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The legal framework for multimodal transport in West Africa: the African Continental Free Trade Area in perspective

Damilola Idris Osinuga

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by

DAMILOLA IDRIS OSINUGA

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Damilola Idris Osinuga
Nigeria

A dissertation submitted to the World Maritime University in partial fulfilment of the requirements for the award of the degree of Doctor of Philosophy in Maritime Affairs

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Abstract

This thesis examines how multimodal transport can play a role in achieving the objectives of the African Continental Free Trade Area (AfCFTA). The thesis argues that multimodal transport is cheaper compared with unimodal transportation. While there are a number of issues affecting the operationalisation of multimodal transport in Africa, this study considers, at its core, the legal regimes and other fragmented institutional and governance frameworks of multimodal transport in West Africa. The fragmentation of the legal framework governing multimodal transport leads to uncertainty and unforeseeability of the liability of parties involved in multimodal transport, consequently leading to increased legal costs.

There is an undisputed view that for effective regional integration, which Africa is seeking to achieve through the establishment of the African Continental Free Trade Area, there is a need to eliminate all trade barriers. Trade barriers (tariff or non-tariff barriers) should be removed to improve competitiveness and reduce trade friction costs. In other words, to achieve the objectives of the African Continental Free Trade Area, it is essential that all unnecessary costs associated with trade are eliminated or reduced to the barest minimum. The process of doing this is called trade facilitation. This thesis looks at the impact of trade facilitation on regional integration and trade.

This thesis' original contribution to knowledge is that Africa's regional integration process needs cost-effective transportation in order to achieve smooth market access, and multimodal transportation can provide the most cost-effective solution. However, the legal uncertainty and complexities that could potentially ensue from the use of multimodal transport make it unattractive to prospective users. Accordingly, actions must be taken to reduce legal ambiguity and create a system in which liability is foreseeable and predictable.

This study reveals that the current legal framework is incomplete, unsatisfactory and, ultimately, leads to uncertainty. The thesis further contends that neither the option of freedom of contract nor improving the current system of various Economic Community of West African States (ECOWAS)member-states' view of multimodal transport, can significantly improve the current fragmented system or deliver the needed certainty.

Accordingly, the thesis proposes that a modified uniform system would help achieve the legal certainty needed for multimodal transport. The thesis finally submits that the ECOWAS should establish a legally binding, regional governance regime on multimodal transport and a majority of its member-states should ratify the instrument.

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

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam, December 11, 2008) (*Rotterdam Rules*) United Nations Convention on International Multimodal Transport of Goods (May 24 1980), not yet in force. (*M.T. Convention*)

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1 General introduction

1.1 Background and Statement of Problem

The discussion on how to best operationalize regional integration is particularly pertinent at a time when "trade wars" loom large on the global economy. The global value chains are experiencing a discernible slowdown and are observing a regionalization process at the same time. This may be attributable to the fact that opposition to the idea of globalisation in general is being encountered at this point in time. Most recently, on May 30, 2019, in the context of Africa, the historic Agreement that established the African Continental Free Trade Agreement (AfCFTA) came into force.[1]

Regional integration is a multidimensional phenomenon involving international trade and investment flows, infrastructure, transportation and free movement of people. It allows better allocation of productive resources to spur economic growth and sustainable development within a regional space. The contemporary consensus, according to the World Bank (2021), is that regional integration may significantly impact trade and investment flows, allocation of economic activity, growth and income distribution.[2]

Globally, countries within the same geographic regions have made several efforts to come together with a view to fostering trade and development. In an effort to achieve regional integration, the European Union, Southern Common Market (also known as Mercosur), Latin American Integration Association (also known as Asociación Latinoamericana de Integración or Associaço Latino-Americana de Integraço, or LAIA/ALADI), African Union, and numerous other smaller regional organisations were all founded. As of January 4, 2019, the World Trade

[1] Celine Bacrot and Giovanni Valensisi. 'Harnessing Trade Facilitation for Regional Integration' (2019) 3rd Quarter(39) UNCTAD Transport and Trade Facilitation Newsletter <https://unctad.org/news/harnessing-trade-facilitation-regional-integration?__cf_chl_captcha_tk__=pmd_t9bFWrnNyGaELopigAK_v.DszlLkTJhsgoh_mMJioMc-1634726312-0-gqNtZGzNAyWjcnBszQdR> accessed October 10, 2021

[2] World Bank. 'Regional Integration' <https://www.worldbank.org/en/topic/regional-integration/overview> accessed October 28, 2021

Organization ('WTO') recognises 467 regional trade agreements ('**RTA**') – counting goods, services, and accessions separately.[3]

From a regional integration perspective, Africa is poised as an attractive investment destination and a key market for goods and services. With a workforce of 600 million set to double by 2040, Africa is clearly on track to become one of the world's major economies. It is pertinent that Africa cooperates with the public and private sectors to connect markets, deepen regional integration, and implement competitiveness-enhancing reforms to turn economic gains into sustainable growth and shared prosperity.[4] Cooperation in major policy areas on the continent can undoubtedly result in large economic gains. Therefore, it is safe to argue that regional integration serves as a springboard or catalyst for speeding Africa's industrialisation and structural transformation, as well as reducing the number of trade conflicts.

In Africa, especially in sub-Saharan Africa, the first RTA were created as a mechanism to promote continental unity in the post-colonial period. Since then, several RTA have been entered into in Africa to achieve economic objectives, increase industrialisation and trade, promote democracy, prevent regional conflicts, and harmonise institutional development.[5] Africa's leaders have recognised the need to focus on regional integration as a strategy for achieving economic growth. There is a consensus that integrating and combining economies, natural resources, skills and competencies helps in overcoming the current challenges plaguing the continent.[6] Many regional trade agreements (RTA) and Regional Economic Communities (RECs) are created to facilitate trade, promote regional economies of scale, and provide market access for growth and development in Africa and its sub-region.

Regional economic communities were created in Africa in a bid to attain integration within the continent. Such RECs include the Economic Community of West African States ('**ECOWAS**'), founded in 1975; the Common Market for Eastern and Southern Africa ('**COMESA**'), founded in 1994; the Economic Community of Central African States ('**ECCAS**') for Central Africa; the Arab Maghreb Union

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[3] World Trade Organization, 'Regional trade agreements' (World Trade Organization) <https://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed August 17, 2019

[4] African Development Bank Group. 'Regional Integration, Trade, and Investment' <https://www.afdb.org/en/knowledge/publications/tracking-africa%E2%80%99s-progress-in-figures/regional-integration-trade-and-investment> accessed October 28, 2021

[5] Paul Collier and Anthony J. Venables. 'Trade and economic performance: does Africa's fragmentation matter?' (2008) Revue d'économie du development < https://www.semanticscholar.org/paper/Trade-and-economic-performance-%3A-does-Africa-%E2%80%99-s-Collier-enables/a501f2aa24344b594c767f48235235cc1f9544d7 >

[6] Economic Commission for Africa (United Nations), *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (United Nations, 2010

('**AMU**'), established in 1989; the Southern African Development Coordinating Conference ('**SADCC**'), established in 1980, which later transitioned to the Southern African Development Community ('**SADC**') in 1992; the Community of Sahel–Saharan States (**CEN-SAD**), formed in 1998; and the East African Community (**EAC**), initiated in 1999.

These RECs are crucial elements of political and socio-economic integration, which ensures peace and stability in their regions. The RECs have a pivotal role to play in ensuring economic development in Africa. About 80 per cent of African countries intra African trade is within its RECs, and only 20 per cent of trade flows outside trade agreements.[7]

Efforts to integrate Africa started in the post-colonial period. African leaders after the colonial period believed that there was a need for Africa to integrate. Kwame Nkrumah, the first president of Ghana, addressed 31 other African heads of state who met in the Ethiopian capital, Addis Ababa, on May 24, 1963. In convincing the other leaders on why Africa should adopt a United States of Africa rather than the Organization of African Unity[8], Nkrumah noted that:[9]

> "… We need unified economic planning for Africa. Until the economic power of Africa is in our hands, the masses can have no real concern and no real interest for safeguarding our security, for ensuring the stability of our regimes, and for bending their strength to the fulfilment of our ends. With our united resources, energies and talents we have the means, as soon as we show the will, to transform the economic structures of our individual states from poverty to that of wealth, from inequality to the satisfaction of popular needs. Only on a continental basis shall we be able to plan the proper utilisation of all our resources for the full development of our continent. How else will we retain our own capital for own development? How else will we establish an internal market for our own industries? By belonging to different economic zones, how will we break down the currency and trading barriers between African states, and how will the economically stronger amongst us be able to assist the weaker and less developed states?"

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[7] Alessandro Sanches-Pereira, *From Regional Economic Communities to a Continental Free Trade Area: Strategic tools to assist negotiators and agricultural policy design in Africa* (14312, 2018)

[8] On May 25, 1963, 32 independent African nations assembled in Addis Ababa established the Organization of African Unity (OAU) by the signing of a Charter on the 25 May 1963 by the following countries: Algeria, Burundi, Cameroon, Central African Republic, Congo (Brazzaville), Congo (Kinshasa), Dahomey, Ethiopia, Gabon, Ghana, Guinea, Côte d'Ivoire, Liberia, Libya, Malagasy, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika, Tshad [later Chad], Togo, Tunisia, Uganda, UAR [Egypt], and Upper Volta [later Burkina Faso].

[9] Kwame Nkrumah. 'Nkrumah: "We Must Unite Now or Perish"' (2006) (448) New African (London. 1978) 28 < https://newafricanmagazine.com/3721/ >

Efforts to integrate the continent necessitated the need by the Organization of African Unity ('**OAU**') to launch the Lagos Plan of Action for the Economic Development of Africa, 1980–2000,[10] which sought to minimise the region's links with 'Western' countries and ensure that Africa relies on and maximises its own resources. In 1991, the Abuja Treaty came into force to also help support the African integration agenda. The treaty corroborates the importance of African solidarity, self-reliance and African development through the industrialisation strategy.[11]

Despite these efforts and economic structures, continental trade integration in Africa is below international standard when compared to other continents, except Antarctica. Africa's participation in global trade is insignificant, at about 3 per cent of global imports and exports.[12] Raw materials and primary commodities exports, with little or no added value, account for the majority of Africa's global trade participation. Intra-African trade appears more significant, at an average of about 16 per cent across the RECs, and is more diversified than African exports to other parts of the world.[13] However, the share of intra-African trade remains low compared to intra-regional trade in other parts of the world. Therefore, for Africa to unlock its full economic potential, it is imperative that it fosters economic integration globally and regionally.[14]

In the last 20 years, world trade has tripled in value;[15] in fact, in 2021, the value of global trade hit a new high of over US $28.5 trillion in 2021, a 25 percent rise from 2020.[16] However, Africa is not prominently visible in this trade growth. Although global trade has grown in recent years by an average of 10 per cent on exports and 13 per cent on imports between 2005 and 2010 respectively, Africa's share of world trade has reduced.[17] In 1948, Africa's share of world exports was 8 per cent[18]

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[10] Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (2. rev. edn, 1982)

[11] Hartzenberg Trudi, *Regional Integration in Africa* (World Trade Organization Economic Research and Statistics Division October, , 2011)

[12] 'MIL-OSI Asia-Pac: WTO Report Highlights Programmes to Strengthen Africa's Trade Capacity' *ForeignAffairs.co.nz* (Mar 30, 2021)

[13] Celine Bacrot. 'Harnessing Trade Facilitation for Regional Integration' (2019) 3rd Quarter(39) UNCTAD Transport and Trade Facilitation Newsletter <https://unctad.org/news/harnessing-trade-facilitation-regional-integration?__cf_chl_captcha_tk__=pmd_t9bFWrnNyGaELopigAK_v.DszlLkTJhsgoh_mMJioMc-1634726312-0-gqNtZGzNAyWjcnBszQdR> accessed October 10, 2021

[14] World Bank. 'Regional Integration' <https://www.worldbank.org/en/topic/regional-integration/overview> accessed October 28, 2021

[15] World Economic Forum, World Bank and African Development Bank, *The Africa Competitiveness Report 2011* (World Bank 2011)

[16] Global Trade Update 2022, United Nations Conference on Trade and Development, "Global Trade Trends and Nowcast" published February 2022

[17] 'Expanding African trade to boost growth and reduce poverty' *Business Weekly* (Mar 14, 2022)

[18] Hartzenberg Trudi, *Regional Integration in Africa*

compared to 3.3 per cent of world trade in 2018.[19] With respect to intra-Africa trade, Africa has consistently remained low compared to intra regional trade in other regions of the world.[20] Most of Africa's exports are destined for foreign markets, with the European Union and the United States of America accounting for more than 50 per cent of this total. Africa imports more than 90 per cent of its products from outside the continent, despite having many of the resources to meet its own import needs. On average, only about 10 to 12 per cent of African trade occurs amongst African nations. This is largely attributable to the slow implementation of regional integration agreements designed to remove tariff and non-tariff barriers.[21]

To allow deeper integration, at the African Union Summit held in Addis Ababa in January 2012, fifty-four (54) African Union Member States agreed to establish the Continental Free Trade Area (CFTA)[22]. On March 21, 2018, a framework agreement was signed by forty-four (44) member states in Kigali to establish the African Continental Free Trade Area ('**AfCFTA**'); the world's largest free trade area, into force[23]. The AfCFTA was signed with an aspiration to boost trade and economic growth, and strengthen integration among African countries. The complete package of legal instruments include a founding agreement, protocols on trade in goods and services, with annexes on trade-related rules and procedures, and a dispute settlement mechanism.[24] A key objective of establishing the continental free trade zone by the African Union is to boost trade, economic growth, and integration among African countries,[25] consequently strengthening intra-African trade.

The pact is expected to increase intra-African trade by making Africa a single market, harnessing the immense potential of its 1.2 billion people and a cumulative GDP of over US$3.4 trillion. The United Nations Economic Commission for Africa (UNECA) estimates that implementation of the agreement could boost intra-African

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[19] World Trade Organization, *World Trade Statistical Review 2018* (, 2018)

[20] *Economic Report on Africa, 2010: Promoting High-Level Sustainable Growth to Reduce Unemployment in Africa;2010 IIS 3190-S10; ISBN 978-92-1-125113-5* (2010)

[21] ibid

[22] The only country yet to sign the agreement is Eritrea

[23] *As at* July 7, 2019, 54 countries have signed the signed the ACFTA leaving Eritrea as the only nation out of not to sign up to the deal.

[24] Trudi Hartzenberg. 'What does the Adoption of the African Continental Free Trade Agreement signify?' https://www.tralac.org/discussions/article/12893-what-does-the-adoption-of-the-african-continental-free-trade-agreement-signify.html accessed December 4, 2018

[25] Mesut Saygili, Ralf Peters and Christian Knebel, Africa's Continental Free Trade Area: Challenges & opportunities (Division on International Trade in Goods and Services, and Commodities, UNCTAD Mar 28, , 2018)

trade by 52 per cent by 2022[26] (compared with trade levels in 2010)[27] (at the time of)and double the share of intra-African trade (currently around 13 per cent of Africa's exports) by the start of the next decade.[28]

The establishment of the Continental Free Trade Agreement was based on the belief that 'enhanced intra-African trade and deepened market integration can contribute significantly to sustainable economic growth, employment generation, poverty reduction, the inflow of foreign direct investment, industrial development, and better integration of the continent into the global economy'.[29] The concerted efforts of the African continent to integrate is supported by the recent wave tilting in favour of restructuring economic spaces towards achieving 'a real continentalisation of markets, and intensification and liberalisation of trade and commerce'.[30] African countries, with weak institutional and human capacity, have to integrate for survival.[31]

This study will restrict its scope to West Africa. This is based on the premise that the African Union ('AU') stated in the Agreement Establishing AfCFTA that 'Regional Economic Communities (RECs) will serve as building blocks to the African Economic Community. The RECs and the AfCFTA Secretariat are urged to collaborate in the implementation of the AfCFTA Agreement'.[32] Accordingly, RECs should take steps to deepen their own integration and promote continental

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[26] Economic Commission for Africa, African Union and African Development Bank, 2017, Assessing Regional Integration in Africa VIII: Bringing the Continental Free Trade Area About (Sales No. E.17.II.K.4, Addis Ababa)).

[27] As of the conclusion of this study in 2022, this had not yet been accomplished. As a result of the covid 19 pandemic, there have been hiccups with regard to the original timeline for the achievement of milestones. Despite this, the AfCFTA has enormous potential to boost trade.

[28] Loes Witschge, 'African Continental Free Trade Area: What you need to know – interview with David Luke, African Trade Policy Centre, Uneca' (Aljazeera.com, 20 March 2018)<https://www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta180317191954318.html> accessed 6 December 2018

[29] African Union, *Boosting Intra African Trade - Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast-tracking of a Continental Free Trade Area (January 30,* , 2012); https://au.int/sites/default/files/documents/32454-doc-declaration_-_english.pdf

[30] Nsongurua J. Udombana. 'A harmony or a cacophony? The music of integration in the African Union Treaty and the new partnership for Africa's development' (2002) 13(1) Indiana International & Comparative Law Review 185

[31] Edwini Kessie. 'Trade Liberalisation Under ECOWAS: Prospects, Challenges and WTO Compatibility' (1999) 7(1) African Yearbook of International Law Online / Annuaire Africain de droit international Online 31 <http://booksandjournals.brillonline.com/content/journals/10.1163/221161799x00020>

[32] See the Resolution of the Assembly Of The African Union Thirteenth Extraordinary Session (On The Afcfta) 5 December 2020 Johannesburg, South Africa Virtual Platforms (Zoom)

integration initiatives.[33] ECOWAS is a REC which was founded in 1975 with 15 West African member states. Its objective is to promote economic integration in all fields of economic activity.

