sea carriage is involved, the internationality of the whole transit is subsequently satisfied. The connection with a Contracting State is a necessary condition under all carriage conventions. The MT Convention needs either the place for the taking in charge of the goods or the place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State. But the expression 'taking in charge of the goods by the multimodal transport operator' is inaccurate. When the multimodal transport operator physically performs a part of the transit, the place for taking in charge of goods may not be the place of receipt of the goods. The place of receipt in a Contracting Sate in Art 5.1 of the Rotterdam Rules is more appropriate. The Rotterdam Rules have four connection factors and any of them in a Contracting State will trigger the application. It is unlikely that the place of receipt, the port of loading, the port of discharge and the place of delivery are in four different Contracting States. Therefore, although four factors widen the scope technically, the practical influence on the parties of multimodal transport contract is far less. In the multimodal transport contract, the place of receipt and the place of delivery are normally confirmed and the port of loading and the port of discharge are changeable at the time when the contract is concluded. If the ports of loading and discharge are in Contracting States but the place of receipt and the place of delivery are not, the question is whether the application of the Rotterdam Rules is beyond the intention of the parties. In the author's view, the

answer is No because an international sea carriage is mandatorily required under Arts 1.1 and 5 of the Rotterdam Rules. The result that the Rotterdam Rules apply when the port of loading or port of discharge is in a Contracting State is consistent with these pre-requisites. Besides, although the port of loading and the port of discharge are changeable, States in which they are located in are normally predictable for parties of the multimodal transport contract which reduces uncertainty. The author believes that **Art 5** of the Rotterdam Rules do not need change.

8.5.2.3 Temporal Scope of Application

The period of the carrier's liability in Art 12 corresponds to the definition of contract of carriage in Art 1.1 that the carrier is liable for the entire carriage under the Rotterdam Rules but allows a flexible reservation to maritime transport. The last issue affects the application of the Rotterdam Rules is that certain types of contracts of carriage in trade are excluded. The charter parties and the contract for the use of a ship are traditionally exceptions to the contract of carriage because the subject of these contract is not carriage of goods and they should be excluded in international multimodal transport. although there is only one multimodal transport contract, the Rotterdam Rules can apply to the maritime performing party which may be a holder of transport document issued by virtue of the above excluded contracts. For example, the multimodal transport operator subcontracts the sea carriage to A who subcontracts to B. If A charters a vessel from C and issues a transport document to B by virtue of the charter party made between A and C, the Rotterdam Rules can apply to the contract of carriage between

A and B. The inclusion of the contract of carriage between A and B is consistent with the notion of maritime performing party which will be discussed below. Therefore, the contracts in Art 6 fits with international multimodal transport.

8.5.2.4 Summary

It can be concluded that with respect of scope of application, the provisions with regard to the geographical and temporal scopes of application of the Rotterdam Rules are clear and suitable for international multimodal transport by containers. Thus, Arts 5 and 12 could apply to container carrier in international multimodal transport and the author thinks these two articles are operative without amendment. As for the definition of the contract of carriage in Art 1.1, the author recommends to amend it as above.

8.5.3 Liability of the Multimodal Transport Operator

The Rotterdam Rules can apply to the multimodal transport operator who is the contractual carrier in the multimodal transport contract providing for sea carriage. Compared with the MT Convention, the substantial change is that the liability of the multimodal transport operator under the Rotterdam Rules have the feature of sea carrier as in maritime transport. There are multiple provisions in relation with the multimodal transport operator's liability regime including the obligations, basis of liability, exceptions and burden of proof. The maritime feature reflects in almost every aspect. From the aspect of obligations of the multimodal transport operator, the Rotterdam Rules consider the influence of containers on seaworthiness and deck cargo. Furthermore, there is a recent global mandatory requirement

for containers impacting on the weight description of the multimodal transport document. Generally, the many characteristics of the liability regime of the multimodal transport operator as a sea carrier under the Rotterdam Rules could be a strong support for wide acceptance due to the following reasons. Firstly, the high similarity of the multimodal transport operator's liability regime to the liability framework of the sea carrier fits the important role of sea carriage in international multimodal transport by containers. Besides, the multimodal transport operator being liable as the sea carrier has a relatively low level of liability in comparison with the liabilities of carriers in other international unimodal conventions. Therefore, it is arguable that the Rotterdam Rules impose an acceptable level of liability on the international multimodal transport operator in general. Secondly, the Rotterdam Rules model the language of the Hague and Hague-Visby Rules and due to the precedents, these provisions with respect of the carrier's liability are easier to be interpreted and followed in English law. Thirdly, the Rotterdam Rules notice the impact of containers used in international multimodal transport, especially in sea carriage. Therefore, the Rotterdam Rules consider the legal and practical developments due to containers in recent years and make innovative changes in relevant matters.

8.5.3.1 Basis of liability, Exceptions and Burden of proof in Art 17

Art 17 provides the basic liability principle that the multimodal transport operator is liable for the loss of or damage to the goods or delay in delivery unless he can prove either the fault on his part or one of exceptions

contributes to the loss, damage or delay. The presumed fault principle[1093] has been adopt in earlier conventions for carriage of goods and the main differences between three difference maritime conventions lie on defences which can directly illustrate the standard of the carrier's liability.

The long list in Art 17.3 of the Rotterdam Rules combines Art IV rule 2 of the Hague and Hague-Visby Rules with some common defences in the CMR and COTIF-CIM. Although they are not completely identical, the exceptions under the Rotterdam Rules intend to suit for the multimodal transport operator to the largest extent which should be retained. The MT Convention provides a rather restrict liability for the multimodal transport operator without a list of exceptions which has been criticised as a substantial reason why it did not achieve support from the shipping industry. The regression of the liability regime under the Hague-Visby Rules could be seen as a concession but a workable liability regime of the multimodal transport operator should take the sea carrier's liability framework into consideration. Otherwise, an ideal liability regime of the multimodal transport operator which is never accepted by industries is meaningless.

Art 17 states several stages for burden of proof which has been established in English law in relation with carriage of goods by sea. Art 17.5 provides the onus of proof on each party when there is a breach of seaworthiness obligation which follows the earlier steps. However, the language of Art 17.5 (a) can be simplified because it just repeats Art 14.

[1093] The presumed fault is suggested by Wright J in *Gosse Millerd v Canadian Government Merchant Marine (The 'Canadian Highlander')* [1927] 2 KB 432 (KB) with regard to the carrier's liability in the Hague and Hague-Visby Rules. See section 3.2.1 above.

8.5.3.1.1 Suggestion

The basis of liability in Art 17.1 is well accepted by international unimodal conventions and there should be no question about this sub-paragraph. The exceptions in Art 17.3 combines the defences in conventions regulating the water carriage and inland carriage. Although it is lengthy, the author thinks the list does not need to change. As for the burden of proof, Arts 17.4 and 17.5 mainly adopt the English courts' approach and provide express rules. There is one suggestion in relation to Art 17.5 (a) and it is purely linguistic. The author's suggestion is in below.

Proposed Art 17.5 (a): if the claimant proves that the loss of or damage to the goods or delay in delivery was or was probable caused by or contributed to that **the carrier did not comply with subparagraphs (a), (b) and (c) of Art 14;** and (b) the carrier is unable to prove either that **none of his breach referred to in subparagraph (a) of this article caused** the loss of or damage to the goods or delay in delivery or (b) it complied with his obligation to exercise due diligence.

8.5.3.2 Obligations

8.5.3.2.1 Seaworthiness

Another progress of Rotterdam Rules is to retain the unique obligation of seaworthiness for sea voyage in Art 14 which is well-established since the Hague Rules. The Rotterdam Rules also make changes including the extended period and a express requirement for containers to accommodate to legal and technical developments. Although the seaworthiness of containers can be implied from the provisions in previous maritime

conventions, the new phrase 'container supplied by the carrier' in Art 14 (c) clearly points that the containers should be cargo-seaworthy when they are supplied by the carrier. Another matter arises in international multimodal transport is if containers are supplied by a performing party and damage occurs due to his negligent, whether the multimodal transport operator should be regarded as in breach of seaworthiness obligation. Given that the seaworthiness obligation is non-delegate under the Hague and the Hague-Visby Rules, the carrier is liable for any breach of this obligation when the vessel comes into his control. If containers are supplied by a performing party, according to Art 12 of the Rotterdam Rules, the period of liability starts when a performing party receives the goods. By following the reasoning, the multimodal transport operator should be liable when a performing party supplies containers negligently. The omission of a performing party causes debates in relation to core obligations of the maritime performing party which will be discussed below.

