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### A Boxful of Rules

Captain VS Parani

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# A BOXFUL OF RULES

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Which Rule applies in Multimodal Transport?



Captain VS Parani, FNI, FICS, LLM

## What the book is about?

Are you involved with or studying the logistics and transport industry? Have you wondered what happens when things go wrong during the transport, such as when a shipment of televisions is received in damaged condition, a container of cigarettes is stolen, or, an important shipment of prawns is received a week too late for the local market? Well, this is what this book is all about!

In the modern global economy, finished and semi-finished products are transported in large volumes across the globe. Things do go wrong during such transport; then what recourse does the cargo owner have? How much loss will be made good by the insurers and under which convention?



*On opening the container, a strange sight awaits the consignee at the destination! How and when did this cargo get damaged? Such situations complicate the liability regime in multimodal transport.*

*Photo courtesy: Captain Förster, <http://www.captainfoerster.de>)*

Yes, there are separate international agreements regarding responsibilities and liabilities during the transport of cargo separately by sea, land, by rail or by air. However, it is not always clear which rule will apply in which circumstance. Matters are made worse when it is not known when and on which mode of transport the loss or delay actually occurred! This kind of uncertain recourse creates confusion, misunderstanding and eventually high insurance costs. Is there an easier way?

This book looks at the different transport conventions, their history, their success and failures, and examines how well they work together. We will also see what solutions to this situation are possible.

The book critically analyses the problems involved, such as the conflict of laws, lack of harmonisation of legislation on the various modes of transport involved, the question of whether a combined transport document fulfils the function of a document of title, and possible solutions and reforms. The work starts by examining the legal regime of each component mode involved in the multimodal transport chain to analyse the strength of the foundation based on which the 'secondary' layer of multimodal transport law regime is based.

The following chapters explore the evolution, contents and the reasons for the failure of the multimodal transport conventions prepared so far and explain why the biggest hurdle for the 'ideal' multimodal convention is more of a political and commercial nature, rather than a legal one.

This work is based on library research of cases, conventions and published accounts of legal difficulties faced by the multi-modal transport industry and its users. The situation is based on the prevailing laws and framework in 2010. You will see that though the book covers some complex topics, the logical flow and simple fashion is aimed to facilitate easy understanding.

The author has over two decades of experience in the maritime and logistics industry, including having been the Captain of a container ship. He has multiple degrees in Navigation, Business Law and Business Administration. He is a Fellow of the Institute of Chartered Shipbrokers and the Nautical Institute. He is also a Member of the Institute of Marine Engineering, Science and Technology.

For more information on the author, or to feedback on the book, visit [www.parani.org](http://www.parani.org).

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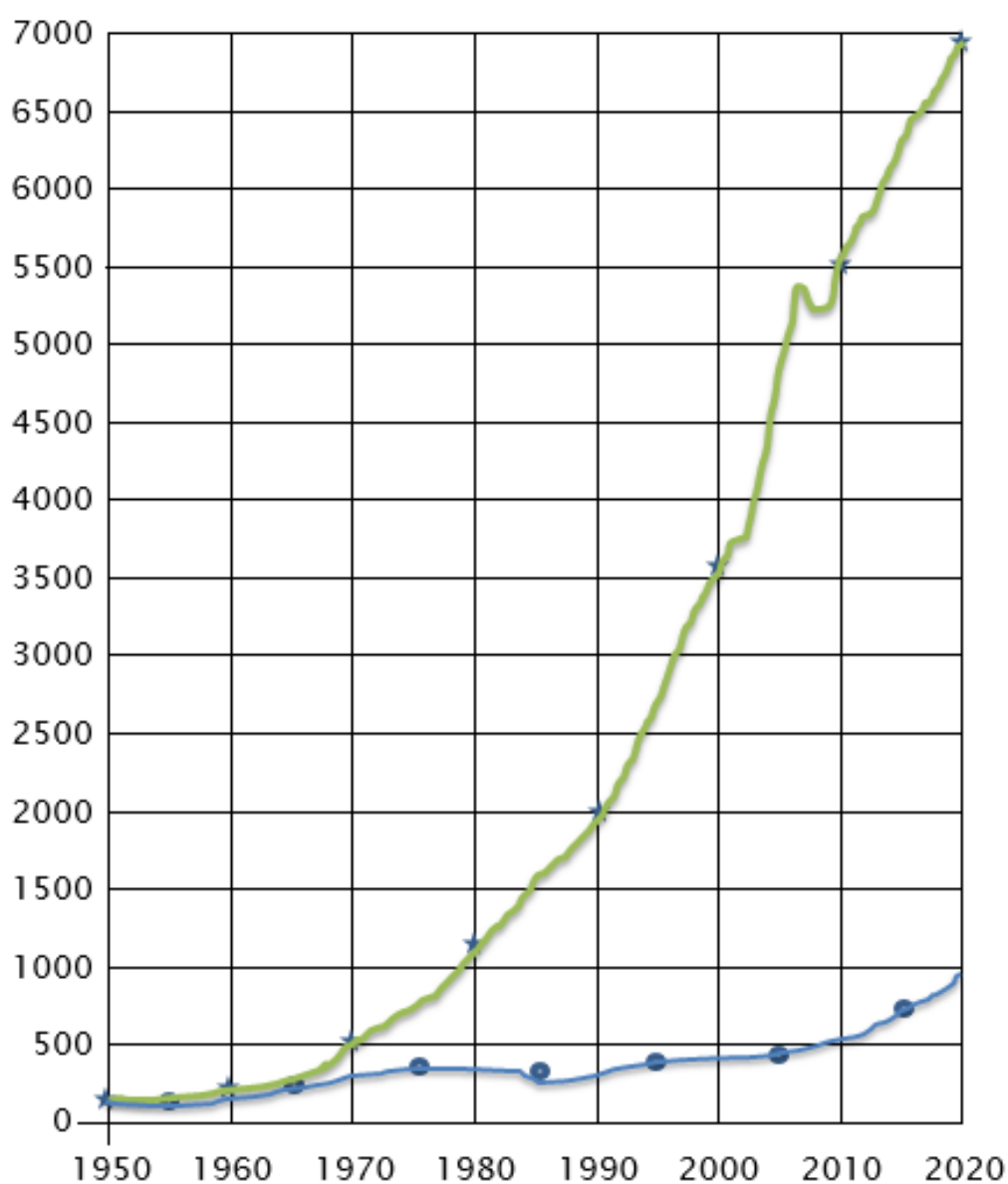
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## Introduction

Freight transport makes a vital contribution to the economy and society, and is at the heart of globalisation.<sup>1</sup>



*The above graph shows the trend in transport of world trade. The amazing increase of transport of **manufactured goods** is shown by the **Green Line**. Transport of **mining raw material and bulk grain** is indicated by the **Blue line**. Graph made from information collected from the UNCTAD, IMF and WTO.*

<sup>1</sup> White Paper "European transport policy for 2010: time to decide", COM (2001)370.

In 1980 container volumes were 13.5 million TEU and,<sup>2</sup> by 2010 the global container throughput reached 560 million TEUs recording an increase of over 400% and a corresponding average annual compound growth of over 9%.<sup>3</sup> International transport of goods by container, especially finished goods, is increasingly favoured by maritime and inland transport industries; the rapid growth of international trade has further boosted the eminence of the container transport industry.<sup>4</sup>

The technical and commercial advantages of the container are that the number of transport units which must be handled, such as bags or pallets (thus the time and manpower required to handle them) are now reduced to a consolidated shipping container. The containers themselves are sturdier transport units and are less susceptible to pilferage, weather and handling damage, therefore reduce transport losses.

Improvements in transport management through information technology, innovative ship and other vehicle building methods (e.g. cellular ships, refrigerated containers, specialized lifting equipment, articulated lorries) have dramatically improved the economies of scale and specialization and generally, the efficiency of container transport. Similar developments in aviation have

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<sup>2</sup> [http://www.unescap.org/ttdw/publications/tfs\\_pubs/pub\\_2398/pub\\_2398\\_ch3.pdf](http://www.unescap.org/ttdw/publications/tfs_pubs/pub_2398/pub_2398_ch3.pdf).

<sup>3</sup> Rodrigue, J-P, C. Comtois and B. Slack (2009), *The Geography of Transport Systems*, Second Edition, New York: Routledge. <http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/worldcontainertraffic.html>. Bruce Barnard, 'Global Container Traffic Hits All Time High', *The Journal of Commerce Online - News Story*, Apr 5, 2011, <http://www.joc.com/maritime/global-container-traffic-hits-all-time-high>.

<sup>4</sup> J-P, C. Comtois and B. Slack (2009), *The Geography of Transport Systems*, Second Edition, New York: Routledge (*ibid.*).

contributed to an annual average increase of 12.2% over the last twenty years in cargo shipped worldwide through air. It is further expected that world air cargo traffic will triple over the next twenty years.<sup>5</sup> It is therefore no surprise that containers are predicted to remain a dominant means of transporting finished goods.<sup>6</sup>



*Multimodal transport allows a seamless transport with minimal handling in the intermediate stages.*

*Photo courtesy: Trans Link (<http://www.translinklogistics.com.br/>)*

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<sup>5</sup> Boeing Commercial Airplanes, World Air Cargo Forecast 2010-2011, <http://www.boeing.com/commercial/cargo/wacf.pdf>

<sup>6</sup> Long-Term Trends in Container Throughput, America's Container Ports: Freight Hubs That Connect Our Nation to Global Markets, Research and Innovative Technology Administration (RITA), U.S. Department of Transportation (US DOT), June 2009, available at [http://www.bts.gov/publications/americas\\_container\\_ports/2011/html/long\\_term\\_trends.html](http://www.bts.gov/publications/americas_container_ports/2011/html/long_term_trends.html). Also see Freight Intermodality, Results from the transport research programme, [http://europa.eu.int/comm/dgs/energy\\_transport/index\\_en.html](http://europa.eu.int/comm/dgs/energy_transport/index_en.html)

Perhaps the most significant paradigm shift was the evolution of multimodal transport; new operating terms such as non-vessel operating carrier, door-to-door delivery and changed customer expectations have blurred the traditionally held boundaries of various modes of transport. Using containers, cargo could be moved quickly over great distances, with little rehandling, and with efficient transfer between modes.<sup>7</sup> It would not be incorrect to state that containerization has facilitated the emergence and widespread use of multimodal transport<sup>8</sup>. The fact that the changes in containerised export and import volumes directly affect the number of multimodal shipping containers transported by rail and road is already established.<sup>9</sup>

International multimodal transport itself is defined as 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.<sup>10</sup>

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<sup>7</sup> Yevdokimov, Yuri V., Measuring Economic Benefits of Intermodal Transportation [article] Transportation Law Journal, Vol. 27, Issue 3 (Summer 2000), pp. 439-452, 27 Transp. L.J. 439 (2000).

<sup>8</sup> UNCTAD, a brief overview of multimodal transport, <http://r0.unctad.org/en/subsites/multimod/mt2brf0.htm> accessed on 01.11.2011

<sup>9</sup> "The rise in container cargo demand in early 2010 affected containership fleet capacity, railroads and commercial trucks that service the seaports, and the inland warehouses and distribution centres that provide logistical support for the entire multimodal freight supply chain" an analysis of the situation in the U.S. in Long-Term Trends in Container Throughput, America's Container Ports: Freight Hubs That Connect Our Nation to Global Markets, Research and Innovative Technology Administration (RITA), U.S. Department of Transportation (US DOT), June 2009, available at [http://www.bts.gov/publications/americas\\_container\\_ports/2011/html/effects\\_of\\_recent\\_trends.html](http://www.bts.gov/publications/americas_container_ports/2011/html/effects_of_recent_trends.html).

<sup>10</sup> United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980).

In trade and transport law, the key questions are who to sue in the event of delay in delivery, loss of or damage to goods, where to sue, time limits for initiating action, or the basis and extent of carrier's liability. These questions are significant; one study estimated the global financial impact of cargo loss to exceed USD 50 billion annually.<sup>11</sup>



*There are several reasons for losses during transport. At sea, it could be caused by heavy weather, water damage, collision, grounding or fire. For example, the M/V Bai Chay Bridge suffered heavy losses of containers during a category 4 super-typhoon. Several containers were lost overboard or crushed due to the severe rolling experienced by the ship.*

*Photo courtesy: Countryman & McDaniel (<http://www.cargolaw.com>)*

The definition of the carrier has also undergone a paradigm shift when compared with the traditional and isolated shipping or aviation laws. New questions arise during the course of a multimodal transport, such as which unimodal convention

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<sup>11</sup> Tom Hayes, The Full Cost of Cargo Losses, Inbound Logistics, January 2004, quoting the National Cargo Security Council, <http://www.inboundlogistics.com/cms/article/the-full-cost-of-cargo-losses/>, accessed on 26 December 2011.

would apply, if any, to the multimodal transport. At times the national laws apply. The answer to such questions is not always predictable to the multimodal operator or to the shipper, which makes it difficult to insure for the cargo damage, loss or delay.

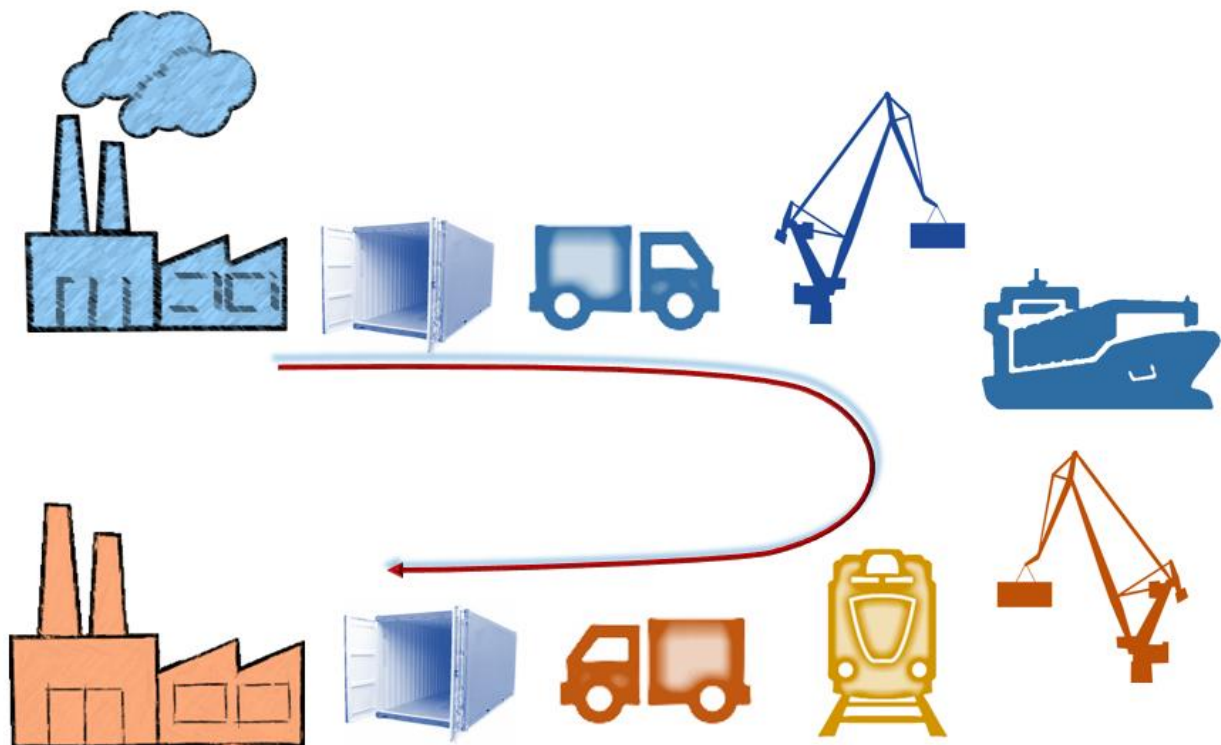
Even after the damage or loss has occurred, the answer is not a simple one for the courts and lawyers, and much time is spent on determining the applicable law before even moving on to the material facts of the case.

In order to reduce their exposure, transport operators incur additional legal fees in drafting extensive contracts of carriage, thus further adding to friction costs. See for example, the guidance given regarding insurance for international trade at the UK Government website at <https://www.gov.uk/transport-insurance-for-international-trade>.

Given its current prominence and the remarkable evolution of multimodal transport, we will examine if the international transport law regimes have kept pace with the technological and commercial development of multimodal transport.

### 3. The various transport modes in a multimodal transport and their international transport regimes

As the multimodal transport obviously involves many modes of transport, the evolution of the legal regimes for each mode will be briefly outlined in this section to illustrate the policy reasons behind the formulation and ratification of each convention and how it is cumbersome to achieve uniformity of legal rules even with one mode of carriage. The fact that the current regimes were achieved after protracted negotiations is probably one of the reasons, the component sectors of a multimodal transport chain are reluctant to give away the hard-won consensual rules.



*A typical multimodal transport chain. The ship leg or train leg could be substituted by plane, inland ship; any such permutations and combinations are possible. The container usually remains unopened until it reaches the destination factory or freight-forwarder.*



### 3a. Sea-carriage

The carriage of goods by sea accounts for nearly ninety per-cent of international trade.<sup>12</sup> For many of the countries surrounded by sea, such as the United Kingdom, up to ninety-five percent of its exports and imports are moved by ships.<sup>13</sup>



*Giant ships such as the CSCL Globe can carry up to 19100 twenty-foot containers. The containers may carry anything ranging from furniture, television sets, clothing, frozen food, fresh vegetables, chemicals, wine, footwear and toys. Containerization has indeed revolutionized the global economy. Considering the scale of multimodal transport, the question of liability is indeed a significant one.*

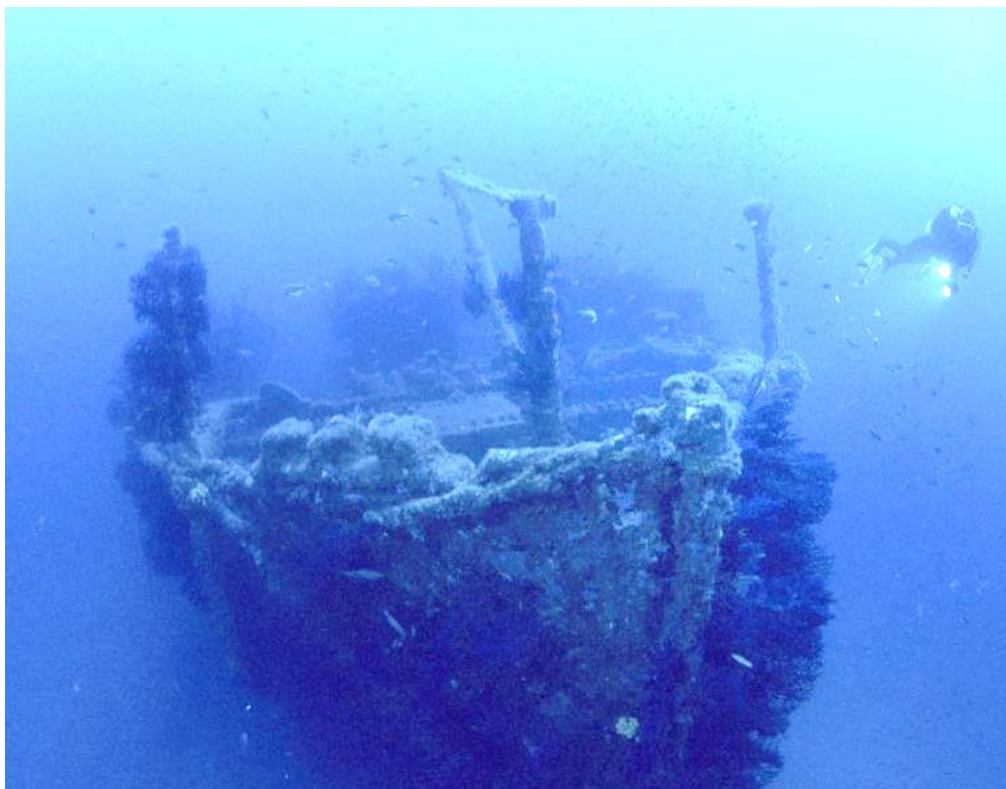
*Photo courtesy: Daily Mail, <http://www.dailymail.co.uk/news/article-2900630/Bigger-Shard-four-football-pitches-size-carry-900MILLION-tins-beans-World-s-largest-ship-arrives-UK-today.html>)*

<sup>12</sup> “More than 90 percent of global trade is carried by sea”, flyer by the International Maritime Organization, International Shipping- Carrier of World Trade.

<sup>13</sup> Flyer by the UK Department of Trade and Investment, ‘The UK ports sector- harbouring a world-class industry’, 2008.



The regime for the transport of goods by sea was not always regulated. The courts in the United Kingdom, were traditionally reluctant to intervene in contracts of carriage between private individuals.<sup>14</sup> The economic conflict over risk allocation between carriers and shippers has been recorded as early as the 1680's, when shipowners and merchants met at the Lloyd's Coffee shop in England to wrangle over terms of all-purpose marine insurance policies and the risks for loss and damage to cargo.<sup>15</sup>



*A diver swims by the wreck of an old cargo ship. Several parts of the oceans were uncharted, navigational aids were much less precise than today's satellite assisted system, and accidents were quite common.*

*Photo courtesy: A. Vanzo/UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-underwater-heritage/wrecks/>)*

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<sup>14</sup> Indira Carr, International Trade Law, 4th edition, 2010, Cavendish, ISBN10: 0-415-45842-0, Chapter 8.

<sup>15</sup> Joseph C. Sweeney, UNCITRAL and the Hamburg Rules - The Risk Allocation Problem in Maritime Transport of Goods, 22 Journal of Maritime Law and Commerce, 513 (1991).

Carriers, especially after formation of the Protection and Indemnity Associations,<sup>16</sup> used their dominant bargaining position to pass on a high proportion of the risks of the maritime adventure to the shippers by inserting exemption clauses derogating from their strict liability for the safe transport of cargo and delivery.<sup>17</sup> Cargo loss due to navigation mishaps and the perils of the sea were frequent in the wooden ships of the early 19th century and most of the West European nations being major maritime powers were naturally sympathetic to carrier interests.