There are a number of peculiar features in West Africa which have accentuated the need for and trends toward further integration. Not only does the region have some of the densest populations in Africa, but it also contains the largest number of individual nations (sixteen) and embraces three different agro-ecological zones, compared with the one agro-ecological zone in other African regions. West Africa possesses the largest variation of mineral ores, and the relief is generally flat, thus making it conducive to the development of railways and roads. Only three out of the sixteen countries in the sub-region are landlocked. However, despite its natural wealth, the socio-economic realities and other crises in the sub-region identify some of the countries within it as among the world's poorest, such as Benin, Cape Verde, Guinea, Guinea Bissau, Liberia, Mali, and Burkina Faso.[34]

Regional integration offers unique opportunities to promote Africa's transformation and development, especially through the RECs. ECOWAS is one of Africa's largest regional economic communities and has shaped regional integration development in West Africa. Since its inception in 1975, the ECOWAS has achieved the enviable feat of crisis prevention, free movement and a common market. Remarkably, top on its list is economic integration.[35]

Article 3 of the ECOWAS Treaty[36] states:

> the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among Member States, of non-tariff barriers in order to establish a free trade area at the Community level

Tariffs have been slightly reduced as a step to achieving a total removal of tariff barriers to ensure efficient market access[37] and economic integration. However,

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[33] Proximity of nations increases the potential for trade amongst them therefore the Acqis principle is a welcome idea

[34] Aryeetey Ernest, *Regional Integration in West Africa* (January, , 2001)

[35] Shamika Sirimanne. 'Regional Integration and Non-Tariff Measures in the Economic Community of West African State (ECOWAS)' (2018) United Nations Conference on Trade and Development; Division on International Trade in Goods and Services, and Commodities <https://unctad.org/en/PublicationsLibrary/webditc2017d1_en.pdf>

[36] Economic Communities of West African States Revised Treaty 2010 s Article 3(d)(1)

[37] Mr Aliko Dangote, noted when speaking about intra ECOWAS trade noted that: ″Our factory in Nigeria is only 28km into the Republic of Benin but the Republic of Benin, does not allow us to take cement into the Benin Republic, but they import from China." This justifies the many challenges of Intra African trade within the REC

there is a need to address non-tariff measures.[38] Undoubtedly, to take full advantage of the AfCFTA, African countries must have a detailed strategy for market access without delay.[39]

Several issues may affect market access to intra-African trade. This may include both tariff and non-tariff barriers. However, according to Balistreri, non-tariff trade costs are more critical trade barriers than tariffs in Africa. The removal of non-tariff trade costs would account for far greater benefits of deep integration in free trade agreements, which deals with issues of trade facilitation, reduction of non-tariff barriers, costs for business services, and the abolition of tariffs.[40]

Eliminating tariffs can help African countries boost economic growth, transform their economies and achieve the United Nations Sustainable Development Goals (SDGs)[41]. Furthermore, the positive impact of the AfCFTA is expected to be even greater if non-tariff measures are addressed, particularly integrating informal trade into formal channels, and the agreement includes trade in services as well.[42]

Within the ECOWAS, tariffs have gradually declined due to liberalisation and increasing trade agreements, however, there are non-tariff barriers that hinder trade. There is, therefore, a need to facilitate the discussion on eliminating and reducing non-tariff barriers that may hinder trade. Additional costs stemming from poor infrastructural provisions and less efficient logistical and distribution networks should be eliminated or reduced to the barest minimum.[43]

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[38] Shamika Sirimanne. 'Regional Integration and Non Tariff Measures in the Economic Community of West African State' (2018) United Nations Conference on Trade and Development; Division on International Trade in Goods and Services, and Commodities <https://unctad.org/en/PublicationsLibrary/webditc2017d1_en.pdf>

[39] Report of the Secretary-General, United Nations, *International Trade and Development* (General Assembly, United Nations , 2018) 488

[40] J. Balistreri Edward, G. Tarr David and Yonezawa Hidemichi. 'Deep integration in Eastern and Southern Africa' (2015) 24(4) Journal of African economies 677 <http://www.econis.eu/PPNSET?PPN=842186182>

[41] Ending poverty in all its forms everywhere is the goal of SDG 1, "sustainable economic growth; diversify, innovate, and upgrade for economic productivity" is the goal of SDG 8, and "strengthening the means of implementation and revitalising the global partnership for sustainable development" is the goal of SDG 17.

[42] Mukhisa Kituyi, 'His African trade deal could improve lives across the whole continent,' [2016] 1(1) World Economic Forum website <https://www.weforum.org/agenda/2016/05/this-african-trade-deal-could-improve-lives-across-the-whole-continent/> accessed 5 December 2018

[43] Celine Bacrot and Giovanni Valensisi. 'Harnessing Trade Facilitation for Regional Integration' (2019) 3rd Quarter(39) UNCTAD Transport and Trade Facilitation Newsletter <https://unctad.org/news/harnessing-trade-facilitation-regional integration?__cf_chl_captcha_tk__=pmd_t9bFWrnNyGaELopigAK_v.DszlLkTJhsgoh_mMJioMc-1634726312-0-gqNtZGzNAyWjcnBszQdR> accessed October 10, 2021

Global economies recognise that international trade can be more cost-effective and time-efficient if different countries take steps to remove complex processes that affect the mobility of goods, the mobility of people, customs insurance, standards and, more generally, conformance with regulations.

Broadly speaking, to reduce costs associated with trade there is a need for trade facilitation reform. This will significantly play a role towards ensuring regional integration and achieving the objectives of AfCFTA. All trading stakeholders would usually benefit from the adequate implementation of trade facilitation policies and reduction of any cost associated with trade.[44]

Trade facilitation is integral to the AfCFTA and is clearly defined in the framework agreement and trade protocols.[45] Research has shown that trade facilitation is critical to reducing the cost associated with trade and impacts heavily on the exchange of trade.[46] Thus, trade facilitation helps to encourage more participation in trade, addresses unnecessary costs related to trade procedures and improves economic welfare.

The World Bank and the World Trade Organisation (WTO) have continually pushed for the implementation of trade facilitation and liberalisation policies. Through the Council for Trade in Goods, the WTO has consistently kept trade facilitation on its agenda. For example, the WTO has urged its members to negotiate trade facilitation rules that can help improve the existing Articles V, VIII, and X of the General Agreement on Tariffs and Trade (GATT) 1994. As of today, almost all trading nations have entered an RTA, which may be bilateral, multilateral or plurilateral in nature, for trade facilitation.[47] This type of regional agreement ranges from free trade agreements to customs unions with common external tariffs. RTA have risen during the past three decades, reflecting, among other things, the growing involvement of developing nations in international trade.[48]

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[44] *APEC economies: realising the benefits of trade facilitation* (2002) 26

[45] See *Annex 3, on Customs Cooperation and Mutual Administrative Assistance, Annex 4 on Trade Facilitation and Annex 8 on Transit*).

[46] Hoekman and Shepherd, *Who profits from trade facilitation initiatives?*

[47] 'Trade facilitation in regional trade agreements', *Transport and trade facilitation series*, vol 3 (United Nations 2012)

[48] Professor De Melo, Jaime, ' Regional trade agreements in Africa: Success or failure?' (International Growth Centre) < https://www.theigc.org/blog/regional-trade-agreements-in-africa-success-or-failure/> accessed August 18, 2019

A primary reason for Africa's low trade integration is the low level of trade facilitation.[49] Africa is said to have the world's highest trade costs.[50] Undoubtedly, facilitating cross-border trade is critical to improving trade integration within the African continent. African countries need to facilitate trade by reducing transaction costs. However, efforts to promote trade on the continent have been hampered by many factors, including non-compliance or poor implementation of trade protocols, lack of effective coordination between REC countries, and poor cooperation between nations. All of these factors contribute to an increase in legal costs, which cascades to transport and transaction costs.

In their study, Wilson, Mann, Woo, Assanie and Choi[51] noted that there is no universal definition of trade facilitation. They observed that trade facilitation is any reform that should be undertaken to reduce the cost associated with trading. Rudahigwa and Tombola also define Trade facilitation as 'any process involved in the reduction in trading costs associated with enforcement, regulation, and administration of trade policies'.[52] The process of trade facilitation is intended to reduce transaction costs.

Trade facilitation and logistics are critical areas of development in any economy's regional integration and economic growth. Research shows that trade may be increased through trade facilitation.[53] However, constraints in a supply chain have been regarded as a barrier to export-led growth.[54]

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[49] 'Trade facilitation and regional integration in Africa' (2014) <https://www.tralac.org/news/article/9442-trade-facilitation-and-regional-integration-in-africa.html> accessed October 26, 2021

[50] Memory Dube and Patrick Kanyimbo. 'Leveraging trade facilitation to drive Africa's regional integration agenda' (2017) <https://www.tralac.org/news/article/11626-leveraging-trade-facilitation-to-drive-africa-s-regional-integration-agenda.html>

[51] Catherine Mann and others, 'Trade facilitation: a development perspective in the Asia Pacific region' (2002) 156

[52] Oswald Rudahigwa and Gustave M. Tombola. 'The Influence of East African Community's Cargo Clearance Procedures on Trade Facilitation in Rwanda' (2021) 6(3) European Journal of Business and Management Research 61

[53] Catherine L. Mann, Tsunehiro Otsuki and John Sullivan Wilson, *Assessing the potential benefit of trade facilitation: A global perspective* (Feb 1, 2004) <http://econpapers.repec.org/paper/wbkwbrwps/3224.htm>;*Sengupta Nirmal and Bhagabati M*oana, A Study of Trade Facilitat*ion Measures*

From WTO Perspective (August, , 2003);UNTCAD secretariat, Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade (8-12 Dece*mber, , 2003);John S. Wilson, Catherine L. Mann and Tsunehiro Ots*uki, Trade facilitation and economic development: measuring the impact (Policy research working paper, World Bank, Development Research Group 2003)

[54] John Arnold and others, *Trade and Transport Facilitation Assessment: A Practical Toolkit for Country Implementation* (World Bank Study, World Bank Publications 2010)

Trade facilitation efforts, in a narrow sense could simply address the logistics of moving goods through ports or the efficient movement of documents associated with cross-border trade.

A study[55] shows that three channels to ensure effective intra-African trade are by: (1) reducing tariffs between members, (2) reducing non-tariff barriers that arise from policies and from non-policy-induced rent extraction, and (3) trade facilitation relating to building infrastructure such as ports, roads, highways, and telecommunications. Trade facilitation also includes transparency of regulations, customs management, and a conducive business environment.[56] A trade facilitation agreement reduces trade barriers in the supply chain and can increase global GDP by six times more than eliminating tariffs. If all countries commit to half of the world's best practices for border management, transport and communication infrastructure, global GDP would increase by $ 2.6 trillion (4.7 per cent) and increase overall exports. for $ 1.6 trillion (14.5 per cent).[57]

Through sub-regional blocs, African countries have entered several agreements to facilitate trade and create free trade unions and customs. However, the proliferation of trade facilitation and free trade agreements at the regional level may have become a source of overlap, and susceptible to incompatibilities.[58]

Transportation is a critical factor of economic development. Without access to markets and resources, there will be stagnation of growth and continued poverty in society. Accordingly, transportation is essential to international trade and regional integration.[59] At the 1st Ordinary Session, 1–2 July 2018, in Nouakchott, Mauritania, transport was one of the top five priority areas adopted by the African Union for initial commitments. This points to the fact that transportation is key to regional integration and, more particularly, the success of AfCFTA. Cross border transportation in Africa is characterised by high prices and long delays. International transportation is also plagued with insecurity and difficulty in connectivity of different modes.[60] A well-structured infrastructure development, improved transport connectivity, and a coordinated trade policy are vital to promoting an integrated region.

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[55] African Development Bank Group (ed), *African Economic Outlook 2019 (Integ*ration for Africa's Economic Prosperity, African Development Bank Group 2019)

[56] African Development Bank Group (ed), *African Economic Outlook 2019 (Integ*ration for Africa's Economic Prosperity, African Development Bank Group 2019)

[57] ibid

[58] Some blocs have overlapped members and many countries belong to multiple blocs

[59] UNCTAD, *Trade Facilitation and Multimodal Transport Newsletter* (United Nations December, , 2000)

[60] Economic Commission for Africa, 'An overview of multimodal transport development in Africa' (2003)

Whilst the elimination of tariff barriers provides some gains as it relates to transaction costs, the benefits may be eluded by the obstacles and cost associated with transportation. Transport costs are an essential element of trade costs and must be addressed by trade facilitation reforms. Transport costs are high in African nations, including West Africa.[61]

If African countries can bring the cost of logistics to the global average, which amounts to an improvement of circa 19 per cent, such improvement will reduce the cost of the cross-border movement of goods and increase intra-regional trade by more than 12 per cent.[62] In West Africa, transportation costs are three times higher than in other regions.[63] Accordingly, reducing the friction cost associated with transport can help African states have more access to other African markets.

Transport cost – whether connected to infrastructural deficiencies, operation, or legal cost – can constitute a significant non-tariff barrier to integration.[64] Trade logistics are the main obstacle to trade within the region. A sustainable and operational linkage for the movement of goods is very important in the region. Accordingly, economic development is impossible without well-developed and sustainable transportation.[65]

A major constraint to the international transportation of goods in Africa is that different transport links or modes, such as air, sea and land, are not interconnected into one complete process to ensure efficient door-to-door transport. Thus, it is difficult to achieve an uninterrupted flow of goods between points of departure to destinations, consequently resulting in delays.[66]

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[61] Chris Milner, Oliver Morrissey and Evious Zgovu. 'Trade facilitation in developing countries' (2008) 8/05 Credit Research Paper <https://www.econstor.eu/handle/10419/65454>

[62] International Monetary Fund. 'Is the African Continental Free Trade Area a Game Changer for the Continent?' (2019) Regional Economic Outlook - Sub-Saharan Africa <https://webcache.googleusercontent.com/search?q=cache:QFmsb0rAP9EJ:https://www.imf.org/~/media/Files/Publications/REO/AFR/2019/April/English/ch3.ashx%3Fla%3Den+&cd=3&hl=en&ct=clnk&gl=ng>

[63] Organization for Economic Cooperation and Development and World Trade Organization (eds), *Aid for*

*Trade at a Glance: Reducing Trade Costs for Inclusive, Sustainable Growth (Co*nnecting to Value Chains: The Role of Trade Costs and Trade Facilitation, OECD Publishing 2015)

[64] Tsitsi Effie Mutambara. 'Regional transport challenges within the Southern African Development Community and their implications for economic integration and development' (2009) 27(4) Journal of Contemporary African Studies 501 <http://www.tandfonline.com/doi/abs/10.1080/02589000903399488>

[65]Thomas H Rosalind. 'DBSA'S Approach to risk analysis and Mitigation with reference to the transport sector' (20th South African Transport Conference Document Transformation Technologies, 16 – 20 July 2001 16 – 20 July 2001)

[66] Economic Commission for Africa, 'An overview of multimodal transport development in Africa' (2003)

In practice, goods arriving at ports in containers are first off-loaded from the containers and re-loaded into trucks before the land segment of the journey. In fact, many containers that enter Africa are shipped into ports and the cargo moved inland in break-bulk form.[67]

The United Nations Economic Commission for Africa (UNECA), through its Regional Advisor on Trade, has stated[68] that the establishment of multimodal transport operators (MTOs) should be encouraged to ensure the non-interrupted flow of goods from origin to destination. UNCTAD has also recommended the use of multimodal transport for developing countries. The Revised African Maritime Transport Charter adopted in Kampala, Uganda,[69] by state members of the African Union advocates for promoting multimodal transportation in Africa. It encourages all member states to promote multimodal transport both at national and regional levels. The peculiar attribute of maritime transport as a regional, continental and international activity allows it to play the vital role of facilitating and developing trade between Africa and the other parts of the world.

Furthermore, a glance at the transport strategies for some RECs in Africa (SADC and COMESA) also shows that RECs in Africa are placing priority on developing multimodal transportation and achieving economic integration.[70]

Multimodal transport is increasingly becoming more popular in world trade and fast becoming integral to logistics services. This may be because multimodal transport includes all aspects of logistics, such as transport, storage and distribution together with information management, under one heading and the control of one person.

The concept of multimodalism in transportation is nothing new. Even in sea carriage, cargoes have recently been carried via multimodal 'through' bills of lading issued by ocean carriers and intermediaries, such as freight forwarders and non-vessel owning common carriers (NVOCCs), providing the shippers an efficient, stream-lined method of moving from 'door to door'.[71] Multimodal transport contractual solutions have several practical advantages over unimodal transport. Overall, multimodal transport costs less, which is a key factor in trade facilitation.

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[67] Economic Commission for Africa, 'An overview of multimodal transport development in Africa' (2003)

[68] Dr. Amal Nagah Elbeshbishi. 'Trade Facilitation in Africa: Challenges, Opportunities and Progress' (Organization of Islamic Cooperation (OIC) High Level Forum;25 - 26 February, 2013) 1

[69] 'Revised African Maritime Transport Charter Adopted' *AllAfrica.com* (Apr 18, 2013) <https://search.proquest.com/docview/1328468319>

[70] Chapter 3 of SADC Protocol on Transport, Communications and Meteorology; Article 84 of the COMESA charter

[71] Michael E. Crowley. 'The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem,' (2005) 79 Tulane Law Review 1461

Further to this, the use of containers in transporting goods reduces handling and consequently saves costs associated with labour, packaging and damage costs during transhipment. The risk of goods being damaged reduces when the number of times a cargo is discharged is reduced.[72]

Another benefit that multimodal transport confers is that a single multimodal transport operator (MTO) handles the entire process and takes responsibility for the entire process. This allows easier communication and efficient tracking. Apart from this, the consignor is not saddled with the responsibility of negotiating for storage between each segment of transportation or movement of goods from the storage point to the point where the next transport operator will pick up the goods. The MTO, who is often more connected in this circle, is able to get storage and movement that is cheaper and more cost-effective.

In the bargain is the fact that, in the event of damage, particularly unlocalised damages, the consignor is able to claim from the single MTO – unlike in unimodal transport, where if such instances occur, each of the carriers will decline liability and the consignor/consignee or his insurer will bear the loss occasioned by such damage.[73]

Furthermore, a consignor who uses multimodal transport is saved from the burden of several documents issued by multiple carriers. Accordingly, there will be no need for the issuance of multiple documents for each transport segment. The consignor is also free from cost related to insurance for several modes of transportation.