8.5.3.2.1.1 Suggestion

In order to be sure that the carrier is liable for the negligence of a performing party on the supplement of the unseaworthiness container, the author proposes that Art 14 (c) should add the phrase as below:

Proposed Art 14 (c): make and keep the holds and all other parts of the ship in which the goods are carried and any containers supplied by the carrier or **a performing party** in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

8.5.3.2.2 Deck Carriage

In carriage of goods by sea, the deck carriage without authorisation constitutes a breach of contract. However, containers nowadays are carried on deck, especially when a container ship is used. The Hague and Hague-Visby Rules do not apply to deck cargo assuming deck carriage is actually performed and stated on the bill of lading. Consequently, many container shipments are excluded. As for international multimodal transport by containers, the authorised deck carriage should have a broad scope to cover container transport and the Rotterdam Rules which models the Hamburg Rules widen the application to containers in respect of deck carriage. Furthermore, the Rotterdam Rules regulate the liability of the multimodal transport operator for authorised deck carriage by virtue of Art 25 but this provision needs modification.

8.5.3.2.2.1 Art 25.1

The Rotterdam Rules permit deck carriage under three situations in Art 25.1 and sub-paragraph (b) is specifically made for containerised goods. Given that three sub-paragraphs are not exclusive applicable, sub-paraph (b) applies only when the deck carriage does not fall within sub-paraphs (a) and (c). Art 25.1 (a) provides the first authorised deck carriage required by law and the rationale is that neither party has a choice of stowing containers and such deck carriage is sanctioned by law. Art 25.1 (a) should not raise any problem and does not need modification.

Another common authorised deck carriage by containers is that such carriage is in accordance with multimodal transport contract, or customs or usages or practices of trade under Art 25.1 (c). However, although *Volcafe*

Ltd and Others v Compania Sud Americana de Vapores SA[1094] is not about deck carriage, the opinion of the House of Lords regarding whether one layer of containers is the shipping practice may be useful to indicate the requirements of being a practice of trade.

One easier way to authorise containers to be carried on deck in international multimodal transport is the multimodal transport contract. But the phrase 'in accordance with' Art 25.1 (c) does not clearly state how the multimodal transport contract should provide for deck carriage by containers. In international multimodal transport, the parties normally do not know whether a particular container would be carried on deck when the multimodal transport contract is concluded. One problem arises whether the deck carriage is in accordance with the multimodal transport contract when the multimodal transport operator has the liberty to stow containers on or below deck. Is a liberty clause in the multimodal transport contract qualified or should the multimodal transport document state such deck Carriage accordingly? Art 25.4 requires the multimodal transport document to state that the goods *may* be carried on deck when it is used to against a third party. In other words, if the claim does not involve a third party, the multimodal transport operator could carry containers on deck by virtue of a broad liberty clause under Art 25.1 (c). If the multimodal transport document is against a third party, the document should also state that the goods may be carried on deck. However, Art I (c) of the Hague and the Hague-Visby Rules requires that the contract of carriage should state the

[1094] [2018] UKHL 61.

goods *as* carried on deck and the English courts held that a mere liberty clause was not a statement because it did not indicate the goods were shipped on deck.[1095] But since Art 25.4 only needs the transport document to state that the goods *may* be carried on deck, it is arguable that a liberty clause in the multimodal transport document is qualified because it provides for the multimodal transport operator's liberty that there might be deck cargo.

Another common statement is the master's remark 'all cargo carried on deck at shipper's risk' on the face of the transport document.[1096] The English courts held that such remark was to state the fact how the goods are carried which was a sufficient on-deck statement under Art I (c) of the Hague and Hague-Visby Rules. If the liberty clause is qualified to provide for that there might be deck cargo, such master's remark should be no doubt. Art 25.1 (c) could apply if there is a liberty clause to stow on deck or a master remark in the multimodal transport document.

If the case does not fall within Art 25.1 (a) or (c), deck carriage by containers can be authorised by Art 25.1 (b) if (a) containers suit for the deck carriage and (b) the decks specifically fit to carry containers.[1097] The first condition can be implied from cargoworthiness obligation in Art 14 (c) that the multimodal transport operator should ensure containers fit for deck carriage regardless who supplies them. This condition was added for

[1095] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) LD* [1953] 2 QB 295 (QB).
[1096] *Sideridraulic System Spa and Another v BBC Chartering & Logistic GMBH & CO KG (The 'BBC Greenland')* [2011] EWHC 3106 (Comm).
[1097] These two conditions should be met simultaneously.

vehicles such as semi-trucks and trailers not for containers which can be omitted. The second condition envisage situations in which the goods are carried on a special type of vessels, the container ship which are specifically built to carry containers. In comparison with general cargo ships, container ships is the long-term trend and Art 25.1 (b) covers cases in which the multimodal transport operator has great flexibility to choose stowing containers on deck without contractual agreements.

8.5.3.2.2.2 Art 25.2

But Art 25.2 provides different liabilities for two different situations. By virtue of the first sentence of Art 25.2, the multimodal transport operator is liable for authorised deck carriage by containers pursuant to Art 17 which means he can escape liability if he proves the loss of or damage to the goods or delay in delivery arising from such deck carriage is caused either by the fault on the part of the multimodal transport operator or by the exceptions in Art 17.3.[1098] The first sentence aims to treat authorised deck carriage as general carriage in comparison with the strict liability for authorised deck carriage by virtue of Art 25.3. The main problem is in the second paragraph of Art 25.2 which creates a special defence 'special risks involved in deck carriage' for cases under Art 25.1 (b).

For the loss of or damage to the goods or delay in delivery caused by special risks involved in deck carriage, the multimodal transport operator is not liable for a case under Art 25.1 (a) and (c) but it is liable for a case under Art 25.1 (b). The rationale of Art 25.1 (b) is that although there is no breach

[1098] Art 25.2.

of contract in the Rotterdam Rules when containers are carried on deck without the consignor' consent, the multimodal transport operator should undertake more risks for such deck carriage. But the words 'special risks' cause confusion. Given that the Rotterdam Rules do not have the definition of 'special risks', the meaning at common law might be reference. At common law, the carrier has an implied duty to carry goods below deck because there are additional risks unavoidably exposed to goods stowed on deck such as jettison, sea water damage and goods washed overboard which are known as 'the special risks involved in deck carriage'.[1099] It is well-recognised that containers reduce traditional risks like jettison and sea water damage to a large extent but there are remaining risks for containers used in international multimodal transport such as moisture damage and containers washed overboard. One problem is that it is uncertain whether those remaining risks constitute the special risks or not. If the phrase 'special risks involved in deck carriage' are interpreted by considering the purpose of draftsmen of the Rotterdam Rules, the special risks involved in deck carriage should include residual risks if they are **unavoidably** caused by deck carriage. The loss of containers overboard could be but the moisture damage might not because it could occur no matter whether containers are carried on deck or not. Therefore, if containers are lost overboard, the multimodal transport operator is liable in the case of Art 25.1 (b) and not liable in the cases of Arts 25.1 (a) and (c). This difference

[1099] Lina Wiedenbach, *The Carrier's Liability for Deck Cargo: A Comparative Study on English Law and Nordic Law with General Remarks for Future Legislation* (Springer 2014) 6.

in liability may promote the inclusion of a liberty clause to stow containers on or below deck in the multimodal transport contract. If construed in accordance with the purposive approach,[1100] the phrase 'special risks' should be deleted and the language should consistent with Art 25.3.

8.5.3.2.2.3 Art 25.3

Another innovation is that the Rotterdam Rules expressly state that for unauthorised deck carriage, the multimodal transport operator is strictly liable regardless of fault only if the loss of or damage to the goods or delay in delivery is solely caused by deck carriage and he cannot rely on defences in Art 17.[1101] It is legitimate because such loss would not have resulted if the goods had been stowed below deck. At common law, unauthorised deck carriage is treated as quasi-deviation and the carrier cannot rely on defences. This provision is consistent with the common law rule and in comparison with the Hague and Hague-Visby Rules in which the consequences of unauthorised deck carriage are unclear,[1102] Art 25.3 could be seen as an improvement. The problem is whether the benefit of limitation should be deprived if deck carriage is unauthorised. Art 59 provides the threshold for the loss of the benefit of limitation and the language is akin to Art IV rule 5 (e) of the Hague and Hague-Visby Rules. Art 25.5 does not intend to override the general rule in Art 61 but to have a special sanction for the breach of an express agreement to carry goods below deck. The multimodal transport operator will be deprived of his right

[1100] See section 1.4.
[1101] Art 25.3.
[1102] See section 2.1.1.4.

to limit liability to the extent that the loss of or damage to the goods or delay in delivery is caused by deck carriage when there is an express agreement to carry the goods under deck. In this situation, the cargo claimant do not need to prove the intention of the multimodal transport operator under Art 61 which could be seen as a special sanction for a particular type of unauthorised deck carriage. The multimodal transport operator will also lose the benefit of limitation of liability if the loss of or damage to the goods or delay in delivery is caused by 'an personal act done with intent to cause such loss or recklessly with the knowledge that such loss would probably result' under Art 61.