The United States judiciary, however, took a restrictive view of such exemption clauses and subjected them to a number of over-riding obligations such as for providing a seaworthy ship and to take due care of the cargo, resulting in the passing of the Harter Act in 1893 which limited the shipowner's freedom of contract and sought to protect the cargo owner.<sup>18</sup> Other countries tried to follow suit and the need for an international convention was felt.<sup>19</sup>

The International Law Association and the Comité Maritime International held a series of diplomatic conferences from 1921 to 1924, building a compromise draft between shipper and carrier,<sup>20</sup> which culminated in the signing of an International Convention for the Unification of Certain Rules of Law Relating to

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<sup>16</sup> Samuel Robert Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules*, 5 *Journal of Transnational Law and Policy*, 9 1995-1996.

<sup>17</sup> Benjamin Yancey, *The Carriage of Goods: Hague, COGSA, Visby and Hamburg*, 57 *Tulane Law Review* 1238, 1240 (1983).

<sup>18</sup> Kozolchyk, 'Evolution and present state of the ocean bill of lading from a banking perspective' (1992) 23 (2) *JMLC* 161.

<sup>19</sup> Robert Rendell, *Report on Hague Rules Relating to Bills of Lading*, 22 *International Law*, 246, 247 (1988).

<sup>20</sup> Michael F. Sturley, 1 *The Legislative History of the Carriage of Goods by Sea Act*, 3-4(1990).

Bills of Lading in Brussels in 1924; this Convention is commonly referred to as The Hague Rules.

The Hague Rules required the carrier, at the start of the voyage, to provide a seaworthy ship, to properly man, equip and supply the ship as well as to ensure the holds were suitable for the carriage of the cargo.<sup>21</sup> The Hague Rules also required the carrier to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. The Rules are incorporated into a contract of carriage and as a Clause Paramount in the Bill of Lading or similar document of title. The Hague Rules exempt the carrier or the ship from liability arising out of unseaworthiness of the ship unless caused by want of due diligence on part of the carrier to prepare the ship at the start of the voyage as per the obligations listed in Article 3 of the Rules.<sup>22</sup> The Hague Rules also exempt the carrier from losses arising out of a 'navigation fault', that is, act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship or arising out of a fire, unless caused by the actual fault or privity of the carrier.<sup>23</sup>

During the post-war era, the improvements in the navigational techniques and ship-building technology during the half-century since the 1924 Rules made

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<sup>21</sup> Article 3, Hague Rules, 1924.

<sup>22</sup> Article 4, Hague Rules, 1924. Also see *Tasman Orient Line CV v New Zealand China Clays Ltd* [2010] NZSC 37 (16 April 2010).

<sup>23</sup> Article 4, Hague Rules, 1924- see 'The Cita' discussed later in this essay.

the balance between the rights and liabilities of shipper and the carrier appear unconscionable.<sup>24</sup>



*A plane helps fight a cargo fire on the Charlotte Maersk. Fire on ships is common even today. Some containers catch fire due the nature of the cargo, others due to negligence of crew. Usually these fires are quite intense and destroy most evidence, complicating answers of liability.*

*Photo courtesy:*

*<http://wildfiretoday.com/2010/07/25/air-tanker-used-on-ship-fire-60-miles-at-sea/>*

The Visby amendments in 1968 therefore, aimed to update and amend the Hague Rules and in their consolidated form are known as the Hague-Visby Rules.<sup>25</sup> The existing limits of liability were raised, and the carrier's right to limit liability was denied where damage was intentionally caused by the carrier that damage would ensue.<sup>26</sup> Countries such as the United Kingdom were quick to

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<sup>24</sup> Ross Masud, 'The emerging legal regime for multimodal transport', International Business Law Journal 1992.

<sup>25</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968

<sup>26</sup> 2(e), Visby Amendments

adopt the Hague-Visby Rules into their Carriage of Goods by Sea Act (COGSA) whereas many countries such as the United States were unhappy with the drafting of the Amendments and continue to incorporate the Hague Rules into their own legislation.<sup>27</sup>

In the post-colonization era,<sup>28</sup> and the improvement in economic conditions of the developing countries brought the realization that the existing rules were not favourable for the cargo interests, and still favoured the developed nations which controlled most of the shipping tonnage.<sup>29</sup> The composition of the cargo interests now also included those domiciled in the developing nations, unlike those included in the drafting of the Hague Rules.<sup>30</sup> The United Nations Conference on Trade and Development (UNCTAD) which functions to promote the interests of the developing nations,<sup>31</sup> took up the case for a new regime and the work was completed by the legal body of the United Nations for harmonization of international trade law, the UNCITRAL.<sup>32</sup> Seventy eight states were represented at the U.N. Convention on Carriage of Goods by Sea at Hamburg in 1978.

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<sup>27</sup> Benjamin Yancey, *The Carriage of Goods: Hague, COGSA, Visby and Hamburg*, 57 *Tulane Law Review* 1238, 1240 (1983). The American Maritime interests were mainly opposed to the Visby amendments, especially that the weight liability ceiling was excessive, the mixed limitation concept did not have any ceiling, and that the container clause was disturbing.

<sup>28</sup> A large number of countries had acceded to The Hague Convention as they 'inherited' the Rules under the colonization period by European nations.

<sup>29</sup> Top seven nations controlling the shipping tonnage are Japan, Greece, Germany, China, United States, United Kingdom and Norway. International Maritime Organization, *Maritime Knowledge Centre*, 2011, *International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, and the Environment*.

<sup>30</sup> See discussion under footnote 20 on the work of the International Law Association.

<sup>31</sup> It provides technical assistance tailored to the specific requirements of developing countries, with special attention to the needs of the least developed countries and of economies in transition.  
<http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>, UNCTAD website, accessed on 04.11.2011.

<sup>32</sup> United Nations Commission on International Trade Law, UNCITRAL's business is the modernization and harmonization of rules on international business.

Top 11 Merchant Ship Owning Nations - 2014		
1	Greece	<i>In 1924, Greece, China, Korea, Singapore, Taiwan were not on the list. Original signatory countries included the below countries which also had control of their several colonies worldwide: Germany, Argentina, Belgium, Chile, Cuba, Denmark, Iceland, Spain, Estonia, United States of America, Finland, France, Great Britain, Ireland, Hungary, Italy, Japan, Latvia, Mexico, Norway, Netherlands, Peru, Poland, Portugal, Romania, Serbia, Croatia, Slovenia, Sweden, and Uruguay.</i>
2	Japan	
3	China	
4	Germany	
5	Republic of Korea	
6	Singapore	
7	United States	
8	United Kingdom	
9	Taiwan	
10	Norway	
11	Denmark	

The Hamburg Rules shifted the balance of duty of care and of liabilities more towards the carrier by making it 'liable for loss resulting from loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'.<sup>33</sup>

This provided the cargo interests with some relief when compared with the Hague-Visby Rules where the carrier was required to exercise due diligence only at the starting of the voyage. The Hamburg Rules also introduced the concept of

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<sup>33</sup> Article 5.1, Hamburg Rules, 1978

liability for delay in delivery of cargo, something which was missing in the Brussels Convention.

In a radical move, the long list of defences available to the carriers under The Hague-Visby Rules<sup>34</sup>, including that for losses due to navigation faults were removed under the Hamburg Rules<sup>35</sup> with the burden of proof remaining on the carrier. The carrier was now also liable for fires caused by fault or neglect of the carrier based on standard industry practices, as well as for improper response to a fire, whereas the Hague-Visby Rules only held the carrier responsible where the fire was caused by actual fault or privity of the carrier. The limits of liability of the carrier and the time limits for notification of damage, as well as for filing a suit were also raised in favour of the cargo interests.<sup>36</sup>

The developing countries sought to reduce their shipping and cargo insurance costs by pushing for adoption of the Hamburg Rules. The developing countries, prompted by their maritime interests and their insurers, refused to reconsider the distribution of liability though there was no empirical evidence to prove that the Hamburg Rules were disadvantageous for the maritime industry.<sup>37</sup> The Hamburg Rules entered into force on 1<sup>st</sup> November 1992 but none of the world's major trading nations acceded to this Convention reflecting a general view that these Rules have over-compensated in their effort to redress a

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<sup>34</sup> Article 4, Hague Rules, 1924

<sup>35</sup> Article 5, Hamburg Rules, 1978

<sup>36</sup> Article 19 & 20, Hamburg Rules, 1978.

<sup>37</sup> Michael F. Sturley, 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Hague-Visby and Hamburg Rules in a Vacuum of Empirical Evidence, Journal of Maritime Law and Commerce, Vol.24, 1993



perceived imbalance in the Hague Rules in favour of shipowners.<sup>38</sup> The Hamburg Rules were even viewed as declaring 'economic warfare' on the industrialized nations.<sup>39</sup> Though the Hamburg Rules addressed many practical issues such as delays to cargo, containerization, arbitration and jurisdiction clause, the Rules failed to achieve the objective of a unified and equitable regime for the carriage of goods by sea due to the drastic shift on cargo liability and a totally new approach to the trade law instead of an evolutionary law prepared after a good period of consensus building.

Countries have adopted either the Hague, Hague-Visby or the Hamburg Rules into their domestic legislation, of which the Hamburg Rules are a minority by a long way.<sup>40</sup> Some countries added to the confusion by introducing 'hybrid' supplementary laws such as the Nordic Maritime Code 1994 and the Carriage of Goods by Sea Regulations, Australia, 1998.<sup>41</sup> The difficulty caused by the coexistence of multiple liability regimes was illustrated in the *Rafaela S* case,<sup>42</sup> where printing machinery was damaged while being carried from England to the United States; the applicable regime was in dispute. The Hague Rules restricted the carriers' liability to U.S.\$2,000 while the Hague-Visby Rules awarded the cargo owners U.S.\$150,000. The case was judged in favour of the cargo owners.

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<sup>38</sup> Kate Lannan, Door-to door carriage of goods- the Rotterdam Rules, 18<sup>TH</sup> OSCE Economic and Environmental Forum.

<sup>39</sup> BW Yancey "The Carriage of Goods: Hague, COGSA, Visby and Hamburg" (1983) 57 Tul LR 1238, 1249-1250, 1257, 1259, describing the process as "belligerent" and "unattractive" and declaring: "If this is 'economic warfare', so be it."

<sup>40</sup> See Appendix 1 for comparative coverage of the Hamburg Rules and the other international conventions for carriage of goods by sea.

<sup>41</sup> Paul Myburgh, 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?', [2000], 31 Victoria University of Wellington Law Review 355-382

<sup>42</sup> *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 2 W.L.R. 554.





*With factories and supermarkets adopting 'just-in-time' inventory practices, delays resulted in significant financial consequences. Cargo interests tried to build in liabilities in the new rules for liability.*

*Photo courtesy: Wikipedia commons*

At its twenty-ninth session, in 1996, the UNCITRAL considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.<sup>43</sup> Probably as a realization from the Hamburg Rules experience, the UNCITRAL agreed that the preparatory and information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial

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<sup>43</sup> United Nations Commission on International Trade Law, Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), A/CN.9/510.

sectors involved in the carriage of goods by sea, such as the CMI,<sup>44</sup> the ICC,<sup>45</sup> the IUMI,<sup>46</sup> the FIATA,<sup>47</sup> the ICS,<sup>48</sup> and the International Association of Ports and Harbours. The Rules had a strong multimodal angle during its drafting and in its eventual text, which will be discussed in the penultimate section of this book.<sup>49</sup> The Rotterdam Rules were prepared and adopted by the UN General Assembly in 2008 and signatories included several developing and developed maritime nations.<sup>50</sup>

The Rotterdam Rules approaches the other contentious issue of carrier's liabilities in a more tactful manner,<sup>51</sup> that requiring the carrier to exercise due diligence towards seaworthiness, manning and care of cargo at all stages of the voyage and not just at the start of the voyage compared with The Hague-Visby Rules. In another major departure from the Hague-Visby Rules, the carrier will no longer be exempt from damages caused by navigation error,<sup>52</sup> or from error in management under the Rotterdam Rules. The Rules however, compensate the loss of exemptions for navigation and management fault, by retaining the defence against fires.<sup>53</sup> This can be seen as a compromise between the Hague-Visby Rules and the highly onerous requirement of the carrier as drafted in the Hamburg Rules.

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<sup>44</sup> Comité maritime international

<sup>45</sup> International Chamber of Commerce

<sup>46</sup> International Union of Marine Insurance

<sup>47</sup> International Federation of Freight Forwarders Associations

<sup>48</sup> International Chamber of Shipping

<sup>49</sup> Infra at Section 11a of this book.

<sup>50</sup> See appendix 1 for status of ratification.

<sup>51</sup> Article 14, Rotterdam Rules, 2009

<sup>52</sup> Article IV, r.2 (a) of The Hague and Hague-Visby Rules, exclusion no longer available under the Rotterdam Rules.

<sup>53</sup> Article 17(3). Rotterdam Rules, 2009.

The liability for delay in delivery of goods was retained from the Hamburg Convention after extensive negotiations where countries like China termed it too high whereas Germany and Sweden felt it was set too low.<sup>54</sup> The position of the countries reflected the concerns of the countries, mainly related to the value of commodities generally traded and the state of the local insurance market. The limits of liability were also increased from previous conventions.

The Rules have however not been able to generate support from all quarters. Criticisms exist that the Rotterdam Rules are drafted in a very complex manner and numerous in comparison with The Hague Rules.<sup>55</sup>



*The following States signed the Convention on 23 September 2009, the first day the Convention has been open for signatories: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America.*

*Photo courtesy: Roel Dijkstra, Rotterdam Rules.*

<sup>54</sup> 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 AMD, Marrakesh 5-6 November 2009.

<sup>55</sup> William Tetley, A Summary of General Criticism of the UNCITRAL Convention (Rotterdam Rules), December 2008, as available from <http://www.mcgill.ca/maritimelaw/rotterdamrules/>, downloaded on 12.03.2010.

Some countries such as Canada openly declared their intention not to sign the convention based on feedback from industry stakeholders, at the same time expressing an endeavour to revisit the ratification question when its major trading partners would accept these Rules.<sup>56</sup>

So, even before the subject of international convention on multimodal transport is broached, its' legal foundation for the largest mode of transport, that is, the sea-leg, is fractured with no immediate unification in sight. The signatory states of the respective sea-transport conventions would naturally view any new multimodal convention which infringes their hard-fought borders of the unimodal regimes with suspicion and not want to "rock the boat".

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<sup>56</sup> Transport Canada, notice to industry, September 15, 2009, no: 03-0068 (0308-02).

### 3b. Aviation

The first international convention for air transport was the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of October 12 1929 which came into force four years later; it was thought that this Convention represented a compromise. On the one hand, it protected an infant industry of air carriers from the potential for crippling law suits which might arise from loss or damage to persons, baggage or cargo. Conversely, it restricted a carrier's contractual right to exclude its liability.<sup>57</sup>

With respect to cargo liability, the Warsaw Convention sets out a fault-based regime with a rebuttable presumption of fault of the carrier, allowing the carrier to avoid liability by showing that it took "all necessary measures" to prevent the loss. In addition, the carrier could assert a contributory negligence defence and may be completely exonerated if the damage was caused "by an error in piloting, in the handling of aircraft, or in navigation".<sup>58</sup>

The Warsaw Convention applies at all times when the cargo is "in the charge" of the carrier, which is generally interpreted to include transportation by other modes if such transportation is for the purpose of loading, delivery or

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<sup>57</sup> Field, Andrew, "International air carriage, the Montreal convention and the injuries for which there is no compensation" [2006] *CanterLawRw* 8; (2006) 12 *Canterbury Law Review* 237.

<sup>58</sup> Paul Stephen Dempsey, *International Air Cargo and Baggage Liability and the Tower of Babel*, 36, *Geo. Wash. Int'l Law Review* 2398 (2004).

transshipment, as well as when the goods are temporarily stored in a warehouse prior to or following air shipment.<sup>59</sup>

Some 20 years later it was concluded that the time was ripe to implement some changes. For this purpose the International Civil Aviation Organization (ICAO), held a diplomatic conference at The Hague in 1955 which resulted in the entry into force in 1963 of the Hague Protocol. Even before this, Protocol came into force, the Guadalajara Convention of 1961 was signed. This Convention concluded the much debated question by confirming that the Warsaw Convention applied to the contracting and the actual carrier.<sup>60</sup>

During the course of the decade, it became clear that the United States was not prepared to ratify The Hague Protocol of 1955 as it believed that the liability limits for carriage of persons in the Protocol were set too low. In 1965, this led the United States to announce its withdrawal from the 1929 convention, effective as of May 15 1966. This solution arose in the form of the Montreal Agreement of 1966, which was not a convention or a protocol, but an agreement between the American civil aviation authorities and the airline companies in question. Pursuant to the Montreal Agreement the airline companies adjusted their conditions of carriage. The Montreal Agreement was finally established on May 13 1966, that is, two days before the date as of which the United States was

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<sup>59</sup> Michael E. Crowley, The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem, HeinOnline -- 79 Tul. L. Rev. 1461 2004-2005.

<sup>60</sup> Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, done at Guadalajara September 18, 1961.



to withdraw from the 1929 convention. The United States revoked the withdrawal at the last minute.<sup>61</sup>

The next amendments were prepared five years later and established during a conference held in Guatemala in 1971. The Guatemala Protocol contains a number of controversial points: the liability limit for passenger claims was substantially increased and fixed limits were introduced and the force majeure defence (Article 20) was removed in relation to passenger claims. However, to date the protocol has not yet come into force. The Carriage by Air and Road Act 1979 provides for the Protocol to be implemented into English Law.



*Though such aviation disasters are relatively uncommon, cargo carried through airplanes do get damaged or stolen.*

*Photo courtesy: Countryman & McDaniel (<http://www.cargolaw.com>)*

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<sup>61</sup> Christopher R. Christensen, The Montreal Convention of 1999, American Bar Association, Aviation Litigation Seminar, June 3, 2005.  
[http://www.condonlaw.com/attachments/montreal\\_convention\\_1999\\_CRC.pdf](http://www.condonlaw.com/attachments/montreal_convention_1999_CRC.pdf).

Again, in 1975, an ICAO conference was held at Montreal during which four protocols were agreed upon; the first three protocols replaced the reference of liability limits in the previous Conventions expressed in Francs Poincaré to that by Special Drawing Rights (SDRs). Montreal Protocol 4 (MP4) is the counterpart of the Guatemala Protocol of 1971. MP4 too contains fixed limits expressed in SDRs. Furthermore, MP4 limits the force majeure defence with regard to loss or damage and allows the introduction of the electronic air waybill.

By the time MP4 came into force in June 1988, the liability regime had changed drastically from the original Warsaw Convention. The "all necessary measures" and "error in piloting" defences had been abolished, although the carrier was now entitled to assert defences based on premises such as the inherent defect of the cargo. The Warsaw Regime now took on a form of strict liability similar to the COTIF-CIM and CMR regimes.<sup>62</sup>

In 1992, the Japanese airlines unilaterally decided to waive the liability limitations with regard to passenger claims and to waive the force majeure defence up to an amount of SDR 100,000 in their conditions of carriage. The actions of the Japanese airlines made the discussion on liability limitations with regard to passengers highly topical.<sup>63</sup> Finally, during the annual meeting of the International Air Transport Association (IATA) in 1995, the IATA Inter-carrier Agreement on Passenger Liability was agreed. In short, the airlines who signed

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<sup>62</sup> Refer Appendix 2 on the ratification status of the Air Transport Conventions.

<sup>63</sup> Christopher R. Christensen, The Montreal Convention of 1999, American Bar Association, Aviation Litigation Seminar, June 3, 2005.  
[http://www.condonlaw.com/attachments/montreal\\_convention\\_1999\\_CRC.pdf](http://www.condonlaw.com/attachments/montreal_convention_1999_CRC.pdf).



this agreement undertook to waive the limits and limit the force majeure defence in regard to passenger claims. The IATA Inter-carrier Agreement was worked out in further detail in the IATA Implementation Agreement in the spring of 1996 in Miami by the IATA Legal Advisory Subcommittee on Passenger Liability. These IATA agreements soon turned out to be a great success and were signed by a large number of airlines. Apparently the developments were still not moving fast enough for the European Commission. In 1995 the European Commission submitted a proposal for a European Council regulation relating to the liability of air carriers in case of accidents. This proposal finally resulted in a Council regulation number 2027/97 which came into force on October 17 1998.

The above developments and the increasing criticism from the industry on the patchwork of the Warsaw system finally led to the drawing up and approval of the Montreal Convention in 1999 under the auspices of the IATA.<sup>64</sup> The new convention entered into force in November 2003 and it modernises the Warsaw system, such as recognising the use of electronic documentation without making any dramatic changes to the liability regime<sup>65</sup>.

Many of the changes brought about by the Montreal Convention are related to the international carriage of passengers by air, thus the reducing its

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<sup>64</sup> Matte, The Warsaw system and the hesitation of the U.S. senate, (1983) 8 *Annals Air and Space Law* 151 and Paul Stephen Dempsey, International air cargo & baggage liability and the Tower of Babel, *The George Washington International Law Review*, 2004.

<sup>65</sup> Article 4(2), Convention for the unification of certain rules for international carriage by air done at Montreal on 28 May 1999.

harmonizing effects on the international carriage of goods by air,<sup>66</sup> and it is expected that the decisions under the Warsaw regime will continue to play a role in the future in aiding the interpretation of those provisions of the Montreal Convention that are similar, if not identical, to those found in the Warsaw Convention.<sup>67</sup> Notwithstanding the aforementioned harmonization efforts, appendix 2 illustrates the current uneven state of application of international conventions on air transport.

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<sup>66</sup> Felix WH Chan, Jimmy JM Ng, Bobby KY Wong, Shipping and Logistics Law, Principles and Practice in Hong Kong, Hong Kong University Press, 2002, ISBN 962 209 600 X, pg.371.

<sup>67</sup> Indira Carr, International Trade Law, 4th edition, 2010, Cavendish, ISBN10: 0-415-45842-0

### 3c. Road, Rail and Inland Transport

The carriage of goods by sea and air may constitute the longest part of the transport chain, but the starting stage and / or eventual carriage to the destination almost always involve carriage by road and/or rail or inland waterways. This road leg is mostly governed by the construction of the contract between the carrier and his client, subject to the local legislation.