Transport users for trade have continued to show a preference for the evolution of seamless door-to-door transport which is reliable and cost-effective. Generally, the transport mode(s) by which their shipments are carried is considered as less important provided delivery is on time.

With the proportion of the world's seaborne trade in containerised cargo accounting for 24.3 per cent of total dry cargo shipments – amounting to circa 7.6 billion tons in 2017[74] and likely to increase – it can be envisaged that the use of multimodal transport will further increase.

However, many factors seem to hinder the development of multimodal transport in [West] Africa. These factors range from high transport costs, delays arising from

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[72] Multimodal transportation brings commercial benefits for society, shipping lines and customers.' (Washin Engine Co.,Ltd 2013) <http://vtown.vn/en/articles/multimodal-transportation-benefits.html> accessed August 14, 2019

[73] Racine Jerome, 'International Multimodal Transport — A Legal Labyrinth' in Arnold Kean (ed), *Essays in air law* (Nijhoff 1982)

[74] 'Developments in international seaborne trade' in , *Review of Maritime Transport 2018* (United Nations 2018) 1

bad or inadequate infrastructure networks, complex customs procedures; insecurity, and the absence of a clear regulatory and legal framework on multimodal transport.

According to a joint publication from the World Bank and UNCTAD, the following interdisciplinary measures will promote policy reforms in a country or a sub-region, and will secure an adequate environment for the development of national or sub-regional trade using multimodal transport systems[75]:

- "Regulatory measures must be taken to harmonise insurance practices and transport liability regimes, and create an appropriate legal framework for the development of multimodal transport operators in the region.
- Trade and transport facilitation measures: efforts must be taken to simplify customs regulations, trade and transport documentation and EDI technology. Effort must also be taken to ensure their acceptance by the trading community, transport operators, government agencies, banks, and insurance companies.
- Measures for development policy: It is important that the countries in a subregion ensure good development of transport services and avoid the poor distribution of resources, especially in terms of improving physical infrastructure, such as multimodal transfer facilities and transport equipment.
- Coordination of sub-regional measures to secure the adequate harmonisation and integration of the different activities at the national level".[76]

1.2 Research Aims and Objectives

Trade facilitation has been described as an economic tool to improve a country's trade competitiveness.[77] Trade facilitation in a broad sense simply means reducing the costs associated with trade. A critical aspect of trade is transportation and logistics. The costs and quality of multimodal transport and logistics services are increasingly important for the participation of developing countries in the globalised

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[75] De Castro F. Carlos. 'Trade and Transport Facilitation - review of Current Issues and Operational Experience' (1996) (SSATP Working Paper No 27) A Joint World Bank/UNCTAD Publication

[76] ibid

[77] United Nations Conference on Trade and Development. 'Trade facilitation and development: Driving trade competitiveness, border agency effectiveness and strengthened governance' (2016b) (Series, No 7) UNCTAD Transport and Trade Facilitation Series <https://unctad.org/en/PublicationsLibrary/dtltlb2016d1_en.pdf>

economy. A two-fold increase leads to a reduction in economic growth above half a per centage point.

Traditional transport services are often not enough for today's needs. Today, there is a need for more integrated logistics, which involves using IT and multimodal transport.[78] Increasingly, goods are being carried under a multimodal transport contract because the focus on carriage is no longer on what modes will be used but that goods are carried from their point of sending to their destination.[79]

This work seeks to research the relationship between regional integration, trade facilitation and transportation. Furthermore, the thesis seeks to consider the current status of multimodal transport in West Africa by juxtaposing the current legal regimes in four of West Africa's top economies, and examining how uncertainty created by this fragmented regimes can lead to legal costs.

This study seeks to research the uncertainty in the legal framework governing multimodal transport in West Africa and its resultant effect on legal cost, which adds to the transaction cost. The work then seeks to research whether there is a need to alter these fragmented regimes and suggests solutions for reforms.

The study further considers the most appropriate alternative to the fragmented regimes. In doing this, the work considers whether to maintain status quo or move away from the status quo. The work argues that a predictable regime and more robust institutional frameworks will reduce uncertainty and consequently lead to reduced legal costs, which will indirectly affect transaction costs.

1.3 Research Questions

The main questions of this research are:

- Is the current legal framework adequate for multimodal transport in the ECOWAS region?
- Does the current legal framework create legal certainty with regards to the applicable liability regime?
- Is legal certainty important to regional integration and trade facilitation?

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[78] United Nations Conference on Trade and Development, *Development of Multimodal Transport and Logistics Services* (TD/B/COM.3/EM.20/2, Expert Meeting on the Development of Multimodal Transport and Logistics Services edn, 2003)

[79] Multimodal Transport: the Feasibility of an International legal Instrument (United Nations Conference on Trade and Development January 13, 2003)

- What is the suitable approach to achieving legal certainty regarding multimodal transport liability in the Economic Community of West African states?

1.4 Methodological Approach to this Study

To effectively address the research issues identified by this study, the study uses doctrinal and socio-legal research methodologies.

Doctrinal legal research is a systematic exposition of the rules governing a particular legal area/subject. It analyses the relationship between rules, explains areas of difficulty and predicts future developments.[80] The doctrinal method employed involves a two-way process – first locating the sources of the law, and then interpreting and analysing the current status of law governing multimodal transport in West Africa. As with doctrinal research, arguments on multimodal transport law are based on the legislation and the interpretation of law by judicial authorities. The research enquired into legal concepts, values, principles and theories, and existing legal literature, such as statutes, treaties, international instruments and case laws.

The study also employs a socio-legal research methodology. Socio-legal research methodology embraces disciplines and subjects which are connected to the law as an institution for social change. The socio-legal research methodology considers law as a catalyst that can play a huge role in social, economic or political issues. The tools for socio-legal research are: (i) interview (ii) Panel discussion, (iii) questionnaire, (iv) observation, and (v) published or unpublished materials. The first four data collection methods are 'primary sources' of empirical data because they are garnered directly from the respondents. Published or unpublished materials, however, are secondary sources. This study did not employ the first four tools, but employs the fifth tool, which is the use of secondary sources, such as published or unpublished materials, in gathering information.

The current study considers the effect of a predictable multimodal transport law in reducing cost and regional integration.

Both approaches are essential to achieving the aim of this study. Whilst doctrinal research relies on the analysis of legislation, instruments, and case laws, the socio-legal approach analyses the law and the effect of the law on the economy due to the development of laws. Accordingly, the socio-legal methodology views law through the lenses of everyday legal situations.

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[80] Terry Hutchinson & Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83

1.5 Reflection on the Legal Methodology

Doctrinal research is probably the most common research approach in legal study. Prof. SN Jain, defines the methodology as 'analysis of case law, arranging, ordering and systematising legal propositions and study of legal institutions through legal reasoning or rational deduction'.[81]

The methodology deals with the use and analysis of legal rules to formulate and interpret legal 'doctrines'.[82] Doctrinal methodology clarifies ambiguities within rules, places them in a logical and coherent structure and describes their relationship to other rules. Undoubtedly, there are circumstances where case laws and statutes cannot be appreciated or entirely understood until an in-depth analysis is done. It is in such cases that doctrinal research is employed.

Doctrinal-based research does not inquire into the relationship of law with other disciplines of society or social elements. The ultimate purpose of doctrinal legal research is justice. Doctrinal legal research is used to enrich and improve the legal system and can be highly academic in nature.

Based on the nature of doctrinal legal research, the aim and objective of this study might not be achieved if only doctrinal legal research were adopted. However, doctrinal legal research provides a foundation for the current study when considering socio-legal issues. An analysis of just the laws governing multimodal transport cannot provide a complete insight of the relationship between transportation, trade, cost (legal cost) and regional integration.

A combination of socio-legal research and doctrinal research methodologies helped in achieving the analytical aims of this study. As earlier stated, law is not merely an ink on a page but an instrument of social and economic change. Laws are made to be used in society and are an intrinsic, interlinked and interdependable part of society.

Socio-legal research methodologies are used in subject areas concerned with law as an institution for social change that can influence economic, social, and political

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[81] S.N. Jain. 'Doctorinal and Non Doctrinal Legal Research
' (1982) 24(2/3) Journal of the Indian Law Institute 341 <https://www.jstor.org/stable/43952212>

[82] Chynoweth Paul, *Advanced Research Methods in the Built Enviroment* (Legal Research in the Built Environment: A Methodological Framework, Andrew Knight & Les Ruddock eds edn, Wiley-Blackwell 2008)

factors[83]. To deal with socio-legal problems in a study[84], socio-legal research methodology is used. This is because it is an interdisciplinary approach.

Therefore, without socio-legal research methodology, it is difficult to discuss the need for new legislation or a modified approach to existing legislation, or to understand the difficulties of legal interpretation of an existing legal regime.

Despite the fact that Chapter 4 of this work discusses four (4) countries, this study does not use a comparative methodology because it only considers the texts of the laws in those instances. The study does not attempt to explain the reasons and ideas behind these countries adopting their different laws, nor does the study deal with the similarities and differences in the laws in the selected four countries.

1.6 Structure of this Study

To answer the research questions above, the research is divided into six (6) chapters. The aim of the research is to study the current uncertainty of multimodal transport law' and how it can lead to legal cost, which will consequently add to transaction costs in trading. The study also seeks to recommend a solution to this uncertainty. Thus, the first chapter of this study gives an overview of the thesis. Thereafter the rationale behind the research and the aims of the research is presented in the chapter. Chapter 1 also provides the analysis of the methodology employed in the study, the overall research structure, and finally, the scope and limitations of the study.

Chapter 2 considers the definition and impact of regional integration and trade facilitation. It is perceived that, in addressing the primary research question, it is important to understand regional integration and trade [transport] facilitation. The impact of trade facilitation and regional integration of the African economies is also thoroughly discussed in Chapter 2. The chapter also discusses the legal framework in relation to transport facilitation.

As made clear in Chapters 3 and 4, it is impossible to discuss multimodal transport in any region without understanding the conceptual meaning of multimodal transport, the documentation required for multimodal transport, and its rise to prominence. Chapter 3 discusses these issues. Chapter 3 further discusses the various global attempts to create a legal framework for multimodal transport. The chapter also carefully analyses the international conventions governing unimodal

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[83] Socio Legal Studies Association. 'Statement of Principles of Ethical Research Practice
' (2009) <https://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf> accessed February 27, 2022

[84] These includes social issues, political issues, and economic logics, contexts and relations

transport and its connection to multimodal transport. Finally, the chapter provides a detailed examination of the legal theories governing multimodal transport law and the different systematic approaches for regulating multimodal transport.

Chapter 4 deals with the crux of the research. The chapter deals with the current status of multimodal transport in West Africa. The chapter considers the potential conflict arising from the current regulatory framework in multimodal transport. Because transportation is important to trade, particularly because of the quest for intra-African trade – and also the benefit which multimodal transport would bring to bear if it becomes prevalent – the work considers the type of theory employed for multimodal transport in West Africa. The study also examines the applicability of mandatory unimodal conventions in the selected countries. The chapter discusses the current framework, its adequacy and impact on [legal] cost and trade facilitation.

The question of what the most appropriate resolution may be is discussed in Chapter 5. The chapter concludes with a recommendation based on an examination of the various possible solutions, specifically whether to rely on contract freedom, improve the current network system, or establish a unified liability regime. In a bid to make the discussion of this study less abstract, the chapter considers/proposes key elements of a proposed harmonised liability instrument that would help achieve the goals of AfCFTA and seek to provide possible resolution of the challenges highlighted in Chapter 4. The chapter considers the different options while stating the pros and cons of the suggested resolution mechanisms. Chapter 5 also considers the competency of ECOWAS to implement the proposed resolution provided in this study.

In the final chapter of this study, general conclusions will be made. An attempt is made to analyse the consequences of maintaining the status quo, and of having a new instrument in the African Free Trade Area. Based on the foregoing analysis, the research questions will be revisited and answered. Recommendations for future research endeavours will also be considered.

1.7 Scope and Limitations of the Study

In an effort to ensure that this research is within a workable limit, this study focuses on the current legal framework for multimodal transport in West Africa and the effect of the uncertainty plaguing multimodal transport law in West Africa, particularly on trade and transport costs. The modes of transport employed in this work are the traditional modes of transport, such as air, sea, rail and road. Pipelines and drones, although they might be able to move some items from one place to the other, will not be considered as a mode of transportation in this work.

The study is restricted to the related legal issues in West Africa. The work does not discuss all issues that lead to high transport costs, such as lack of infrastructure, information technology deficiencies, and other trade and non-trade barriers affecting transportation within the region.

The study acknowledges the significance of the question of national court jurisdiction in cross-border transportation disputes that may arise out of a contract of carriage. This work will not deal with this issue because of the likelihood that it may extend to private international law, and conflict of laws, which are beyond the scope of this work. While the issue of which national courts will have jurisdiction in an international multimodal transport contract and whether courts of West African nations will give effect to foreign jurisdiction clauses is worthy of analysis in any body of work, for clarity and to avoid conflation between private international law and international private law, this work will not delve into this issue. Also, this work will not deal with forum shopping issues, *lis pendens* and forum convenience for the reasons stated above.

2 Definition and impact of regional integration and trade facilitation

2.1 Overview of Regional Integration

Cambridge Dictionary defines 'integration' as 'the action or process of combining two or more things in an effective way'.[85]

However, like most terms in academia, 'regional integration' does not have one single definition. Regional integration may mean the fusion of states into a larger whole. This is usually done by a process that entails countries sharing their sovereignty with respect to an agreed sector or coverage.[86] Schulz et al.[87] describe regional integration as a process of 'change from relative heterogeneity and lack of cooperation towards increased cooperation, integration, convergence, coherence and identity in a variety of fields, such as culture, security, economic development and politics, within a given geographical space (Schulz et al. 2001).'

Goertz and Powers (2011)[88] describe regional integration arrangements based on four essential features:

i. regional (the presence of contiguous States),

ii. having a set of legally binding treaties that constitute the institution

iii. involving economic cooperation, and

iv. other multiple issues.

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[85] Cambridge. (2020). [online] Available at: https://dictionary.cambridge.org/dictionary/english/integration [Accessed 13 Jan. 2020].

[86] Gebru Solomon Gebreyohans. 'Regional Integration in the Horn of Africa: State of Affairs and Challenges' (2016) 31 WAI-ZEI 1<http://file:///C:/Users/DAMILOLA%20OSINUGA/Downloads/Regional_Integration_in_the_Horn_of_Afri.pdf>

[87] Miclael Schulz, Joakim Öjenda and Söderbaum Fredrick, 'Regionalization in a globalizing world; a comparative perspective on forms, actors, and processes' , vol 16 (Ringgold Inc 2001) <https://search.proquest.com/docview/199545859>

[88] Powers Kathy and Goertz Gary. 'The economic-institutional construction of regions: conceptualization and operationalization' (2011) 37 Review of International Studies 2387

The United Nations Economic Commission for Africa defines regional integration as the 'process or arrangement, where countries in a defined geographical area voluntarily surrender their sovereignty in one or more areas to carry out specific transactions, in view of achieving a goal or enjoying specific benefits to a higher degree than they would individually'.[89]

Regional integration can also be described as an arrangement between two or more countries to cooperate, through formal, regional rules and institutions, to (1) overcome barriers to the flow of goods, services, capital, and people across borders, (2) manage shared resources, and/or (3) achieve peace and security in the region.[90]

According to Van Niekerk,[91] regional integration can be defined through three different capacities:

- geographic scope
- the substantive coverage or breadth the sector of coverage (this can include trade, policies relating to sectors, labour etc.), and
- the depth of integration.

Ernst B Haas, in defining integration, broadly described it as:

the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.[92]

Regional integration may also be defined as an arrangement which creates a preferential agreement (usually but not always reciprocal) among countries with a view to reducing barriers to economic and non-economic transactions.[93] Economic, political, or other strategic factors may drive regional integration.

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[89] United Nations Economic Commission for Africa. 'Assessment
of Progress on Regional Integration in Africa.' (United Nations Economic Commission for Africa, Abidjan, Côte d'Ivoire 21–24 March 2013. 2013)

[90] Ancharaz Vinaye, 'Making the African Continental Free Trade Area (AfCFTA) Work' (United Nations African Institute for Economic Development and Planning 2020)

[91] Van Niekerk, L. (2005). Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience. [online] Siteresources.worldbank.org. Available at: http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/Kritzinger.pdf [Accessed 13 Jan. 2020].

[92] Ernst B. Haas, The uniting of Europe; political, social, and economic forces, 1950-1957 (Stanford University Press 1968)

[93] Bruce Clifford Ross-Larson and United Nations. Economic Commission for Africa., Assessing regional integration in Africa (Economic Commission for Africa 2004)

Abdi and Seid[94] defined regional integration with an economic bias as an agreement with geographically discriminatory trade policies as its characteristic. They further described regional economic integration as a preferred agreement to connect economies in two or more countries. These countries are usually within the same geographical area. Abdi and Seid[95] note that regional integration is achieved by removing or reducing barriers to economic transactions (such as tariffs) to raise and improve living standards and promote peaceful relations between participating countries.

Regional integration can also imply that nations of a geographic region come together to form a type of partnership in a bid to foster trade and development. Regional integration can be a free trade area (as in the case of the African Continental Free Trade Area), a customs union, a common market (as in the case of the European Union), an economic union or a political union.[96]

For this work, regional integration will be defined as a process in which countries within a close geographical area come together and agree to surrender a portion of their sovereignty as it relates to an agreed coverage with a view to achieving development and economic growth.

2.2 The Impact of Regional Integration on Economic Growth

Developing countries use regionalism as a development tool. It is seen as a part of the global economic environment, and consequently affects developing countries.[97] Regionalism aids integration in all parts of the world, including Africa.