8.5.3.2.2.4 Suggestion

Overall, Art 25.1 of the Rotterdam Rules cover the deck carriage by containers in international multimodal transport either by the terms of contract or by using the special container ship. In consideration of the practice in container transport, Art 25.1 (c) authorised more deck carriage by containers and widens the application of the Rotterdam Rules but the meaning of 'in accordance with' could be further clarified as below. And as discussed above, the term of special risks should be deleted in order to avoid confusion.

Proposed Art 25.1 (c): the carriage on deck in accordance with the contract of carriage should include that the contract of carriage may provide for the carriage on deck.

Proposed Art 25.2: the carrier is not liable for loss of or damage to such goods or delay in their delivery **caused by ~~the special risks involved in~~**

their carriage on deck when the goods are carried in accordance with subparagraphs (a) or (c) in this article.

8.5.3.2.3 SOLAS Amendment and Containers' Weight Information

The SOLAS amendment requires the shipper must provide a verified gross mass ('VGM') of a packed container prior to loading and if not, the container cannot be loaded on to a ship.[1103] But the shipper can authorise a maritime performing party such as the master or terminal representative to obtain a VGM.[1104] The SOLAS Amendment provides two methods of weighing: the first one is to weigh the packed containers using certified equipment and the second one is to weigh individual packages before packing into containers with the tare mass of containers and use a certified method approved by competent authority.[1105] The individual packages that have accurate weight clearly and permanently marked on surfaces do not need to be weighed again. The enforcement of the SOLAS amendment affects the Rotterdam Rules with regard to the information of containers' weight in the transport document.

Firstly, Art 36.1 (d) states that the transport document shall include the number of packages and the weight of goods if furnished by the shipper. After the SOLAS amendment, for containerised cargo, the multimodal transport document under the Rotterdam Rules shall include the weight of containerised goods and there is no option for the shipper. Secondly, the

[1103] SOLAS Chapter VI Part A Regulation 2 paras. 4-6.
[1104] IMO, 'Guideline regarding to the Verified Gross Mass of a Container Carrying Cargo', Doc. MSC.1/Circ. 1475 (7 June 2014), Art 13.1.
[1105] SOLAS Chapter VI Part A Regulation 2 para. 4.

World Shipping Council suggests that neither the carrier nor the terminal operator is required to confirm the VGM.[1106] In other words, the multimodal transport operator's right to qualify the weight of containerised goods is not deprived by the SOLAS Amendment. But in some cases, the right to qualification may be limited.

In the Rotterdam Rules, the carrier may qualify the weight of containerised goods and a distinction is drawn between situations where the cargo in containers has been inspected and those are not inspected.[1107] The SOLAS amendment has influence on his right to qualification the weight information in the latter situation. In closed containers, the carrier may qualify the weight information if (i) neither the container is weighed by the carrier nor a performing party and there is no agreement with the shipper that containers would be weighed prior to the shipment and such weight information would be included in contract particulars or (ii) there was no physically or commercially reasonable means of checking the weight of the containers.[1108] Although the SOLAS amendment requires to the shipper to obtain a VGM, it does not prevent a performing party to obtain on behalf of the shipper. And in international multimodal transport, it is common that a performing party collects the goods at the premise of the shipper and carries the packed containers to the port of loading. Therefore, it is highly

[1106] < http://www.worldshipping.org/industry-issues/safety/faqs/where-a-discrepancy-is-found-in-the-declared-vgm-what-are-the-obligations-of-the-carrier-and-terminal> acces sed 20 Sep. 2020
[1107] Arts 40.3 and 40.4.
[1108] Arts 40.4 (b) (i) and (ii).

likely that a performing party weighs containers under an agreement with the shipper. Sub-paragraph (ii) is inoperative due to the same reason.

The SOLAS amendment affects the weight information of containerised goods on the transport document according to Art 36.1 and limits the multimodal transport operator's right to qualify the weight of containerised goods under Art 40.4 (b). Though the application of Art 40.4 is restricted by the SOLAS Amendment to some degree, these sub-paragraphs do not need change.

8.5.4 Performing Party and Maritime Performing Party

8.5.4.1 The Definitions of Performing Party and Maritime Performing Party

The Rotterdam Rules bring the multimodal transport operator into the definition of the carrier provided that the multimodal transport contract falls within the definition of contract of carriage in Art 1.1. In international multimodal transport, apart from the contractual carrier, there are several persons involved to perform the contract such as sub-contractors who carry the goods in unimodal stages, stevedores and terminal operators. They are not the contractual parties of the multimodal transport contract but perform or undertake to perform some obligations of the multimodal transport operator. The problem is how their liabilities are governed by the Rotterdam Rules. The Rotterdam Rules provide two notions, the performing party and the maritime performing party in Arts 1.6 and 1.7 but only impose liabilities on the maritime performing party due to the maritime nature of the Rotterdam Rules. There are some ambiguous in provisions of the definition of the maritime performing party and the maritime performing party's

liability. But in general, the notion of the maritime performing party reflects the practice in international multimodal transport and facilitates the cargo claimants.

The notion of the performing party assists the interpretation of maritime performing party which is a sub-category. However, the words in two provisions are not consistent which cause construction problems about what obligations should be included. The performing party should perform or undertake to perform any obligations of carriers under the contract of carriage with respect to receipt, loading, handling, stowage, carriage, care, unloading, or delivery of the goods. The definition of the maritime performing party does not list what the carrier's obligations he can perform or undertake to perform but use the phrase 'any of carrier's obligations' instead. If construed restrictively, it seems that the performing party can only perform listed obligations and the maritime performing party can perform other carrier's obligations other than listed ones. But given that the maritime performing party is a subcategory of the performing party, it is unreasonable to provide more obligations to the maritime performing party than the performing party. Besides, the maritime performing party is distinguished from the performing party based on geographical scope rather than functions. Another issue is obligations of a performing party are almost identical to the carrier's obligation, care for cargo in Art 13 except keep. Art 1.7 does not mention the obligations of the maritime performing party and it should refer to Art 1.6. The author thinks that obligations of a performing party should not omit 'keep' because the *travaux préparatoires*

of the Rotterdam Rules imply that the intention of draftsmen was to parallel core obligations under the contract of carriage with respect to the goods in Art 13 and there is no reason to solely exclude keep obligation.[1109] Furthermore, one requirement to apply the Rotterdam Rules to the maritime performing party is that the loss of or damage to the goods or delay in delivery occurs when the maritime performing party has custody of the goods. The listed obligations are treated as 'core obligations' of the carrier and there might be some confusion since the maritime conventions do not provide a clear definition of these obligations. The keep obligation of the carrier could refer to the keep obligation of a bailee, which was thought as 'keeping the goods safely' and he would be liable if the goods were stolen without his negligence.[1110] The 'care for' obligation aims to take measures regarding the cargo and does not cover the keep obligation. Therefore, although these two obligations are similar, the care for obligation cannot cover the keep obligation of the carrier. The obligations of performing party should include 'keep obligation'. Besides, it was proposed to add the word 'keeping' in Art 1.6 (a) in 2012 as it had been omitted and the amendment was approved in January 2013.[1111]

The third issue whether the listed obligations exclude the seaworthiness obligation because the maritime performing party is imposed the same

[1109] UNCITRAL Working Group III (Transport Law), 'Transport Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]', (28 November-9 December April 2005) 16th session UN Doc. A/CN.9/WG.III/WP.56, Art 1 (e).
[1110] See *Southcote's case* 76 ER 1061.
[1111] The proposal reference is C.N.563.2012. TREATIES-XI.D.8 of 11 October 2012 and the approvement reference is C.N.105.2013.TREATIES-XI.D.8 of 25 January 2013.

obligations of the carrier by Art 19. If an independent contractor who performs the seaworthiness obligation is not neither a performing party nor a maritime performing party, it cannot sued by virtue of Art 19. The vessel-worthiness obligation appears to be irrelevant to obligations with respect of goods but the cargoworthiness obligation are closely linked. Therefore, the phrase 'obligations with respect of goods' should be interpreted as obligations that have direct influences on the goods or carriage and the cargoworthiness obligation is included.