*The final step in the multimodal transport almost always is by road, completing the 'door-to-door' advantage. Photo: Author's own*

The first steps towards standardization of the law relating international carriage of goods by road were taken in 1956 with the Convention on the International Carriage of Goods (CMR) drafted by the United Nations Economic

Commission for Europe (UNECE). The parties currently members to this instrument are largely EU nations and some countries which have access to Europe by road.<sup>68</sup> The European focused legal regime is however, very significant considering that it sustains one of the largest volumes of international trade.<sup>69</sup>

The COTIF joins together three carriage by rail conventions, namely the revised Berne Rail Conventions (the CIM, and the CIV) and the Additional Convention (the CAV). This too, like the CMR is a regional convention rather than an international convention and includes signatories from the European continent and countries connected by rail to it.<sup>70</sup> The COTIF governs only international carriage taking place exclusively over railway lines registered under the Convention. Other regional conventions exist, such as the IACGR, the International Agreement in Carriage of Goods by Rail, 1954 which include countries such as China and Vietnam among its signatories.

The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) of 22 June 2001, as the name suggests, governs international transport through inland waterways, and is at present confined to European nations.

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<sup>68</sup> [http://www.unece.org/trans/conventn/legalinst\\_25\\_OLIRT\\_CM.html](http://www.unece.org/trans/conventn/legalinst_25_OLIRT_CM.html), status of CMR convention 1956, as accessed on 31.10.2011.

<sup>69</sup> Allan Woodburn, Julian Allen, Michael Browne and Jacques Leonardi, Transport Studies Department, University of Westminster London, UK, The Impacts of Globalisation on International Road and Rail Freight Transport activity, Global Forum on Transport and Environment in a Globalising World 10-12 November 2008, Guadalajara, Mexico, intra-Europe trade in 2006 was USD 3,651 billion and 31.2% of the international trade volumes. Trans-border crossings accounted for 26% of European road traffic and 51% for rail traffic in 2006.

<sup>70</sup> [http://www.otif.org/fileadmin/user\\_upload/otif\\_verlinkte\\_files/07\\_veroeff/02\\_COTIF\\_99/Prot-1999-ratifications\\_13\\_09\\_2011\\_fde.pdf](http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_13_09_2011_fde.pdf) as accessed on 31.10.2011.



*Inland water transport is extensively used in rivers of Europe, China, U.S. and South America.*

*Photo courtesy: Duncan Evans, <http://islandshipping.blogspot.com/>. The CMNI is however is confined to European nations.*

The CMR comes into application when (a) there is a contract for carriage of goods by road for a reward, (b) the goods are carried on vehicles, (c) the place of taking over and the place designated for delivery specified in the contract are situated in two different states, and (d) the place of taking over or delivery of goods is in a contracting state.<sup>71</sup>

Under the CIM-COTIF and CMR regimes, the carrier is subject to a form of strict liability.<sup>72</sup> The carrier is presumed liable for loss, damage, or delay unless it can establish that the loss was caused by the shipper's fault, instructions given by the shipper, inherent vice of the goods, or "circumstances

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<sup>71</sup> Article 1(1) of CMR.

<sup>72</sup> Stephen Zamora, Carrier Liability for Damage or Loss to Cargo in International Transport, 23 AM J. Comp. L. 391, 403-45 (1975).

which the railway could not avoid and the consequences of which it was unable to prevent".<sup>73</sup>

Both the CIM and the CMR Conventions in specific language govern carriage by other modes incidental to carriage under a rail or truck bill of lading. For example, article 1 of the CMR Convention provides that "this Convention shall apply to every contract for the carriage of goods by road in vehicles for reward"; and article 2(1) adds that "where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways, or air, and...the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage."



*This 40-foot shipping container fell off a truck while rounding a bend.*

*Photo courtesy: John Grainger at <http://www.dailytelegraph.com.au/shipping-container-causes-traffic-chaos/story-e6freuy9-1226072115543>*

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<sup>73</sup> CMR, article 17(2), and also CIM-COTIF article 27(2). These are known as nonprivileged exceptions.



It is opined that the CMR is in-exhaustive with its central concepts remaining undefined, resulting in the courts often resorting to domestic law.<sup>74</sup> Matters such as delivery, central to carriage of goods, are undefined; and liability for loss or damage to goods occurring prior to taking over and delivery is not dealt with in the CMR. Art.29.1 has been termed 'a notorious provision' by Clarke,<sup>75</sup> who, in support of his statement, cites the examples of German courts who have been more ready than most to find gaps in the CMR regime through which to resort to familiar concepts of domestic law, whenever a black and white answer could not be found in the text itself. The uneven interpretation of the articles, such a jurisdiction favouring carriers,<sup>76</sup> does not promote harmonized application of an international convention such as that on the Contract for the International Carriage of Goods by Road (CMR) 1956.<sup>77</sup>

So, even before we attempt to climb up the legal pyramid to reach the ideal multimodal convention, we realise that even the base unimodal legal regimes are even within themselves not in agreement. So, can the unimodal regimes see eye to eye with other conventions and support a strong and acceptable multimodal transport convention?

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<sup>74</sup> Indira Carr, *International Trade Law*, 4th edition, 2010, Cavendish, ISBN10: 0-415-45842-0, page 399.

<sup>75</sup> Malcolm Clarke, *Road transport*, *Journal of Business Law*, 200, pg.431.

<sup>76</sup> such as Netherlands, see Merlijn Hijzen (Van Steenderen Mainport Lawyers), Art. 32 CMR: A Blow to the "Dutch Trick", January 7, 2010, at [http://www.forwarderlaw.com/library/view.php?article\\_id=594](http://www.forwarderlaw.com/library/view.php?article_id=594).

<sup>77</sup> Refer *Fortis Corporate Insurance N.V. v. Uni-Data Logistics B.V. and UPS SCS (Nederland) B.V.* [1] Dutch Supreme Court – judgment of 18 December 2009 and *Datec Electronic Holdings Ltd v United Parcels Service Ltd.* [2005] EWCA Civ 1418; [2006] 2 All E.R. (Comm) 350 (CA (Civ Div)), and the discussion by Malcolm Clarke in 'Road transport', *Journal of Business Law*, 200, pg.429-436.

#### 4. The modes of carriage work together: The emergence of multimodal transport , containerization and new transport law questions

Containerization is a technical term which introduced the legal concept of multimodal carriage by creating a transport where at least two of the above discussed means of transport,<sup>78</sup> and with it their respective transport conventions, were involved. The technical and practical premises on which the existing legal regimes were formulated were no longer necessarily valid, and a host of new questions cropped up.

Prior to containerization, the handling process for waterborne general cargo, also called break bulk cargo, was slow, piece-meal, and repetitive.



*This is what a quayside used to look like before containerization. Damage to cargo, pilferage, delays, costs were much higher than they were today. In a way, containerization revolutionized the way in which trade was done for many centuries before. Photo courtesy: Wikipedia commons.*

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<sup>78</sup> R. de Wit, Multimodal Transport – carrier liability and documentation, London 1995 and J. Ramberg, Multimodal transport – a new dimension of the law of carriage of goods?



All products other than bulk commodities (e.g., grain, coal etc.) were moved individually, sometimes on pallets or in boxes. Boxes were loaded one by one into a truck and then driven to a port. Once at the dock, each item, box, or pallet was systematically unloaded and then hoisted into the hold of the ship. At the destination, the freight was similarly unloaded and put on a truck or train for delivery. Transitions between other modes of transport, such as railroads, only compounded the inefficiency. In addition to being slow due to excessive handling, the extended loading and unloading process exposed the cargo to potential damage and pilferage. By the 1960s, it was obvious that break-bulk shipping technology could not keep pace with the demands of a growing world trade.

The solution developed in the mid-1950s, credited largely to Malcolm McLean,<sup>79</sup> was to unitize cargo into standard sized ocean containers that allowed ocean carriers and ports to invest in mechanized systems and equipment to automate the transport process and raise productivity. The ocean containers were designed to fit neatly above decks and into specially constructed holds on container vessels.

These containers could be lifted and placed quickly on and off vessels by container cranes; the same containers could further be locked onto trailer chassis and rail cars. Whereas general cargo berths typically handled around 100,000 cargo tons per year, the new container terminals were able to handle up to

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<sup>79</sup> Brian J Cudahy, *Box Boats; how container ships changed the world*, Fordham University Press, 2006.

2,000,000 tons per year.<sup>80</sup> Similar containers, albeit lighter units were used for multi-modal transport involving an air leg, and most likely involving a trucking leg from/ to the origin/ destination. Using containers, cargo could be moved quickly over great distances, with little rehandling, and with efficient transfer between modes.<sup>81</sup>



*Malcom Purcell McLean pictured above is often credited with inventing the modern container in 1956. He was an American trucker who developed the idea to maximise efficiency in stowage and handling, thereby dramatically reducing the cost and time involved in transporting goods.*

*Photo courtesy: Wikipedia commons.*

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<sup>80</sup> Martin Stopford, *Maritime Economics* (London: Routledge, 1997), 342.

<sup>81</sup> Law of Intermodal Transportation: What It Was, What It Is, What It Should Be, The [article] *Transportation Law Journal*, Vol. 27, Issue 3 (Summer 2000), pp. 367-418 .

With the advent of carriage of goods in containers, the interest naturally focused on carriage from point-to-point whereby different modes of transport could be integrated in the same contract of carriage.<sup>82</sup> The door-to-door service is favoured by exporters as it provides a one-stop solution for delivering goods to virtually anywhere in the world. For the multimodal transport operator and even a unimodal carrier, extending the limits of the traditional scope of service offers greater profits.<sup>83</sup>

While the goods themselves are carried across several modes more easily now, the international legal rules have not developed in pace with the technological advancements. The laws relating to the carriage of goods are still held back by the old unimodal laws and result in uneasy situations where the outcome of any claims and related suits is uncertain.

#### **4a. The container as a deck cargo on the sea-carrier**

The first major issue arose with the traditional construction of The Hague Rules which predated containerization and Article 1(c)<sup>84</sup> stated that the Rules do not apply to cargo "which by the contract of carriage is stated as being carried on deck and is so carried". The common law position is that the carrier has a duty to stow cargo below deck. Carriage on the weather deck is only permissible where

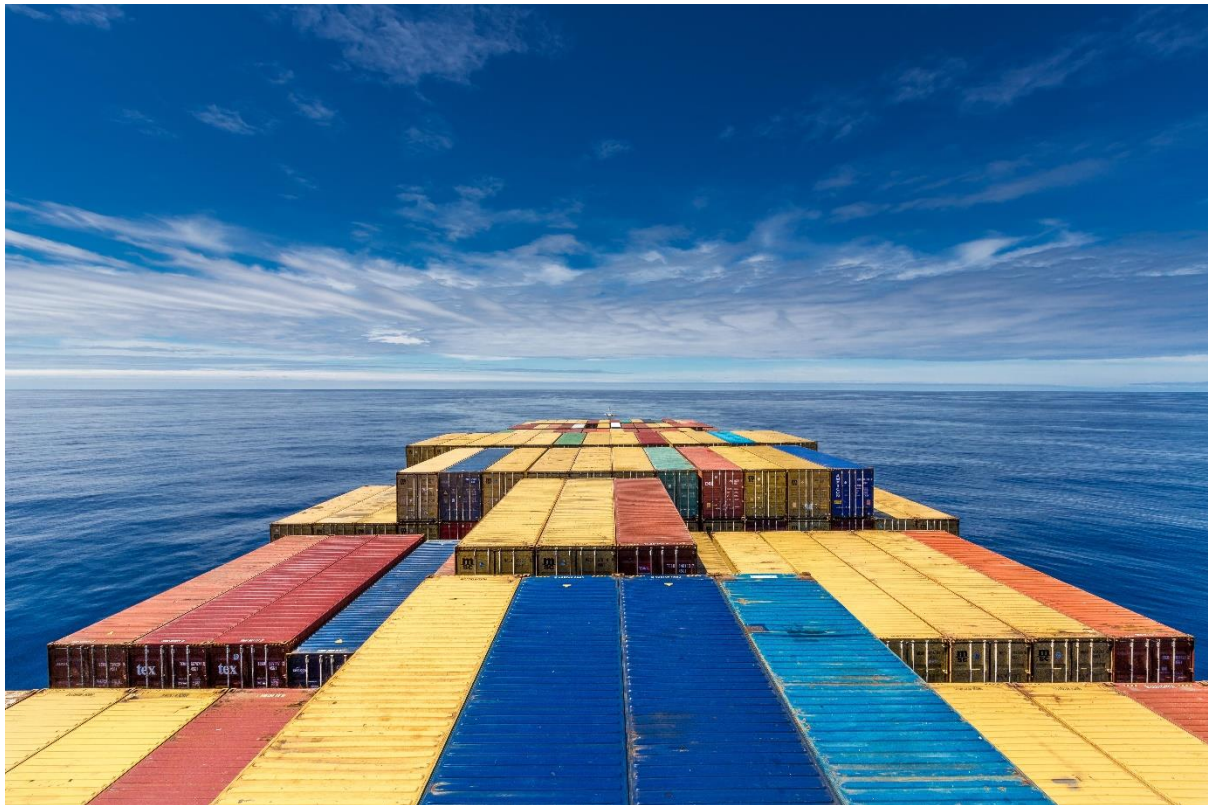
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<sup>82</sup> R. de Wit, *Multimodal Transport – carrier liability and documentation*, London 1995 and J. Ramberg, *Multimodal transport – a new dimension of the law of carriage of goods?* (in *Etudes offertes à René Rodière*, Dalloz Paris 1981).

<sup>83</sup> Felix WH Chan, Jimmy JM Ng, Bobby KY Wong, *Shipping and Logistics Law, Principles and practice in Hong Kong*, Hong Kong University Press, 2002, ISBN 962 209 600 X.

<sup>84</sup> this remained unchanged with the Visby amendments.

the shipper has agreed to such carriage, or where there is a custom of the trade to carry the goods on deck.. The *Hong Kong Producer* demonstrates the courts initial reluctance to sanction on deck carriage.<sup>85</sup> Here the carriers evidence that there was a custom at the port to stow containers on deck, was not accepted, a liberty clause was required if the on-deck carriage was not to amount to a breach of contract. However by the time of the *Mormacvega*,<sup>86</sup> the court was willing to accept that in the case of purpose built or converted containership, the weather deck was the normal place for the carriage of containers.



*On modern container ships, containers are carried in almost equal quantities above and below decks, all with their designed and approved securing systems.*

*Photo: Captain Sahil Fauzdar, who is a friend of the Author.*

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<sup>85</sup> *Encyclopaedia Britannica v. The Hong Kong Producer* [1969] Lloyd's Rep. 536.

<sup>86</sup> *Du Pont de Nemours v. S.S. Mormacvega* [1984] 1 Lloyd's Rep. 296.

Other issues which are not fully updated for container transport are requirements in The Hague-Visby rules for providing a seaworthy ship or for stowage of cargo, i.e. would this be extended to providing a seaworthy container and for proper stowage and securing of cargo in the container.<sup>87</sup> The Hamburg and the Rotterdam Rules which did provide for such a carriage, remain unratified.

#### **4b. The container as a package**

Containerization also posed a question whether a container is a package for the purposes of determining the limits of liability under the transport laws. In the U.S., the current position is that when the bill of lading lists the number of containers and describes the items inside the containers in terms that can reasonably be understood as "packages," the items inside, not the containers, will be treated as COGSA package.<sup>88</sup> When the bill of lading lists the number of containers and describes the items inside the containers in terms that can reasonably be understood as "packages," the items inside, not the containers,<sup>89</sup> will be treated as COGSA packages. "When the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a package if it is listed as a package on the bill of lading and if the parties have not

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<sup>87</sup> Samir Mankabady, Some Legal Aspects of Carriage of Goods by Container, International and Comparative Law Quarterly, Vo. 27, pg.317.

<sup>88</sup> Craig Still, Thinking Outside the Box- The Application of COGSA's \$500 per Package Limitation to Shipping Containers, 24 Houston Journal of International Law 81 2001-2002.

<sup>89</sup> *Mitsui & Co., Ltd. and Ataka & Co., Ltd., v. American Export Lines, Inc., Armstrong Cork Canada, Ltd., and Armstrong Cork Company, v. American Export Lines Inc.*, 636 F.2d 807, Nos. 8, 11, Dockets 80-7095 /7085. United States Court of Appeals, Second Circuit. Argued Sept. 8, 1980, Decided Jan. 16, 1981.



specified that the shipment is one of 'goods not shipped in packages.'<sup>90</sup> Though the courts have developed tests to answer this question, the clarification is not yet available in an internationally accepted transport law convention.<sup>91</sup>

#### 4c. 'Tackle to tackle' application of the HVR to containers

The Hague-Visby Rules traditionally applied to the contract of carriage under Article I(e) from the 'time the goods are loaded to the time when they are discharged from the ship'. Though the transport law rules were not amended, the courts improvised in *Mayhew Foods v OCL* to determine that the Rules applied during container transshipment and waiting periods ashore.<sup>92</sup>



*Containers start their journey, either at the factory or at inland container depots which may be several hundred miles from the port. The HVR do not reflect the reality of modern day multimodal transport practices.*

*Photo courtesy: Arabian Supply Chain.Com (<http://www.arabiansupplychain.com/article-6391>)*

<sup>90</sup> *Binladen BSB Landscaping, v. M.V. "Nedlloyd Rotterdam" Nedlloyd Lijnen B.V. (Nedlloyd Lines)*, No. 463, 759 F.2d 1006, 1985 A.M.C. 2113, Docket 84-7710, United States Court of Appeals, Second Circuit, Argued Dec. 3, 1984, Decided April 3, 1985.

<sup>91</sup> Craig Still, Thinking Outside the Box-The Application of COGSA's \$500 Per Package Limitation To Shipping Containers, 24 Houston Journal of International Law, 81 2001-2002.

<sup>92</sup> [1984] 1 Lloyd's Rep 317.

## **5. The new role of the freight forwarder and emergence of the NVOCC**

As door-to-door service has usually a higher profit margin than unimodal carriage, many carriers have extended their business to provide door-to-door service. In many instances, the shipper may not have sufficient cargo to fully stuff a container; here NVOCCs (non-vessel operating common carriers), or freight-forwarders consolidate the cargo and take on the role of the multimodal transport operator.

The route is chosen by the parties; in case the cargo is urgently required and is of high value, air transport is chosen with a preceding and/ or following road or rail leg. In case the cargo is heavy, and allows for a longer transportation time, sea-leg is chosen. The technological development of transport means and operations, as well as in communications, coupled with liberalization in the provision of services, enabled more and more transport operators are able to provide such safe and efficient door-to-door transport. These services are increasingly market-segment oriented rather than transport mode oriented. So then, which one, if any, of the unimodal transport rules apply to the freight forwarder? If the unimodal transport rules continue to apply for that part of the chain, when did one mode end and the other start? Which transport documents, such as bills of lading, would apply for the entire section of the multimodal transport? Shippers realized that this new concept involves the effective participation of various transport mode operators but does not always make clear



who is responsible for delivering cargo at destination in safe conditions, according to agreed schedules.

### **5a. MTO as a principal or an agent of the carrier?**

The answer will determine who to sue in event of loss or damage to the cargo. The freight-forwarder's role has evolved from the traditional agent role,<sup>93</sup> to a more complex one with the development of multimodal transport. In multimodal transport, it is quite often the case that the MTO may not himself perform the whole or certain parts of the transport and may for example, subcontract an air carrier to perform the air transport. Where he takes on the role of arranging transport, his capacity is important in sorting out the liability of various parties involved in a multimodal transport. Shippers or consignees would obviously find it convenient to pursue one single multimodal transport operator rather than against several unimodal carriers involved.<sup>94</sup>

The MTO cannot be sued as an agent unless he has failed to exercise due diligence. The law is still unsettled on if can be sued when he acts as a principal,<sup>95</sup> though freight forwarders have been held by the courts to have acted as, and thus incurred toward the cargo-owner the liabilities of, a carrier.<sup>96</sup>

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<sup>93</sup> *Jones v European & General Express Co. (1920) 15 Asp RMC 138*. The traditional view is that the consignor cannot sue the freight forwarder acting as the agent though he can be sued for not exercising due care and skill.

<sup>94</sup> UNCTAD, Implementation of Multimodal Transport Rules, UNCTAD/SDTE/TLB/2, 25 June 2001.

<sup>95</sup> Shane Nossal, The Legal Status of Freight Forwarders' Bills of Lading, 25 Hong Kong L.J. 78 1995.

<sup>96</sup> *Harris (Harella) Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep 251.

Ideally the transport document issued by the forwarder should expressly indicate whether he is acting as the agent or the principal; however, in practise, this is rarely the case.<sup>97</sup> The question is resolved by looking to other factors such as:<sup>98</sup>

(a) Whether the freight forwarder held itself out as a carrier, although not owning or having chartered any vessels;<sup>99</sup> (b) The type of transport document, for instance, a forwarder's house bill of lading, inferring to the groupage bill of lading issued by the carrier may indicate the forwarder's intention to act as the principal. Whether the freight forwarder issued its own bill of lading to the cargo owner and took a bill of lading from the actual carrier naming itself as the shipper;<sup>100</sup> (c) The charges. An inclusive price as opposed to freight charges plus commission may indicate that the forwarder is acting as the principal. This presumption may be displaced by contract terms;<sup>101</sup> (d) The language used by the consignor and forwarder. For instance, did the consignor request the forwarder to carry or to make the transport arrangements?<sup>102</sup> (e) The extent and frequency of communication between the consignor and the forwarder. Under the BIFA Standard Trading conditions, a forwarder's failure to produce evidence of any contract entered into as agent on demand by the consignor changes his capacity to that of principal (cl6(B)); (f) Past course of dealings with forwarder and consignor. (g) The usual capacity of the forwarder. Does the forwarder normally provide the services as the agent or principal? (h) Where the freight forwarder

<sup>97</sup> Indira Carr, *International Trade Law*, 4th edition, 2010, Cavendish, ISBN10: 0-415-45842-0, pg. 403.

<sup>98</sup> *Ocean Projects Inc v Ultratech Pte Ltd* [1994] 2 SLR 369, 375-6.

<sup>99</sup> *Marston Excelsior Ltd v Arbuckle Smith & Co* [1971] Lloyd's Rep 306,311.

<sup>100</sup> *Hair & Skin Trading Co v Norman Airfreight Carriers Ltd* [1974] 1 Lloyd's Rep 443.

<sup>101</sup> *Marston Excelsior Ltd v Arbuckle Smith & Co* [1971] Lloyd's Rep 306,311.