Kouassi notes that the process of regional integration is important to Africa, and believes that it is through political and economic integration that the continent can become a powerful actor in a globalised world.[98] Ahunna Eziakonwa, a Director at the Regional Bureau for Africa of the United Nations Development Programme (UNDP) and former United Nations Assistant Secretary-General, while praising the

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[94] Abdi I. Ali and Seid H. Edris. 'Assessment of Economic Integration in IGAD' (2013) 13(2) The Horn Economic and Social Policy Institute (HESPI)

[95] Abdi I. Ali and Seid H. Edris. 'Assessment of Economic Integration in IGAD' (2013) 13(2) The Horn Economic and Social Policy Institute (HESPI)

[96] Kehoe J William, 'Regional and Economic Integration; Implication for Global Business ', Economic Integration- Handout

[97] ibid

[98] R. Kouassi. 'The Itinerary of the African Integration Process: An Overview of the Historical Landmarks' (2002) 1(No 2) African Integration Review

establishment of AfCFTA, noted that it is impossible for Africa to develop without regional integration because African markets are small and fragmented, and cannot compete with international markets.[99]

Professor Severine Rugumamu also stated that;

> The emergence and development of regionalism on a global scale clearly indicates that individual states outside the major economic and security blocs will find themselves slowly but inexorably cast aside. If Europe needs economic and political integration for strength and prosperity, Africa needs it for survival. Only through integration can the continent collectively and effectively respond to the multifaceted challenges posed by the processes of globalization.[100]

The use of regionalism as a tool for development is employed by countries through entering into regional trade agreements ('**RTA**') with trade partners. RTA are bilateral trade treaties between two or more parties. They include free trade agreements and customs unions.[101] Some authors have noted that the use of regionalism and regional blocs could even be an intermediate step towards having global free trade.[102]

Regional trade agreements have existed for hundreds of years. The French province proposed a customs union as early as 1664; Austria signed free trade agreements with its five neighbours in the 18th and 19th centuries. The colonial empire was based on preferential trade agreements.[103] Clearly, the issue of a regional trade agreement is not new to the world.

RTAs have evolved into a tool that enables developing nations to successfully advance their trade and development programmes. They have also been used to attain preferential treatment among trade partners. The role played by RTA is important to promoting trade liberalization and trade expansion, and generally

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[99] Ahunna Eziakonwa, ' No real development in Africa without regional integration' (Africa Renewal 2019) < https://www.un.org/africarenewal/magazine/april-2019-july-2019/no-real-development-africa-without-regional-integration> accessed November 8, 2019

[100] Rugumamu Severine, Africa's Search for Regional Cooperation and Integration in the 21st Century (ACBF Working Paper ACBFWP/03/2004 ,2004)

[101] World Trade Organization, ' Regional trade agreements and preferential trade arrangements' (World Trade Organization) < https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm> accessed July 13, 2019

[102] Shang-jin Wei. 'Can regional blocs be a stepping stone to global free trade?' (1996) 5(4) International review of economics & finance 339 <http://www.econis.eu/PPNSET?PPN=260931322>

[103] Schiff Maurice and Winters Allen, Regional integration and Development Development (Oxford University Press 2003)

fostering development.[104] Before now, trade facilitation was not a major discussion when regional agreements were entered into. However, since the formation of the World Trade Organization and its negotiations on trade facilitation, trade facilitation has become the cornerstone of several regional agreements.

Studies have shown that there is rapid economic growth when developing countries open their markets for free international trade.[105] Empirical evidence shows that countries with open economies grow faster than those with closed economies. There are numerous studies and research[106] on the relationship between trade openness and economic growth. The majority of these studies are of the view that the relationship between trade openness and economic growth is positive. Trade can affect growth in many ways, one of which is the transmission of technology. It can also lead to the transfer of domestic economy between countries, which consequently allows domestic manufacturers to learn from more developed economies.[107]

In recent years, several authors have explored the impact of regional economic integration on economic growth. Many of these authors have concluded that global economic integration is the key to promoting resource allocation, technology transfer and enhancing the standard of living.[108] Although there are dissenting voices, most scholars believe that economic integration is key to development. Some scholars have noted that regional economic integration may lead to trade imbalances and market volatility.[109]

Research shows that small economies can grow faster when they enter and implement regional trade agreements.[110] Regional integration, particularly through

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[104] Mbakiso Magwape. 'The AfCFTA and Trade Facilitation: Re-Arranging Continental Economic Integration' 45(4) Legal Issues of Economic Integration 355 <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=LEIE2018021>

[105] World Bank. 'Stronger Open Trade Policies Enable Economic Growth for All' (2018) <https://www.worldbank.org/en/results/2018/04/03/stronger-open-trade-policies-enables-economic-growth-for-all> accessed March 10, 2022

[106] Hanson, J. A., Growth in Open Economies (Lecture Notes in Economics and Mathematical Systems, Springer, 2012); Robert C. Feenstra. 'New Evidence on the Gains from Trade' (2006) 142(4) Rev World Econ 617 <https://www.jstor.org/stable/40441113>;Douglas A. Irwin, Free Trade under Fire (Princeton University Press 2020);Deepak Lal, Reviving the Invisible Hand: The Case for Classical Liberalism in the Twenty-First Century (2008);Francisco Rodríguez and Dani Rodrik. 'Trade policy and economic growth: A skeptic's guide to the cross-national evidence' (2000) 15(1) NBER macroeconomics annual 261

[107] Grossman m. Gene and Helpman Elhanan. 'Endogenous Innovation in the Theory of Growth' (1994) 8(1) The Journal of Economic Perspectives 23 <https://www.jstor.org/stable/2138149>

[108] Economic Commission for Africa (United Nations), Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade (United Nations , 2010)

[109] MB Hailu. 'Regional Economic Integration in Africa: Challenges and Prospects' (2015) 8(2) Mizan Law Review 299

[110] Athanasios Vamvakidis. 'Regional integration and economic growth' (1998) 12(2) The World Bank economic review 251 <http://www.econis.eu/PPNSET?PPN=262172402>

regional trading, is said to aid the efforts of developing nations to industrialise their economy.[111] Trade openness and regional integration increase competition, manufacturing efficiency, and economic growth in the local market, consequently increasing production efficiency and economic growth.[112] Open economies can trade at more competitive prices in the world market than closed economies because free trade facilitates price convergence between countries or regions. Extensive market access can also benefit countries economically.[113] Furthermore, trade liberalisation contributes to economic growth by creating benefits for governments if they adopt policies which are less distortionary and achieve disciplined management of the macroeconomy.[114]

Trade has contributed significantly to the development and growth of economies and will continually be a contributory factor if African countries are to achieve an industrialised economy. Trade liberalisation is posited to have played a significant role in achieving economic growth among East Asian countries and reducing the poverty rate in South-East Asian countries whose economies were impecunious. Now South-East Asian countries have achieved significant economic growth. Undoubtedly, trade has a positive and turnaround effect on poverty considering its effect on revenues, economic growth and government budget, which will consequently affect the lives of citizens of a country.[115]

2.2.1 Africa in Profile

Despite the clear fact that many countries have benefited from trade, it appears that the African region is lagging. Statistics show that Africa's share of world trade has reduced from about 5.5 per cent in 1960 to about 2.5 per cent in 2018.[116] Africa remains the least developed continent.[117] Despite the continent's wealth of natural

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[111] Diego Puga and Anthony J. Venables. 'Preferential trading arrangements and industrial location' (1997) 43(3) Journal of International Economics 347

<https://www.sciencedirect.com/science/article/pii/S0022199696014808>

[112] John Vickers and George Yarrow. '"Economic Perspectives on Privatization"' (1991) 5(2) The Journal of Economic Perspectives 111 <https://search.proquest.com/docview/1300199510>

[113] Alberto F. Ades and Edward L. Glaeser, Evidence on growth, increasing returns and the extent of the market, vol 4714 (National Bureau of Economic Research <Cambridge, Mass.>: NBER working paper series, 1994)

[114] United Nations Economic Commission for Africa, Assessing Regional Integration in Africa VI: Harmonizing Policies to Transform the Trading Environment: Assessing Regional Integration in Africa Series (United Nations Economic Commission for Africa October, , 2013) 1

[115] World Trade Organization, World Trade Report 2007 (WTO Publ 2007)

[116] Sara Gustafson, 'How well is Africa Integrated into World Trade?' (*AGRILINKS*, 5July 2018) <https://www.agrilinks.org/post/how-well-africa-integrated-world-trade> accessed 18 January 2020

[117] Omorogbe Yinka. 'The Legal Framework for Economic Integration in the ECOWAS Region: An

resources, Africa remains largely underdeveloped. The use of 'western' resources as agents has failed to generate the expected returns on growth.[118] It is a consensus among several scholars that regional integration is the right direction for Africa to take to improve trade within the continent. This is because Africa is a continent characterised by small countries, small economies and small markets.[119]

Regional integration is very beneficial to regions which have small markets. In such situations, regional integration enables countries involved in regional agreements to combine markets, consequently achieving expanded markets that are more competitive.[120] Integrated markets allow competition among manufacturers and provide scale benefits in manufacturing. They also give room for specialization.[121] All of these will attract foreign direct investment into the region. The existence of regional blocs and arrangements, as done in Africa, can help increase market sizes. Research has shown that market size and growth attracts foreign investors and foreign direct investments[122].

Another benefit of regional integration is that it helps to increase bargaining power in multilateral negotiations. In regions like Africa, regional agreements are employed in collective actions to address problems affecting the African continent, such as economic or security problems. In such instances, building a collective bargaining capacity to negotiate with other regions is very important and can help achieve favourable terms when negotiating with other regions or countries.[123] A good illustration of this is a country like the Republic of Benin, whose GDP is US$10.35 billion. Benin cannot possibly have equal bargaining power when entering a trade agreement with Italy, whose GDP is circa US$2.5 trillion. However, the position might be different if Africa at large, or a REC like the Economic Community of West African States, entered such an agreement with Italy.

Analysis of the Trade Liberalisation Scheme' (1993) 5(2) African Journal of International and Comparative Law 355

[118] ibid

[119] Hartzenberg Trudi, Regional Integration in Africa (World Trade Organization Economic Research and Statistics Division October, , 2011)

[120] Bruce Clifford Ross-Larson and United Nations. Economic Commission for Africa., Assessing regional integration in Africa (Economic Commission for Africa 2004)

[121] Colin McCarthy (ed), African Regional Economic Integration: Is the Paradigm

Relevant and Appropriate?, vol 2 (European Yearbook of International Economic Law book series, Springer, Berlin, Heidelberg 2011) 345

[122] V. N. Balasubramanyam, David Sapsford and David Griffiths. 'Regional Integration Agreements and Foreign Direct Investment: Theory and Preliminary Evidence' (2002) 70(3) The Manchester School 460 <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-9957.00311>

[123] Peter Draper and Mzukisi Qobo, 'Multilateralizing regionalism: case study of African regionalism', Multilateralizing Regionalism (Cambridge University Press 2009) 403

There is no doubt that regional integration improves efficiency, which is a consequence of competition among rival corporations. One problem with manufacturing and production in the African continent is that the continent is plagued with monopolies and oligopolistic market structures. Adopting and enforcing regional competition rules throughout Africa would generate and enhance an atmosphere of free competition.[124]

Regional integration also leads to harmonisation of policies and replacement of national policies with common policies agreed by member states.[125] Even where national policies are retained, there is a need for coordination of national policies so as not to conflict with the common policies and not to be an impediment to achieving the aim of integration. To achieve policy harmonisation, countries must have a common understanding of what they intend to achieve. This is achieved through consultations and discussion. These discussions could indirectly promote regional peace in Africa.

Regional economic integration is not novel to Africa. In fact, since African countries became independent, many African leaders have called for the integration of Africa. The iconic 1963 speech of Ghana's leader Kwame Nkrumah at the Organisation of African Unity (OAU) Conference in Addis Ababa, Ethiopia, where he spoke about the need for regional integration, underscores this fact. One of the major arguments in support of regional integration in Africa is based on the fragmentation of sub-Saharan Africa. Africa has 55 small economies, with a combined Gross domestic product ('**GDP**') of US$1.71 trillion, which is less than half the GDP of Germany (US$3.948 trillion).[126]

The economic growth of Sub-Saharan Africa is very disappointing. In 2003, over 50 of the 55 countries in Africa had less than a 5 per cent average economic growth rate, consequently reinforcing the reality that the fight against poverty reduction remains elusive.[127]

In Africa, there have been a number of attempts to achieve economic and political integration. These integration efforts have taken place both continent-wide and

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[124] Economic Commission for Africa, Assessing Regional Integration in Africa V: Towards an African Continental Free Trade Area - Towards an African Continental

Free Trade Area (United Nations , 2012)

[125] Nsongurua J. Udombana. 'A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development' (2002) 13(1) Indiana International & Comparative Law Review 185

[126] World bank, 'DataBankMicrodataData Catalog' (*World Bank*

Statistics, 2019) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=IT-ZG> accessed 20 January 2020

[127] Van Niekerk - Lolette Kritzinger. 'Regional Integration: Concepts, Advantages, Disadvantages and Lessons of Experience' World Bank 1

regionally. The first attempt at integration led to the creation of the OAU in 1963. The intention of the OAU is to integrate the continent and spur economic and political development. The Lagos Plan of Action for the Economic Development of Africa was also initiated to achieve the goal of integration. However, the Lagos Plan of Action was never implemented. In 1991, leaders of African countries came together to adopt the Treaty Establishing the African Economic Community, also known as the Abuja Treaty[128].

The Abuja treaty, which came into force in 1994, aims at fostering mutual economic development among African states. It highlights the need for a single market, common currency, free trade areas and customs unions, among other things. The Abuja Treaty stated that to promote the attainment of the objectives of the treaty, there was a need to strengthen the existing regional economic communities and the establishment of other communities where they do not exist.

The REC's principal aim is to ensure regional integration in Africa,[129] and it is used as a step towards continent-wide regional integration. The fact that most African countries are immersed in poverty has led to the creation of several RECs, some of which have overlapping members. As of today, there are eight RECs: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Southern Africa Development Community (SADC).[130]

The regional integration agreements entered into by African nations are to ensure economic growth and reduce the transaction costs of trade. These agreements are sometimes focused on import tariffs, aiming to achieve duty-free trade in goods among member states.

Tariffs are undeniably an important barrier, but they may not be the most important barrier. There are other, non-tariff barriers which are important to economic growth. It is, therefore, quite heartening to discover that approximately half of all trade facilitation reforms made during 2009–10 took place in sub-Saharan Africa.[131] In a

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[128] The AEC Treaty (the Abuja Treaty objectives are broader than trade and economic integration. It includes social and cultural development, cooperation in all aspects of human activity to enable a better standard of living for the African populace. The AEC also seeks to ensure economic stability and build close and peaceful relations between member countries.

[129] MB Hailu. 'Regional Economic Integration in Africa: Challenges and Prospects' (2015) 8(2) Mizan Law Review 299

[130] Although only eight of them have been recognized by the African Union

[131] World Bank, Doing Business 2011: Making a Difference for Entrepreneurs (Doing Business, World Bank Publications 2010)

globalised world, it is crucial for businesses to reduce trade regulations, such as cumbersome customs procedures, inefficient port operations, inadequate infrastructure, and excessive documentation, which all result in additional costs and delays that impede trade development and growth.[132]

The AfCFTA is a key driver in regional and economic integration. The scope of AfCFTA is large. The agreement will cover tariff reductions between member states, trade facilitation and services, and regulatory measures.[133] The implementation of AfCFTA would transform African markets and economies, and increase production in services, manufacturing and other sectors.[134] AfCFTA details the different phases of achieving regional integration, and addresses the reduction of both tariff and non-tariff barriers. AfCFTA also notes that to achieve sustainable development, it is essential to put in place policy reforms and trade facilitation measures. Trade facilitation will aid trade in the continent and help achieve a positive increase in intra-African trade.

Although African countries have now continuously made trade facilitation the cornerstone in several of their regional integration agreements, AfCFTA will be a clearer path to achieving trade facilitation with a view to removing trade barriers and ensuring economic development in all the RECs in Africa.