8.5.4.1.1 Suggestion

The definitions of a performing party and a maritime performing party has some ambiguity and the author thinks the language in these two provisions needs a little change. Since Art 1.6 (a) has been amended by adding the word 'keep' in 2013, this provision does not have any problem. But the obligations of a maritime performing party in Art 1.7 should be consistent with Art 1.6 (a) and in order to avoid ambiguity, the author suggests the following change.

Proposed Art 1.7: maritime performing party means a performing party to the extent performs or undertakes to perform any of carrier's obligations **referred to in Art 1.6** during the period between the arrival of goods at the port of loading and their departure from the port of discharge.

8.5.4.2 Liability of the Maritime Performing Party

The maritime performing party is subject to the same liability regime as the carrier in Rotterdam Rules if two conditions in Art 19 are met. The first one is the performance is in a Contracting State and the second one is loss of

or damage to the goods or delay is caused during the period of liability. The first condition is narrower than the geographical scope of application in Art 5 which only requires one of four places is in a Contracting State. In a case where the place of receipt is in a Contracting State, the Rotterdam Rules apply to the multimodal transport operator but apply to the maritime performing party only if he performs activities in a port in a Contracting State. The connection with a Contracting State is to ensure that the application of the Rotterdam Rules is within the intention of the maritime performing party who could be sued directly.

However, the words 'received', 'delivered' and 'performed' could be interpreted as actual places while the definition of the maritime performing party includes a person who undertakes to perform. Therefore, the author thinks that the phrase 'as contemplated by the contract of carriage' should be added. The second condition seems a little redundant because it repeats the geographical scope of the maritime performing party provided by the definition of the maritime performing party. And there is another amendment made in 2013 with regard to the maritime performing party that after the requirement of period of liability from the port of loading to the port of discharge, it was proposed to add the phrase 'and either' for the conditions (ii) and (iii).[1112] But this amendment does not affect the author's proposal as below.

[1112] The proposal reference is C.N.563.2012. TREATIES-XI.D.8 of 11 October 2012 and the approvement reference is C.N.105.2013.TREATIES-XI.D.8 of 25 January 2013.

The occurrence that caused the loss of or damage to the goods or delay in delivery took place when the maritime performing party has custody of the goods or during the time he performs his activities contemplated by the contract of carriage which is consistent with the basis of liability of the carrier in Art 17.1.

8.5.4.2.1 Suggestion

Proposed Art 19.1 (a): the maritime performing party received the goods for carriage or delivered the goods or performed his activities **as contemplated by the contract of carriage ~~with respect of goods~~** in a port in a Contracting State; and

Proposed Art 19.1 (b): the occurrence of the loss of or damage to the goods or delay in delivery took place (i) **during the period as defined in Art 1.7**; and either (ii) while it has custody of the goods or (iii) at any other time it was anticipating in the performance of activities contemplated by the contract of carriage.

The Rotterdam Rules provide the joint liability of the carrier and one or more maritime performing parties which aims to facilitate the cargo claimant to sue. The result can be illustrated by a hypothetical example. The multimodal transport operator undertakes to carry containers from A to C and subcontracts the sea leg from A to B to a sea carrier. The sea carrier subcontracts the loading operation to an independent contractor and the containers were lost overboard due to the independent contractor's negligence. In this case, if the port of loading is in a Contracting State, the cargo claimant can sue the multimodal transport operator, the sea carrier

and independent contractors and the Rotterdam Rules ensure the cargo claimant to recover the damage to the large extent. Art 20 is helpful and practicable in international multimodal transport.

8.5.5 Limitation of Liability

The multimodal transport operator can limit his liability for all breaches of obligations under the Rotterdam Rules by virtue of Art 59.1.[1113] The phrase 'breaches of obligations' is broad and clear to include all claims in the event of breaches of obligations which is designed by draftsmen of the Rotterdam Rules to cover claims of misdelivery and misinformation.[1114] These two kinds of claims are not clearly covered by the phrase 'loss or damage to or in connection with the goods' in Art IV rule 5 of the Hague-Visby Rules and the words 'damage resulting from loss of or damage to the goods' in Art 18 of the MT Convention. The words 'breaches of obligations', in the author's opinion, is an improvement to avoid debates about what claims are covered by limitation of liability and consistent with the previous provisions providing the carrier's obligations.

The limits of liability are divided into two situations: the loss of or damage to the goods and delay in delivery. The limitation of liability for loss caused by delay in delivery is further classified: pure economic loss and other loss including physical loss and consequential loss. The Rotterdam Rules have a separate calculation method for the limitation of liability for pure economic loss which is no more than two and a half times of freight payable for the

[1113] Art 59.1.
[1114] It also corresponds to the carrier's liability of delivery under Art 11 of the Rotterdam Rules.

goods delayed. The limit for economic loss due to delay in delivery is adopted by the Hamburg Rules and the MT Convention although these two conventions limit the liability for all loss due to delay in delivery on the basis of freight. If the liability for physical and consequential loss due to delay in delivery is calculated based on freight, the level is likely to be quite low in any time when the sea carriage is involved and it can be limited to 'packages or units or weight of the goods that are the subject of the claim or dispute' in Art 59.1. The limit for economic loss due to delay is calculated on the freight basis because there will be no goods lost or damaged and freight is the predictable element for cargo claimant and the multimodal transport operator.

Art 59.1 uses the package and weight elements which could be regarded as a maritime feature since the Hague-Visby Rules. The Rotterdam Rules make a small clarification of the word 'unit' which refers 'shipping unit' only. This change is consistent with an English court's decision on the meaning of 'unit' in Art IV rule 5 of the Hague-Visby Rules.[1115] As for 'packages', the Rotterdam Rules have a similar provision to define what is a package for containerised goods.[1116] Due to high similarity to Art IV rule 5 of the Hague-Visby Rules, the English courts' judgments with respect of 'enumeration' in the Hague-Visby Rules could apply to determine whether there is sufficient

[1115] It was held that the word 'unit' in Art IV Rule 5 of the Hague-Visby Rules meant physical unit of shipment rather than unit of measurement like freight unit. See *Vinnlustodin HF and another v Sea Tank Shipping AS (The 'Aqasia')* [2018] EWCA Civ 276, [23] and [92].

[1116] Art 59.2: the packages or units enumerated in the multimodal transport document as packed in containers should be deemed as packages or unit.

enumeration according to Art 59.2 of the Rotterdam Rules. When the VGM obtained under the SOLAS amendment adopts the second method which is to weigh separate packages in containers, the number of packages in a VGM could be a sufficient enumeration. A recent English case *Kyokuyo Co Ltd v AP Moller Maersk A/S*[1117] clearly examine the words 'enumerated as packed in' in Art IV rule 5 of the Hague-Visby Rules which is identical to Art 59.2 of the Rotterdam Rules. The decision is that the phrase 'as packed' should not interpreted literally and it is not an additional requirement to describes how the goods are actually packed in the container as to whether they are separate items or consolidated as packages. The author thinks the judgment should apply to Art 59.2 because if not, the amount of limitation of liability would be vary dramatically depending on the description of goods which are consolidated as package or not although the facts are no difference.

The most obvious change limitation of liability is the monetary amount, 875 SDRs per package or other shipping unit or 3 SDRs per kilogram of the gross weight of goods. The exact level of limitation cannot be settled until the last meeting of the Working Group. The 10 percent higher than the Hamburg Rules' level could be seen as a concession which is higher the limits of the Hague-Visby Rules but lower than the limits of the MT Convention.

The author thinks that the amount may be reasonable for the following reasons. Firstly, the limitation of liability in the Hague-Visby Rules and the

[1117] [2018] EWCA Civ 778.