<sup>102</sup> *Ocean Projects Inc v Ultratech Pte Ltd* [1994] 2 SLR 369, 375-6.

agrees to provide other services, such as the packing, warehousing, or carriage of the goods, then he will be directly responsible to the cargo-owner for the performance of those services. And this is so even if he sub-contracts the performance of the service to a third party.<sup>103</sup>

In *Aqualon (UK) Ltd v Vallana Shipping Corp*,<sup>104</sup> P agreed with N that N would arrange for the movement of all its goods from the Netherlands to the UK for an all-in price. N would engage English road hauliers, T, and Dutch hauliers J. J would take T's trailers to P's Dutch factory to load a cargo and place them on a ferry. The ferry booking would be made by N or T. P would produce a consignment note naming N as carrier. N regularly would later alter the note to delete N's name and insert T's name. In the box marked sender's instructions, N used the stamp "N (As Agents Only)". The goods were damaged while at sea by a storm. P claimed against N and the question was whether N was a CMR carrier. N claimed that it only acted as a forwarder to procure carriage without undertaking to act as P's agent to make a contract of carriage. N's invoices referred to the FENEX conditions. The Court held, that (1) while it might be possible for a forwarder to take an intermediate role between that of a carrier and agent, a court would not infer such an intention in absence of clear evidence; (2) in identifying the CMR carrier it was relevant to take into account the terms of the particular contract, any descriptions used or adopted, the course of dealings, the nature and basis of charging and the nature and terms of any

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<sup>103</sup> Shane Nossal, The Legal Status of Freight Forwarders' Bills of Lading, 25 Hong Kong L.J. 78 1995.

<sup>104</sup> *Aqualon (UK) Ltd v Vallana Shipping Corp.*, Queen's Bench Division (Commercial Court) [1994] 1 Lloyd's Rep. 669.

consignment note; (3) P was never alerted to any problem about the way consignment notes were made out and P never had any notice that N was systematically rejecting any role or responsibility as carrier; (4) there was nothing in the FENEX conditions inconsistent with N being a contracting carrier; (5) the fact that there was an all-in price pointed towards N having the personal responsibility of a carrier as did the terms of the consignment note produced by P and signed by J's driver; (6) the consignment note was not only prima facie evidence of the making of the contract but also of the identity of the carrier entering into it as stated on its face; and (7) as N knew that the notes were being made out and signed by J in such a way that indicated a belief by P that N was the CMR carrier and as N failed to correct that impression, N was to be treated as a CMR carrier.

*In Kuehne & Nagel (Hong Kong) Ltd. v Yuen Fung Metal Works Ltd.*,<sup>105</sup> the consignor YF formed a contract with KN for the carriage of aluminium goods from Hong Kong to Germany. The goods were stuffed in containers and to be carried in three stages (1) by sea to Russia (2) by the Trans-Siberian Railway and (3) by trucks across Poland to Germany. The carriage was performed by a company closely related to KN. Three original bill of lading were issued in KN's own name. The goods were delivered to the customer of YF without surrender of any original bill of lading, contrary to the condition stated in the bills. The court rejected KN's claim of being just the international freight forwarder, and held it

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<sup>105</sup> [1979] HKLR 526

to be the carrier in this case, besides the fact that delivery of goods without surrender of the bill of lading amounted to a fundamental breach of contract.



*When the container leaves the factory, it will pass through road, rail, sea or air.  
Several legal regimes, all for the same box!*

*Photo courtesy: Wikipedia commons.*

## 5b. Bills of lading in multimodal transport

Traditionally,<sup>106</sup> one bill of lading would be issued to cover each part of the journey.<sup>107</sup> A bill of lading fulfils the role of a document of title,<sup>108</sup> an evidence of contract to carry the goods to the destination,<sup>109</sup> and a proof of receipt of cargo by the carrier.<sup>110</sup> The terms contained in the bills of lading play a central part in determining the rights and liabilities of the carrier under the governing international convention. However, under the documentary credit system, shippers prefer a single bill of lading which would allow release of their payment on its presentation to the bank.

The limited scope of The Hague-Visby Rules have left the sea carriage regime unable to deal efficiently with the increasing number of claims involving multimodal bills of lading where the loss or damage occurs inland. For the past several decades, parties to multimodal bills of lading have compensated by including choice of law provisions (network clauses and Clauses Paramount), to govern the rights and liabilities of the carrier and shipper outside the tackle-to-tackle period, and Himalaya Clauses to extend coverage to persons not otherwise covered by the regime. These clauses, however, have been subject to different interpretations by different courts, as evidenced by the *Kirby* case; even the most

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<sup>106</sup> The use of the bill of lading can be traced back to the 14th century, see Bennett, *The History and Present Position of the Bill of Lading as a Document of Title to Goods*, 1914, CUP.

<sup>107</sup> Under the Carriage of Goods by Sea Act 1971, Article III (3), the carrier is obliged to issue a bill of lading to the shipper.

<sup>108</sup> *Sanders v Mclean* [1883] 11 QBD 327.

<sup>109</sup> *Crooks v Allan* [1951] 1 KB 55.

<sup>110</sup> *Smith v Bedouin Steam Navigation Co.* [1896] AC 70.

carefully drafted bills of lading have not prevented the application of state law on significant issues of liability and damages. The result has been low predictability and high litigation costs.<sup>111</sup>

The through bill of lading evolved with containerization, and was issued if a shipper sent the cargo to the sea carrier's loading depot for grouping. The MTO would typically undertake to collect the goods at the shipper's factory or warehouse, to consolidate them with goods of other shippers, to carry them to the final destination and to deliver them to the consignee, all under a bill of lading issued by the multimodal transport operator.

It does not necessarily follow that a freight forwarder, held to have assumed contractual liability as a carrier, is capable of issuing a bill of lading which the law considers as genuine. Recognition of the document issued by a freight forwarder as a bill of lading is relevant to (a) its use in documentary credit transactions, (b) its usefulness as security for loans, and (c) the rights and liabilities of the parties associated with the carriage of the goods, taking into account the applicability of the Hague-Visby Rules or other international convention to the contract of carriage.

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<sup>111</sup> Michael E. Crowley, *The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem*, 79 *Tulane Law Review* 1461 (2004-2005).



### 5c. The through bill of lading as a contract of carriage

The courts have in general been reluctant to hold that transport documents issued by a freight forwarder who has assumed the liabilities of a carrier constitute bills of lading. For example, in *Freight Systems Ltd v Korea Shipping Corp* the plaintiff,<sup>112</sup> Freight Systems Ltd, was a freight forwarder who arranged for the carriage of goods belonging to Marianne Trading Ltd. ('Marianne') from Hong Kong to Seattle on board the defendant's vessel, the 'Korea Wonis-Sun.' The plaintiff issued to Marianne an 'Intermodal B/L' and received from the defendant shipowner a bill of lading stating that the shipper/exporter was 'Freight Systems Ltd o/b Marianne Trading Ltd.' The letter of credit called for a 'Full set of original Freight Systems Ocean Bills of Lading.'

The goods arrived at the final destination in a damaged condition and the plaintiff paid compensation to Marianne under its bill of lading. The plaintiff then commenced proceedings against the defendant claiming an indemnity for the amount paid on the grounds that the plaintiff had entered into the contract of carriage with the defendant as a principal. The High Court of Hong Kong held that the plaintiff had no standing to sue the defendant under the bill of lading issued by the defendant because the plaintiff had entered into contractual relations with, and accepted the bill of lading from, the defendant as an agent of Marianne.

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<sup>112</sup> *Freight Systems Ltd v Korea Shipping Corp*, HCt, No CL174 of 1988 (21 Nov 1990, Kaplan J. Also see *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 NSWLR 745.

This decision is open to the criticism that it does not reflect the commercial reality of the transaction. Korea Shipping Corporation had contracted with Marianne as a principal and had accordingly incurred towards Marianne the liabilities of a contractual carrier. However, the plaintiff was held incapable of securing an indemnity for damage to the goods from the defendant, the actual carrier, because of the court's literal interpretation of the expression 'o/b' (held to stand for 'on behalf of') appearing in the defendant's bill of lading.<sup>113</sup>

A container bill of lading may also be issued by the sea carrier, which is similar to the traditional bill of lading, and the carrier's liability are determined by the facts of the case. In *Esmeralda I*,<sup>114</sup> the carrier was held not liable for the shortfall of cargo discovered at the destination as the bill of lading was qualified as 'FCL/FCL, and 'packed by shippers'.

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<sup>113</sup> Felix WH Chan, Jimmy JM Ng, Bobby KY Wong, Shipping and Logistics Law, Principles and Practice in Hong Kong, Hong Kong University press, 2002, ISBN 962 209 600 X, page 186,

<sup>114</sup> [1988] 1 Lloyd's Rep 206.

### 5d. The combined or through bill of lading as a document of 'title'?

In contrast with a traditional sea bill of lading,<sup>115</sup> a multimodal transport document is often issued as a 'received for shipment' bill. Its status as a document of title is unclear.<sup>116</sup> For instance, under English Law, where the contract of sale stipulates a date of shipment, the seller does not fulfil his obligation by producing a document which shows that the goods were "received for shipment" on the contract date.<sup>117</sup> It is settled that an air waybill issued by an air carrier is not a document of title. In the Australian case, *The Cape Comorin*,<sup>118</sup> it was also held that a bill of lading issued by a forwarder is not a document of title.

The multimodal transport document may be negotiable or non-negotiable and may not be an easy matter to distinguish between either. In *The Chitral*,<sup>119</sup> a cargo was dispatched from Bremen to Dubai, carried by a vessel, C. A bill of lading was issued by German freight forwarders, IASC, to the sellers of the cargo in a traditionally negotiable format. A second bill of lading was issued by agents for the shipowners to IASC as shippers, with a named consignee. No notify party was specified. The cargo was damaged during the voyage, and one of the issues

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<sup>115</sup> as per the custom in *Lickbarrow v Mason* (1787) 2 T.R. 63; reversed (1790) 1 H.Bl. 357, but restored by the House of Lords (1793) 2 H.Bl. 211.

<sup>116</sup> *The Ship "Marlborough Hill" Appellant; v Alex. Cowan and Sons, Limited, and Others Respondents* [1921] 1 A.C. 444, the judgement was criticised in *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 K.B. 443. See discussion in Benjamin's Sale of Goods 8th Ed., Main Volume, Part 7, Chapter 18-088.

<sup>117</sup> *Diamond Alkali Export Corp v Fl Bourgeois* [1921] 3 K.B. 443.

<sup>118</sup> [1991] 24 NSWLR 745.

<sup>119</sup> *International Air and Sea Cargo GmbH v Owners of the Chitral* [2000] 1 All E.R. (Comm) 932; [2000] 1 Lloyd's Rep. 529;

was whether the second bill was negotiable. The court held that in absence of the generally used words 'or order or assigns', the bill was not negotiable.

## **6. The central question: Who is exposed to how much risk during the multimodal transport?**

Having seen the various issues which have surfaced since the rise to prominence of containerization, we now turn to the central questions in multimodal transport; who is liable for how much in case of delay, loss of or damage to goods during the transport? Where to sue and the time limits for initiating action are the questions that go hand-in-hand with the key questions on liability. The liability varies on case-to-case basis and gives uncertainty as to the multimodal carrier's liability in a given situation. The courts have tried to stretch the boundaries of the existing unimodal regimes in deciding the cases that have surfaced so far but the lack of an internationally applicable legal regime is sorely felt.

The question on liability is important as the limits are different. The legal conventions for each transport regime evolved at different times and the liability limits were based on the distribution of risk between the shipper and the carrier, as was perceived by the industry at the time of drafting of the rules. The limits of liability reflected the average value of goods shipped through that mode of

transport, and were influenced by the tenuous balance between the shipper and cargo insurance as discussed in detail in previous chapters.<sup>120</sup>

The limits of liability vary substantially between the modes as compared in below the table.

Table 1: Liability limitations under the various transport conventions

Sea			Inland Waterway	Road	Rail	Air
Hague Rules	Hague- Visby Rules	Hamburg Rules	CMNI	CMR	COTIF/ CIM	Warsaw/ Montreal Convention
£ 100/ pkg	2 SDR/kg or 666.67 SDR/ pkg	2.5 SDR/kg or 835 SDR/kg	2 SDR/kg or 666.67 SDR/ pkg or 1,500 + 25,000 SDR/contai ner	8.33 SDR/kg	17 SDR/kg	17 SDR/kg

More importantly, the sea-carriers continue to enjoy the defence of negligent navigation and management, whereas the air, road and rail carriers no

<sup>120</sup> See Section 3 on the component modes in a multimodal transport.

longer enjoy such a protection. It naturally follows that the carrier and shipper will each argue that the convention which favours them the most is applied when ascertaining the limits of liability in cases of damage during multimodal transport.

As Hillenbrand puts in a bullet point checklist to trace the movement of the cargo and potential liability in a rather interesting manner:<sup>121</sup>

1. Plot out the points involved in the transportation.
2. List all companies that could have been involved in the transport of the cargo.
3. Superimpose the names of the companies on the diagram of the transportation movement.
4. Obtain all transportation contracts.
5. Determine which contract was in effect when the shipment moved.
6. Obtain all incidental and collateral contracts.
7. Determine which company was acting as agent for the other parties.
8. Set out the chronology of the events.
9. Determine when the damage was discovered.
10. Determine liability by measuring the validity of the contracts.
11. Identify possible defences.

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<sup>121</sup> Hyman Hillenbrand, Checklist for Transportation Litigation, 14 Brief 35 1984-1985.

## 6a. Localized and Unlocalized loss

Two terms which play a central role in determining the distribution of liability in a multimodal transport are introduced at this point; localized loss is where damage is known to have occurred during a particular stage of transport. This is a simpler starting point to have in a dispute, though the positions on applicable regime for the contract or on time limits for commencing suits are still unclear. It is also possible that there may be an overlap, such as during transshipment, say from sea to road, would the case be judged under Hague, Hague-Visby or Hamburg, or by CMR, or by the applicable national law.



*Damages to cargo when handling between various modes of transport also occur quite regularly. Reasons such as failure or mishandling of the lifting equipment cause such damages.*

*Photo courtesy: Logistics THL Corp, <http://thllogistics.net/>*



In *Thermo Engineers v Ferrymasters*,<sup>122</sup> damage occurred to goods during the process of loading the trailer carrying the goods onto the ship at Felixstowe. As the carriage contracted for was 'roll-on, roll-off' carriage under Article 2 CMR, the question arose whether the sea carriage would be applicable. The court judged that the Hague Rules would be applicable, and the decision has been the subject of some argument.<sup>123</sup>

## 6b. Unlocalized loss

Unlocalized loss is a problem typical for multimodal transport, which occurs when the stage at which the actual damage or loss of goods was caused cannot be determined. In the container trade as the loss is often concealed as the container is sealed upon receipt and is not open until delivery.<sup>124</sup> Even if the damage is identified, it may have occurred gradually or span on two legs. This severely complicates the determination of the applicable legal regime, and this is probably where the absence of a multimodal transport convention is most acutely felt.<sup>125</sup> Except as provided in a limited manner under Art 18(4) of the Montreal Convention,<sup>126</sup> none of the international conventions can be applied to the

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<sup>122</sup> *Thermo Engineers Ltd and Anhydro A/S v Ferrymasters Ltd* [1981] 1 W.L.R. 1470 (QBD)

<sup>123</sup> David A. Glass, Article 2 of the CMR Convention - a Reappraisal, *Journal of Business Law*, 2000, Nov, 562-586.

<sup>124</sup> An UNCTAD source offered the opinion that from 40-60% of claims involve concealed damage. U.N. Doc. TAD/INF/992 (1978), at 2.

<sup>125</sup> Marian Hoeks, *Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods*, Wolters Kluwer, 2010, ISBN 978-90-4113246-8, pg. 17.

<sup>126</sup> Montreal Convention, A18(4): The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

recovery of the loss if the stage at which it occurred cannot be identified. The national law may then be applied to such cases, and not all countries have legislations governing multimodal transport.

Even in countries such as Netherlands and Germany with multimodal laws, it has not been a smooth sailing for the operators. In 2006, the German Federal Supreme Court (BGH), judged a case involving thirteen different incidents of unlocalized loss.<sup>127</sup> Every time the goods were carried by road from the carrier's depot in Germany to the airport in Brussels, from where they were subsequently shipped overseas. The court applied the CMR, since the CMR, of all possibly applicable regimes, entailed the strictest liability regime. The other ten incidents occurred under nearly identical circumstances, but were governed by the German commercial code as they took place after the new German TRG statute came into force.

Under the laws of the People's Republic of China, the multimodal transport without a sea leg will be subject to the provisions of the section 4, chapter 17 of the Contract Law, article 311 of which provides for a strict liability system for the MTO in case of concealed damage where the stage of transport in which the loss or damage took place cannot be ascertained.<sup>128</sup> In the U.S., under the Carmack Amendment, claim for loss or of damage to a multimodal shipment

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<sup>127</sup> BGH, 30 Mar. 2006, *TranspR* 2006, 250-254.

<sup>128</sup> UNCTAD/SDTE/TLB/2, 25 June 2001, 'Implementation of multimodal transport rules', para 160.

may be filed against either the originating carrier, the carrier making final delivery, or any intermediate participating carrier.

Unlocalized loss also brings in the question of time bar for initiating a suit against cargo damage, that is, should the time bar for notifying the carrier, or to bring a suit commence from the completion of say, the main air leg, or should it count from the completion of the entire multimodal transport.

### **6c. Which convention applies?**

When these questions on localized and unlocalized losses are answered using unimodal conventions, the gaps in the legal system are painfully evident. In *Quantum v. Plane Trucking*,<sup>129</sup> the claim was concerned with the loss of a consignment of hard disks which were arranged to be flown from Singapore to Paris by Air-France and then transported by road pursuant to a subcontract with Plane Trucking from Paris to Dublin. The goods had been lost as a result of a purported hijacking involving certain of Plane's employees. Plane was insolvent and Air France's liability was not in dispute.

On an application for damages to be assessed, the judge had accepted Air France's submission that carriage by air subject to the Warsaw Convention on International Carriage by Air 1929 had ended in Paris and that its liability thereafter fell to be measured on the basis of its own terms and conditions,

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<sup>129</sup> *Quantum Corp Inc v Plane Trucking Ltd.* [2001] 1 All E.R. (Comm) 916 (QBD (Comm)).

having regard to the fact that whilst Air France had contracted to transport the goods on the second leg of the journey by road they were not contractually obliged to do so and could have substituted carriage by air.

Quantum contended that under the terms of the contract, Air France had expressly contracted to perform the first leg of the journey by air and the second by road and it would follow that as per art. 29 of CMR, Air France could not avail itself of the CMR limits of liability because of the wilful misconduct of Plane Trucking and/or their employees, which is to be regarded as the wilful misconduct or default of the agents or servants of Air France or of those other persons of whose services Air France made use for the performance of the carriage, those agents, servants or other persons having been acting within the scope of their employment.

The Queen's Bench Division (Commercial Court) viewed the contract as 'predominantly' an air contract only as regards the distance between Singapore and Paris. The Court held that the CMR applied only to a contract providing for carriage by road from start to finish, with the exception of the case envisaged by Article 2 of the CMR. The International Carriage of Goods by Road, scheduled to the Carriage of Goods by Road Act 1965 and known as the CMR Convention, was inapplicable as the goods were taken over not in Paris, but in Singapore.

The court of first instance also considered only rule about multimodal transport movements in the CMR is found in Article 2(1) which states that

where "the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air" and "the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage". In this case, the goods were indeed unloaded from the aircraft and loaded onto the truck and so the Commercial Court held that was not a mode-on-mode as per Article 2(1); therefore the CMR would not apply at all.

The Court of Appeal did not agree with the interpretation of Article 2(1) of the lower court and reversed the decision of that court. The Court of Appeal referred to various European judgements on cases brought upon by similar circumstances,<sup>130</sup> and held that the concept of a "contract for the carriage of goods by road" under article 1 of CMR embraced a contract which provided for or permitted the international carriage of goods by road on one sector of a larger contract and under which such carriage by road actually took place; that the place of taking over and delivery of the goods under article 1(1) were to be read as referring to the start and end of the contractually provided for or permitted road sector; that the contract was one for carriage by road within article 1(1) of CMR in relation to the Paris to Dublin sector that to the extent that they limited the airline's liability in respect of that sector the airline's own; conditions were therefore overridden.

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<sup>130</sup> *Atlas Assurance Co Ltd v Ocean Transport and Trading Ltd.* (1975) 11 ETL 279 (Antwerp Commercial Court, 23 September 1975), *International Marine Insurance Agency Ltd v P & O Containers Ltd (The Resolution Bay)* (unreported) 28 October 1999, Rotterdam Rechtbank and two judgments of the German Supreme Court, the BGH.

Mance L.J. added that to characterise the contract overall “would open up a prospect of metaphysical arguments about the essence of a multimodal contract”, arguments best avoided.



*The 2001 film **The Fast and the Furious** directed by Rob Cohen follows undercover cop Brian O'Conner (Paul Walker) who must stop semi-truck hijackers led by Dominic Toretto (Vin Diesel) from stealing expensive electronic equipment. The movie is inspired by real life; cargo theft is driven by organized crime, and is called America's costliest crime*

*Photo courtesy: (NBC news and video:*

*[http://usnews.nbcnews.com/\\_news/2012/08/05/13132047-pirates-on-the-highways-cargo-theft-costing-nation-billions?](http://usnews.nbcnews.com/_news/2012/08/05/13132047-pirates-on-the-highways-cargo-theft-costing-nation-billions?))*

Interestingly, the decision of the Court of Appeal in *Quantum* finds support in the Netherlands,<sup>131</sup> but not so much in Germany (even though a decision of the BGH was referred to in *Quantum*).

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<sup>131</sup> Haak speech Antwerp 2006, Haak, K.F. 'De scope van de CMR; expansief of restrictief?', speech Antwerp June 2006.

The German BGH was asked whether the CMR applied to an international road carriage transport between Rotterdam and Mönchengladbach,<sup>132</sup> where the contracted carriage commenced in Tokyo where the shipment of twenty-four containers stuffed with copiers was loaded in to an ocean-going vessel and carried by sea to Rotterdam before the road carriage started. After the goods were loaded on to trailers for road transport, the truck driver made an unsuccessful left turn which toppled the trailer and damaged the cargo. The waybill contained a clause granting the Tokyo District Court sole jurisdiction over any claims arising out of the contract of carriage, and a clause choosing Japanese law as the law applicable to the contract.