2.3 Trade Facilitation: Definition, Application, and Economic Contribution

In today's world, there is a mutual interdependence between different economies. Nowadays, it is difficult to find an example of a closed economy. What we have now are open economies; however, the degree of openness varies from one country to the next. The implication of this is that there is no country that can be entirely self-sufficient.[135] The importance of trade as a tool for economic development stands uncontested in economic theory. Notwithstanding the importance of trade in economic growth, global trade involves certain costs associated with transportation and other transaction costs, which are inherent to trade; however, in practice these costs are usually higher than necessary. This is due to bureaucratic trade procedures

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[132] World Bank, Africa's Pulse, September 2011: An Analysis of Issues Shaping Africa's Economic Future (Washington, DC 2011)

[133] World Bank, *The African Continental Free Trade Area* (World Bank Publications 2020)

[134] ibid

[135] VIJAYASRI G.V. 'The Importance of International Trade in the World' (2019) 2(9) International Journal of Marketing, Financial Services & Management Research <https://pdfs.semanticscholar.org/0c65/06f1ab891cb40206230f6d841cb7e11796a7.pdf>

and documentation requirements.[136] The World Bank, in a report, noted that trade facilitation is an essential component for achieving success in economic growth and development.[137]

The term 'trade facilitation' can be interpreted differently. Like many areas of study, it is difficult to find a common definition of trade facilitation. Trade facilitation has been defined as the simplification, standardisation, harmonisation and elimination of the procedures, data requirements and administration involved in an international trade transactions.[138] The World Trade Organization defines trade facilitation as the 'simplification and harmonisation of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade'.[139] The United Nations Economic Commission for Europe defined trade facilitation as 'the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment'.[140]

Trade facilitation can also be defined as a

> comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practices.[141]

The Organisation for Economic Co-operation and Development (OECD) refers to trade facilitation as a 'specific set of measures that streamline and simplify the technical and legal procedures *for products entering or leaving a country to be traded internationally [emphasis mine]*'.[142] In addition to customs procedures, some authors include in their definition technical regulations, conformity

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[136] UNCTAD, Trade Facilitation and Development: Driving trade competitiveness, border agency effectiveness and strengthened governance (United Nations Conference on Trade and Development, 2016)

[137] John Raven, 'Trade and Transport Facilitation: A Toolkit for Audit, Analysis, and Remedial Action' (Washington, DC: World Bank 2001)

[138] Hellqvist Marcus, Trade Facilitation– Impact and Potential Gains (August, 2002)

[139] World Trade Organization. 'Trade facilitation' accessed June 25, 2019

[140] United Nations Economic Commission for Europe, 'Trade Facilitation Implementation Guide' (Trade Facilitation Implementation Guide 2012) < http://tfig.unece.org/details.html> accessed June 26, 2019

[141] Carolin Eve Bolhöfer. 'Trade Facilitation - WTO Law and its Revision to Facilitate Global Trade in Goods' (2007) 2(11) Global Trade and Customs Journal 385

<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=GTCJ2007047>

[142] OECD, 'Why trade facilitation matters in today's global economy' (Oecd.org e.g. 2005) < http://www.oecd.org/trade/topics/trade-facilitation/> accessed June 25, 2019

assessment and certification, competition policy, and government procurement and transparency.[143]

Trade facilitation is also referred to as a 'technology' of international trade – a set of policies and procedures that help determine the total cost of moving goods from one country to another with a view to ensuring a mutually beneficial transaction for exporters and importers.[144] A broad definition of trade facilitation would simply be streamlined regulatory environments, and harmonisation of procedures, standards and conformance to international regulations.[145]

According to the Kelkar Committee Report, trade facilitation is defined thus:

> Trade facilitation revolves around the reduction of all the transaction costs associated with the enforcement of legislation, regulation, and administration of trade policies. It involves several agencies, such as customs, airport authority, port authority, central bank, trade ministry etc. The main objective is to reduce the cost of doing business for all parties by eliminating unnecessary administrative burdens associated with bringing goods and services across borders[146]

In simple terms, trade facilitation can be defined as the simplification of the trade interface between trading partners. This trade interface includes, in a broader sense, compliance with government rules by traders, application of these rules (including taxes) by authorities, information exchange, financing, insurance, ICT and legal services, transport, handling and storage.[147]

Authors like Dee Philippa[148] take a broader perspective on the definition of 'trade facilitation' to include anything that affects the time cost or money cost of delivering goods in the international trading system. In recent times, the definition of trade facilitation has been extended to include the transparency and professionalism of

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[143] Philippa Susan Dee, Chris Geisler and Greg Watts, The impact of APEC's free trade commitment (Staff information paper / Industry Commission, Australia, Industry Comm 1996)

[144] Bernard Marco Hoekman and Ben Shepherd, Who profits from trade facilitation initiatives? (Discussion paper series, Centre for Economic Policy Research 2013)

[145] Yuen Pau Woo and Wilson S. John. 'Cutting Through Red Tape: New Directions for APEC's Trade Facilitation Agenda' (2000) Asia Pacific Foundation of Canada

[146] Sengupta Nirmal and Bhagabati Moana, A Study of Trade Facilitation Measures From WTO Perspective

[147] Jean-Christophe Maur. 'Regionalism and trade facilitation' (2008) 42(6) Journal of world trade 979 <http://www.econis.eu/PPNSET?PPN=592145956>

[148] Philippa Dee, Christopher Charles Findlay and Richard William Thomas Pomfret, 'Trade facilitation: what, why, how, where and when?'(Edward Elgar Publishing 2009) <https://trove.nla.gov.au/>

customs, the harmonisation of different standards, and compliance with international or regional regulations.[149]

It is easy to infer that the term trade facilitation is closely linked to the exchange of goods between at least two countries. Trade facilitation has been said to entail activities that cover the value chains important for production and trading.[150] In summation, the main objective of trade facilitation is to lower trade cost and eliminate unnecessary costs associated with the exchange of goods.

In light of the spectrum of different definitions of trade facilitation, the definition adopted in this work is the definition from the World Trade Organization, which defines trade facilitation as a

> comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practices.[151]

2.4 Role of Trade Facilitation in the Economy

International trade has grown exponentially in the past fifty years. Global exports have increased from US$296 billion in 1950 to over 8 trillion dollars in 2005. Its share of GDP also increased from 5.5 per cent to 19.4 per cent.[152] Trade growth was enhanced by the fall in average import tariffs from 8.6 per cent in 1960 to 3.2 per cent in 1995.[153]

A growth in transport and communication technologies have contributed to the growth of trade since 1951. The amount of cargo shipped worldwide grows by more than 10 per cent per year. Tariff reductions and shorter delivery times allow countries to exchange an increasingly diverse set of products, from low-value bulk

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[149] Buyonge Creck and Kireeva Irina. 'Trade Facilitation in Africa: Challenges and Possible Solution' 2(1) World Customs Journal 41

[150] Rippel Barbara. 'Why Trade Facilitation is Important for Africa' (2011) (27) Africa Trade Policy Notes Note

[151] Carolin Eve Bolhöfer. 'Trade Facilitation - WTO Law and its Revision to Facilitate Global Trade in Goods' (2007) 2(11) Global Trade and Customs Journal 385 <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=GTCJ2007047>

[152] Angus Maddison, The world economy :a millennial perspective (OECD) 383 <http://sowiport.gesis.org/search/id/gesis-solis-00347474>

[153] A. Clemens Micheal and Williamson G. Jeffrey., Why Did the Tariff Rate-Growth Correlation Reverse after 1950 (September, 2002)

products to high-technology products and highly sensitive agricultural products. However, trade has not grown and diversified at the same pace globally.[154]

Trade facilitation continues to create opportunities to increase the benefits of free trade, economic growth and poverty reduction.[155] The removal of trade barriers has been identified as an important factor in the expansion of global trade. All major stakeholders in international business see the need to facilitate trade procedures for economic growth.[156]

Trade facilitation as a comprehensive approach to facilitating global trade in goods was added to the World Trade Organization's agenda at its 1st Ministerial Conference in Singapore in 1996. However, it became more prevalent upon the adoption of Article 27[157] at the Doha WTO Ministerial conference declaration 2001.

On February 22, 2017, the World Trade Organization's (WTO) Trade Facilitation Agreement (TFA) which was agreed at the WTO Bali Ministerial Conference in 2013, entered into force. Since entering into this agreement, many countries have taken steps towards implementing the terms of the agreement in their national markets. As at June 2019, 144 countries (including 12 of the 15 ECOWAS countries) have signed the TFA.[158] The steps taken by countries around the globe underscores the fact that many countries are committed to improving the international trading system and encouraging free trade. It also indicates the desire of countries to agree on a single set of standards for all countries (whether developed or developing).[159] Trade facilitation policies are targeted at barriers affecting trade ,which include but are not limited to lack of transparency and unnecessary multiplication of documentation requirements.

Trade facilitation can help reduce the gap between export and import prices. In reducing the cost of trade, prices for consumers and companies importing inputs for production must decrease, which, in turn, causes profits to increase. Experimental data indicates that incremental cost, delays and bureaucratic inefficiency – and in some cases corruption – can add up to 15 per cent to the price of goods, which will

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[154] Minor Peter and Tsigas Marinos. 'Impacts of Better Trade Facilitation in Developing Countries - analysis with a New GTAP Database for the Value of Time in Trade' (GTAP 11th Annual Conference Helsinki, Finland Nathan Associates Inc, May 7, 2008)

[155] Rippel Barbara. 'Why Trade Facilitation is Important for Africa'

[156] Hellqvist Marcus, Trade Facilitation – Impact and Potential Gains (August, 2002)

[157] WTO, ' Doha WTO Ministerial 2001: Ministerial Declaration' (World Trade Organization 2001) < https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradefacilitation> accessed June 30, 2019

[158] World Trade Organization, ' Trade facilitation Agreement Facility ' (World Trade Organization June 5, 2019) < https://www.tfafacility.org/notifications> accessed June 28, 2019

[159] Antoni Estevadeordal. 'Why trade facilitation matters now more than ever' (2017) Brookings Institution Reports <https://search.proquest.com/docview/1893495183>

consequently impede the competitiveness of goods between countries.[160] Quantitative research has shown that trade transaction costs decreased through trade facilitation measures can lead to significant improvement in tariff liberalisation.[161] Francois indicates that the world's annual income would increase by US$72 billion if there were a 1.5 per cent reduction in trade transaction costs for goods exchange.[162] In addition, a one per cent reduction in costs associated with maritime and air transport services in developing countries can boost global GDP by US$7 billion (1997 value).[163]

Another study shows that a one per cent reduction of trade transaction costs would create annual gains of approximately forty billion United States dollars (US$40,000,000,000) on a global basis. The study further noted that developing countries in the Asia Pacific, North Africa and Sub-Saharan Africa would significantly benefit from such reduction.[164]

Measuring the economic impact of trade facilitation is a difficult task. This is not unconnected to the lack of standard parameters.[165] A major challenge is finding distinct measures to quantify trade facilitation efforts. The pertinent question often remains of whether they should focus on customs reforms, international regulatory harmonisation or e-commerce. In determining the effect of trade facilitation in the economy, there are two types of empirical evidence that show that improving trade facilitation can have significant economic benefits – econometric analyses and computable general equilibrium models. Econometric analysis uses different trade facilitation measures, with many of the latest documents using the Doing Business World Bank database or World Bank performance indicators.[166] Irrespective of the type of research used in determining the economic benefits, it is agreed that improved trade facilitation has the potential to increase trade.

Wilson, Mann, and Otsuki, in their 2003 work,[167] analysed the relationship between trade facilitation, trade flows, and GDP while considering the benefits of specific trade facilitation in the Asia-Pacific region. They used four indicators of trade facilitation to measure trade facilitation effort: port efficiency, customs

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[160] UNCTAD, Trade Facilitation and Development: Driving trade competitiveness, border agency effectiveness and strengthened governance

[161] Michael Engman, The Economic Impact of Trade Facilitation (Oct 12, 2005)

[162] Joseph Francois, Hans Meijl and Frank Tongeren. 'Trade liberalization in the Doha Development Round' (2005) Economic policy 351 <http://www.econis.eu/PPNSET?PPN=48459639X>

[163] Report by the secretariat of the United Nations Conference on Trade and Development, Trade and Development Report, 2001 (, 2001)

[164] OECD, 'Quantitative Assessment of the Benefits of Trade Facilitation' (2004)

[165] Bolhöfer. 'Trade Facilitation - WTO Law and its Revision to Facilitate Global Trade in Goods' 385

[166] Hoekman and Shepherd, Who profits from trade facilitation initiatives?

[167] Wilson, Mann and Otsuki, Trade facilitation and economic development: measuring the impact

environment, regulatory environment, and e-business usage. Available estimates show that potential gains from increased port efficiency are relatively larger than for improved customs procedures.

The International Chamber of Commerce stated that efficient customs administration for companies competing in international markets is very important.[168] It has been reported that the average customs transaction in developing countries involves circa 30 parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60–70 per cent of all data at least once.[169] it is estimated that a day saved in shipping time is partly a result of faster custom clearance, which amounts to a circa 0.5 per cent drop in ad valorem levels.[170] Customs documents, or the surcharges arising from delays during imports of goods, may in some cases add up to 15 per cent of the value of the goods being traded. The World Bank also reported that the average time required for customs clearance for sea cargo in Africa is 10.1 days compared to the average clearance time in OECD, which is 2.1 days.[171] This would amount to an additional cost of approximately 8.1 per cent (for Africa) and 1.6 per cent (for Europe) of the total transaction value[172]. All these are challenges for all countries involved in trading. It is therefore important to find ways to simplify the trading process and make it seamless.[173]

According to one study, improving port efficiency and customs administration for below-average efficient countries half-way up to the global average will increase trade flows by USD 107 billion and USD 33 billion respectively. Improvements in customs administration and port efficiency will significantly benefit developing countries[174]

Fulfilling an inordinate number of rules, regulations, and procedural and administration requirements in effect constitutes cost that does not bring benefits to stakeholders. To facilitate trade, it is therefore important that regulations are transparent, and their application is coherent, predictable and non-discriminatory.[175]

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[168] Committee on Customs and Trade Regulations, Trade Liberalization, Foreign Direct Investment and Customs Modernization: A Virtuous Circle (8 October, 1999)

[169] Sengupta Nirmal and Bhagabati Moana, A Study of Trade Facilitation Measures from WTO Perspective

[170] Allen Dennis, The impact of regional trade agreements and trade facilitation in the Middle East North Africa region (2006)

[171] Engman, The Economic Impact of Trade Facilitation (Oct 12, 2005)

[172] David L. Hummels and Georg Schaur. 'Time as a Trade Barrier' (2013) 103(7) The American Economic Review 2935 <https://www.jstor.org/stable/42920676>

[173] OECD, 'Trade facilitation: the benefits of simpler, more transparent border procedures', Policy brief (OECD 2003)

[174] Chris Milner, Oliver Morrissey and Evious Zgovu. 'Trade facilitation in developing countries' (2008) 8/05 Credit Research Paper <https://www.econstor.eu/handle/10419/65454>

[175] OECD, 'Trade facilitation: the benefits of simpler, more transparent border procedures'

The transparency of relevant national regulations, procedures and practices is widely recognised as a key factor in ensuring that the objectives of the regulations are efficiently achieved so regulation aids the expected benefits of trade and investment liberalisation. Transparency of regulation supports the ability of market participants and stakeholders to fully understand the conditions and restrictions of entering and operating in the market, to obtain a precise image of the costs and the return of their participation, and to have the time and flexibility necessary to meet the requirements and adapt to the possible changes.[176.]

Greater transparency and predictability are valued by the private sector as one of the most important benefits of trade facilitation. The many costs associated with obtaining information about rules, regulations and requirements reinforces to the fact that transparency and predictability is very important. First, the reduction of unnecessary burdens associated with regulation such as reducing the many regulations or opaque regulations brings direct economic benefits to all companies. The more transparent the process is, the lower the cost of compliance related to the creation, compilation, transmission and processing of the necessary information and documents[177].

E-commerce and e-business is a key measure of the impact of trade facilitation. In 2001, the Australian Department of Foreign Affairs and Trade and Chinese Ministry of Foreign Trade and Economic Cooperation stated that the use of paperless documentation could help reduce cost by between 1.5 and 15 per cent of the landed cost of an imported item.[178] Thus, it is pertinent that the nature of trade transactions be reduced, and paperwork should be accordingly replaced with electronic documentation, which consequently de-links the production of documentation with the physical flow of goods.

In sum, whatever the measures of trade facilitation, the cumulative effect of improvements in trade facilitation is greater than the possible impact of individual measures, confirming the importance of implementing a comprehensive reform of trade interventions rather than focusing only on isolated measures. The use of individual trade facilitation indicators should allow the parties to better evaluate which dimensions of trade facilitation deserve priority. The best results will be subject to the improvement of the information available in the database of current measures.[179] In fact, trade-facilitating reforms are positive steps for human,

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[176] ibid

[177] Hellqvist Marcus, Trade Facilitation – Impact and Potential Gains

[178] Australia. Department of Foreign Affairs and Trade, Paperless trading: benefits to APEC: the potential of the APEC paperless trading initiative (2001)

[179] E. Moïsé and S. Sorescu. 'Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries Trade' (2013) (144) OECD Trade Policy Papers <https://search.proquest.com/docview/1323480612

commercial and institutional development. They help small entrepreneurs, often women, to enter the formal sector, they make businesses more transparent and accountable, promote good governance, create better jobs, strengthen Information Technology skills and modernise societies by ushering in the benefits of administrative efficiency.[180] Many trade facilitation measures directly help informal enterprises better engage with foreign trade, thus supporting Objective 8.3 of the SDG goals to formalise and grow micro, small and medium-sized enterprises.[181]

In effect, from all indications, there is a positive link between trade facilitation and trade, which consequently leads to increased trade, even through a modest reduction of transaction costs. What is more interesting is that these gains are beneficial to both developed countries and developing countries.[182] The trade gains affects all sectors of the economy. Dennis and Shepherd[183] state that improving trade facilitation can help promote export diversification, thus making it easier for countries to export new products.

From the above, it is evident that the objectives of trade facilitation are:

- simplification (and removal, where possible) of the formalities and procedures related to the import, export and transit of goods
- harmonisation of applicable laws and regulations
- unification and integration of definitions and information requirements, and use of information and communication technologies.[184]

2.5 Importance of Trade Facilitation for the African Economies

Recently, trade facilitation has become a priority. Regional associations are helping countries implement programs designed to improve the cross-border movement of goods.[185] The growth of regional trade blocs in recent years has been hailed as an

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[180] UNCTAD, Trade Facilitation and Development: Driving trade competitiveness, border agency effectiveness and strengthened governance

[181] ibid

[182] Engman, The Economic Impact of Trade Facilitation (Oct 12, 2005)

[183] Allen Dennis and Ben Shepherd. 'Trade Facilitation and Export Diversification' (2011) 34(1) The World Economy 101 <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-9701.2010.01303.x>

[184] Hellqvist Marcus, Trade Facilitation– Impact and Potential Gains

[185] Antoni Estevadeordal. 'Why trade facilitation matters now more than ever' (2017) Brookings Institution Reports <https://search.proquest.com/docview/1893495183>

important development of international relations. Almost all countries are members of a regional trade bloc, and some countries belong to more than one bloc. More than a third of world trade is done within these blocs and for almost two-thirds of trade in the case of the Asia-Pacific Economic Cooperation (APEC).[186]

Like other continents, for many years African states have understood and recognised the benefit of trade facilitation in relation to strengthening trade and particularly the role of trade in every economy. Wilson noted that high trade costs could negatively affect the economy of African countries in several ways. Lower consumer welfare will be experienced in a country with high trade costs because imported goods will be more expensive.[187]

Trade enables states to specialise and export goods that can be cheaply produced in exchange for what others can offer at a lower cost. Therefore, if trade is a means of growth and development, it is only necessary to remove obstacles that prevent trade from increasing. Accordingly, free trade is an important tool in removing these barriers and promoting a higher level of trade in African countries[188].