Hamburg Rules applies to sea carrier only and in the Rotterdam Rules, the multimodal transport operator is liable for the non-localised damage which occurs at any stage of international multimodal transport by containers. Therefore the limits for the multimodal transport operator should not be lower than the amounts in earlier maritime conventions. Secondly, if the cargo claimant intend to rely on a higher level of limitation under other international unimodal conventions, it will have incentive to prove that the conditions in Art 26 are satisfied. Apart from the Rotterdam Rules, the contractual limitations in various multimodal transport documents have different amounts. Although many of them adopt the Hague-Visby Rules' limits, the contractual terms could be void if they conflict with the mandatory amounts of limitation in other international unimodal conventions. For example, the UNCTAD/ICC Rules provide that when a sea or inland waterway carriage is included according to the multimodal transport contract, the Hague-Visby Rules limits apply to the liability of the multimodal transport operator of the loss of or damage to the goods or delay in delivery. When the loss of or damage to the goods or delay in delivery occurs in international inland waterway carriage which is covered by the CMNI, the special limits for containers in Art 20 apply. The limits of liability in standard forms do not provide a feasible solution. Therefore, the amount is reasonable and does not need change.

The last issue is when the multimodal transport operator loses the right to limit. The Rotterdam Rules provide that the limit can be broken only if there is a personal act or omission which means the act or omission of the

multimodal transport operator as a company should be the corporative representative. The multimodal transport operator will not lose his right to limit if his employees has omission. The practical effect is the limit is almost unbroken which ensures the sustainability of the multimodal transport operator's liability level.

In general, the language of provisions in respect of limitation of liability in the Rotterdam Rules do not have substantial changes and mirrors the Hague-Visby Rules to a large extent. The author does not think that the above provisions need amendment.

8.6 Summary

To summarize, container carrier has to deal with new challenges in international multimodal transport. Although the Rotterdam Rules make concession during preparation and remain the nature as maritime convention, the Rotterdam Rules make progress in providing a feasible liability framework for container carrier.

Firstly, the Rotterdam Rules accommodate the door-to-door transportation and can cover the period of container carrier's liability at the largest extent. Secondly, the Rotterdam Rules remain the general liability structure from the Hague and Hague-Visby Rules which provide predictability and certainty and the experience from case law can be borrowed. Thirdly, the Rotterdam Rules consider the technical and legal changes caused by containers. But there are still ambiguous drafting in provisions of the Rotterdam Rules. Overall, the Rotterdam Rules provide a feasible yet not perfect solution for regulating container carrier's liability in international multimodal transport.

CHAPTER 9 Conclusion

9.1 Overview of this Thesis

International multimodal transport has been developed rapidly during the recent 50 years and the container plays an irreplaceable role in the course. In contrast with the massive volume of container trade, the status of the legal framework for international multimodal transport has a slow progress in the international legislative level. Therefore, the author chooses the liability framework of the container carrier in international multimodal transport as the subject of this thesis.

The central research question of this thesis is **Has** the current liability regime provided a sufficient framework for container carriers in international multimodal transport? The current legal framework applying to international multimodal transport consists of several applicable international unimodal conventions and two ineffective conventions which could apply to the whole international multimodal transport: the MT Convention and the Rotterdam Rules. The primary objective of this thesis is to re-examine and assess the current liability regime for the container carrier in international unimodal conventions. The secondary objective is to evaluate solutions provided by the MT Convention and the Rotterdam Rules for container carriers in international multimodal transport. Then, this thesis particularly focuses on container carrier's liability in the Rotterdam Rules and provides further recommendations with regard to relevant provisions.

Due to the objectives of this thesis, the author makes some reservations of the definition of international multimodal transport. Firstly, since this thesis focuses on container carrier's liability, the standard containers are only available to four modes of transport (sea, road, rail and inland waterway) excluding air transport. Secondly, given that the goal of this thesis is to evaluate the liability framework of the container carrier in the international legislative level, the internationality of segments are required to be carried at least by two different modes of transport in this thesis.

The central research question is considered from three aspects as follows. Firstly, how wide should the scope of application of an international convention be to cover the container carrier's period of liability in international multimodal transport? Secondly, do the existing conventions provide a proper and satisfactory framework to govern the container carrier's liability? The liability regime consists of many issues but due to the objectives and limits of this thesis, the author discuss the framework from three parts: standard of liability (basis of liability, exceptions and burden of proof), the identity of carrier and liabilities of relevant third parties and limitation of liability. Thirdly, if not, what solutions can be adopted. In this thesis, the author focuses on the solutions provided by the Rotterdam Rules and analyse whether they are feasible and what improvements could be made. These three research questions will be answered in the following sections accordingly, section 9.2, section 9.3 and section 9.4.

To achieve objectives of this thesis and answer three research questions, this thesis consists of 9 chapters. Chapter 1 introduces the background of

international multimodal transport and the influence of containers and the relevant legal concepts. Then, from chapters 2 to 5, the author discusses the liability framework of the container carrier in the current effective unimodal conventions. Chapter 2 covers the scope of application issue in each international unimodal convention. Chapter 3 deals with the core liability system of the carrier in international unimodal conventions which is considered from three main parts: basis of liability, defences and burden of proof. In chapter 4, it mains focus on the question who could be identified as the carrier and the liabilities of relevant third parties in international unimodal conventions. The limitation of liability issue is considered in chapter 5. Chapter 6 presents the unique liability approach for the contractual carrier in international multimodal transport, both theoretically and practically. Chapter 7 discusses the only international convention for international multimodal transport, namely the MT Convention. the author compares the MT Convention and international unimodal conventions to find why the MT Convention did not gain worldwide support. Next, the author analyses the Rotterdam Rules as the feasible solution in depth in chapter 8 and what lessons the Rotterdam Rules could learn from the earlier international conventions (both unimodal and multimodal). Additionally, the author makes suggestions with regard to related provisions of the Rotterdam Rules from the perspective of the container carrier's liability in international multimodal transport. Finally, in chapter 9 (this chapter), the author will summarise all findings from previous discussions and research outcomes in the order of research questions.

9.2 How Wide Should the Scope of Application of an International Convention be to Apply to International Multimodal Transport?

Given that the prerequisite for applying an international convention is its scope of application issue, this precondition is discussed in chapter 2 (international unimodal conventions) and in chapter 7 (the MT Convention). As for the scope of application matter, the author divides into two parts: the first one is **whether** these effective international unimodal conventions could apply to particular segments in international multimodal transport and the second one is if they could, **whether** there are any conflict between different unimodal conventions. The authors concludes that these international unimodal conventions could apply to respective segments in international multimodal transport provided their requirements of scopes of application were satisfied. However, these restrictions meet some challenges from the perspective of international multimodal transport by containers as whole. Besides, the potential conflict issue between different unimodal conventions arises even if those conditions are met. The failure of the MT Convention implies that one uniform convention replacing all existing unimodal conventions would not succeed. To answer the question how wide should the international convention be, the author thinks that in order to coexist with the current unimodal conventions, the scope of application should be broad enough to keep pace with the need of international multimodal transport by containers and avoid potential conflicts with other unimodal conventions simultaneously. Thus, the author believes the Rotterdam Rules provide an alternative solution. The detailed

provisions of the Rotterdam Rules and the author's suggestions will be in section 9.4.1.

9.2.1 Basic of Application

9.2.1.1 Contract of Carriage

In summary, all three sea conventions including the Hague Rules, the Hague-Visby Rules and the Hamburg Rules could apply to the sea segment of the international multimodal transport provided the conditions were satisfied. Two widespread sea conventions, the Hague and Hague-Visby Rules, have several requirements for their applications while the Hamburg Rules adopt a relatively simple approach. The Hague and Hague-Visby Rules apply to certain types of shipping documents, namely bill of lading or similar document of title and the English courts provide a broad interpretation of the documentary approach that no actual issuance of a bill of lading is required.[1118] A further step taken by the court is that the straight bill of lading could be regarded as 'the bill of lading or similar document of title' under the Hague and Hague-Visby Rules.[1119] Despite of the wide interpretation taken by the English courts, the application of this documentary approach to the documents used in international multimodal transport are rather restricted. If separate documents are issued in respect of separate segments, the document covering sea carriage needs to satisfy the above requirements. If only one multimodal transport document is

[1118] See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB) and *Kyokuyo Co Ltd v AP Moller-Maersk A/S* [2018] EWCA Civ 778.
[1119] *J I MacWilliam Co Inc v Mediterranean Shipping Co SA (The 'Rafaela S')* [2005] UKHL 11.

issued, whether it can apply to the Hague and Hague-Visby Rules is impacted by other factors such as the person who issues the document and the relation to carriage of goods by sea.[1120] The Hamburg Rules adopt a simpler approach to avoid the above debates in relation to the documentary approach in the Hague and Hague-Visby Rules.[1121] Although the Hamburg Rules are not ratified by major shipping countries, the approach was partly taken by the Rotterdam Rules which indicates the trend of development to some extent.