Only the applicability of the mandatory rules of the CMR could grant the German court the jurisdiction. The *Oberlandesgericht* (OLG) Dusseldorf determined that Article 31(1) CMR granted it jurisdiction since the CMR applies to such claims. The BGH did not agree with this decision and stated that there is no jurisdiction for German courts under the circumstances, since the CMR does not apply, as a matter of principle, to multimodal contracts of carriage. These decisions reflect the susceptibility in multimodal transport issues to varying interpretations by courts of different countries, and even in the same countries, disagreements between different courts.

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<sup>132</sup> BGH 17 Jul.2008, *TranspR* 2008, 365-368.



## 6d. Difficulty in drafting a multimodal carriage contract

The absence of an international legal convention governing the multimodal transport creates drafting difficulties, and that the outcomes are not predictable in case of dispute. Though carriers may insert their own clauses in the Bill of Lading, or even standard clauses such as per the BIMCO COMBICON, their acceptance by the court is uncertain. In *The 'OOCL Bravery'*,<sup>133</sup> the consignor formed a contract with the carrier for the delivery of some goods, door-to-door from Wisconsin to the Netherlands. The carrier issued a through bill of lading for the goods and stated that the goods would be transported on the said ship from Montreal to Antwerp, with delivery in the Netherlands. The goods were stolen enroute from Antwerp to Netherlands due to the negligence of the subcontracted trucking company. Clause 4 stated that "...each stage of the transport shall be governed according to any law and tariffs applicable to such stage" while the 'Clause Paramount' in the bill provided for the U.S. COGSA to govern the goods before loading on board and after discharge from vessel and while subject to the bill of lading. The court considered that clause 4 was of no effect and the carrier would be subject to the higher liability under COGSA.

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<sup>133</sup> [2000] 1 Lloyd's Rep 394.

### 6e. Time for commencing litigation; which convention applies?

In *Finagra (UK) Ltd. v OT Africa Line Ltd.*,<sup>134</sup> a multimodal transport operator carried goods for a consignor, first by sea from Lagos to Rotterdam, and then by road to Amsterdam. The goods were damaged during the carriage and the stage at which it occurred could not be determined. The whole carriage was covered by a bill of lading which provided for the MTO to be liable as per the Hague Rules for an unlocalized loss, and a time bar for bringing a suit within nine months. The court held the standard time bar of twelve months as per the Hague Rules to apply and the suit would be allowed.



*Blue coloured fungus appear on a pastry which was carried in a refrigerated container. The container passes through various modes of transport and it is not always possible to determine when and why the cargo got spoilt.*

*Photo: Author's own source.*

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<sup>134</sup> [1998] All ER (D) 296.

## 6f. Liability gap

Another issue arises when due to disparity in liabilities in the contract between the original shipper and MTO, and the contract between the MTO and the actual carrier, the multimodal operator cannot recover any claims paid out from the subcontracted carrier. An example of the difficulty was the Dutch case involving the multimodal operator, Van de Wetering and the actual carrier, Stena Line.<sup>135</sup> Thirty-eight pregnant heifers were carried from Herwijnen (NL) to Dundalk (Ireland). The carriage took place in an especially equipped trailer. The trailer was shipped over sea on the lower deck in conformity with the instructions of Stena Line. At arrival in the quarantine stable near Harwich, all upper stalled and four out of six from the in S-trap stalled heifers were dead. The insurers of the goods claimed compensation from Van de Wetering who called Stena Line into warranty.

Unfortunately for the multimodal carrier, Stena Line had legitimately entered an exoneration clause relating to the carriage of live animals into the sea carriage contract. Such a clause is allowed under the applicable articles of Dutch sea carriage law- which is based on the Hague-Visby Rules- and caused Stena Line to escape liability. Van de Wetering on the other hand was not so lucky. Based on the contract he concluded for road and roll-on, roll-off carriage from Herwijnen to Dundalk, the loss was governed by Article 2(1) of the Convention for the International Contract of Carriage of Goods by Road (CMR); this forced

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<sup>135</sup> Rb Arnhem 18 Jul. 1996, *S&S* 1997, 33.

Van de Wetering to compensate the cargo interests for 8.33 SDR per kilogram, while his recourse action against Stena Line did not avail him anything.

The current American position is held by the decision in *Norfolk Southern v. Kirby*,<sup>136</sup> where Kirby, an Australian company, sold machinery to a General Motors plant in Alabama. To fulfil its obligation of delivery, Kirby contracted with ICC, an Australian “freight forwarding” company to coordinate delivery of the goods. ICC issued a bill of lading to Kirby that contained a “Clause Paramount” that invokes the defences and limitations of liability of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1350-1315. The bill of lading also contained a “Himalaya” clause, which extends the carrier's own defences and limitations of liability to the carrier's agents and subcontractors. ICC subsequently hired Hamburg Süd, a shipping company to ship the goods overseas. Hamburg Süd shipped the goods from Australia to the United States, and contracted with Norfolk Southern to complete delivery to Alabama. Hamburg Süd issued its own bill of lading to ICC that also contained a Clause Paramount and Himalaya clause.

After Norfolk Southern's train derailed, allegedly causing \$1.5 million of damage to the machinery, Kirby sued Norfolk Southern for negligence and breach of contract. Norfolk Southern claimed that its liability, if any, was limited by the Himalaya clause in its contract with Hamburg Süd, capping Norfolk Southern's liability at \$5,000.

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<sup>136</sup> *Norfolk Southern Railway Co. v. James n. Kirby, Pty Ltd.* (02-1028) 543 U.S. 14 (2004) 300 F.3d 1300.

The Supreme Court reversed the decision of the Court of Appeals and ruled for Norfolk Southern and limited liability. The court explained that it believed that a limited agency rule tracks industry practices. In intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner. If the judgment would be otherwise, carriers would have to seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection. That task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation.

The court felt that the decision produced an equitable result without undermining the COGSA's liability regime; Kirby would retain the option to sue ICC, the carrier, for any loss that exceeds the liability limitation to which they agreed. Kirby had indeed sued ICC in an Australian court for damages arising from the Norfolk derailment. The Court commented that it was logical that ICC—the only party that definitely knew about and was party to both of the bills of lading at issue here—should bear responsibility for any gap between the liability limitations in the bills. Meanwhile, Norfolk would enjoy the benefit of the Hamburg Süd bill's liability limitation.

In considering the *Norfolk* case, the U.S. Court was also questioned in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*<sup>137</sup> whether the terms of a single through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import's journey by a rail carrier, despite prohibitions or limitations in another federal statute, i.e. the Carmack Amendment. The plaintiff cargo interests (collectively "cargo owners") delivered goods to the carrier ("K-Line") in China for transport overseas and ultimately to inland destinations in the Midwestern United States.



*Train derailments occur due to reasons such as mechanical failure of tracks, high speed at turns, strong winds or a collision with another object.*

*Photo courtesy: Blog site of Starr DiGiacomo (<http://poleshift.ning.com>)*

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<sup>137</sup> *Kawasaki Kisen Kaisha Ltd. et al. v. Regal-Beloit Corp. et al.*, Supreme Court of the United States, No. 08–1553 June 21, 2010.

K-Line issued a through bill of lading which included: (1) a forum selection clause designating Tokyo District Court in Japan as the forum court; (2) authority to the carrier to sub-contract on any term whatsoever for the completion of the journey; and (3) COGSA terms govern the entire journey. K-Line had subcontracted with a rail carrier ("Union Pacific") to ship the goods to its final inland destination. During transit, the train derailed and the goods were destroyed.

The cargo owners filed suit for loss of cargo against both K-Line and Union Pacific (collectively "carrier defendants") in California Federal District Court. The carrier defendants moved to dismiss the case on the grounds that the bills of lading contained a forum-selection clause that designated Tokyo as the forum to resolve disputes under Japanese law. The cargo owners argued that the Carmack Amendment provisions govern the inland rail portion of the international shipment. Therefore, the Tokyo forum selection clause would be inapplicable because the Carmack Amendment limits the rail carrier's ability to choose the venue. The U.S. Supreme Court held that that Carmack does not apply to a shipment *originating* overseas under a single through bill of lading.

By accepting goods for further transport from another carrier in the middle of an international shipment, Union Pacific would not become a receiving rail carrier under Carmack and a through bill of lading.



The above judgment was distinguished in the following case of *American Home Assur. Co. v. Panalpina, Inc.*,<sup>138</sup> where three containers of forklifts parts were shipped from Elwood, Illinois, United States to Australia. During the rail transportation from the Midwest, the train derailed and three containers were allegedly damaged as a result. The principle issue was whether the movement involved a limitation of liability under the Carriage of Goods by Sea Act ("COGSA") to \$500, or whether the Carmack Amendment and the Staggers Rail Act applied to the domestic rail portion, which would result in no limitation. The Court judged that rail carrier, BNSF was subject to the local statute and could not limit its liability to COGSA's \$500 limitation provision because BNSF "received" the property 'for transportation under this part,' did not contract out of Carmack with the shipper. BNSF would not be exempt even though the rail carriage was part of a continuous intermodal movement and was distinguished from *Kawasaki* that BNSF was a receiving carrier, and not a delivering carrier.

Also, in regard to multimodal transport involving an air leg, on 10 February 2011, the United States Court of Appeals for the Ninth Circuit issued a decision that when sued for cargo loss or damage, an international air forwarder shall be guaranteed a right of indemnity against the ultimately responsible custodial airline.<sup>139</sup> This matter arose from litigation brought against UPS Supply Chain Solutions, Inc. ("UPS-SCS") by a subrogating insurance underwriter in November 2006, arising from damage to a turbine engine in the

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<sup>138</sup> *American Home Assurance Co. a/s/o Crown Equipment Corporation, Plaintiff, v. Panalpina, Inc. and A.P. Moller-Maersk A/S d/b/a Maersk Sealand and/or Maersk L, Defendant. A.P. Moller-Maersk A/S, Third-Party Plaintiff, v. BNSF Railway Company, Third-Party Defendant.* United States District Court, S.D. New York. No. 07 CV 10947(BSJ).Feb. 16, 2011.

<sup>139</sup> *UPS Supply Chain Solutions, Inc. v. Qantas Airways Ltd.*, 08-55281.

course of its international transportation by air. The suit was timely filed against UPS-SCS on the eve of the two year statute of limitation provided by Article 25 of the Montreal Convention (1999). UPS-SCS contended that Qantas Airways, Ltd., as the custodial airline, was ultimately responsible for the cargo damage incurred.

However, prior case law developed primarily under the predecessor Warsaw Convention (1929) precluded air forwarders from seeking recourse against the responsible custodial airline beyond the Convention's two-year statute of limitation. Where, as in this case, the suit against the air forwarder was brought at the last minute, such case law in effect precluded the air forwarder from any remedy against the responsible airline. Just as other airlines have successfully argued in the past, Qantas advocated the progeny of Warsaw case law to be equally applicable under the Montreal Convention. The Court opined that the new features in the Montreal Convention (including Article 37 and Chapter 5) were specifically intended to reverse an injustice which had existed for over 70 years.

This opinion reverses what has been millions of dollars in air forwarder losses on account of prior judicial interpretations of the Montreal Convention. Those previous interpretations reasoned the treaty to contain a "Statute of Repose" working to deny indemnity rights after expiration of the two year statute of limitations under Article 35 – even where plaintiffs' underlying cargo action was timely filed. This injustice was unique to international carriage of air,

with no analogous injustice in the legal regimes governing carriage of goods by sea or by surface transportation.

It would not be inaccurate to sum up that the current state of liability for multimodal transport and the transport documents is characterised by a patchwork of different legal regimes deriving from international conventions (applying different mandatory rules as regards liability requirements, exclusion clauses, limits of liability, time bars for suit, etc.), national legislation, contractual arrangements and professional practices within the transport sector. How does this multimodal legal muddle affect trade and the transportation industry?<sup>140</sup>

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<sup>140</sup> A term borrowed from the subject of the article by Malcolm Clarke, 'A multimodal muddle', S. & T.L.I. 2002, 3(2), 6-7.

## 7. The size of the problem

A study by the European Commission in 2001 estimated the total multimodal market in Europe alone at about 11-14 billion Euro. The current carrier liability situation causes operators to be faced with unnecessarily high insurance premiums, doubled up insurance and comparatively high litigation costs resulting from extended and complicated legal proceedings, this in turn creates friction costs and reduces the competitiveness of multimodal transport.<sup>141</sup> The total friction cost of carrier liability for existing intermodal transport operations in Europe was estimated to be about 500-550 million Euro per annum; of this nearly half was incurred on moving sea containers.<sup>142</sup>

For developing countries and for small and medium-size transport users in particular, the concern of friction costs is considerable. The current legal framework was considered not cost-effective,<sup>143</sup> and making equitable access to markets and participation in international trade much harder for small or medium players.<sup>144</sup>

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<sup>141</sup> European Commission, Mobility and Transport, Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, final report, tren/cc/01-2005/lot1/legal assistance activities.

<sup>142</sup> Friction costs incurred by operations across the North Atlantic and delivery to American destinations is excluded from this calculation.

<sup>143</sup> For example, one important criterion of being a member of the Singapore Registry of Accredited Multimodal Transport Operators is that the applicant must be insured for carriers liability insurance for at least US\$500,000 per any one claim. <http://www.sla.org.sg/mto>.

<sup>144</sup> United Nations Conference on Trade and Development (UNCTAD), Development of Multimodal Transport and Logistics Services, TD/B/COM.3/EM.20/2, 15 July 2003, available at [http://www.unctad.org/en/docs/c3em20d2\\_en.pdf](http://www.unctad.org/en/docs/c3em20d2_en.pdf), accessed on 2nd November 2011.

Harmonisation of conditions, such as uniform liability limit for all modes, to facilitate intermodal transport could yield savings in friction costs of up to 50 million Euro per annum in Europe alone.<sup>145</sup>

## 8. Possible approaches to the central liability question

At the risk of oversimplification, or appearing to restrict to only the below mentioned, the liability issue can be solved by holding one party responsible for the whole multimodal transport either for a standard minimum amount regardless of where the damage occurred, or, to apply the respective existing unimodal convention as per the transport leg in which the damage occurred.<sup>146</sup> Compromise is probably the underlying philosophy in every international convention, and a multimodal regime is no different; the compromise method here is called a modified approach. The three approaches are critically examined below:

### 8a. Uniform approach

In this system, the multimodal contract of carriage is seen as a "*sui generis contract*"<sup>147</sup> that covers the liability of the MTO from the place of origin to the destination in relation to the damages of the goods. Had there been no international framework of unimodal carriage conventions in existence, the

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<sup>145</sup> European Commission, The economic impact of carrier liability on intermodal freight transport, Final Report 10 January 2001, accessed at [http://ec.europa.eu/transport/library/final\\_report.pdf](http://ec.europa.eu/transport/library/final_report.pdf) on 02.11.2011.

<sup>146</sup> UNCTAD/SDTE/TLB/2, 25 June 2001, 'Implementation of multimodal transport rules', para 21.

<sup>147</sup> constituting a class alone.

objective of harmonization would have been best served by a uniform liability regime where multimodal transport is concerned.<sup>148</sup>

Under the “uniform” system the same liability regime is applied to the entire multimodal transport, irrespective of the stage at which the loss or damage occurred.<sup>149</sup> The result is that it simplifies the liability in case of unlocalized loss and broadly speaking, makes the whole scheme of liability, including for localised loss predictable and transparent.<sup>150</sup> The uniform approach also has the potential to become a global solution in that it is not based on the incorporation of existing national legislation. This approach appears to be favoured in the United States to a certain extent by application of the domestic legislation.<sup>151</sup>

The drawbacks of this approach are that first, the carrier liability would generally increase compared with the current situation, prominently for sea-carriers where the limits of liability are still low compared with other modes.<sup>152</sup> There would be a clash between the uniform liability system and the various existing modal regimes.<sup>153</sup> Neither will the maritime industry give up its zealously guarded limits or defences of liability without a fight, nor is it likely

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<sup>148</sup> De Wit, *Multimodal Transport*, Lloyd's of London press, 1995.

<sup>149</sup> UNCTAD, *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2, 25 June 2001, para 21.

<sup>150</sup> Koppenol-Laforce, *International Contracts*, London, Sweet & Maxwell, 1996.

<sup>151</sup> Vibe Ulfbeck, *Multimodal Transports in the United States and Europe--Global or Regional Liability Rules?* 34 Tul. Mar. L.J. 37 2009-2010.

<sup>152</sup> See table 1, comparing limits of liability under different international conventions.

<sup>153</sup> TREN/CC/01-2005/LOT 1/LEGAL ASSISTANCE ACTIVITIES

Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, page 56.

that cargo-interest groups will agree to lower the limits of liability for road, rail or air transport, where these limits were increased after much negotiations during the formative years of their respective international conventions.<sup>154</sup>

Also, the unimodal conventions, due to their long history have become deeply ingrained in the various national and international systems. It is thought that in Europe, the uniform liability model clearly lacks the ability to create harmonization within the chain of contracts, because the liability of the subcontracting inland carrier vis-a-vis the contracting carrier is mandatorily regulated under the existing European conventions governing inland transport.<sup>155</sup> The European Commission in fact, admitted that the uniform approach would "legally be possible through the adoption of a European Convention between all EU Member States but would be politically unviable, given that it would trigger fierce opposition from most stakeholders and would not enjoy sufficient support from the Member States."<sup>156</sup>

It must also be specially noted that the majority of international trade is carried by sea, and the voice of the maritime industry bears enormous significance. The maritime cargo carrying industry, unlike the aviation, rail and road carriers is split vertically into different segments such as tanker, bulk

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<sup>154</sup> See discussion on evolution of unimodal liability conventions in section 3 of this book.

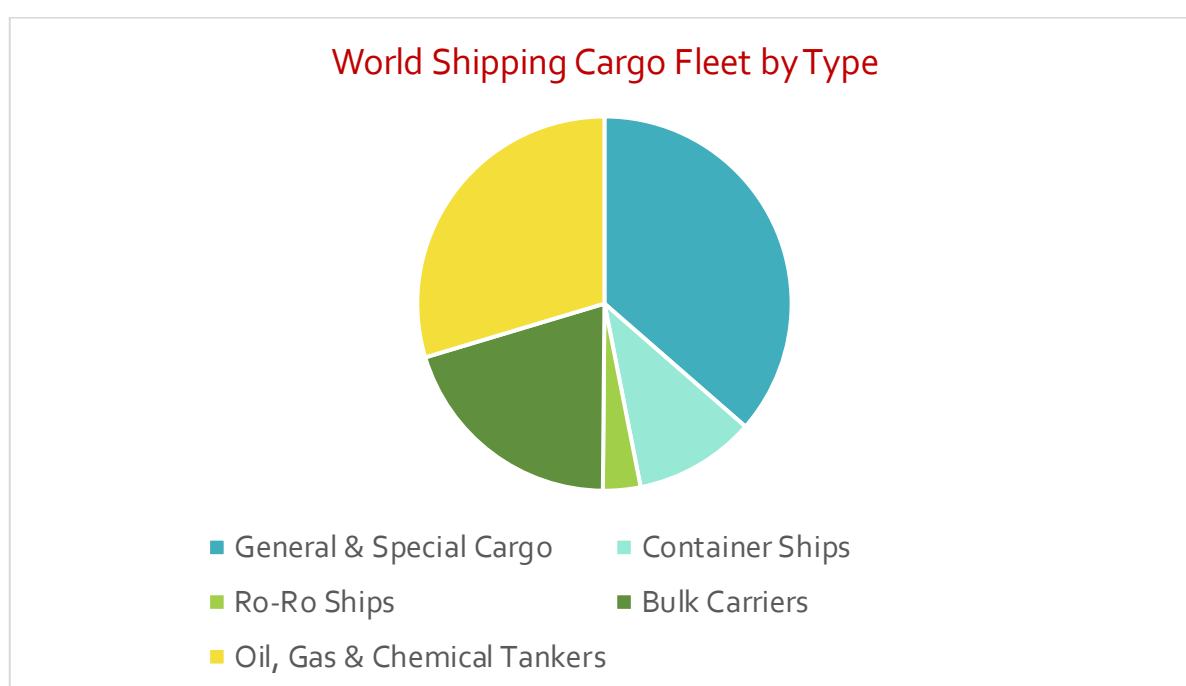
<sup>155</sup> Vibe Ulfbeck, Multimodal Transports in the United States and Europe--Global or Regional Liability Rules? 34 Tul. Mar. L.J. 37 2009-2010.

<sup>156</sup> TREN/CC/01-2005/LOT 1/LEGAL ASSISTANCE ACTIVITIES

Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, page 185. "



trade, heavy lift and containers.<sup>157</sup> Only the container ship industry and ro-ro segments of the shipping industry may even be remotely interested in aligning the maritime liability rules with that of the multimodal convention (which in turn are close to the aviation and road rules); it is therefore no surprise that there is such vociferous opposition to increasing the risk exposure of the entire shipping industry just to accommodate the concerns of one of its segments.



*Despite the growing status of containerization, it still represents a relatively small sector in the carriage of goods by sea. The rest of the shipping industry has no interest to ratify any liability regime which will put it at a disadvantage or just to make things easier for the multimodal transport industry.*

<sup>157</sup> In January 2010, there were 102,194 commercial ships in service with a combined tonnage of 1,276,137 thousand dwt. Looking at individual sectors, oil tankers accounted for 450 million dwt (35.3 %) and dry bulk carriers for 457 million dwt (35.8%), representing an annual increase of 7.6% and 9.1 % respectively. and dry bulk carrier tonnage, which together account for nearly 72 % of the world fleet (increased by 6.5 % and 6.4 % respectively in 2007); the containership fleet reached 169 million dwt (4.5% over 2009). The fleet of general cargo ships showed a decrease, reaching 108 million dwt (8.5% of the fleet). The tonnage of liquefied gas carriers continued to grow, reaching 41 million dwt (an increase of 12%). Source: UNCTAD Review of Maritime Transport 2010.

Secondly, the uniform liability approach causes problems for the multimodal transport operator to take recourse from the subcontracted carrier. The MTO would be bound to the shipper by the higher uniform limit of liability under the multimodal regime while the subcontracting carrier would be required to pay out only the lower limit of liability under the applicable unimodal convention.<sup>158</sup> Though the shipper would be able to predict his risk, the MTO would not have the same luxury.