Prior to TFA and the African Continental Free Trade Agreement, most Regional Economic communities had trade facilitation agreements and programs seeking to improve trade within the region.[189] For example, SADC's (a bloc in Africa) trade protocol aims to simplify and harmonise customs regulations and procedures in the region.[190] Also, the ECOWAS treaty[191] provides for the removal of technical barriers to trade and the harmonisation of trade policies for the establishment of a free trade area, a customs union, a common market and, in due course, a monetary and economic union in West Africa. Article 70 of the Common Market for Eastern and Southern Africa (COMESA) also provides for trade facilitation initiatives.

The East African Common Market Protocol, which was signed by the five East African Community Heads of State on the 20th of November 2009, states that Member States must change national laws to allow full implementation of immigration and customs reform. Therefore, trade facilitation agreements are not entirely novel to Africa or its regional blocs.

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[186] Schiff Maurice and Winters Allen, Regional integration and Development (Oxford University Press 2003)

[187] Alberto Portugal-Perez and John S. Wilson. 'Why Trade Facilitation Matters to Africa' (2009) 8(3) World trade review 379 <http://hdl.handle.net/10986/4852>

[188] African Union, Boosting Intra African Trade - Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade and Framework for the fast-tracking of a Continental Free Trade Area

[189] Magwape. 'The AfCFTA and Trade Facilitation: Re-Arranging Continental Economic Integration' 355

[190] See Southern African Development Community, Protocol on Trade (1996)

[191] See the Economic Community of West African States Treaty (July 1993)

These regional blocs have played a role in ensuring and attaining the objectives of the WTO TFA and trade liberalisation in general. However, despite Africa's efforts to pull down trade restrictions in a bid to create a single market within regional and sub-regional agreements, trade in Africa is still affected by trade barriers. Over the last ten years, about 10–12 per cent of Africa's trade was with African countries, whilst 40 per cent of North American trade is with other North American countries, and 63 per cent of trade by countries in Western Europe is with other Western European nations. Promoting trade within Africa can help strengthen specialisation among African countries and develop regional value chains to promote diversity and competitiveness. As such, there is a pertinent need for African countries to resolutely pursue a harmonised regional trade policy as part of their strategy of development and collective transformation in the context of regional integration[192].

To allow deeper integration, at the African Union Summit held in Addis Ababa in January 2012, fifty-four African Union member states agreed to establish the Continental Free Trade Area (CFTA). On March 21, 2018, a framework agreement was signed by forty-four member states in Kigali to bring the African Continental Free Trade Area ('**ACFTA**') – the world's largest free trade area – into force.[193] The ACFTA was signed to boost trade and economic growth, and strengthen integration among African countries. The most important benefits of creating a free trade area (FTA) are significantly anchored in the prospective gains from a larger market. With free mobility of goods and services, investment easily responds to the requirements of market demand and supply within the FTA, resulting in more efficient allocations of resources.

Trade facilitation is integral to the African Continental Free Trade Area and is clearly defined in the framework agreement and trade protocols. The AU Assembly, being the highest decision-making body, decided that the African union should implement an action plan to promote trade in Africa. With AfCFTA, AU and the RECs are expected to provide oversight to the Action Plan for Boosting Intra-Africa Trade ('BIAT'), which has identified seven (7) priority programs,[194] including trade facilitation and trade information. The Protocol on Trade of Goods includes several

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[192] African Union, Boosting Intra African Trade - Issues Affecting Intra-African Trade, Proposed Action Plan for boosting Intra-African Trade andmFramework for the fast-tracking of a Continental Free Trade Area

[193] As at July 7, 2019, 54 countries have signed the signed the ACFTA leaving Eritrea as the only nation out of not to sign up to the deal.

[194] 1) Broadening Africa's economic and market space by fast-tracking the establishment of a Continental Free Trade Area (2) addressing supply-side constraints and weak productive capacities (3) Addressing infrastructural bottlenecks (4) Eliminating trade barriers through improved trade facilitation (5) Enhancing opportunities for intra-African trade through trade information networks (6) Addressing financial needs of traders and economic operators through improved trade finance (7) Addressing adjustment costs associated with FTAs and trade liberalization to ensure equitable outcomes for Member States

provisions on the elimination of trade barriers by improving trade facilitation and reducing the cost of doing business in Africa.[195]

The ACFTA aims also to resolve the onerous customs procedures and bureaucratic practices – it aims to establish cooperation between customs authorities on product standards and rules in a bid to achieve the main objective of easier movement of goods between Africa's borders.[196] This Protocol contains a systematic plan for promoting trade within ACFTA. The content of the trade facilitation provision contains the specific obligations of the member states, mainly included in the three annexes of the Protocol on Trade in Goods (Annex 3, on Customs Cooperation and Mutual Administrative Assistance, Annex 4 on Trade Facilitation and Annex 8 on Transit). The annexes are attached to the Protocol on Trade in Goods and must be read together with the Protocol on Trade in Goods.

The main part of the instrument presents its ambitions, which are in line with trade facilitation. Africa needs to achieve the elimination of trade barriers, and harmonisation and implementation of trade facilitation instruments throughout Africa. The goals of the Protocols on Goods and Services are listed in article 3 of the instrument establishing the AfCFTA. They include effective customs, trade and transit facilitation, closer cooperation in the field of technical barriers to trade, and sanitation and phytosanitary measures.[197] This shows the economic and inclusive attitude of the AU. It should be noted, however, that harmonisation of customs procedures is not included in the objectives. The reason for this is that the AU believes that AfCFTA will lay the foundation for the formation of a continental customs union in the future.[198] Notwithstanding this omission, there is a dedicated annex to the Protocols on Goods and Services relating to continental harmonisation of tariffs and harmonisation of customs procedures.[199]

The Agreement establishing AfCFTA provides for trade facilitation in annex 4 of the Protocols in Goods and Service. The purpose of the annex is to expedite the movement, clearance and release of goods, including goods for cross-border journeys within State parties through simplifying and harmonising international trade procedures and logistics.[200] Annex 4 also provides for publishing information on the internet in accordance with Article 1 of the World Trade Organization Free Trade Agreement. The annex also provides for issues such as preferential treatment, rules of origin and tariffs. These similarities with WTO's trade facilitation policies

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[195] See Article 10, 12, 15 of the protocol on trade of goods

[196] Magwape. 'The AfCFTA and Trade Facilitation: Re-Arranging Continental Economic Integration' 355

[197] ibid

[198] See Article 3(d) of the agreement establishing the African Continental Free Trade Area

[199] See Annex 3 of the Protocols in Goods and Services

[200] See Annex 4 Article 2(b) of the Protocols in Goods and Services.

suggest that there is an intentional inclusion of global trade facilitation standards into the African Continental Free Trade Agreement to achieve a globally recognised concerted effort. The annex on trade facilitation also states that the required notice and timing for the implementation should be made to the AfCFTA Sub-Committee for Trade Facilitation, or under the WTO TFA. This provision also shows that ACFTA acknowledges the WTO Trade Facilitation Agreement as the primary instrument for global trade facilitation, and the binding obligations it imposes on the African Member States instrument.

In general terms, this agreement promotes the African Economic Community as envisioned by the Abuja Treaty of 1991 and is a step towards the realisation of Africa's Agenda 2063, which aims to build a prosperous and united Africa. The main purpose of AfCFTA is to facilitate, harmonise and better coordinate trading systems, and to eliminate the challenges of various trade agreements across the continent. An integrated economy in Africa is expected to improve the competitiveness of local industries, achieve economies of scale for local producers, better allocate resources, and attract foreign direct investment.[201] AfCFTA also aims at eliminating tariffs on trade of goods within Africa. The elimination of tariffs will result in significant welfare gains and expand production, employment expansion, and trade growth within Africa.[202]

The Free Trade Area aims at creating a single market among African countries for the exchange of goods and services of over 1.1 billion people and a total gross domestic product of circa US$1.71 trillion.[203] The creation of a single market will further strengthen collaboration in investment measures, intellectual property rights and competition policy to support innovation, competitiveness and product development and diversification.[204]

According to one study,[205] empirical analysis using a gravity model for African countries shows that a reduction in tariffs may boost intraregional trade, particularly for the mineral, manufacturing, and agriculture-related sectors. In addition, AfCFTA could significantly increase cross-border trade in Africa if both tariffs and

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[201] Mesut Saygili, Ralf Peters and Christian Knebel, Africa's Continental Free Trade Area: Challenges & opportunities (Division on International Trade in Goods and Services, and Commodities, UNCTAD Mar 28, , 2018)

[202] ibid

[203] World Bank, 'Sub-Saharan Africa' (*The World Bank International Bank for Reconstruction and Development (IBRD)*, 2018) <https://data.worldbank.org/region/sub-saharan-africa> accessed 1 February 2020

[204] United Nation Conference on Trade and Development. 'The African Continental Free Trade Area; The Day after the Kigali summit' (No 67 May 2018) accessed July 17, 2019.

[205] International Monetary Fund, ' Is the African Continental Free Trade Area a Game Changer for the Continent?', Regional Economic Outlook - Sub-Saharan Africa Recovery Amid Elevated Uncertainty (Apr. 2019).

non-tariff policies are introduced. Reduction in rates must be comprehensive for it to have significant effects on inter-regional trade flows. Eliminating 90 per cent of the tariffs on trade flows within the area would increase trade regionally by circa 16 per cent, or US$16 billion over time.[206.]

The reduction of tariffs has many economic impacts, not only on the member countries but also on other countries in the world. This impact can be felt on production, imports and exports. Thus, the creation of a free trade agreement (FTA) will lead to several levels of economic prosperity in Africa.[207] This initiative will create employment, investment and competition. It is opined that some African states may suffer revenue loss as a result of tariff liberalization; however, tariff liberalisation will collectively benefit the continent. Notwithstanding this, African states must come up with innovative alternative sources of income.[208]

According to the World Bank, by 2035, 50 million people could escape extreme poverty and real income could increase by 9% if the AfCFTA's objectives are fully attained. Deep integration in line with the AfCFTA's goals would increase exports from Africa to the rest of the world by 32% and intra-African exports by 109%, driven by manufactured goods[209]. Imports from outside the continent will drop by $10 billion a year, while exports of agricultural products and industrial products will increase by $4 billion (7 per cent) and 21 billion (5 per cent) respectively. If trade facilitation measures are employed to accelerate and reduce the cost of customs procedures, exports from Africa to the rest of the world will increase by 6 per cent.[210]

The potential benefit of AfCFTA on the economy cannot be overemphasised. It has been stated that efficient regional integration supports the industrialisation of Africa. Free movement of goods across borders will increase the pressure of competition on market participants in the region. CFTA offers an opportunity to increase trade in Africa beyond the 13 per cent which the trade level is pegged at.[211] In addition, AfCFTA will also create a wider market and economies of scale capable of

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[206] International Monetary Fund, 'Is the African Continental Free Trade Area a Game Changer for the Continent?', Regional Economic Outlook - Sub-Saharan Africa Recovery Amid Elevated Uncertainty (Apr. 2019).

[207] Terzi Nuray. 'African Continental Free Trade Area and Its Impacts on Turkey's Market' (2018) Politico Economic Evaluation of Current Issues.

[208] Mureverwi Brian. 'Welfare Decomposition of the Continental Free Trade Area' (Selected Paper for Presentation at the 19th Conference on Global Economic Analysis 15-17 June, 2016)

[209] World Bank, 'Africa: Free Trade Deal Boosts Africa's Economic Development' Asia News Monitor (Jul 4, 2022)<https://www.worldbank.org/en/topic/trade/publication/free-trade-deal-boosts-africa-economic-development>.

[210] Soininen Ilmari. 'The Continental Free Trade Area: Current State of Play' (2014) (Policy Brief 01) Saana Institute <http://www.saana.com/wp-content/uploads/2014/09/Saana-Institute-Policy-Brief01_CFTA.pdf>

[211] Mureverwi Brian. 'Welfare Decomposition of the Continental Free Trade Area'

attracting foreign direct investment, creating new jobs, and promoting growth in Africa.[212]

Notwithstanding the benefits of the liberalisation of tariffs, an African free trade area may face other challenges that may impede intra-African trade. Beyond traditional trade policies and tariffs, many other barriers can influence the market and the free circulation of goods, investment, services, and ideas. There is, therefore, a need to remove these barriers.[213] Non-tariff trade costs, such as transport, security and customs clearance, primarily affect an intra-African trade of goods. Easy conduct of trade transactions, ensuring fast and efficient delivery of goods as well as ensuring that cost is at a minimal level, is important for the free exchange of goods between African states.[214]

The UNCTAD Secretary-General, Dr Mukhisa Kituyi said:

> The ink on the African Continental Free Trade Area (AfCFTA) agreement is dry and the players are ready to trade, but a large and complicated hurdle remains – non-tariff barriers (NTBs). NTBs are a wide range of restrictive regulations and procedures, other than tariffs, that make trade difficult and/or costly ... the time and costs of moving goods in Africa will be reduced if there is political willingness to fight non-tariff barriers.[215]

According to Balistreri, non-tariff trade costs are more important trade barriers than tariffs in Africa. The removal of non-tariff trade costs accounts for far more significant benefits of deep integration in free trade agreements, which deals with issues of trade facilitation, reduction of non-tariff barriers, costs for business services, and the abolition of tariffs.[216]

In addition to tariffs, distance is increasingly an obstacle to trade between the regions of Africa. This means that factors other than tariffs make trading expensive for African countries and play a part in the regional trade gaps currently experienced

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[212] Regional Focus. 'The Continental Free Trade Area (CFTA):
Process and Political Significance' (2016) <https://www.tralac.org/images/docs/12458/cfta-process-and-political-significance-a-primer-by-regions-refocus-and-twn-africa-april-2016.pdf>

[213] Schiff Maurice and Winters Allen, Regional integration and Development Development (Oxford University Press 2003)

[214] United Nations Conference on Trade and Development. 'African Continental Free Trade Area:
Policy and Negotiation Options for Trade in Goods' (2016a)
<https://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf>

[215] Dr. Kituyi Mukhisa, at the presentation of the new tradebarriers.africa platform to the African Union at the 12thAfrican Union Extraordinary Summit in Niamey, Niger on July 7, 2019.

[216] Balistreri Edward, Tarr David and Yonezawa Hidemichi. 'Deep integration in Eastern and Southern Africa' 677

by the continent. One key factor is poor trade facilitation services, including logistics, transport infrastructure and border processes.

Typical non-tariff barriers, such as deficient business and regulatory environments, also play a vital role in the trade gap.[217] Poor trade logistics is the main obstacle to trade within the region. If African countries can bring the cost of logistics to the global average, which amounts to an improvement of circa 19 per cent, such improvement will reduce the cost of cross-border movement of goods and increase intra-regional trade by more than 12 per cent.[218] Accordingly, efficient transport services are vital for economic development, as transport services are crucial to achieving global and regional reach, strengthening integration and attracting foreign investment. It is therefore pertinent for African countries to establish appropriate strategies for the development of efficient transport services.

2.6 Transport Facilitation as an Essential Factor in Trade Facilitation and Regional Integration

As stated earlier, trade facilitation does not have a universally accepted definition. However, what is clear from the several definitions of trade facilitation is that:

- The focus of trade facilitation is on international trade formalities, operation, documentation and procedures
- The primary goal of trade facilitation is to reduce the time of international trade and reduce unnecessary cost associated with trade
- This is best achieved by simplification, harmonisation and standardisation[219].

The continued reduction of tariffs and non-tariff barriers to trade arising in the context of multilateral trade agreements increases trade interests as a growth driver. Supported by appropriate development strategies, trade can help transform the structure of developing countries towards high-value-added products, which has a positive impact on revenue.[220] However, attempts by developing countries to increase their share in global trade are hampered by transport costs, which reduce

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[217] International Monetary Fund. 'Is the African Continental Free Trade Area a Game Changer for the Continent?'

[218] ibid

[219] Jaimurzina Azhar. 'The future of trade and transport facilitation: implications of the WTO Trade Facilitation Agreement' (2014) 5(333) Natural Resources and Infrastructure Division, UNECLAC

[220] Frankel A. Jeffrey and Romer David. 'Does Trade Cause Growth?' (1999) 89(3) The American Economic Review 379 <https://www.jstor.org/stable/117025>

the competitive advantage of their exports.[221] Research shows that one important factor affecting the development of countries' foreign trade is transport costs, save for country-specific elements that increase or decrease the competitiveness of their exports.[222] In this context, Clark, Dollar, and Micco [223] further emphasise that the importance of transport costs is greater than that of tariff barriers. The authors note that the effect of the cost of transportation is twenty times higher than tariffs in certain countries.

In an effort to reduce the cost associated with international trade, the Trade Facilitation Agreement, adopted at the Bali Ministerial Conference in December 2013, highlights in its provisions the need for freedom of transit. This underscores the importance of the transport sector to countries globally, and their policy makers.[224] This clearly shows that trade facilitation is linked to transport. More particularly, in recent times, United Nations agencies have linked facilitation to transportation and have recognised transport facilitation and trade facilitation.[225] These are sometimes referred to jointly as 'trade and transport facilitation' or 'transport facilitation'.

In order to improve the competitiveness of international trade in any country, it is necessary to improve the quality of international transport and reduce the associated costs. In addition, commercial costs must be reduced to bring trading practices in line with international standards. It is also essential to remove all unnecessary barriers to trade.[226] The implementation of measures affecting trade and transport barriers is a trade and transport facilitation program. The optimisation of international transport operations can only be achieved through efficient multimodal transport.[227]

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[221] UNCTAD secretariat, Transit trade and maritime transport facilitation for the rehabilitation and development of the Palestinian economy (United Nations 2004) <http://www.econis.eu/PPNSET?PPN=386173052>

[222] Mattos S. José Carlos. and José Acost Maria, 'Maritime transport liberalization and the challenges to further its implementation in Chile', Serie comercio internacional (2003)

[223] Ximena Clark, David Dollar and Alejandro Micco. 'Maritime transport costs and port efficiency' (2002) Policy Research Working Paper; No. 2781 <https://openknowledge.worldbank.org/handle/10986/15758 License: CC BY 3.0 IGO>

[224] See article 11 of the Trade Facilitation Agreement

[225] Global Facilitation Partnership for Transportation and Trade (GFP) and the Economic Commission for

Latin America and the Caribbean (ECLAC) recognizes transport facilitation as an integrated component of trade facilitation.