Unlike sea conventions, other unimodal conventions do not adopt such complicated approach. The English courts present a liberal construction with regard to 'contract for carriage by road' in Art 1.1 of the CMR in *Quantum Co Inc and Others v Plane Trucking Ltd and Another*.[1122] Assuming that the same interpretation is followed to interpret Art 1.1 of the COTIF-CIM and Art 1.1 of the CMNI, they could apply to each particular segment of the international multimodal transport provided actual performance of particular mode of transport is involved.

The MT Convention tried to adopt one multimodal transport contract as the basic of application and the temporal scope accommodates to international multimodal transport.[1123] However, the problem is the MT Convention did not expressly state the criterion of using more than one mode of transport. The similar problem arises in the Rotterdam Rules and the author makes

[1120] See *Mayhew Foods v Overseas Containers Ltd* [1984] 1 Lloyd's Rep 317 (QB).
[1121] Arts 1 (6).
[1122] [2001] 1 All ER (Comm) 916 (QB); [2002] EWCA Civ 350.
[1123] Art 1 (2).

suggestions with regard to the definition of contract of carriage in section 9.4.

9.2.1.2 Temporal and Geographical Scopes

There is one common problem that the temporal scopes of application of all three sea conventions could not extend to other modes of transport. In the Hague and Hague-Visby Rules, the period of carrier's liability can be contractually arranged but normally restricts to operations from loading to discharge.[1124] It does not fit with the practice in container transport and arise some uncertainty. However, if construed it by following *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*,[1125] the lining and stuffing of containers done by the carrier's sub-contractors might be covered by these Rules. The Hamburg Rules provide the widest scope of application as a sea convention which extends to 'the port of loading to the port of discharge' period. It is a development but does not solve the problem completely. The periods of carrier's liability in the CMR and the COTIF-CIM usually start from taking over the goods until delivery. The temporal scopes do not cause much debate except for that the place of taking over could be interpreted as covering both the actual place of taking over and the contractual place of taking over.[1126] The temporal scope of the CMNI is similar to the Hamburg Rules and does not arouse controversy.

[1124] Art I (e) and see *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QB).
[1125] [2018] UKSC 61.
[1126] See *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350.

With regard to the geographical scope of application, the connecting factors have been increased from the Hague Rules to the Hamburg Rules which implies that the geographical scopes are widen gradually. The main issue is the Hague-Visby Rules because the incorporation requires a delicate drafted provision in the contract of carriage.[1127] The geographical scopes in the CMR, the COTIF-CIM and the CMNI are simple, requiring the internationality of the carriage.[1128]

Another problem in relation to containers in the sea conventions is deck carriage which the three sea conventions exclude its application subject to conditions. The requirement of the deck carriage statement in Art I (c) of the Hague and Hague-Visby Rules is construed loosely so deck carriage (mostly container transport in nowadays) is probable to be excluded.[1129] The Hamburg Rules and the CMNI authorise more deck carriage and the Rotterdam Rules cover more.[1130] These changes mean the deck carriage has been gradually accepted and it is more suitable for modern international multimodal transport by containers. The temporal and geographical scopes of the MT Convention do not have problem and the temporal scope is assimilated into the Rotterdam Rules.[1131]

9.2.2 Possible Conflict

[1127] See *Trafigura Beheer and Another v Mediterranean Shipping Co* (*The* '*MSC Amsterdam*') [2007] EWCA Civ 794.
[1128] Art 1.1 of the CMR, Art 1.1 of the COTIF-CIM and Art 1 (1) of the CMNI.
[1129] See *Sideridraulic System Spa and Another v BBC Chartering & Logistic GMBH & CO KG (The 'BBC Greenland')* [2011] EWHC 3106 (Comm).
[1130] Art 9 of the Hamburg Rules and Art 3 (6) of the CMNI.
[1131] Arts 1 (2) and 2.

Since the international unimodal conventions can apply to each segment, the next question whether they would conflict with each other and if so, how to solve the problem? The conflict issue also arises in the MT Convention and there is a provision addressing conflicts with the CMR and the COTIF-CIM.

The conflict may arise between unimodal conventions when the loss of or damage to the goods occurs at the connect point of two different modes of transport or the occurrence of the loss of or damage to the goods cannot be localised. The solution would be the conflict provision in international unimodal conventions providing which convention will apply. All three sea conventions do not have the conflict provision while the rest unimodal conventions have. However, the CMR can apply subject to several conditions and it is unlikely to apply to container transport due to the restriction in respect of a special kind of transport.[1132] The COTIF-CIM is applicable but its geographical requirement makes the application rather limited.[1133] The CMNI can also apply nevertheless its application does not fit with the practice of container transport since the sea carriage normally occupies the larger percentage.[1134] In general, these international unimodal conventions cannot solve the conflict issue completely from the perspective of international multimodal transport by containers.

The MT Convention excludes the extended application of the CMR and the COTIF-CIM and but it does not avoid conflicts because such extensions are

[1132] Art 2.1.
[1133] Art 1.3.
[1134] Art 1 (2).

not the object this thesis due to the requirement of dual internationality.[1135] When these unimodal conventions can apply to separate segments, the application of the MT Convention overlaps anyway and the MT Convention supersedes other conventions by its mandatory nature. This is one important reason why it failed to achieve wide support of those Contracting States of these unimodal conventions.

9.3 Do the Existing Conventions Provide a Proper and Satisfactory Framework to Govern Container Carrier's Liability?

Provided the different international unimodal conventions apply to each segment of international multimodal transport without problem, the next issue is do the existing conventions provide a proper and satisfactory framework to regulate the liability of container carrier? The author analyses this question from two sides: one framework consists of all the unimodal conventions and the other one is the MT Convention. The author concludes that neither way would succeed and the author thinks the Rotterdam Rules could be a feasible solution because the Rotterdam Rules could apply to the whole international multimodal transport but remain the maritime feature. This design can ensure the Rotterdam Rules fit international multimodal transport. Besides, since 90 percent of international multimodal transport involves a sea carriage, the maritime feature does not change the container carrier's liability dramatically and might be easier to achieve support from major shipping countries.

[1135] Art 30 (4).

The liability framework of container carrier is evaluated from three main aspects: standard of liability, identity of carrier and liabilities of relevant third parties and limitation of liability. The author contends that the container carrier's liability varies substantially in these aspects among these unimodal conventions and it is unlikely to simplify into one uniform rule which could be inferred from the result of the MT Convention. These distinctions increase the uncertainty to predict the consequences of the loss or damage to the goods or delay. The MT Convention offers one possibility to solve the problem and in spite of its failure, the approach proposed by the MT Convention has been adopted by several contractual rules. However, considering the contractual rules are lack of mandatory force, they could not provide a clear solution to regulate the container carrier's liability in international multimodal transport and this is the advantage of the Rotterdam Rules.

9.3.1 Standard of Liability

The standard of carrier's liability is affected by basis of liability, exceptions and burden of proof. One distinguished feature of the carrier in sea carriage is that instead of a general liability with regard to the goods, there are two unique obligations in the Hague and Hague-Visby Rules, namely to provide a seaworthy ship and to care of the cargo.[1136] The similar duties are provided in the CMNI and the interpretation could be adopted since the provisions of the CMNI and the Hague and Hague-Visby Rules are highly

[1136] Art III rules 1 and 2.

likely.[1137] The levels of the sea carrier's liability in two duties are reasonable care which is relatively low in comparison with the CMR and the COTIF-CIM. The contents of these duties could been updated according to the developed shipping technologies such as containers and navigation skills.[1138] The Hamburg Rules tried to replace these two duties with a general liability provision but failed.[1139] Therefore, the Rotterdam Rules recover the traditional structure of the Hague and Hague-Visby Rules which is also reflected in defences and burden of proof. But one improvement in the Hamburg Rules is that the carrier is liable for delay which is consistent with other conventions. The standard of carrier's liability in the CMR and the COTIF-CIM is affected by the defences which is explained by the English courts as 'utmost care' and the level is much higher than reasonable care.[1140] The MT Convention resembled the standard of carrier's liability in Hamburg Rules and gained the similar unpopularity of the Hamburg Rules as well.[1141]

Another distinction among these international unimodal conventions is defences available to the carrier. The sea carrier in the Hague and Hague-Visby Rules has a long list of excepted perils and some exceptions covers the negligence of the carrier.[1142] It could be argued that the English Court's

[1137] Art 3.
[1138] See *Alize 1954 and CMA CGMA Libra v Allianz Elementar Versicherungs AG* [2020] EWCA Civ 293 and *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKSC 61.
[1139] Art 5.
[1140] Art 17.1 of the CMR and Art 23.1 of the COTIF-CIM. See *JJ Silber Ltd and Others v Islander Trucking Ltd* [1985] 2 Lloyd's Rep 243 (QB).
[1141] Art 16.
[1142] Art IV rule 2.

attitude towards the defences is to construe it in line with the duty of cargo, especially when defences involves with reasonable care of the cargo to some extent.[1143] The Hamburg Rules adopt an uniform test for liability in Art 5 and abolish many excepted perils as in the Hague and Hague-Visby Rules. The CMR and the COTIF-CIM have the same structure as two kinds of risks but the standard of liability is the same, namely the utmost care.[1144] The CMNI mixes two methods and provides a lower standard of liability. The exception in the MT Convention is the identical phrase in the Hamburg Rules which could be seem as a level of liability lower than the CMR and the COTIF-CIM but higher than the Hague and Hague-Visby Rules. The problem is neither the sea carrier or the land carrier accepted the new level of liability.