Multimodal transport operators are also disadvantaged from the perspective that they will be required to pay the shipper according to the uniform system but they cannot start proceedings against a single responsible sub carrier because the stage where the damage occurred is undetermined. Therefore the MTO will be required to start proceedings against all the sub carriers involved in the transport to obtain the reimbursement of the amount paid, and even in this case there is no guarantee that the MTO would get a compensation because the sub carriers can refute the evidence given by him or can invoke the exceptions. Thirdly, it is also possible that the same carriage may be covered under either a multimodal transport contract or a unimodal transport one; the uniform system of liability would unfairly prejudice the former, potentially discouraging operators to undertake liability for all the legs of the transport in question.<sup>159</sup>

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<sup>158</sup> Roger Clarke, *Cargo Liability Regimes*, Prepared for the OECD Maritime Transport Committee, Directorate for Science, Technology and Industry, January 2001.

<sup>159</sup> UNCTAD: *The Feasibility of an International Legal Instrument* UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

## 8b. Network approach

Under the “network” system, the liability of the MTO for localized damage is determined by reference to the international convention or national law applicable to the unimodal stage of transport during which the damage occurred.<sup>160</sup>

Thus, the liability of the MTO changes depending on where the loss or damage takes place. In case of non-localized damage the MTO's liability is often made subject to general provisions of the law, which may not be easily determined in every case. A set of “fall-back” provisions apply “by default” in cases where the loss or damage cannot be localised. These “fall-back” provisions are either determined contractually or by statute.<sup>161</sup> The same set of liability rules would apply between the shipper and the multimodal operator, as well as the MTO and the subcontracted carrier, thus there is no question of a 'liability gap'.<sup>162</sup>

One of the advantages of the network system is that a single carrier- the multimodal transport operator, can be sued on the basis of a single contract. Also, conflicts with the existing international unimodal conventions are avoided. Through the use of “references”, the system provides for flexibility in that the

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<sup>160</sup> UNCTAD, Implementation of Multimodal Transport Rules, UNCTAD/SDTE/TLB/2, 25 June 2001, para 21.

<sup>161</sup> TREN/CC/01-2005/LOT 1/LEGAL ASSISTANCE ACTIVITIES

Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, page 54.

<sup>162</sup> Also see discussion on liability gap in section 6f of this book.

applicable regime is automatically adapted to revisions or amendments of the international unimodal conventions.<sup>163</sup> Compared to a unimodal situation, the shipper gains certainty as to the liable party that he needs to sue and the terms of the contract under which he may sue. The objective consensus seems to be that, unlike the uniform system, the pure form of the network system, the pure form of this system can be applied without an international convention to provide it with legitimacy.<sup>164</sup>

Other advantages of the network system are that the multimodal regime does not have to undergo any change in case of revisions of the unimodal conventions. Compared to the current scenario, the risk factor for the insurance companies will remain the same unlike the situation which a uniform liability system may engender.

However, in the same way as in a strictly unimodal situation, the applicable liability rules will depend on the stage at which the damage occurred. This leads to lengthy proceedings to identify where the loss, damage or delay occurred, contrary to cargo-interests, and creates uncertainty, delays and expenses for the consignor. If the multimodal transport operator subcontracts the consignment partly or fully, he is exposed to similar uncertainty, delays and expenses in his relationship with the subcontractors. This is especially so because goods are often transported in locked

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<sup>163</sup> TREN/CC/01-2005/LOT1/LEGAL ASSISTANCE ACTIVITIES, *ibid*.

<sup>164</sup> R. De Wit, *Multimodal Transport*, London: Lloyd's of London Press, 1995. As mentioned by Marian Hoeks, *Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods*, Wolters Kluwer, 2010, ISBN 978-90-4113246-8, pg. 27.

and sealed containers, which are not opened until delivery. Moreover, problems to locate the loss or damage frequently occur on the point of transshipment from one mode to another mode and the damage or delay may even be cumulative over different modes of transport.<sup>165</sup> It is also possible that two different regimes may apply to the same claim or the regime which applies can only be identified when it is clear during which stage of the transport a loss/damage occurred.<sup>166</sup>

Establishing a time bar for bringing a suit for unlocalized or cumulative loss also becomes a contentious issue. Therefore, the network system largely falters when it comes to unlocalized loss.

The network system may provide for an alternative provision which applies in case of unlocalized loss but such 'fall-back' provisions are usually favourable to the carrier and are again 'grey-area'.<sup>167</sup> Even though he knows who he will sue and under which contractual terms he will be able to sue, it remains impossible for the shipper to predict prior to the journey to which liability risks he is exposed because the contractual terms only provide him with a framework, which will be filled out with different liability rules in function of the modal stage where the loss or damage occurred. This unpredictability makes it more difficult to conclude an appropriate insurance coverage.

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<sup>165</sup> TREN/CC/01-2005/LOT1/LEGAL ASSISTANCE ACTIVITIES, *ibid.*

<sup>166</sup> UNCTAD, Implementation of Multimodal Transport Rules, UNCTAD/SDTE/TLB/2, 25 June 2001.

<sup>167</sup> UNCTAD: The Feasibility of an International Legal Instrument UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

The network liability system does not make a good case for harmonization as it upholds and reinforces the basic idea that different types of transports are to be governed by different sets of liability rules, which may in turn vary from one jurisdiction to another.

Under European law, criticism of the network principle seems to be increasing.<sup>168</sup> Often, the network liability model gets criticized for being too complicated and for creating too much unpredictability. This critical approach is reflected in a draft for common European rules on multimodal contracts.<sup>169</sup>

### **8c. The Modified Approach**

As can be seen from the above, neither the network liability model nor the uniform liability model can-at present-achieve the ideal solution of creating both real globalization and harmonization in the chain of contracts.

The modified approach is a working compromise between the conflicting uniform and network liability approaches and offers some solution to the legal issues in multimodal transport. Here, some rules apply irrespective of the unimodal stage of transport during which loss, damage or delay (hereafter "loss")

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<sup>168</sup> Jan Ramberg, *The Law of Transport Operators in International Trade*, (2005), ISBN 91-39-01096-1, pg. 176-187.

<sup>169</sup> *Integrated Services in the Intermodal Chain (ISIC)*, Final Report, Task B: Intermodal Liability and Documentation § 1.1 (2005). The proposal is commented on by Ellen Eftesøl-Wilhelmsson, *EU Intermodal Transport and Carrier Liability*- 360 *Scandinavian Inst. of Mar. L.Y.B. (SIMPLY)* 133 (2007).

occurs, but the application of other rules depends on the unimodal stage of transport during which loss, damage or delay occurs.<sup>170</sup>

The system was first proposed by the United States,<sup>171</sup> and eliminated the defence of freedom from fault and contained the defences only of consignor's fault and inherent vice of the goods. The purpose of the system was to save unnecessary litigation as the plaintiff and the MTO would never have to consider where and when the damage or loss had occurred. In addition, the system would provide for predictability since it would also ensure that the consignor, at the time of contracting with the MTO, would know what right of recovery he would have from the MTO in case of loss, damage, or delay. The system would reduce insurance costs which ultimately had to be paid by the consumer. With such strict liability on the part of the MTO, the need for duplicate insurance would disappear.

The potential disadvantage of a modified system, however is that application of its provisions may be complex and that it may fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network-system.<sup>172</sup>

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<sup>170</sup> UNCTAD: The Feasibility of an International Legal Instrument UNCTAD/SDTE/TLB/2003/1, 13 January 2003, para 52.

<sup>171</sup> ICAO Doc. 9007 LC/166 9/6/72 Summary of the Work of the Legal Committee during its 19th Session (Montreal, May 22-June 2, 1972).

<sup>172</sup> UNCTAD: The Feasibility of an International Legal Instrument UNCTAD/SDTE/TLB/2003/1, 13 January 2003, para 52.



Both the 1980 MT Convention and the UNCTAD/ICC Rules operate a modified system under which in cases of localized loss only the monetary limits of liability may be determined by reference to mandatory unimodal regimes. Both regimes have clearly influenced regional, subregional and national laws, which have been adopted over recent years. The 1980 MT Convention is not in force internationally, but the UNCTAD/ICC Rules have been relatively successful and have been incorporated by BIMCO and FIATA into their standard form documents. The following section illustrates how these different approaches to solving the multimodal quandary were applied and negotiated while drafting the 'ideal' multimodal convention.

## **9. The multimodal conventions**

### **9a. The first steps**

The first attempt was made by the International Institute for the Unification of Private Law (UNIDROIT), which after nearly 30 years of commencing the work and enhanced by the wishes of the signatories to the CMR convention, was approved by its Governing Council in 1963, as the “draft convention on the international combined transport of goods” and took the European road convention at its point of departure, governing combined transport of goods by containers.

With the entry of containerization in the shipping scenario,<sup>173</sup> the Comité Maritime International (CMI) was prompted to independently prepare and adopt a “draft Convention on Combined Transport-Tokyo Rules” in 1969, with a particular focus on rules on unlocalized loss in a combined transport by sea, and focusing on the model of the 1924 Hague Rules.

Since there were two sets of rules now in existence, the Inland Transport Committee of the UNECE decided to convene a "round table" in an attempt to combine and rationalise the two proposals into the “Rome Draft” in 1970. Successive meetings of the UN/ECE and the IMCO in 1970 and 1971 failed to achieve an agreement on the Rome Draft and instead produced a modified draft of that convention which came to be known as the “Draft Convention on the International Combined Transport of Goods”, better known as the “TCM draft”, using the French acronym for “Transport Combiné de Marchandises.” The TCM draft never went beyond the drafting stage as it was seen to contain dispositive law, was unable to reach a consensus on whether a uniform or network approach should be adopted and most importantly, there was stiff opposition from developing countries.<sup>174</sup>

The discussions on the draft TCM Convention also demonstrated the reluctance of air carriers to adopt any legal regime that would convert the

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<sup>173</sup> "The need for the uniform multimodal legislation was enhanced by the advent of containerization but not created by it." S.R. Mercogliano, 'The container revolution'. Sea History 2006. pg. 114. As mentioned by Marian Hoeks, Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods, Wolters Kluwer, 2010, ISBN 978-90-4113246-8, pg. 19.

<sup>174</sup> Marian Hoeks, Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods, Wolters Kluwer, 2010, ISBN 978-90-4113246-8, pg. 20.

agency status of the air freight forwarder into that of a principal, and that developing countries are concerned about the possibly harmful effects on their transportation industries should the adoption of the proposed TCM Convention result in concentrating the control of international cargo movements in the hands of a few giant combined transport operators.<sup>175</sup>

The UN/IMCO Container Conference, which was to finalize the TCM draft in 1972, recommended that the subject be further studied, particularly its economic implications and the needs of developing countries. UNCTAD was proposed to undertake this task. The provisions of the TCM draft convention were however subsequently reflected in standard bills of lading such as the Baltic and International Maritime Conference's (BIMCO) Combiconbill and in the "Uniform Rules for a Combined Transport Document" of the International Chamber of Commerce (ICC).<sup>176</sup> These industry documents, however, have not received formal intergovernmental recognition.

The Intergovernmental Preparatory Group (IPG) was then set up by the Trade and Development Board of the UNCTAD and,<sup>177</sup> following an extensive investigation, eventually prepared the draft convention leading to the adoption of

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<sup>175</sup> Gerald F. Fitzgerald, Proposed Convention on the International Combined Transport of Goods: Implications for International Civil Aviation, 11 The Canadian Yearbook of International Law 166, 1973.

<sup>176</sup> The ICC Uniform Rules were first issued in 1973 as publication No. 273. They were slightly revised in October 1975 to overcome practical difficulties of application concerning the combined transport operator's liability for delay (ICC Publication No.298). The ICC Rules were conceived as an essential measure to avoid a multiplicity of documents for combined transport operations.

<sup>177</sup> Decision 96 (XII) of May 1973.

the United Nations Convention on International Multimodal Transport of Goods 1980.

### **9b. United Nations Convention on International Multimodal Transport of Goods 1980 (MT Convention)**

It is significant to note that this was the first international transport convention to be prepared under the auspices of UNCTAD; unlike the UNCITRAL, ICAO, or the IMO,<sup>178</sup> the UNCTAD is neither technically nor legally oriented. Its focus is on economic issues in essentially a political context. The MT Convention was basically a long-term strategy on the part of the developing countries to realize maximum economic benefits from the international transport sector.<sup>179</sup> While it deals with a kind of transportation supplied principally by developed market economies, ("Group B")<sup>180</sup> many of the significant provisions were proposed by shipper countries, ("Group 77) predominantly by the Third World developing countries.<sup>181</sup> It naturally followed that support for the Convention was polarized.<sup>182</sup>

The developing countries felt that the capital-intensive containerized activity was incompatible with their labour-intensive economies; the suspicion

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<sup>178</sup> and the international conventions drafted by them.

<sup>179</sup> William Driscoll and Paul B. Larsen, The Convention on International Multimodal Transport of Goods, HeinOnline -- 57 Tul. L. Rev. 194 1982-1983.

<sup>180</sup> The negotiating blocs or groups were formed as per the recommendations of the Trade and Development Board of the UNCTAD.

<sup>181</sup> New International Economic Order (NIEO), 6 GAOR (Special Session) Supp. (No.1) at 5, U.N. Doc. A/9559 (1974).

<sup>182</sup> The other group was Group D- socialist bloc. The blocks were formed as per the recommendations of the Trade and Development Board of the UNCTAD.

seemed to be that any steps taken to improve the efficiency and productivity of multimodal transport would harm the development of the local MTOs and industry players.<sup>183</sup> Consequently, the developing countries sought to insert both principles and operative provisions of a public law nature that would provide opportunities to monitor and control multimodal services, so as to benefit their economic opportunities and social goals. On legal aspects, the early support for the uniform system of liability (and later the modified network system, which appears in the Convention text) reflected a belief that the traditional principles of division of responsibility for cargo loss and damage were disadvantageous to their essentially shipper nature.

To reemphasize the agenda of the developing countries, it has been said that the Convention "is interesting and important not only for the principles it establishes, but also for its symbolic significance to the developing countries, irrespective of how soon it may come into force."<sup>184</sup> However, during the negotiations, the Group B perspective prevailed and the public law provisions were watered down before their addition into the final MT Convention.<sup>185</sup>

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<sup>183</sup> William Driscoll and Paul B. Larsen, *The Convention on International Multimodal Transport of Goods*, HeinOnline -- 57 Tul. L. Rev. 194 1982-1983.

<sup>184</sup> W.J. Driscoll, 'The world's first international multimodal transport Convention'. Transcript of seminars on international intermodal cargo liability, Course VI, Shippers National Freight Claim Council, Fordham University School of Law and Golden Gate University, San Francisco. September 1980. p.174.

<sup>185</sup> The public law matters are contained in the preamble of the Convention, and include issues such as licensing of MTOs, consultations between liners and shippers, insurance, cargo sharing, labour provisions, and customs. The developing countries wanted to include provisions to promote shipping companies and corollary insurance and labour markets but these were rejected by the developed nations. The developing countries had to contend with imposing their views with regard to customs issues in the final outcome of the MT Convention.

The developed countries were further composed of groups which were heavily shipper oriented, such as Canada and Australia, or, traditionally heavy suppliers of transportation services, such as the United Kingdom and Japan. There was also a group where both shipping and cargo interests were strong, such as the United States. The traditional ship owning countries strongly preferred the network system of liability while the shipper oriented countries preferred a modified network system.

These groups had to carry out extensive internal consultations before coming to the negotiations though the groups did accept the proposals on electronic data processing and jointly opposed to the inclusion of public law in the MT Convention.

The developing nations and the Group B nations also held opposing views on the acceptability of the Hamburg Rules as a model for the administrative provisions of the MT Convention.<sup>186</sup> It must be noted that the interpretation and the preparatory documents of the Hamburg Rules are very relevant in the interpretation of the MT Convention; for example, article 24(1) of the Multimodal Convention uses article 19 of the Hamburg Rules as a guide, for a prima facie rule of evidence in favour of the MTO where notice of a claim for apparent damage has not been given promptly upon delivery of the goods to the consignee. The MT Convention also adopted the Hamburg Rules time limits for giving

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<sup>186</sup> Refer detailed discussion on the Hamburg Rules in section 3a of this book.

notice of claims for delay (60 days).<sup>187</sup> It may be noted that during the negotiations, the spokesman for Group B pointed out that a twenty-day notice was preferable as the sixty-day notice effectively precluded the MTO from giving notice in time to permit a recourse action by the MTO against an underlying carrier where the underlying carriage is subject to one of the model conventions.<sup>188</sup>

The Multimodal Convention is considered by many states to be a companion treaty to the Hamburg Rules, because ocean carriage is generally a part of multimodal transportation, and the Hamburg Rules made a drastic change to the Hague / HVR liability regimes in disfavour of the maritime interests.<sup>189</sup> This association with the Hamburg Rules is one of the major factors in the non-ratification of the MT Convention, which was evident as early as the late 1980's.<sup>190</sup> The reason cited was that as long as the Hamburg Rules were not in force, there would be no point in bringing the MT Convention into force since this would create too big a gap between the liability of the MTO and that of the subcontracting ocean carrier who would still be liable only under the Hague Rules or the Hague-Visby Rules.<sup>191</sup>

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<sup>187</sup> William Driscoll and Paul B. Larsen, *The Convention on International Multimodal Transport of Goods*, HeinOnline -- 57 Tul. L. Rev. 194 1982-1983.

<sup>188</sup> FitzGerald, *The United Nations Convention on the International Multimodal Transport of Goods*, 5 *Annals of Air & Space Law*. 51, 70-71 (1980).

<sup>189</sup> See detailed discussion in section 3a, especially footnote 39.

<sup>190</sup> UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, TD/B/C.4/315/Rev.1.

<sup>191</sup> UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, TD/B/C.4/315/Rev.1. Para 49.



The United States, which happened to own the largest number of aircraft in the working group, noting that air carriers did not issue a negotiable bill, was particular that the MT document should contain only those elements necessary for transportation purposes.<sup>192</sup> The U.S. also noted that the Warsaw Convention's liability limits were considerably higher than those of other modes and felt that it was desirable to explore the possibility of special rules for air.<sup>193</sup> There was considerable opposition from the aviation industry for inclusion of the air leg in the MT Convention itself, and therefore to satisfy the demands of the ICAO delegation, Article 1(1) excludes pick up and delivery from the MT Convention.<sup>194</sup>

The MT Convention was concluded with the air-carriers still unclear about the extent of the geographical area that can legitimately be covered by pick-up and delivery operations and the insertion of the words 'as defined in such contract' in the second sentence of Article 1(1) may or may not have solved the problem, although they do hold out some hope for a flexible interpretation of that sentence. Fitzgerald opined immediately after the signing of the MT Convention that the debate would long continue as to whether or not the parties to the MT contract can, because of the inclusion of those words, have complete freedom to label any movement they like as a pick-up and delivery operation.<sup>195</sup> There is

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<sup>192</sup> The socialist bloc agreed with some proposals of Group B and Group 77 and was not a major influence on the drafting of the Convention.

<sup>193</sup> Preparation and Adoption, U.N. Doc. TD/MT/CONF/C.1/CRP.14 (1980).

<sup>194</sup> Gerald F. FitzGerald, *The United Nations Convention on International Multimodal Transport of Goods* (1980) - Discussion of the Operations of Pick-up and Delivery with Particular Attention to the Air Mode 7 Air Law, Volume VII, number 4202 1982. A good account of the negotiations for the drafting of Article 1(1).

<sup>195</sup> Gerald F. FitzGerald, *The United Nations Convention on International Multimodal Transport of Goods* (1980) - Discussion of the Operations of Pick-up and Delivery with Particular Attention to the Air Mode 7 Air Law, Volume VII, number 4202 1982.

some doubt about the extent to which the concept of transshipment is included by implication in the present wording of the second sentence of Article 1(1).<sup>196</sup>

The question of drawing a distinction between pick-up and delivery services and non-pick-up and delivery services also assumes considerable importance in the case of localized damage which involves the application of the higher limits contemplated by Article 19 of the MT Convention.<sup>197</sup>

Under the Multimodal Convention, the multimodal transport operator (MTO) issues a single multimodal bill of lading to the shipper covering the entire transport. The MTO may perform the transport itself, or subcontract to other carriers. In any event, if the goods are lost, damaged or delayed during any stage of carriage between the time the MTO takes custody and delivery, Article 1(2) provides that the MTO is liable directly to the shipper, as a principal and not as an agent of the carriers who participate in the multimodal transport. The three negotiating groups agreed that liability should be based on the MTO's fault, and that he would bear the burden of proof in establishing that he had not been in fault in causing loss, damage or delay. This regime followed the Hamburg

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<sup>196</sup> Article 1(1) qualifies that the operations of pickup and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.

<sup>197</sup> Article 19, MT Convention, Localised Damage: When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Rules,<sup>198</sup> and the 1929 Warsaw Convention.<sup>199</sup> Consequently, the MTO's recourse against the subcontracting carriers will be base for his contracts with them.

Article 19 of the MT Convention provides for a modified network system in the area of limitation of liability. Higher modal liability limits, but not the entire regime, apply whenever the damage can be localized to a particular modal stage of the entire multimodal transport.<sup>200</sup> Article 19 also provides for the application of mandatory national law to localized damage; this provision was mainly forced upon by the U.S.A. which did not want to disturb its liability regime under its COGSA.<sup>201</sup>

As a compromise between states wanting a network regime,<sup>202</sup> and those wanting a uniform liability regime,<sup>203</sup> the MT Convention allows, for example, the CIM and CMR Conventions to apply whenever by their own terms they would apply and not be considered as multimodal transport.<sup>204</sup> The effect of article 38 of the MT Convention would be that if a court were to find that The Hague Rules were binding on the parties, it would apply those requirements and not the Multimodal Convention.

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<sup>198</sup> Hamburg Rules, Article 10.

<sup>199</sup> Warsaw Convention 1929, Article 20(1).

<sup>200</sup> MT Convention, Article 19.

<sup>201</sup> Preparation and Adoption, U.N. Doc. TD/MT/CONF/4 (1979) and Add.1 (1979) at 26.

<sup>202</sup> Refer notes on 'network approach' under section 8b.

<sup>203</sup> Refer notes on 'uniform approach' under section 8a.

<sup>204</sup> Refer notes on 'modified network approach' under section 8c.