[226] Michel Audigé, Maritime Transport Serving West and Central African Countries: Trends and Issues (, 1995)

[227] ibid

Accordingly, transport facilitation is a component of trade facilitation and can be defined as the simplification and harmonisation of international transport procedures. The objective of transport facilitation is to improve transport services with the view to reducing costs and facilitating the free movement of people and the free movement of merchandise trade between countries.[228] Research shows that transport facilitation Is of greater economic benefit than the removal of tariffs.[229]

Many ports have suffered delays in the past due to the dysfunctional interface between freight carriers, agents, ports, customs, and other interested parties. In the 1970s, countries had problems with acute port congestion associated with poor documentation procedures. Facilitation, however, has steered most economies through revolutionary changes in commercialisation and the transport activities imposed by a container.[230] While many developing countries still struggle to cope with the myriad of procedural and documentary changes necessary to manage the goods arising from a container, which differ from general port-to-port cargo, facilitation has played its role effectively in making the movement of goods easier.

For developing countries, greater integration into the global economy has proven to be an essential factor in productivity and growth.[231] In this regard, it is crucial to simplify the transport of goods between countries and reduce transaction costs. Measures to facilitate the reduction of costs in international trade should be at the heart of long-term development policies in developing countries and regions. The Economic Community of West African States (ECOWAS) in West Africa is no exception to this market mechanism.[232]

Implementing trade and transport facilitation measures has been a top priority in recent international discussions and has a decisive influence on international trade programs. At the World Summit on Sustainable Development held in Johannesburg in 2002,[233] participants suggested an integrated strategy to national and regional

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[228] 'Transport Facilitation Project (I)' (European Union - External Action 04/01/2019) < https://eeas.europa.eu/headquarters/headquarters-homepage/56181/transport-facilitation-project-i_uz> accessed June 28, 2019

[229] De Castro F. Carlos. 'Trade and Transport Facilitation - review of Current Issues and Operational Experience'

[230] ibid

[231] Daniel Sakyi and others. 'The Effects of Trade and Trade Facilitation on Economic Growth in Africa' (2017) 29(2) African development review 350 <https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-8268.12261>

[232] Shahrzad Safaeimanesh and Glenn P. Jenkins. 'Trade Facilitation and Its Impacts on the Economic Welfare and Sustainable Development of the ECOWAS Region' (2021) 13(164) Sustainability (Basel, Switzerland) 164 <https://doaj.org/article/94f53f92e3564f519d13169d32259354>

[233] The World Summit on Sustainable Development was held in Johannesburg from August 26 – September 4, 2002.

policy formulation and development for transport services to provide safe and efficient transport. The conference acknowledged that developing countries need to improve their transport and communications infrastructure as well as their multimodal transport services in order to benefit from liberalised trade opportunities. In door-to-door transport, infrastructure, facilities and equipment must be available, including sea (ports and terminals), road, rail and air connections.[234]

The consistent implementation of these issues is the systematic rationalisation of trade and transport facilitation programs, which includes documentation and rationalisation of procedures related to trade and transport. It requires the efficient operation of transport and interface modes, eliminating physical and institutional obstacles and simplifying legislation to improve international transport operations. However, it is noteworthy that this is not enough. General structural changes to trade and transport practices are required, particularly in the field of customs procedures and the use of modern commercial and transport procedures. Governments need to understand the benefits of implementing facilitation measures and put them at the forefront of their policies.[235]

Competition in many developing countries is hampered by administrative delays during cross border crossings due to unstructured systems and unharmonised systems.

The availability of transport services is a key factor in the competitiveness of individual companies and countries. Developing countries need to develop physical, institutional and legal infrastructure in order to create an environment for transport services for investment and trade.

Many international trade transactions are now door-to-door, but the existing legal framework for transportation does not adequately reflect this development. The international community faces the challenge of creating a unified legal system that enables the development of multimodal transport.[236] The harmonisation of regulations in relation to transport issues is very important for trade facilitation. Many international transport agreements are aimed at harmonising, simplifying and standardising rules on transport infrastructure, means of transport, cargo labelling and packaging, qualification and standards of crews, and a working regime, which will consequently have a positive impact on transport time and costs, and in effect

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[234] UNTCAD secretariat, Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade

[235] De Castro F. Carlos. 'Trade and Transport Facilitation - review of Current Issues and Operational Experience'

[236] UNTCAD secretariat, Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade

international trade. Therefore, whether a transport law agreement, convention, or treaty effectively facilitates trade depends on its specific purpose and a careful analysis of the intended or potential impact on the time and costs of transport operations.[237]

2.7 Framework Agreements on Transport Facilitation

More than 80 per cent of global trade takes place by sea – by far the most important mode of transport. Over the past three decades, shipping has increased by an average of 3.1 per cent annually. International shipping costs are on average two to three times higher than the customs duties of importing countries.[238] The IMO have always recommended to member states that data requirements, formalities and procedures in relation to arrival and departure of a ship should be simplified. To this end, the International Maritime Organization (IMO) adopted the Convention of Facilitation of International Maritime Traffic (FAL Convention) in 1965. The convention consequently entered into force on 5 March 1967 and has been amended thirteen times.[239] About 115 of the current 171 members of the IMO has acceded to the FAL Convention. The aim of the convention is to facilitate maritime transport by minimising the documentation, formalities and procedures associated with the arrival, stay and departure of a ship engaged in international voyage.[240] The FAL Convention states that its provision should be applied on the arrival, stay and departure of the ship itself, its crew, passengers, baggage and cargo. The International Maritime Organization is saddled with the responsibility of providing technical cooperation and support in ensuring the ratification and implementation of the FAL Convention.

Unnecessary paperwork continues to constitute a problem in several industries, and the maritime transport industry is no different. The FAL Convention reduces the number of declarations which public authorities should require to nine. These standardised forms include *inter alia* the IMO General Declaration, the Cargo Declaration, the Crew and Passenger Lists, and the Dangerous Goods Declaration.

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[237] Jaimurzina Azhar. 'The future of trade and transport facilitation: implications of the WTO Trade Facilitation Agreement'

[238] V Vince, 'Maritime Transport and Port Operations' (*Global Facilitation Partnership for Transportation and Trade*, November 3, 2013) <https://gfptt.org/node/67?page=3> accessed 23 October 2020

[239] 1969, 1973, 1977, 1986, 1987, 1990, 1992, 1993, 1996, 1999, 2002, 2005, 2009

[240] United nations economic commission for Europe, 'FAL Convention' (*Trade facilitation Implementation Guide*, 2016) <http://tfig.unece.org/contents/FAL-convention.htm> accessed 22 October 2020

Under the FAL convention, parties accede to take all reasonable steps, in accordance with the provisions of the Convention and its annexes, to facilitate and expedite international maritime trade and prevent unnecessary delays of ship, persons and property on board a ship.[241] In addition, they are committed to working together to ensure the highest practicable degree of uniformity in procedures, requirements and documentation in all cases where this uniformity will facilitate and improve international maritime traffic. Any alterations in formalities, documentary requirements and procedures to meet special requirements of a domestic nature will be kept to a minimum.[242]

In January 2018, the amendments to the Convention on Facilitation of International Maritime Traffic (FAL Convention) entered into force globally. Some of the changes introduced include the obligation for contracting parties to make electronic information exchange, including electronic data interchange (EDI), compulsory for the transmission of information relating to maritime transport. The amendment also stipulates that this should be in place by April 8 2019, with a transitional period of at least 12 months during which both paper and electronic documents would be allowed.[243] In relation to crew, the amendment prohibits any discrimination based on nationality, race, colour, sex, religion, political opinion or social origin. Shore leave should be granted.

Annex 9 (Monitoring) requires states to set up facilitation committees. The purpose of the National Maritime Committees or FAL Committees recommended by the IMO FAL Convention is to encourage the adoption and implementation of facilitation measures between government ministries and other stakeholder agencies, including the ports and shipowners.[244] There is also the National Trade and Transport Facilitation Committees (NTTFC). The United Nations regional commission, UNCTAD and the World Bank support the NTTFC through technical assistance projects in more than thirty countries. The NTTFC perform similar responsibilities to the NTFB,[245] save for the fact that they also deal with transport

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[241] Article 1 of the Convention of Facilitation of International Maritime Traffic (FAL Convention) in 1965

[242] Article 3 of the Convention of Facilitation of International Maritime Traffic (FAL Convention) in 1965

[243] Davide Scavuzzo, 'The amendments to the FAL Convention have entered into force ' (*Lexology*, January 16, 2018) <https://www.lexology.com/library/detail.aspx?g=9f14b335-57e3-408c-9913-3d3a5d61a1d5> accessed 23 October 2020

[244] United nations economic commission for Europe, 'FAL Convention' (*Trade facilitation Implementation Guide*, 2016) <http://tfig.unece.org/contents/FAL-convention.htm> accessed 22 October 2020

[245] The United Nations Economic Commission for Europe Revised Recommendation 4 suggests that governments should establish national trade facilitation bodies (NTFB) as an indispensable component of trade policy formation, which embraces the views, and opinions of all stakeholders in pursuing agreement, cooperation and collaboration.

issues. They act as inter-institutional consultative bodies to facilitate international trade and transport regulations, make recommendations and create transparency in important trade and transport issues.[246] In the ECOWAS region, some member states have set up a National Trade Facilitation Committee.[247] No country has set up a National Trade and Transport Facilitation Committee.

Likewise, the aviation industry is not exempt from attempts to implement trade facilitation measures. The main legislative function of the International Civil Aviation Organization (ICAO) is to develop and implement the Standards and Recommended Practices (SARPs) for International Civil Aviation Standards. They are listed in 19 technical annexes to the Convention on International Civil Aviation (Chicago Convention). Appendix 9 of the Chicago Convention contains SARPs and guidance facilitation. Annex 9 also sets out the methods and procedures for conducting customs clearance operations following state laws while enabling the maximum productivity of airlines, airports and agencies of the government concerned.[248]

The focus of the Annex is on reducing paperwork, harmonising international documentation for international traffic and simplifying procedures for unloading aircraft, passengers and cargo. It was pointed out that delays due to bureaucracy should be reduced because of cost, which would be foisted on all stakeholders in the aviation community.[249]

The need to implement the provisions of the FAL convention and other transport facilitation programs cannot be overemphasised. Time has a direct impact on the increase in transportation cost. Shipping freights are usually high and determined daily. Consequently, any delay during carriage increases the cost of transportation. Accordingly, reducing the documentation necessary for international sea carriage to a minimum and simplifying formalities will directly influence the cost of

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[246] UN Centre for Trade Facilitation and e-business (UN/CEFACT), 'NTFB - Background' (*UNECE*, 2015) <https://www.unece.org/cefact/nat_bodies.html> accessed 23 October 2020

[247]Countries like Gabon, Guinea, Guinea Bissau, Cote D'ivoire, Gambia and Ghana are yet to have National facilitation Bodies

[248] Icao, 'Security and Facilitation - ANNEX 9' (*International Civil Aviation Organization*)
<https://www.icao.int/Security/FAL/ANNEX9/Pages/default.aspx> accessed 23 October 2020

[249] Annex 9 on Facilitation is based on 10 articles of the Chicago Convention which stipulates that the civil aviation community should comply with laws governing inter alia the inspection of aircraft, cargo and passengers by authorities concerned with customs, immigration, agriculture, and public health. Those articles are Article 10: Landing at customs airport; Article 13: Entry and clearance regulations; Article 14: Prevention of spread of diseases; Article 22: Facilitation of formalities; Article 23: Customs and immigration procedures; Article 24: Customs duty; Article 29: Documents carried in aircraft; Article 35: Cargo restrictions; Article 37: Adoption of international standards and procedures; and Article 38: Departures from international standards and procedures

transportation. This will be a practical and realistic step towards achieving transport facilitation and trade facilitation.

2.8 The Role of Maritime Transport in Trade Facilitation in Africa

Maritime transport plays a crucial role in connecting the world's economy and supply chain, and its impact on global economics is substantial.[250] Resources utilised in manufacturing centres are also transported via maritime transport.

While Africa accounts for just 2.7 per cent of global trade by value, the continent contributes 7 per cent of maritime exports and 5 per cent of maritime imports by volume. An improved statistics on export and import, maritime transport remains the main gateway to the international and intra-African marketplace.[251]

Many scholars[252]have analysed the impact of maritime transport on economic growth. They all found that there is a positive relationship between maritime transport and economic growth. Park and Seo[253] note that container port activities can significantly influence regional economic growth positively.

[250] H. N. Psaraftis (ed), International Encyclopedia of Transportation (The Future of Maritime Transport, Elsevier: 2021)

[251] UNCTAD. 'Maritime trade and Africa' (2018) <https://unctad.org/press-material/maritime-trade-and-africa> accessed August 20, 2021

[252] Corinne Bagoulla and Patrice Guillotreau. 'Maritime transport in the French economy and its impact on air pollution: An input-output analysis' (2020) 116 Marine policy 103818 <https://dx.doi.org/10.1016/j.marpol.2020.103818>;Mustafa Özer, Şerif Canbay and Mustafa Kırca. 'The impact of container transport on economic growth in Turkey: An ARDL bounds testing approach' Research in transportation economics <https://dx.doi.org/10.1016/j.retrec.2020.101002>

[253] Jin Suk Park and Young-Joon Seo. 'The impact of seaports on the regional economies in South Korea: Panel evidence from the augmented Solow model' (2016) 85 Transportation research. Part E, Logistics and transportation review 107 <https://dx.doi.org/10.1016/j.tre.2015.11.009>

Studies have shown that there is a visible correlation between transport and economic growth.[254] However, in comparison to other modes of transportation, such as air and land, maritime transport has a stronger impact on economic growth.[255]

While the challenge of Africa's minimal integration in world trade is reflected in the challenges faced by its maritime sector, the industry promises an enormous opportunity for the world's youngest and second-most-populous continent.[256] Africa has the potential to be the key growth market of the 21st century; however, to unlock this potential Africa needs to improve governance, reduce barriers to trade, create jobs and invest in infrastructure. Development in the maritime industry can help play a role in addressing these challenges.[257] UNCTAD noted that one solution for Africa is diversifying its economies and enabling greater integration into regional and global value chains.

Investing in seaports can also support economic activities. The benefit of investing in seaports includes reducing transportation cost (a major objective of trade facilitation), increasing private investment, creating employment opportunities[258] and improving logistics.[259] Mudronja[260] also noted that the impact of seaports on the

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[254] Ximena Clark, David Dollar and Alejandro Micco, Port Efficiency, Maritime Transport Costs and Bilateral Trade (Jan 1, w10353, 2004);Ştefan Gherghina and others. 'Empirical Evidence from EU-28 Countries on Resilient Transport Infrastructure Systems and Sustainable Economic Growth' (2018) 10(8) Sustainability (Basel, Switzerland) 2900 <https://explore.openaire.eu/search/publication?articleId=dedup_wf_001::96801505dd32b3ed7e5cac5f0c6b4382>

[255] Jin Suk Park, Young-Joon Seo and Min-Ho Ha. 'The role of maritime, land, and air transportation in economic growth: Panel evidence from OECD and non-OECD countries' (2019) 78 Research in transportation economics 100765 <https://dx.doi.org/10.1016/j.retrec.2019.100765>

[256] UNCTAD. 'Maritime trade and Africa' (2018) <https://unctad.org/press-material/maritime-trade-and-africa> accessed August 20, 2021; UNCTAD, 'Review of Maritime Transport, 2021;2021 IIS 4050-S9;UNCTAD/RMT/2021;ISBN 978-92-1-113026-3 (Paper), 978-92-1-000097-0 (Internet)' () <https://statistical.proquest.com/statisticalinsight/result/pqpresultpage.previewtitle?docType=PQSI&titleUri=/content/2021/4050-S9.xml> accessed September 29, 2022

[257] Jadesimi Amy and Søgaard Kasper. 'The maritime industry can unlock growth with Africa' <https://www.globalmaritimeforum.org/news/the-maritime-industry-can-unlock-growth-with-africa> accessed August 31, 2021

[258] Anna Bottasso and others. 'The impact of port throughput on local employment: Evidence from a panel of European regions' (2013) 27 Transport policy 32 <https://dx.doi.org/10.1016/j.tranpol.2012.12.001>;Claudio Ferrari, Marco Percoco and Andrea Tedeschi. 'Ports and local development' (2010) 37(1) International journal of transport economics 9 <http://www.econis.eu/PPNSET?PPN=629724652>

[259] Theo E. Notteboom and Willy Winkelmans. 'Structural changes in logistics: how will port authorities face the challenge?' (2001) 28(1) Maritime policy and management 71 <http://www.tandfonline.com/doi/abs/10.1080/03088830119197>

[260] Gorana Mudronja, Alen Jugović and Dunja Škalamera-Alilović. 'Seaports and Economic Growth: Panel Data Analysis of EU Port Regions' (2020) 8(12) Journal of marine science and engineering 1017 <https://search.proquest.com/docview/2470774077>

growth of regional economies in the European Union is huge, and port infrastructure investment is a contributory factor to economic growth. Shan,[261] using data from 41 major port cities between 2003 and 2010, also corroborates the positive impact of port infrastructure investment.

The implication of all the above is simple and straightforward. Maritime trade is the most important among all other means of transportation for trade. As noted in the preceding sections, intra-African trade is low and, accordingly, there is a need to promote market integration and access between these states.