The burden of proof can also indicate the standard of carrier's liability. The common first step in international unimodal conventions is that the cargo claimant proves the loss of or damage to the goods occurs after the goods are carried in an apparent good order and condition. The next step is usually for the carrier to prove the exceptions caused the loss of or damage to the goods. In the Hague and Hague-Visby Rules, the carrier needs to prove his exercise of due diligence for seaworthiness obligation and reasonable care for care of cargo duty. For the second obligation, even if the carrier failed, he could rely on exceptions in Art IV rule 2 but the Supreme Court recently decided that the carrier had to prove the lack of negligence for Art IV rule

[1143] See *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKSC 61.

[1144] Arts 17.2 and 17.4 of the CMR and Arts 23.2 and 23.3 of the COTIF-CIM.

2 (q).[1145] It is not clear whether the carrier has the same burden of proof with regard to other exceptions in Art IV rule 2 but the author thinks it is unlikely to impose the same onus. As for burden of proof regarding seaworthiness, the carrier bears the onus to prove due diligence was exercised not only by him but also by his agents or servants.[1146] The carrier's burden of proof in the CMR and the COTIF-CIM depends on which kind of risks caused or was attributed to the loss or damage to the goods or delay but does not decrease the standard of liability. The carrier's burden of proof in the Hamburg Rules depends on the only exception which is in the moderate level. The carrier in the CMNI has the lower burden as to prove the exceptions could be attributable to the loss or damage to the goods or delay.

Overall, the container carrier's liability in international unimodal conventions varies substantially which is contrary with the liability of one contractual carrier in practice. The result of the MT Convention indicate that the industry is not ready to accept an uniform liability which is normally higher than the Hague and Hague-Visby Rules. That's probably the reason why the Rotterdam Rules intend to stay with the main liability framework of carrier in the traditional maritime conventions.

9.3.2 Identity of Carrier and Relevant Third Parties

[1145] See *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKSC 61.

[1146] See *Union of India v NV Reederij Amsterdam (The 'Amstelslot')* [1963] 2 Lloyd's Rep 223 (HL) and *Parsons Co and Others v CV Scheepvaartonderneming Happy Ranger (The 'Happy Ranger')* [2006] EWHC 122 (Comm).

The identity of carrier issue occurs mainly in the sea conventions due to the traditional effect of signature by the master on behalf of the carrier and the demise or identity of carrier clause.[1147] It becomes common that the charterer signs the bill of lading as carrier and the important impact of such signature as carrier by the charterer himself has been recognised by the English courts.[1148] The Hamburg Rules require the signature of carrier on the bill of lading which increases certainty of the carrier's identification. The identity of the carrier issue does not cause so much trouble in other unimodal conventions. The CMR treated the contractual carrier who does not actually perform as the carrier and the COTIF-CIM and the CMNI have the similar results. Therefore, container carrier in international multimodal transport could be treated as the carrier in these two conventions. The MT Convention regards the contractual carrier as the only carrier and the exclusion of the sub-contractors who take actual performances seems unfair to the cargo interests in consideration of the frequent employments of sub-contractors in international multimodal transport. The Rotterdam Rules address the identity of carrier issue particularly which is another improvement for container carrier.

The relevant third parties' liabilities has developed from the Hague-Visby Rules because the Hague Rules do not regulate the liabilities of relevant third parties. Thus, the third parties employ other tools to apply the

[1147] The different forms of signatures have different effects. See *The 'Berkshire'* [1974] 1 Lloyd's Rep 185 (QB)(Admlty), *The 'Rewia'* [1991] 2 Lloyd's Rep 325 (CA) and *The 'Venezuela'* [1980] 1 Lloyd's Rep 393 (QB)(Admlty).

[1148] See *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')* [2003] UKHL 12.

exceptions and limitations of the Hague Rules, namely the Himalaya clause[1149] and sub-bailment on terms.[1150] Although the Hague-Visby Rules includes the Himalaya clause applicable to the agents or servants of the carrier, the sub-contractors are not covered. The carrier's agents and servants could still pursue the approach of sub-bailment on terms because the scope of the Himalaya clause might be narrower and the sub-contractors could use two approaches. The Hamburg Rules introduce the actual carrier concept and impose the joint liability of the carrier and actual carrier. Such arrangement is followed by the MT Convention and the CMNI. As for the CMR and the COTIF-CIM, the main concern is the successive carrier who is akin to the actual carrier and he has several liability of the carrier.[1151] The trend is to cover more relevant third parties and their liabilities and benefits in the conventions tend to be consistent with the carrier. The Rotterdam Rules propose new concepts for the relevant third parties, performing party and maritime performing party in order to cover person whose performance is related to contract of carriage. And the pattern of joint liability is assimilated into the Rotterdam Rules.

9.3.3 Limitation of Liability

Considering the calculation of limitation of liability has the basic of weight and the basic of unit or package methods, the Hague Rules only use one package method whilst the CMR and the COTIF-CIM use the weight method.

[1149] See *New Zealand Shipping v A M Satterthwaite Co Ltd (The 'Eurymedon')* [1975] AC 154 (PC)(New Zealand) and *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The 'New York Star')* [1981] 1 WLR 138 (PC)(Australia).
[1150] *The Pioneer Container* [1994] 2 AC 324 (PC)(Hong Kong).
[1151] Art 34 and Art 26.

The rest conventions adopt both methods including the MT Convention and the Rotterdam Rules. The importance of methods is because if a container is regarded as a package, the amount might be much lower in the Hague-Visby Rules, the Hamburg Rules and the CMNI. But the Hague-Visby Rules calculate the limitation based on the enumeration on the bill of lading, rather than actual shipping status unless the enumeration is incorrect.[1152] The amounts of limitation of liability are obviously different in these unimodal conventions and the differences are so dramatic that it is impossible to satisfy all carriers in these conventions with the same amount.[1153] Thus, the MT Convention provided a two-tier limit: one is for international multimodal transport with sea or inland waterway carriage and the other is for international multimodal transport with road or rail carriage.[1154] This modified uniform approach sets the former limit as default and the second limit can apply only if the damage is localised to certain segment. This condition ensures the application of one limitation rule to the largest extent but unfortunately, the amount was not widely accepted. The Rotterdam Rules mirror the approach to some degree and add more specific requirements for apply other international unimodal conventions. Besides, there is a conflict provision, Art 82, which functions closely with scope of application issue.

[1152] Art IV rule 5 (c) and *River Gurara (Owners of Cargo Lately Laden on Board) v Nigerian National Shipping Line Ltd (The 'River Gurara')* [1998] QB 610 (CA).
[1153] In general, the amounts in order from low to high in these unimodal conventions are: Art IV rule 5 of the Hague or Hague-Visby Rules (depending on the weight of containers), Art 6 (1)(a) of the Hamburg Rules, Art 20 (1) of the CMNI, Art 23.3 of the CMR and Art 30.2 of the COTIF-CIM.
[1154] Art 18.

The limit for liability of delay is calculated on the basis of freight of goods delayed and all conventions except for the Hague and Hague-Visby Rules have the limit for liability of delay.[1155] As for the situation of losing the right to limit, there is similar condition that the involvement of negligence with the knowledge that the damage would probably result is at least required.[1156] The exceptions are the Hague Rules in which the carrier can limit liability in any event in Art IV rule 5. Despite that there are similarity with regard to limitation of liability, container carrier's limitation of liability should be calculated based on one system and the balance among these conventions needs to be made. The limitation of liability in the Rotterdam Rules is designed to achieve this goal. As for relevant third parties, the Rotterdam Rules have an innovation approach for container carrier in international multimodal transport and he author thinks the approach is realistic albeit minor changes.