Article 18 of the MT Convention specifies limits of liability on unlocalized loss. The developed countries agreed on the proposal of the Group of 77 that the limits would be based on the Hamburg Rules, but only for multimodal carriage including a sea leg, as this leg is always the major leg. The compromise formula, therefore, became the Hamburg limits with a ten percent increase where a sea-leg was involved,<sup>205</sup> and the CMR limits (8.33 SDR/kilogram) when the multimodal carriage did not include a sea or inland waterway leg.<sup>206</sup> The liability limit for delay was kept separate from the limits for damage or loss, in line with the Hamburg Rules.<sup>207</sup>

The MT Convention adopted the approach of the Hamburg Rules that the package with a container constitute the measure of the liability limit per package. However, when the packages are not enumerated separately on the bill of lading, the container constitutes the package for limitation purposes.<sup>208</sup> In summary, there is a floor under this network system of liability limits, which is the lower of the two-tier limits established by the MT Convention for unlocalised loss.

Time limits for bringing a suit was limited to two years as per article 25(1) of the MT Convention. However, to accommodate the MTO's recourse claims against his subcontractors, the shipper must give notice to the MTO describing

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<sup>205</sup> Article 18(1), MT Convention.

<sup>206</sup> Article 18(3), MT Convention.

<sup>207</sup> Article 18(4), MT Convention.

<sup>208</sup> Article 18(2) (a), MT Convention.

the details of his claims within 6 months after the goods have been or should have been delivered.

The MT Convention was concluded, with negotiations even about the conditions for entry into force. The developing countries proposed a higher number of carrier owning nations to ratify the Convention, but considering that the Convention should not be delayed due to opposition from one mode of transport, the resulting condition was agreed at (a still high number) thirty states becoming parties to the Convention.

The Convention has still not been ratified by the required number of countries, mainly due to its close association with the Hamburg Rules, as discussed earlier.<sup>209</sup> Some knowledgeable observers commented very early on that the Multimodal Convention would not become a reality unless the Hamburg Rules were ratified.<sup>210</sup> Opposition to the Hamburg Rules has also been voiced from the marine insurance groups (P&I Clubs) for concerns of increasing litigation and the unavailability of the 'nautical fault' defense increases the risk exposure of the clubs.<sup>211</sup> In this context, the UNCTAD argued that the Hamburg Rules are modeled on the CMR and the Warsaw Conventions, both of which have passed the test of practical applicability. The MT Convention incorporates

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<sup>209</sup> See discussions accompanying footnotes, *supra* at 190.

<sup>210</sup> Address by Professor Selvig and Mr. Amado Castri, Fordam Conference (1981) (unpublished). Professor Selvig was president of the UN Conference on International Multimodal Transport. Mr. Amado Castro was spokesman for the Group of 77. As mentioned by William Driscoll and Paul B. Larsen in 'The Convention on International Multimodal Transport of Goods', *HeinOnline* -- 57 *Tul. L. Rev.* 194 (1982-1983).

<sup>211</sup> C.W.H. Goldie, *Effect of the Hamburg Rules on Shipowners' Liability Insurance*, CMI Report 1979, "Colloquium of the Hamburg Rules", Vienna 1979, at pp.26-27.

aspects of the United States Harter Act and many parts of the arguments that the text or its liability rules are 'new' are consequently not valid, unless seen from a narrow 'maritime' point of view. It has also been argued that this stance of the marine insurers is not based on empirical data.<sup>212</sup>

As also mentioned earlier, the convention unsettles many of the traditional liner service providing countries as to the agenda of the Third World countries in rearranging the balance between cargo and shipping interests.<sup>213</sup>

Some of the arguments posed on behalf of multimodal transport operators are that these comparatively restrictive rules would inhibit innovation, increase in insurance rates, and that some operators offering segmented services may be at a competitive disadvantage when compared with 'genuine' multimodal service offered by foreign companies.<sup>214</sup> Some of the concerns raised include the fact that the exposure of the multimodal operator to liability in cases of unlocalized loss does not necessarily mean he can always fall back on the subcontracted leg of the transport, as it would be unclear where the damage occurred. On the other hand, it must be noted that this risk exists under the present conventions such as the Hague-Visby Rules or the ICC Rules. The task of predicting the risk exposure was still, albeit less, uncertain.<sup>215</sup>

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<sup>212</sup> E. Selvig, *The Hamburg Rules*, Marius, Nr. 31 B, Nordisk Institut for Sjørett, Oslo, August 1978, p.6.

<sup>213</sup> See discussions accompanying footnotes, *supra* at 183.

<sup>214</sup> William Driscoll and Paul B. Larsen, *The Convention on International Multimodal Transport of Goods*, HeinOnline -- 57 Tul. L. Rev. 194 1982-1983.

<sup>215</sup> UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, TD/B/C.4/315/Rev.1, para 88.

The UNCTAD in a study accepted that support for the the MT Convention was still polarized, similar to the Hamburg Convention, by cargo interests on one hand, and shipping and their insurers on the other hand. Additionally, there was some opposition from NVOCCs and MTOs, whose stance was not very collective or coherent.<sup>216</sup> The UNCTAD also added that the limits of liability are not as onerous as argued by the shipping interests, and the limits were low compared to the 1979 Visby protocol, and urged more countries to ratify the MT Convention.<sup>217</sup>

### **9c. The UNCTAD-ICC Rules**

Many years had passed since the MT Convention was prepared, but neither that was ratified nor the Hamburg Rules failed to effectively replace the old system under The Hague and The Hague/Visby Rules. Pending the entry into force of the UN Convention on International Transport of Goods 1980, the UNCTAD's Committee on Shipping, by resolution 60 (XII) of November 1986, instructed the secretariat to prepare model provisions for multimodal transport documents, in close collaboration with the competent commercial parties and international bodies, based on the Hague and Hague/Visby Rules as well as existing documents such as the FBL (FIATA Bill of Lading) of the International Federation of Freight Forwarders Association (FIATA) and the ICC Uniform

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<sup>216</sup> UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, TD/B/C.4/315/Rev.1, para 185.

<sup>217</sup> UNCTAD Secretariat, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, TD/B/C.4/315/Rev.1, para 195.



Rules for a Combined Transport Document.<sup>218</sup> This decision of the UNCTAD coincided with the ICC's own wish to update its own rules on multimodal transport.

Following this resolution, a joint UNCTAD/ICC working group was created to elaborate a new set of rules for multimodal transport documents. During a series of meetings the joint UNCTAD/ICC working group completed the preparation of the UNCTAD/ICC Rules for Multimodal Transport Documents in 1991. The Rules entered into force on 1 January 1992.<sup>219</sup>

The UNCTAD/ICC Rules for Multimodal Transport Documents have been incorporated in widely used multimodal transport documents such as the FIATA FBL 1992,<sup>220</sup> and the “MULTIDOC 95” of the Baltic and International Maritime Council (BIMCO).<sup>221</sup> The main features of the UNCTAD/ICC Rules are the following:

The Rules do not have the force of the law but are of purely contractual nature and apply only if they are incorporated into a contract of carriage,

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<sup>218</sup> These documents, as mentioned earlier were based on the TCM draft but did not yet have formal intergovernmental recognition. See section 9a above.

<sup>219</sup> The text of the Rules can be found in ICC publication No. 481. They replaced the previous ICC Rules for a Combined Transport Document, 1973 (modified 1975) which were based on the “Tokyo Rules” and the “TCM” draft mentioned earlier.

<sup>220</sup> See FBL Negotiable FIATA Multimodal Transport Bill of Lading, issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents. The first FIATA FBL, called the FIATA Uniform Bill of Lading, was introduced in 1971 and was based on the Tokyo Rules developed by the CMI. A revised FIATA FBL was issued after the ICC introduced its Uniform Rules for a Combined Transport Document in 1975.

<sup>221</sup> Negotiable Multimodal Transport Bill of Lading issued by the BIMCO subject to UNCTAD/ICC Rules for Multimodal Transport Documents. The BIMCO's previous Multimodal Transport Document known as the “COMBIDOC” was based on the previous ICC Rules for a Combined Transport Document 1975.

without any formal requirement for “writing” and irrespective of whether it is a contract for unimodal or multimodal transport involving one or several modes of transport, or whether or not a document has been issued. (Rule 1).

Similar to the MT Convention, the liability of the MTO under the Rules is based on the principle of presumed fault or neglect. However, unlike the MT Convention, under Rule 5.1, the MTO is not liable for loss following delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO. More importantly, the UNCTAD/ICC Rule 5.4 preserves the navigation defence of the MTO when a sea-leg is involved,<sup>222</sup> aligning the Rules closer to the Hague-Visby Regime than the Hamburg Regime.

The limitation amounts established by the UNCTAD/ ICC Rules for loss of, or damage to, goods are clearly lower than those of the MT Convention. They are based on the limits set by the SDR protocol of 1979 amending the limits of the Hague/Visby Rules. The time bar is also similar to the Hague-Visby Rules.

As mentioned earlier, the UNCTAD/ ICC Rules are not international conventions and are therefore not mandatory. A study by the European Commission observed that the state of legal confusion still prevailed nearly twenty years after the adoption of the MT Convention.<sup>223</sup> Several countries such

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<sup>222</sup> These defences, however, are made subject to an overriding requirement that whenever loss or damage resulted from unseaworthiness of the vessel, the MTO must prove that due diligence was exercised to make the ship seaworthy at the beginning of the voyage (Rule 5.4).

<sup>223</sup> “International Transportation and Carrier Liability”, June 1999, section 1.

as India, and regional groups such as the Andean Community,<sup>224</sup> the MERCOSUR,<sup>225</sup> and the ASEAN,<sup>226</sup> adopted the framework of the Multimodal Convention and UNCTAD/ ICC rules into their domestic statutes but the overall outcome has been disjoint and ineffective.<sup>227</sup>

Today, the law on multimodal transports is regionalized in several respects. Different liability rules apply to inland carriage in Europe and in the United States, a disparity which has led to the favouring of one liability model in the United States and another one in Europe. Furthermore, the two liability models may have different effects under U.S. law and under European law. The differences stem in part from different techniques in regulation (the status and the contract approach, respectively) but predominantly from the fact that the U.S. legal system is believed to allow for more freedom of contract in this area of the law.

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<sup>224</sup> Decision 331 of 4 March 1993 as Modified by Decision 393 of 9 July 1996: "International Multimodal Transport" The member States of the Andean Community in which these laws and regulations apply are Bolivia, Colombia, Ecuador, Peru and Venezuela.

<sup>225</sup> Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995 The member States of MERCOSUR in which the Agreement is to apply are Argentina, Brazil, Paraguay and Uruguay.

<sup>226</sup> The Association of Southeast Asian Nations, consists of Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Viet Nam, Lao PDR and Myanmar.

<sup>227</sup> Indira Carr, *International Multimodal Transportation of Goods: the Indian Response*, (2000) 391) *International Trade Law Quarterly* 1. See also UNCTAD/SDTE/TLB/2, 25 June 2001, 'Implementation of multimodal transport rules', for illustrations of multimodal legislation in various parts of the world.

## **9d. Review of the situation post MT Convention and UNCTAD/ ICC**

### **Rules**

The UNCTAD in 2001, summarised in a review of the implementation of the MT Convention that solutions for the future proposed varied from the preparation of a new set of model laws, to a mandatory international convention or a non-mandatory international convention, similar to the UN Convention on the International Sale of Goods 1980, to apply by default. It is recognized that model laws such as the UNCTAD/ ICC Rules applicable by parties' contractual agreement or a non-mandatory international regime would be more widely acceptable but they would not be effective in promoting uniformity. While a mandatory international convention would, in principle, be the best means of creating international uniformity, the UNCTAD accepted that international conventions are difficult to negotiate and very slow to enter into force.<sup>228</sup>

It is also felt that the MT Convention was introduced at a time when the multimodal transport industry was not fully mature, nor a major component compared to their sister unimodal carriage sectors, and these factors led to its failure.

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<sup>228</sup> UNCTAD/SDTE/TLB/2, 25 June 2001, 'Implementation of multimodal transport rules', para 253.

## 10. Do we need harmonization at all?

There are doubts raised on the requirement for harmonization in the first place; would it go the same route of failure as Esperanto?<sup>229</sup> In particular, it is argued that the benefit of lower transaction costs and lower legal risk expected to result from legal harmonisation must be balanced against the transition costs incurred by parties that must adapt to the operation of the harmonised rule.<sup>230</sup> Some even see in the harmonisation process a direct source of higher transaction costs because it would typically lead to the adoption of "sub-optimal," vaguely drafted rules for the purpose of achieving political compromise.<sup>231</sup>

The search for consensus between different legal traditions may entail mitigating or abandoning the preferred rule in a given legal system, especially when it is unlikely that it will obtain the support of other legal systems.<sup>232</sup> Instead, it sometimes requires an effort to formulate rules at a level of generality and flexibility so as not to displace traditional legal concepts and doctrines. Neither product appeals to domestic readers persuaded of the superiority of national law.<sup>233</sup>

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<sup>229</sup> Esperanto was a language developed in the late 1800's with an aim to promote global peace and harmony. However, it is generally considered a failed attempt and attracts several criticisms. John Edwards, *Minority Languages and Group Identity: cases and categories*, John Benjamins Publication Co. 2010, pg.187.

<sup>230</sup> Michale P. Van Alstine, *Treaty Law and Legal Transition Costs*, 77 CHI.-KENT L. REV. 1303, 1303-24 (2001).

<sup>231</sup> Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671, 694-96 (1999).

<sup>232</sup> Jose Angelo Estrella Faria, *Uniform Law and Functional Equivalence: Diverting Paths or Stops Along the Same Road? Thoughts on a New International Regime for Transport Documents*, 2 *Elon L. Rev.* 1 2011. The author of the captioned article was appointed Secretary-General for International Institute for the Unification of Private Law ("UNIDROIT") on 1<sup>st</sup> October 2008.

<sup>233</sup> "As time changes and the law does not, codifications become the enemy of substantive reform. In today's world, any code that does not build a process for prompt and sustained reconsideration into its structure becomes part of the problem, not part of the solution." Arthur Rosett, *Unification, Harmonisation, Restatement, Codification and Reform in International Commercial Law*, 40 *Am. J. Comp. L.* 683, 688 (1992).

There are also criticisms directed against the international negotiation process itself. The rigidity of the treaty-making process and the little flexibility-if any-left for adaptations to the domestic reality, it was said, was discouraging States from adhering to international conventions.<sup>234</sup>

In any case, doubts about the harmonisation process are not new, and not every criticism is justified or reasonable. This apparent paradox, in fact, has prompted international organizations involved in legal harmonisation to consider more critically the limitations of the instruments they produce and the possible shortcomings of their methods. There is growing awareness of the challenges of overcoming the barriers posed by deeply ingrained legal concepts and categories, and of the need for shifting attention from conceptual categories to their practical operation in the relevant legal systems.<sup>235</sup>

One alternative is the "functional approach" serves to promote "best solutions" rather than simply to build on common approaches, which is the modern trend in legal harmonisation.<sup>236</sup> This functional approach is also used in 'preventive harmonisation,<sup>237</sup> which is basically an effort to formulate uniform rules to address new phenomena before the development of domestic practices

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<sup>234</sup> "At the international level, it is harder to persuade States to accede to a convention if 'the price' is so high at the outset. And, if this initial hurdle is overcome and a reasonable number of States do accede, amendment of that original convention then requires agreement from a much larger group of States if uniformity is to be maintained." Alan D. Rose, *The Challenges for Uniform Law in the Twenty-First Century*, 1 UNIF. L. Rsv. 9, 13 (1996).

<sup>235</sup> Rodolfo Sacco, *Diversity and Uniformity in the Law*, 49 Am. J. COMP. L. 171, 188 (2010).

<sup>236</sup> Roy Goode et al, *Transnational Commercial Law-International Instruments and Commentary* (Oxford University Press 2007), pg. 169.

<sup>237</sup> "Preventive" harmonisation means the effort to formulate uniform rules to address new phenomena before the development of domestic practices and usage could generate disparate laws and regulations. The UNCITRAL Model Law on Electronic Commerce is a well-known example of this approach.

and usage could generate disparate laws and regulations. One example is the Rotterdam Rules, where the drafters chose a balance between harmonisation of results and preservation of existing theories.<sup>238</sup>

Some still suggest that it would be better to simply allow companies to "elect in and out of national commercial law systems" so that States "could compete for legal business on the basis of the attractiveness of their rules and dispute resolution procedures, rather than coerce their subjects to follow any one system of commercial law."<sup>239</sup>

The fact that uniformity in an area of law can be attained through rules, for example UCC 500,<sup>240</sup> and the UNCTAD/ICC Rules for Combined Transport, which are not law is yet another affirmation that the origin of "uniform" rules is incidental. There is one undisputable concept which supports the notion of harmonisation: the notion of profit. With similar legal rules forming the backdrop of contract negotiations, understanding may be come by more easily and negotiations for drafting may be shorter - and more importantly: cheaper. Thus, if traders speak the same basic language they save money - and saving money means making more of it. Another economic point in favour of unification of commercial laws is the more macro-economic argument that as trade is encouraged based on common legal understanding, new markets emerge or

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<sup>238</sup> Jose Angelo Estrella Faria, Uniform Law and Functional Equivalence: Diverting Paths or Stops Along the Same Road? Thoughts on a New International Regime for Transport Documents, 2 *Elon L. Rev.* 1 2011.

<sup>239</sup> Paul B. Stephan, The Futility of Unification and Harmonisation in International Commercial Law, 39 *VA. J. INT'L L.* 743, 789, 795 (1999).

<sup>240</sup> Uniform Customs and Practice for Documentary Credits 1993. The documentary letter of credit - deemed by English judges to be the "life blood of international commerce" Lord Justice KERR in *R.D.Hardbottle (Mercantile) Ltd v. National Westminster Bank Ltd.* [1978] *Q.B.* 146 at 155, and others.



become more accessible, and in turn different sectors of industry flourish. This argument is an extension of the political argument of "removing barriers in trade", as phrased by the preamble to the CISG.<sup>241</sup>

Commercial law essentially caters to the needs of the business community and society as a whole, by providing the statutory boundaries for party autonomy as morality of society dictates, thus enabling the greatest freedom within these boundaries for business to grow and develop in the pursuit of profits and economic growth. Objectives of uniform law must be viewed in connection with their context, and both their political and lawmaking goals must be assessed.<sup>242</sup>

## 11. The third doctrine of 'absorption'

Apart from the uniform (*sui generis*), network approaches to solving the multimodal legal muddle, there is also the absorption theory. This theory relies on the subordinate aspects of the contract getting absorbed into the predominating element. This may not be the purists' idea of a multimodal convention but possesses the scope of solving many of the practical legal issues involved. Firstly, considering that the multimodal carriage will most likely contain only two modes of transport, either air and road, sea and road, sea and rail, rail and road, inland sea and road etc. The predominant mode would usually

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<sup>241</sup> Camilla Baasch Andersen, Defining Uniformity in Law, 12 Uniform Law Review n.s. 5 (2007).

<sup>242</sup> Paul B. Stephan, The Futility of Unification and Harmonisation in International Commercial Law, 39 VA. J. INT'L L. 743, 789, 795 (1999).

be the air, sea or rail leg and the corresponding unimodal convention will be stretched to apply in case of damage occurring on the subordinate leg.

Support for this theory can be found as early as the Hamburg Rules,<sup>243</sup> and the CMR by way of article 1(1). The Hamburg rules had, along with introducing carriage of containers on deck, also introduced the concept of ‘actual’ and ‘contractual’ carrier, and the carrier’s period of responsibility could be extended to the time the carrier took ‘charge’ of the cargo until delivery to the consignee compared with the coverage period only on board the ship under the Hague-Visby Rules. The air carriers already adopt this practice and the pick-up and drop-off operations are absorbed into the air-leg. Article 31 of the Warsaw Convention permits the carrier and the shipper to refer to other modes of transport in the Warsaw air waybill. The air leg itself will be governed by the Warsaw Convention, and a presumption is established that even if other modes of transport are involved, the damage took place during air transport for the purpose of loading, delivery, or transshipment of the goods.<sup>244</sup> The air carriers had, in any case objected to including the air leg in any uniform liability multimodal convention.<sup>245</sup>

The Court of Appeal in *Quantum v Plane Trucking* clearly did not consider this absorption approach, however it found some support by the Dutch *Hoge*

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<sup>243</sup> See section 3a of this book.

<sup>244</sup> William Driscoll and Paul B. Larsen, The Convention on International Multimodal Transport of Goods, HeinOnline -- 57 Tul. L. Rev. 194 1982-1983.

<sup>245</sup> Gerald F. Fitzgerald, Proposed Convention on the International Combined Transport of Goods: Implications for International Civil Aviation, 11 Can. Y.B. Int'l L. 166 1973.

*Raad* who applied this doctrine in *General Vergas*.<sup>246</sup> Here, the owner of a shipment of aluminium ingots commissioned Steinweig to accept the delivery of his goods in the port of Rotterdam. to unload them from the ship and to store them in his warehouse. Steinweig however, store only half of the shipment in his warehouse situated on the quay where the ship moored. The other half was loaded onto an inland waterway vessel and sent to Steinweig's premises at Spijkenisse for storage and during the inland vessel sank enroute to its destination. The shipper pursued Steinweig who in turn countered that he was not liable for the damage under the freight forwarding conditions unless the principal could prove that the damage occurred due to his lack of due skill and care. The Dutch Court established that the inland services were subordinate and instrumental to the custody agreement, and the freight forwarding conditions would not apply.<sup>247</sup>

The disadvantage of this approach is that it cannot apply when there are more than two modes of transport involved. Also the boundaries limiting the independence of the subsidiary leg from the predominant leg are not clearly delineated. Article 2(2) of the CMNI, controls this boundary to a certain extent by qualifying that the convention does not apply to the carriage of goods , without transshipment, both on inland waterways and in waters to which maritime regulations apply when a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in

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<sup>246</sup> Hoge Raad (Dutch Supreme Court) 28 November 1997, S&S 1998, 33.

<sup>247</sup> Marian Hoeks, *Multimodal Transport Law, The Law Applicable to the Multimodal Contract for the Carriage of Goods*, Wolters Kluwer, 2010, ISBN 978-90-4113246-8, pg. 72.

waters to which maritime regulations apply is greater. The absorption approach would also mean that each unimodal convention would have to be modified to make provisions for a subsidiary leg.

The Rotterdam Rules of 2008, drafted jointly by the CMI and the UNCITRAL,<sup>248</sup> appear to have allowed this line of thinking in its 'maritime-plus' approach.<sup>249</sup> The Rotterdam Rules appear to be modelled after, and even go beyond the proposed new U.S. COGSA,<sup>250</sup> especially since commercial practice in the United States might seem to suggest a preference for the extension of the maritime liability regime to cover the entire transport.<sup>251</sup>

### **11a. Rotterdam Rules as a solution to the multimodal problem?**

Article 1(1) of the Rotterdam Rules allows the contract of carriage by sea to provide for carriage by other modes in addition to sea carriage. Article 26 applies a network liability treatment for localized damage mode in stating that when loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship,

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<sup>248</sup> Refer footnote 43 and accompanying comments regarding the preparation of the Rotterdam Rules.