9.4 Proposals regarding Relevant Provisions of the Rotterdam Rules

9.4.1 Scope of Application

The application of the Rotterdam Rules is based on the contract of carriage which requires a sea leg to be involved. The definition in Art 1.1 could be construed to deal with the uncertainty of the use of modes of transport on the transport document in accordance with *Quantum Co Inc and Others v*

[1155] Art 6 (1)(b) of the Hamburg Rules, Art 23.5 of the CMR, Art 33 of the COTIF-CIM, Art 20 (3) of the CMNI.
[1156] Intent to cause the loss or damage is usually included as a more severe fault. Art IV rule 5 (e) of the Hague-Visby Rules, Art 8 of the Hamburg Rules, Art 29 of the CMR, Art 36 of the COTIF-CIM, Art 21 of the CMNI and Art 21 of the MT Convention.

Plane Trucking Ltd and Another.[1157] Therefore, the author suggests to add a phrase in **Art 1.1** to clarify the broad interpretation and **the phrase is** 'the contract of carriage provides for carriage by sea if (a) the carriage by sea is unspecified and (b) a sea carriage is actually performed'. Art 5 provides the geographical scope of application. The internationality requirement does not need for change because when an international sea carriage is involved, the internationality of the whole transit is subsequently satisfied and other geographical requirements such as the connection factors and the relation with a Contracting State in Art 5 are common elements. The temporal scope of application corresponds to the definition of contract of carriage in Art 1.1 and could apply to the entire international multimodal transport. The author thinks **Arts 5 and 12** need no change and three provisions together provide an appropriate scope of application applying to international multimodal transport by containers.

Art 82 deals with the conflict issue and Art 26 relates to it to some extent. The limited network liability approach consisting of these two provisions could apply to the contractual carrier in international multimodal transport. The author's suggestions will be summarised in section 9.4.2.1.

9.4.2 Liability of Container Carrier

9.4.2.1 Limited Network Liability System

Art 82 is a conflict provision addressing the relation of the Rotterdam Rules with other non-maritime unimodal conventions. Due to the subject of this thesis, the relevant provisions are paragraphs (b), (c) and (d) and the

[1157] [2002] EWCA Civ 350.

respective conventions are the CMR, the COTIF-CIM and the CMNI. The possibilities of conflict with those conventions in international multimodal transport by container is little and there is no much doubt about Arts 82 (b)-(d). In the author's opinion, there is only one minor amendment to be made in **Art 82 (d)** in order to be consistent with the texts of the CMNI by **adding the sentence** 'However, this Convention should prevail if (a) a maritime bill of lading is issued or (b) the distance of sea carriage is longer'. Art 26 is the core provision of the network liability approach and it provides several restrictions on the applications of the CMR, the COTIF-CIM and the CMNI. Though there are some limits, the author believes Art 26 could ensure the application of the Rotterdam Rules to the container carrier in international multimodal transport as default which increase predictability to the maximum extent and give priority to other unimodal conventions in certain circumstances to avoid conflicts. In general, Art 26 provide a possible solution to the container carrier's liability in international multimodal transport. The only amendment is to **add the phrase** 'or an agent of the shipper' after the shipper in **Art 26 (a)** for further explanation.

9.4.2.2 Standard of Liability

The Rotterdam Rules provide a moderate level of liability for the container carrier in international multimodal transport in comparison with these unimodal conventions and the MT Convention. Unique obligations in sea carriage are remained and updated in accordance with the development of container transport such as seaworthiness and deck carriage. With regard to seaworthiness, the fitness of containers is expressly included in Art 14

(c) and considering the lining and stuffing operations are normally completed by sub-contractors, the author thinks it is better to **add the phrase** 'or a performing party' after carrier in **Art 14 (c)** to correspond to the vicarious liability of the carrier in Art 18. The Rotterdam Rules authorise more deck carriage and have specific provisions for containers carried on deck. the authorised deck carriage in Art 25.1 (c) includes such carriage in accordance with the contract but this provision should be further explained as to the meaning of 'in accordance with'. Reading Art 25.4 together, the author thinks **Art 25.1 (c)** should **add a new sentence** 'The carriage on deck in accordance with the contract of carriage include the situation where the contract of carriage may provide for the carriage on deck'.

As for defences, although the long list of exceptions as in the Hague and Hague-Visby Rules is retained, the Rotterdam Rules change some controversial defences in Art 17.3 including eliminating nautical fault and covering fire caused by negligence. The regression of the liability regime under the Hague-Visby Rules could be seen as a concession but a workable liability regime of container carrier in international multimodal transport should take the sea carrier's liability framework into consideration. Arts 17.2, 17.4 and 17.5 provide the burden of proof rule which are generally consistent with the burden of proof rule in Hague and Hague-Visby Rules in English law. The language of Art 17.5 (a) could be simplified because it just repeats Art 14 but it does not affect the operation of Art 17.5 (a). Overall, the author thinks **Art 17** is satisfied.

9.4.2.3 Identity of Carrier and Liability of Performing Party and Maritime Performing Party

Art 37 of the Rotterdam Rules specifically deals with the identity of carrier issue and gives priority to the name of carrier identified on the documents. Considering it is in line with *Homburg Houtimport BV v Agrosin Private Ltd and Others (The 'Starsin')*,[1158] it indicates that the draftsmen of the Rotterdam Rules absorbed recent case law decisions to solve controversial issues in the previous conventions. Another innovation of the Rotterdam Rules is to present the concepts of performing party and maritime performing party to regulate the liabilities of relevant third parties. The definition of performing party in Art 1.6 is broad to embrace any person whose performance is related to the contract of carriage. There is a small mistake that the keep obligation was omitted in **Art 1.6** but it has been corrected in 2013. The author thinks that the definition of maritime performing party in **Art 1.7** should be amended accordingly and the obligations of maritime performing party should be **changed as** 'any of carrier's obligations referred to in Art 1.6'.

The Rotterdam Rule impose the joint liability of the carrier and the maritime performing party in Art 19 subject to several conditions. This joint liability does not arise questions since all unimodal conventions except for the Hague and Hague-Visby Rules and the MT Convention approve this several liability. The Maritime performing party could be liable even if he sub-

[1158] [2003] UKHL 12. Rix LJ is in the Court of Appeal, see [2001] EWCA Civ 56, [70]-[76]. This case will be analysed in depth in next section 4.1.1.1.3.

contract all performance to other person. Therefore, the author suggests that **Art 19.1 (a)** should **replace the phrase** 'as contemplated by the contract of carriage**' with** 'with respect of goods' in relation to his activities. Another change proposed by the author is about the period of liability in Art 19.1 (b). The author contends that rephrasing 'the period between the port of loading and the port of discharge' in **Art 19.1 (b**) **by** 'during the period as defined in Art 1.7' in line with Art 1.7 could add coherence.

9.4.2.4 Limitation

Arts 59 and 60 provides the limitation of liability for the loss of or damage to the goods or delay and **Art 61** provides the loss of carrier's right to limit liability. In general, the language of provisions in respect of limitation of liability in the Rotterdam Rules do not have substantial changes and mirrors the Hague-Visby Rules to a large extent. The amount increases in certain degree but as explained by the author in section 8.5.5, it is acceptable to container carrier in international multimodal transport. The author does not think that the above provisions need further amendment.

9.5 Concluding Remark

International multimodal transport has become an important transport method in nowadays and the developments such as the use of containers in different modes of transport and new transport technologies attribute to its rapid growth. The existing international unimodal conventions have been applied in each mode of transport for many years and in order to accommodate to international multimodal transport by containers, these conventions have been amended or interpreted accordingly. However, due

to their unimodal natures, they are unsuitable to regulate container carrier's liability in international multimodal transport as whole. The ineffective MT Convention provided some inspired thoughts and the Rotterdam Rules gain experience from the previous conventions.

Considering the necessity of a sea carriage in international multimodal transport by containers, the author believes that the Rotterdam Rules could be a feasible solution and the maritime nature should be seen as an advantage rather than an disadvantage. Some provisions of the Rotterdam Rules are the result of concession to achieve consensus but overall, the Rotterdam Rules have considered the controversies in the previous maritime conventions and the relevant case law in recent years which reflects the dynamic market practice. The author thinks that some provisions could apply with further explanations so that the author proposes moderate changes with regard to relevant provisions.

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