<sup>249</sup> Theodora Nikaki, Conflicting Laws in "Wet" Multimodal Carriage of Goods: The UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], *Journal of Maritime Law & Commerce*, Vol.37, No.4, October 2006.

<sup>250</sup> In 1996, a proposal for a new COGSA was drafted in the United States. According to section 13 of the proposal, the new COGSA would apply to "all contracts that include the carriage of goods by sea covering transportation to or from the United States." The Mar.Law Ass'n of the U.S. Comm. on the Carriage of Goods, Majority Report: Revising the Carriage of Goods by Sea Act, MLA Doc. No. 724, at 56 (May 3, 1996).

<sup>251</sup> Michael E. Crowley, The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem, 79 *Tulane Law Review* 1461 2004-2005.

the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay: (a) pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred; (b) specifically provide for the carrier's liability, limitation of liability, or time for suit; and (c) cannot be departed from by contract either at all or to the detriment of the shipper under that instrument. Thus, when damage cannot be localised, the maritime law regime is extended, regardless of the status of the contracting carrier and regardless of how the contract between the shipper and the contracting carrier would have otherwise been categorized; this solution is seen as bridging the gap between the application of the status approach under U.S. law and the contractual approach under European law, as well as improving the legal clarity of the network system.<sup>252</sup>

The Rotterdam Rules also follow the more neutral terminology used by the 1980 Multimodal Convention and refer instead to "transport documents," which, as in the case of the Multimodal Convention, can be "negotiable" or "non-negotiable." This exemplifies the functional approach to legal harmonisation referred to earlier,<sup>253</sup> and may prove to be useful to help advance legal

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<sup>252</sup> Dr Ellen Eftestøl-Wilhelmsson, *The Rotterdam Rules in a European Multimodal Context*, (2010) 16 JIML, *The Journal of International Maritime Law*.

<sup>253</sup> Refer footnote 239 and comments in section 10 of this book.

harmonisation where the practical commercial need for uniformity collides with the overwhelming force of traditional legal thinking. This new approach leads to opinions that the Rotterdam Rules represent the latest attempt to create what appears to be a global solution to the multimodal problem.<sup>254</sup>

The multimodal overtones of the Rotterdam Rules are also evident in Article 82 which state that "nothing in this Convention affects the application of any of the international conventions (for carriage by road, rail, air or inland waterway) in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods. The drafting of this provision is however criticized as creating difficulties as to determining the applicability of the Convention in relation to other potentially applicable legal regimes to the same transport."<sup>255</sup>

Other disadvantages of the Rotterdam Rules are that they are not applicable for other modes such as air-legs and separate set of rules will be required there; further, the Convention as such does not actually cover transport additional to maritime transport, as it merely gives the maritime carrier the option to include such additional carriage in his contract. In practice, this may well result in considerable difficulties for the customers to determine whether or not the carrier has exercised that option.

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<sup>254</sup> Vibe Ulfbeck, *Multimodal Transports in the United States and Europe--Global or Regional Liability Rules?* 34 Tul. Mar. L.J. 37 2009-2010.

<sup>255</sup> F. Berlingieri, *A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?* (in *Uniform Law Review* 2003).

These Rules are also thought to uphold the regionalization tendency by adopting the extension of the maritime liability regime as the solution for transports with an inland leg in jurisdictions such as the United States, and the network principle as the solution for transports with an inland leg in Europe.<sup>256</sup>

Berlingieri feels that it is unhelpful to expand a unimodal transport convention to cover other modes as well, since nowadays the important factor for customers is not exactly how goods have been carried and which mode of transport has been used but rather the desire to get the goods in the right condition to the right place at the right time.<sup>257</sup>

The European Commission in a review of the situation concluded that an endorsement of the Rotterdam Rules and a parallel European Convention for non-sea plus multimodal transport would legally be feasible but politically unviable.<sup>258</sup> It is also thought that the modified network liability system of the Rotterdam Rules does not provide a sufficient alternative to the European Commission's plan for increased use of multimodal transport by providing the transport users with a predictable liability system needed to reduce transactions costs by changing mode of transport.

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<sup>256</sup> F. Berlingieri, A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door? (in Uniform Law Review 2003).

<sup>257</sup> F. Berlingieri, A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door? (in Uniform Law Review 2003).

<sup>258</sup> Dr Ellen Eftestøl-Wilhelmsson, The Rotterdam Rules in a European Multimodal Context, (2010) 16 JIML, The Journal of International Maritime Law.

The International Federation of Freight Forwarders Associations (FIATA) Working Group Sea Transport, also felt that the Rules were too complicated and recommended that its members oppose the signing of the Convention by their respective governments,<sup>259</sup> also citing the following details:

(a) The complexity of the Convention would lead to additional transaction costs, administrative burdens and invite misunderstandings and misinterpretations.

Possibly worse, the Convention States could end up with different interpretations, so that the Rotterdam Rules would fail in reaching their main objective to unify the law of carriage of goods by sea.

(b) Although freight forwarders, as carriers or logistics service providers, stand to gain from the benefits according to carriers by the Rotterdam Rules – such as the right to limit liability not only for loss of or damage to cargo but for any breach (Art. 59.1) and no liability for delay unless agreed (Art. 21) – the Rotterdam Rules work to the disadvantage of freight forwarders when acting as shippers or when demanding compensation from the performing carriers.

(c) It was expected that the expansion of freedom of contract in case of volume contracts (Art. 1.2 and Art. 80) could lead to additional difficulties in getting compensation from the performing carriers.

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<sup>259</sup> Fédération Internationale des Associations de Transitaires et Assimilés, FIATA Position on the UN Convention on Contracts for the International Carriage of Goods wholly or partly by Sea (the “Rotterdam Rules”), March 2009, [http://www.fiata.com/uploads/media/FIATA\\_Position\\_Paper\\_UN\\_Convention\\_on\\_Contracts\\_for\\_the\\_International\\_Carriage\\_of\\_Goods\\_wholly\\_or\\_partly\\_by\\_Sea\\_\\_the\\_Rotterdam\\_Rules\\_-\\_March\\_2009\\_02.pdf](http://www.fiata.com/uploads/media/FIATA_Position_Paper_UN_Convention_on_Contracts_for_the_International_Carriage_of_Goods_wholly_or_partly_by_Sea__the_Rotterdam_Rules_-_March_2009_02.pdf), accessed on 23.10.2011.



(d) As shippers, freight forwarders would be liable without any right to limit liability for incorrect information to the carriers (Art. 79.2(b)), although the carriers enjoy the right to limit their liability for incorrect information to the shippers (“any breach”).

The FIATA also recapitulated that freight forwarders are frequently engaged in various capacities in the seaports which could expose them to liability as “maritime performing parties” (Art. 1.7 and Art. 19). Under the current legal regimes, stevedores and warehousemen enjoy freedom of contract allowing them to escape liability, at least to the extent that their customers are or could be covered by insurance for loss or damage.

In countries where stevedoring and warehousing enterprises are owned or controlled by governments or municipalities, any moves towards ratification of the Rotterdam Rules would for this reason presumably be strongly opposed in order to avoid escalation of liability insurance premiums. Multipurpose cargo terminals engaged as distribution centres in logistics operations would strongly oppose a sort of maritime law injection into their business, which presumably will be governed by more sophisticated liability regimes.

The FIATA Working Groups also felt that the transport document issued under the Rotterdam Rules, if the document were a “non-negotiable transport document”, it would lack the characteristics of a document of title in the

common-law sense by reason both of being described as “non-negotiable” and of covering carriage otherwise than exclusively by sea.<sup>260</sup>

The FIATA deemed as 'most cumbersome' and 'absolutely unacceptable',<sup>261</sup> the option which accorded to carriers to issue negotiable transport documents or electronic equivalents and nevertheless retaining the right to deliver the goods without getting the negotiable transport document in return (Art. 47.2). the FIATA opines that such documents may well constitute important tools in maritime fraud, when a seller fraudulently sells the goods to a second buyer who could convince the carrier that he is entitled to get the goods, although he is unable to tender an original Bill of Lading, leaving the unfortunate first buyer with a right to get limited compensation from the carrier.

Freight forwarder members were warned to take care not to be associated with such malpractice with the risk of being held liable through “guilt by association”. In conclusion, the FIATA felt that the 'maritime plus' option of the Rotterdam Rules was 'disturbing', that the positives like removal of navigation fault defence could be effected by amending the Hague-Visby Rules; the States of their respective member associations should not ratify this Convention.<sup>262</sup>

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<sup>260</sup> See discussion in Benjamin's Sale of Goods 8th Ed., Main Volume, Part 7, Chapter 21-087.

<sup>261</sup> [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/FIATApaper.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/FIATApaper.pdf)

<sup>262</sup> [http://www.fiata.com/uploads/media/01cf16a\\_ods\\_05.pdf](http://www.fiata.com/uploads/media/01cf16a_ods_05.pdf).

## 12. Conclusion

The present situation may be characterized by uncertainty as to the law applicable to multimodal transport operations. The lack of a uniform liability regime in force, diverse national laws and regulations including varying approaches on central issues such as the liability system, limits of liability, time-bar, etc., make it difficult for the parties to assess in advance the risks involved.<sup>263</sup>

The current multimodal transport scenario is still internationally dependent on the network approach to determine liability in case of loss or damage.<sup>264</sup> In cases where the location of damage to the goods cannot be accurately determined, a lengthy contest is initiated between the shipper, the MTO and any subcontracting carrier to determine who is liable and what is the lowest limit of liability. This scenario appears discouraging, especially for small businesses who could otherwise venture into international markets, but for the complexities and costs of the current multimodal transport regimes.<sup>265</sup>

The problem of reconciling the differing systems of liability imposed by the mandatory carriage regimes is still unresolved. Even the unimodal systems are

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<sup>263</sup> UNCTAD, Implementation of Multimodal Transport Rules, UNCTAD/SDTE/TLB/2, 25 June 2001, para 251.

<sup>264</sup> Professor Dr KF Haak and MAIH Hoeks, Arrangements of intermodal transport in the field of conflicting conventions, *Journal of International Maritime Law* 10 [2004] 5.

<sup>265</sup> Kurosh Nasser, The Multimodal Convention, *Journal of Maritime Law and Commerce*, Vol.19, No.2, April 1988.

not uniformly implemented globally, giving rise to a patchwork of transport law regimes.

The general concept of uniformity is difficult to achieve due to the diversity of legal disciplines operating with uniform laws, which must be seen in the context of the several political and commercial goals involved. Different contexts and political goals of law will affect the lawmaking goals and the realistic level of similarity which the proposed form of uniformity may reach.<sup>266</sup> Despite the growing status of containerization, it still represents a relatively small sector in the carriage of goods by sea. The rest of the shipping industry has no interest to ratify any liability regime which will put it at a disadvantage or just to make things easier for the multimodal transport industry.

In a recent response to a questionnaire by the European Commission, it was not surprising to note that each section of the industry wanted the regime applicable to their industry applicable to the multimodal transport, given the comfort level of each operator with the system they was most familiar with.<sup>267</sup> As part of the same process, there were proposals for a "neutral" liability regime in line with the basis of liability found in the United Nations Convention on Contracts for the International Sale of Goods (CISG), subjecting the carrier to

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<sup>266</sup> Camilla Baasch Andersen, *Defining Uniformity in Law*, 12 *Unif. L. Rev.* n.s.5 2007.

<sup>267</sup> TREN/CC/01-2005/LOT 1/LEGAL ASSISTANCE ACTIVITIES

Study on the details and added value of establishing a (optional) single transport (electronic) document for all carriage of goods, irrespective of mode, as well as a standard liability clause (voluntary liability regime), with regard to their ability to facilitate multimodal freight transport and enhance the framework offered by multimodal waybills and or multimodal manifests, page 7.

almost strict liability.<sup>268</sup> These proposals are however yet to even to be tabled in an international legal forum.

Transport documents based on the UNCTAD/ ICC rules continue to be in use, and carriers have their own clauses in them but the outcomes of any related disputes may not necessarily be predictable.

Multiple conventions have been prepared to address the challenges raised by multimodal transportation, fine tuning a compromise with each passing regime. Success has even eluded the much anticipated 'maritime-plus' Rotterdam Rules. The hurdle is more a political one than a legal one. Until that time there will be a boxful of rules and the players will have to pick one hoping for a lucky draw.



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<sup>268</sup> Integrated Services in the Intermodal Chain (ISIC), Final Report, Task B: Intermodal Liability and Documentation § 1.1 (2005).

## Appendices

### Appendix1: Hague, Hague-Visby and Hamburg Rules: Parties to the Conventions

#### and the Countries which apply the rules

- SDR Protocol

- By application of local law

Albania	Hamburg	
Algeria	Hague	
Angola	Hague	
Antigua & Barbuda	Hague	
Argentina	Hague / Hague-Visby	■
Aruba	Hague	■
	Hague -	
Australia	Visby/Hamburg	■
Austria	Hamburg	
Bahamas	Hague	
Bahrain	Hague-Visby	■
Bangladesh	Hague	■
Barbados	Hamburg	
Belgium	Hague-Visby	•
Belize	Hague	
Bermuda	Hague-Visby	•
Bolivia	Hague/Hamburg	
Botswana	Hamburg	
Brazil	Hague	■
British Virgin Islands	Hague-Visby	•
Brunel	Hague	
Bulgaria	Hague	■
Burkina Faso	Hamburg	
Burundi	Hamburg	
Cameroon	Hamburg	
	Hague -	
Canada	Visby/Hamburg	■
Cape Verde	Hague	

Finland	Hague-Visby	•
France	Hague-Visby	•
Gambia	Hamburg	
Georgia	Hamburg	
Germany	Hague-Visby	■
Ghana	Hague	
Gibraltar	Hague-Visby	•
Greece	Hague-Visby	•
Grenada	Hague	
Guinea	Hamburg	
Guinea-Bissau	Hague	
Guyana	Hague	
Hong Kong	Hague-Visby	•
Hungary	Hamburg	
Iceland	Hague-Visby	■•
India	Hague/Hague-Visby	■•
Indonesia	Hague Visby	■
Iran	Hague	
Iraq	Hamburg	■
Ireland	Hague-Visby	
Israel	Hague/Hague-Visby	
Italy	Hague-Visby	■•
Ivory Coast	Hague	
Jamaica	Hague	
Japan	Hague-Visby	•
Jordan	Hamburg	

Cayman Islands	Hague-Visby	●
Chile	Hamburg	
	Hague-	
China	Visby/Hamburg	■
Colombia	Hague/Hamburg	■
Congo, Democratic Republic of	Hague	
Croatia	Hague-Visby	●
Cuba	Hague	
Cyprus	Hague	
Czech Republic	Hamburg	
Denmark	Hague-Visby	●
Dominican Republic	Hamburg	
Ecuador	Hague-Visby	
Egypt	Hamburg	●
Estonia	Hague	■
Falkland Islands	Hague-Visby	
Fiji	Hague	
Morocco	Hamburg	
Mozambique	Hague	
Netherlands	Hague-Visby	●
New Zealand	Hague-Visby	●
Nigeria	Hamburg	
Norway	Hague-Visby	●
Oman	Hague-Visby	■●
Pakistan	Hague	■
Panama	Hague	■
Papua New Guinea	Hague	
Paraguay	Hamburg	
Peru	Hague/Hamburg	■
Philippines	Hague	■
Poland	Hague-Visby	●
Portugal	Hague/Hague-Visby	■
Qatar	Hague-Visby	■
Romania	Hamburg	

Kazakhstan	Hamburg	
Kenya	Hamburg	
Korea (South)	Hague-Visby	■
Kuwait	Hague-Visby	■
Latvia	Hague-Visby	■
Lebanon	Hamburg	
Lesotho	Hamburg	
Liberia	Hamburg	
Lithuania	Hague-Visby	●
Madagascar	Hague	
Malaysia	Hague	
Malta	Hague	■
Mauritius	Hague	
Mexico	Hague-Visby	●
Monaco	Hague	
Montserrat	Hague-Visby	●
Slovenia	Hague	
Solomon Islands	Hague	
Somalia	Hague	
South Africa	Hague-Visby	■
Spain	Hague-Visby	●
Sri Lanka	Hague-Visby	
Sweden	Hague-Visby	●
Switzerland	Hague-Visby	●
Syria	Hamburg	
Taiwan	Hague-Visby	■
Tanzania	Hamburg	
Thailand	Hague-Visby	■
Timor-Leste	Hague	
Tonga	Hague-Visby	
Trinidad and Tobago	Hague	
Tunisia	Hamburg	
Turkey	Hague	■

Russia	Hague-Visby	●
Saint Kitts and Nevis	Hague	
Saint Lucia	Hague	
Saint Vincent and the Grenadines	Hamburg	
Sao Tome and Principe	Hague	
Sarawak	Hague	
Senegal	Hamburg	
Seychelles	Hague	
Sierra Leone	Hamburg	
Singapore	Hague-Visby	●
Slovakia	Hamburg	

## Turks and Calicoes

Islands	Hague-Visby	●
Tuvalu	Hague	
Uganda	Hamburg	
Ukraine	Hague-Visby/Hamburg	■
United Arab Emirates	Hague-Visby	■
United Kingdom	Hague-Visby	●
United States of America	Hague	■
Venezuela	Hague-Visby/Hamburg	■
Vietnam	Hague-Visby	■
Zambia	Hamburg	



**Appendix 2:**

## Aviation, Parties to the Conventions &amp; the Countries which apply the rules

<b>COLUMN A</b>	<b>COLUMN B</b>	<b>COLUMN C</b>	<b>COLUMN D</b>	<b>COLUMN D</b>
<b>Warsaw Convention Countries</b>	<b>Warsaw Convention Amended by Hague</b>	<b>Warsaw Convention Amended by Montreal Protocol 4</b>	<b>Montreal Convention</b>	<b>(con't) Montreal Convention</b>
Liability for Cargo loss, delay or damage	250 francs per kilogram (US \$20.00 per kilogram) (US \$9.07 per pound	250 francs per kilogram (US \$20.00 per kilogram) (US \$9.07 per pound	17 SDR per kilogram (US \$25.16 approx. per kilogram)	17 SDR per kilogram (US \$25.16 approx. per kilogram)
Armenia	Algeria	Argentina	Albania (NC)	Luxembourg (WH)
Bolivia	Bahamas	Australia	Austria (WH)	Macedonia (NC)
				Madagascar (WH)
	Bangladesh	Azerbaijan	Bahrain (MP4)	Maldives (WH)
				Malaysia (WH)
				Mali
Honduras	Congo	Chile	Barbados (WC)	Malta (WC)
Indonesia	Costa Rica	Costa Rica	Belgium (MP4)	Mexico (WH)
			Belize (NC)	Monaco (WH)
Myanmar			Benin (WH)	Mongolia (WC)

			Bosnia & Herzegovina (NC) <sup>269</sup>	
Suriname	Fiji	Ethiopia	Botswana (WC)	Namibia (NC)
	India	Ghana	Brazil (MP4)	Netherlands (MP4)
Uganda	Iran	Guatemala	Bulgaria (WH)	New Zealand (MP4)
	Iraq	Guinea	Cameroon (WH)	Nigeria (WH)
	Libya	Honduras	Canada (MP4)	Norway (MP4)
				Oman (MP4)
				Pakistan (WH)
		Israel	Cape Verdi (WH)	Panama (WH)
	Morocco	Mauritius	China (WH)	Paraguay (WH)
		Nauru	Colombia (MP4)	Peru (WH)
			Cook Islands (NC)	
			Cote d' Ivoire (WH)	
			Croatia (MP4)	
	Papua New Guinea	Niger	Cuba (WH)	Poland (WH)
	Philippines	Oman	Cyprus (MP4)	Portugal (MP4)
		Serbia and Montenegro	Czech Rep. (WH)	

<sup>269</sup> Bosnia & Herzegovina were separated from Yugoslavia. It is unclear whether they accepted Yugoslavia's accession as a Warsaw / Hague State.

	Russian Federation		Denmark (MP4)	Qatar (WH)
				Republic of Korea (WH)
				Romania (WH)
			Dominican Republic (WH)	
COLUMN A Warsaw Convention Countries	COLUMN B Warsaw Convention Amended by Hague	COLUMN C Warsaw Convention Amended by Montreal Protocol 4	COLUMN D Montreal Convention	COLUMN D (con't) Montreal Convention
	South Africa	Togo	Ecuador (MP4)	Saint Vincent and the Grenadines (WH)
	Sri Lanka	Turkey	Egypt (MP4)	Saudi Arabia (WH)
				Singapore (MP4)
			EL Salvador (WH)	
	Trinidad & Tobago	Uzbekistan	Estonia (MP4)	Slovakia (WH)
	Tunisia		Finland (MP4)	Slovenia (MP4)
				South Africa (WH)
	Ukraine		France (WH)	Spain (MP4)

	Venezuela		Gambia (NC)	Sweden (MP4)
	Viet Nam		Germany (WH)	Switzerland (MP4)
	Yemen		Greece (MP4)	Syrian Arab Republic (WH)
	Zambia		Hungary (MP4)	Tonga (MP4)
			Iceland (MP4)	United Arab Emirates (MP4)
			Ireland (MP4)	Tanzania (NC)
			Italy (MP4)	United State (MP4)
			Japan (MP4)	United Kingdom (MP4)
			Jordan (MP4)	Vanuatu (WH)
			Kenya (MP4)	Uruguay (WC)
			Kuwait (MP4)	European
			Latvia (WH)	Community (NC)
			Lebanon (MP4)	
			Lithuania (WH)	

Column D also includes information indicating the most recent version of the Warsaw Convention ratified by that country before it ratified the Montreal Convention.

WC = Warsaw Convention

WH = Warsaw Convention as amended by Hague

MP4 = Warsaw Convention as amended by Montreal Protocol 4

NC = No convention (meaning that the party never ratified any version of the Warsaw Convention or the Montreal Convention)

Under the various Warsaw Conventions, when a country ratified a later version of the convention, it automatically ratified the previous versions. Because the Montreal Convention is a new treaty, a country could ratify it without ever ratifying any version of the Warsaw Convention. This complicates matters because for a convention to apply, both parties must have ratified the same Convention.

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