Despite two-thirds of African member states being coastal, Africa does not have seamless maritime connectivity that could aid access to the local markets of member states. Over the years, maritime transportation has clearly emerged as a cheaper mode of transport compared to other modes. Therefore, it is important that African countries take steps to reduce the costs associated with maritime trade. More importantly, almost a quarter of all transportation of goods is carried by sea. Intra-African freight transportation is in high demand (22 per cent). Accordingly, the amount of tonnes transported by vessels would increase from 58 million to 132 million tonnes with the implementation of the AfCFTA. All of these projections may be wishful thinking if African nations do not prioritise the implementation of priority infrastructure projects to improve connectivity in the region.[262] Adequate transport infrastructure and services in Africa, including maritime transport connectivity, are critical to reaping the full benefits of the AfCFTA.

The Economic Commission for Africa ('ECA') alluded to this at the fifth African Business Forum on 7 February 2022. The ECA stated that over 25 per cent of intra-African trade gains in services would go to transport alone and circa 40 per cent of the increase in Africa's services production would be in transport. Studies have shown that a proper implementation of AfCFTA would double maritime freight from 58 million to 131.5 million tonnes.[263] An estimated 126 vessels for bulk cargo and 15 vessels for container cargo by 2030.

To disseminate cargo to the local market and complement maritime trade, Africa must invest in about 1,844,000 trucks for bulk cargo and 248,000 containers for container cargo by 2030. This underscores the importance of transportation to

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[261] Jun Shan, Mingzhu Yu and Chung-Yee Lee. 'An empirical investigation of the seaport's economic impact: Evidence from major ports in China' (2014) 69 Transportation research. Part E, Logistics and transportation review 41 <https://dx.doi.org/10.1016/j.tre.2014.05.010>

[262] UNCTAD, 'Review of Maritime Transport, 2021;2021 IIS 4050-S9;UNCTAD/RMT/2021;ISBN 978-92-1-113026-3 (Paper), 978-92-1-000097-0 (Internet)' () <https://statistical.proquest.com/statisticalinsight/result/pqpresultpage.previewtitle?docType=PQSI&titleUri=/content/2021/4050-S9.xml> accessed September 29, 2022

[263] 'Africa's Transport Sector to Strongly Benefit from African Continental Free Trade Area (AfCFTA)' *AllAfrica.com* (Feb 9, 2022) <https://search.proquest.com/docview/2627193379>

improving African trade and aiding the objectives of regional integration.[264] However, there is a need for the advancement of maritime infrastructure and services.[265] The maritime industry and transport industry at large requires much investment to realise its potential.

Container ports and inland waterway networks in Africa should support AfCFTA's goals by improving infrastructure, services and performance to meet international standards. There should be improved productivity levels, which currently average 20 crane movements per crane and hour in West Africa.[266] According to the well-known statement, 'time is money' – Africa must work towards reducing barriers. If these barriers are not addressed, transport costs in the region will remain high.

2.9 Multimodal Transport – an Essential Element of Transport Facilitation

Logistics is an important role in promoting international trade in goods. Logistics services includes the management, packaging, storage, exchange of information and transport services within a supply chain. Well-developed transport and logistics modalities will bring enormous growth to trade and production.[267] Research shows that improving transport infrastructure in Africa is one of the essential factors for increasing the continent's trade.[268]

Clearly, high-quality logistics services are needed to increase a country's export competitiveness. One way to increase competitiveness is by reducing the cost of cargo transportation and logistics in general.[269] Research has shown that slower international supply chains are more expensive.[270] Studies have also shown that Africa's transport costs are still among the world's highest. To illustrate – the cost

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[264] ibid

[265] Maritime Executive. 'Fulfilling Africa's Maritime Trade Potential' (2018) <https://www.maritime-executive.com/article/fulfilling-africa-s-maritime-trade-potential> accessed August 30, 2018

[266] UNCTAD. 'Maritime trade and Africa' (2018) <https://unctad.org/press-material/maritime-trade-and-africa> accessed August 20, 2021

[267] Van Niekerk Lolette Kritzinger and Moreira Emmanuel Pinto, Regional Integration in Soth Africa - An Overview of Recent Development (World Bank December, , 2002)

[268] Limão Nuno and Venables J Anthony. 'Infrastructure, Geographical Disadvantage, Transport Costs, and Trade' (2001) 15(3) The World Bank Economic Review 451 <https://www.jstor.org/stable/3990110>

[269] Korinek Jane and Sourdin Patricia. 'To What Extent Are High-Quality Logistics Services Trade Facilitating?' (2011) (108) OECD Trade Policy Working Papers <https://search.proquest.com/docview/857720239>

[270] Djankov Simeon, Freund Caroline and Cong S. Pham. 'Trading on Time' (2010) 92(1) The Review of Economics and Statistics 166 <https://www.jstor.org/stable/25651397>

of shipping a car from Japan to Abidjan, Côte d'Ivoire, is circa US$1,500 (including the cost of insurance); however, the cost of shipping the same car from Addis Ababa, Etophia to Abidjan is US$5 000.[271]

According to an International Monetary Fund working paper, distance is a factor that contributes to the high cost of international trade with Africa.[272] The costs imposed by distance are divided into four types: (1) search costs, which refer to the costs associated with finding trading partners; (2) costs associated with shipment of goods; (3) cost of management and control, and (4) cost of the time taken to deliver and communicate with partners in a different location.[273]

Multimodal transport is increasingly becoming more popular in world trade, and fast becoming integral to logistics services. In finding a solution to the growing cost of transportation, there has been a switch to multimodal transport. This may be because multimodal transport includes transport, storage and distribution, together with information management, under one heading and the control of one person. This is further facilitated by the growth of the unitisation of cargo combined with technological developments that improve cargo transfer systems between different modes. This has significantly influenced modern transport models and practices. Global transport networks and increased use of transhipment via hubs and seaports have also led to a situation where almost all urban centres have transport connections with global markets.[274.]

The basic notions behind multimodal transport (which is usually a door-to-door concept) are one multimodal transport operator – which could be a 'non-vessel operating common carrier' (NVOCC) or a 'vessel-operating common carrier' (VOCC) – one document, one sole responsibility for loss or damage and one sole insurance coverage.

In recent times, the transportation of goods in international trade has increasingly been carried out on a door-to-door basis, which usually involves the use of two or more modes of transportation. Contractual arrangement is also a reason for the increasing popularity of multimodal transport. Consignors prefer to leave decisions about the mode of transportation and route to a single person, who is usually the multimodal transport operator (MTO). This person is responsible to the shippers for whether the goods arrive safely and on time, and also assumes contractual responsibility throughout the transport period. Many shippers do not want to have

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[271] Hartzenberg Trudi, *Regional Integration in Africa* (World Trade Organization Economic Research and Statistics Division October, , 2011)

[272] Arvind Subramanian and Natalia Tamirisa, Africaś trade revisited, vol 2001,33 (IMF working paper, Intern. Monetary Fund 2001)

[273] Tony Venables, Geography and international inequalities: the impact of new technologies (Centre for Economic Performance, London School of Economics and Political Science 2001)

[274] Economic Commission for Africa, 'An overview of multimodal transport development in Africa'

multiple unimodal transport contracts for each journey, with different carriers needed to ensure delivery of goods.[275] Multimodal transport today is seen as safe, efficient transportation by the most appropriate combination of modes. In practice, the main carriage is done by either rail or sea, and the initial or final leg is done by road. Authors like Taylor believe that multimodal transport is a key factor in increasing the productivity and competitiveness of the freight transport industry[276]

A major benefit of Multimodal transport is that it saves time. As much as 10 days can be saved by using multimodal transport for the carriage of cargo from the Far East to New York rather than using sea transport alone, which is unimodal in nature.[277] Multimodal transport also saves costs, which is a major element of trade facilitation.

> The competitiveness of multimodal transport operators is the result of financial liquidity, rather than unit price per segment (origin service, ocean voyage, destination). Their pricing rules follow a 'risk management policy' based on customer profile (financial weight, payment habits, volume, origins/destinations, etc.) within the margins of regional competition. They try to secure the lowest possible rates from subcontractors based on volume, and can afford substantial rebates to users.[278]

On the issue of cost, the use of containers in transporting goods reduces potential handling and consequently saves costs associated with labour, packaging and damage during transhipment. The risk of goods being damaged is lower when the number of times a cargo is discharged is reduced.[279] Another benefit that multimodal transport confers on the consignor is the fact that only one MTO handles the entire process and takes responsibility for the entire process. This allows easier communication and efficient tracking between the MTO and the consignor. Apart from this, the consignor is not saddled with the responsibility of negotiating for storage between each segment of transportation, or for movement of goods from the storage point to the point where the next transport operator will pick up the goods. The MTO, who is often more connected in these areas, is able to get storage and movement in a more cost-effective manner.

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[275] Diana Faber. 'The problems arising from multimodal transport'

[276] John C. Taylor. 'Remove barriers to intermodal' (1993) 34(4) Transportation & Distribution 34

[277] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'; Richard W. Palmer and Frank P. DeGiulio. 'Terminal operations and multimodal carriage: history and prognosis' (1989) 64(2-3) Tulane Law Review 281

[278] De Castro F. Carlos. 'Trade and Transport Facilitation - review of Current Issues and Operational Experience'

[279] Multimodal transportation brings commercial benefits for society, shipping lines and customers.' (Washin Engine Co.,Ltd 2013) <http://vtown.vn/en/articles/multimodal-transportation-benefits.html> accessed August 14, 2019

Another benefit is the fact that, in the event of damage – particularly unlocalised damages – the consignor is able to claim from the single MTO, unlike a unimodal transport contract, wherein proving unlocalised loss may be difficult because each carrier will decline liability. Consequently, the consignor/consignee will be left to resort to his insurer to bear the loss occasioned by such damage.[280]

Furthermore, a consignor who uses multimodal transport is saved from the burden of several documents issued by multiple carriers. Accordingly, there will be no need for the issuance of multiple documents for each transport segment. The consignor is also free from the cost related to insurance of several modes of transportation.

Logistics concepts like multimodal transport have proven over time to be an essential means of reducing transportation, storage, packaging, and associated costs, as well as improving the quality of just-in-time delivery.

Although the data on the share of the total volume of cargo transported by multiple modes of transportation is unavailable, there is data on the development of containerised cargo and its traffic. This gives an indication of the proportion of multimodal transportation of cargo because containers are designed for transportation of goods by multiple modes.

With the advent of containers in the mid-1960s, containerised transport has grown exponentially. The World port container throughput has grown from zero in 1965 to 753 million twenty-foot equivalent units (TEUs) of containers in 2017.[281]

The proportion of the world's seaborne trade in containerised cargo accounts for 24.3 per cent of total dry cargo shipments, which amounts to circa 7.6 billion tons in 2017.[282] Most of this containerised cargo will involve transportation by at least two modes of transportation before reaching its destination. In particular the first and the last part of any door-to-door transaction will usually involve transportation by another mode, such as road or, to a lesser extent, rail.[283]

Trade in manufactured goods has increased significantly as a result of globalisation, which has resulted in foreign direct investment in factories and assembly plants in regions with lower labour costs and good access to trade routes. As at 2017, the value of globally exported manufactured goods stood at approximately US$17.7

[280] Racine Jerome, 'International Multimodal Transport — A Legal Labyrinth'

[281] UNCTAD secretariat, Review of Maritime Transport, 2018 (United Nations publication, 2019)

[282] ibid

[283] UNTCAD secretariat, Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade

trillion.[284] Most of these manufactured goods moving by sea are transported in containers.

Container cargo trade is said to be the basis of a global trading system; as such, it is very important to be able to efficiently move containers and avoid bottlenecks at all phases. This is crucial to saving money and time. To achieve this, African countries must ensure that custom procedures are smooth and liberalized. African countries must further ensure that there are high-quality ports, efficient logistics for multimodal transport and high-quality telecommunications, as well as infrastructure to transfer goods to final destinations.[285] Notwithstanding these challenges, to allow competitiveness of regional trade in Africa and ECOWAS, it is important that multimodal transport is encouraged.

The revised African Maritime Charter adopted in Kampala, Uganda,[286] advocates for the promotion of multimodal transportation in Africa. It encourages all parties to promote multimodal transport at both the national and regional levels. Article 21 states that:

1. States Parties shall promote multimodal transport at national and regional levels through the:
    a) Development of an appropriate regulatory framework;
    b) Improvement of existing facilitation and transit policies;
    c) Promotion of the development of integrated transport master plan for all modes of transport at national, subregional, regional and continental levels;
    d) Construction, rehabilitation and modernisation of infrastructure, equipment and transport services;
    e) Training of transport services professionals;
    f) Establishment of economic community and logistics platforms.
2. States Parties shall work towards the establishment of a harmonised legislative and regulatory framework capable of ensuring the promotion and the guaranteeing of stability of multimodal joint ventures.

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[284] Liam O' Connell, ' Trends in global export volume of trade in goods from 1950 to 2017 (in billion U.S. dollars)' (Statista 2019) < https://www.statista.com/statistics/264682/worldwide-export-volume-in-the-trade-since-1950/> accessed August 13, 2020

[285] Korinek Jane and Sourdin Patricia. 'To What Extent Are High-Quality Logistics Services Trade Facilitating?'

[286] 'Revised African Maritime Transport Charter Adopted'

3. States Parties shall endeavour to participate in the negotiation, adoption and implementation of regional and international conventions on multimodal transport.287

In addition, the World Bank and UNCTAD, in recognising the benefits of multimodal transport, listed some interdisciplinary measures[288] that promote multimodal policy reforms.[289] Accordingly, to promote multimodal transport in West Africa, member states of ECOWAS must make a conscious effort towards implementing the above measures.

Transport is indispensable to international economic cooperation and foreign trade. The development of multimodal transport is essential to foreign trade. The development of multimodal transport must focus on the reduction and elimination of physical (infrastructural) and non-physical barriers. Until these developments cut across all the current barriers, multimodal transport may not be as attractive as it should to African transport users.

2.10 Impact of the Implementation of Digital Trade Facilitation on Trade Costs

There is no doubt that reduction of cost is important to economic growth. That much is clear from preceding paragraphs and sections of this work. There is a general consensus that reduction of trade costs would encourage the more integrated participation of developing economies in international trade and inter-regional trade.[290]

Lot of efforts have been geared towards eliminating tariff barriers. Further cost reductions will be achieved when non-tariff barriers, such as inefficient transport, infrastructure barriers, and cumbersome regulatory and documentary procedures are eliminated or removed. Accordingly, it is germane to simplify the procedure for trade.

One way to achieve this is paperless trade. Paperless trade means the use and exchange of electronic data and documents to support the trade transaction

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[287] The Revised African Maritime Transport Charter (Adopted in Kampala, Uganda, on 26th July 2010)

[288] The measures have been listed in Chapter 1 of this work

[289] De Castro F. Carlos. 'Trade and Transport Facilitation - review of Current Issues and Operational Experience'

[290] Yann Duval, Chorthip Utoktham and Alexey Kravchenko, 'Impact of implementation of digital trade facilitation on trade costs' (Bangkok: Asia-Pacific Research and Training Network on Trade (ARTNeT) 2018)

process.[291] The use of paperless trade as a measure of achieving trade facilitation gained global acceptance by the entry into force of the WTO Trade Facilitation Agreement in February 2017.[292] There are also regional initiatives, such as the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific.[293] It is important to note that paperless trade measures and cross-border paperless trade measures were not included in the Trade Facilitation Agreement, however, to achieve the objectives of the TFA, Paperless trade can be a key driver in achieving trade facilitation goals.

As a result, it is critical to have policies that support the implementation of paperless trade beyond the bare minimum.

Digital trade measures can be implemented through various measures. There is a need for the optimization of Paperless trade measures in Africa. Some of the recognized paperless trade measures include:[294]

- electronic/automated customs systems (e.g., ASYCUDA), with internet connection available to customs and other trade control agencies at border crossings
- electronic single window system
- electronic submission of customs declarations
- electronic application and issuance of trade licenses
- electronic submission of Sea Cargo Manifests
- electronic submission of Air Cargo Manifests
- electronic application and issuance of Preferential Certificate of Origin
- e-Payment of customs duties and fees
- electronic application for customs refunds.

For cross border transactions, some of the paperless trade measures include:[295]

a) laws and regulations in place for electronic transactions

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[291] United Nations. 'Trade Facilitation and Paperless Trade Implementation Global Report' (2017) <https://unnext.unescap.org/content/un-global-survey-trade-facilitation- and-paperless-trade-implementation-2017> accessed September 5, 2021

[292] ibid

[293] See http://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific.

[294] See survey questionnaire is available in full at: https://unnext.unescap.org/content/un-global-survey-trade-facilitation- and-paperless-trade-implementation-2017

[295] See survey questionnaire is available in full at: https://unnext.unescap.org/content/un-global-survey-trade-facilitation- and-paperless-trade-implementation-2017

b) a recognised certification authority issuing digital certificates to traders to conduct electronic transactions

c) engagement of the country in trade-related cross-border electronic data exchange with other countries

d) Certificates of Origin electronically exchanged between countries

e) Sanitary and Phytosanitary Certificate electronically exchanged between countries

f) banks and insurers in the country receiving letters of credit electronically without lodging paper-based documents.

Of all the paperless trade measures, studies have shown that e-business rules and regulations are an important part of the exchange and legal recognition of information and trade-related data documents in a country and throughout the entire international distribution system.[296]

More than 70 per cent of countries surveyed in the Global Survey on Trade Facilitation and Paperless Trade Implementation 2017[297] have taken steps to promote the legal and regulatory framework needed to support electronic transactions. However, in more than half of these economies, these legal systems are not yet fully developed. Sub-Saharan Africa is underdeveloped, and a legal framework for digital and electronic trade is nearly non-existent. A 2019 report[298] by the United Nations states that implementation is low in sub-Saharan Africa and the Pacific Islands.

Of course, issues related to electronic signatures remain a challenge in sub-Saharan Africa. Although AfCFTA negotiations are scheduled to include a protocol on e-commerce under Phase III – this protocol will establish a common position on digital economy and e commerce – there is yet to be a general Rule for electronic documents which can be used for carriage of goods by any unimodal or multimodal transport in Africa. Most countries are still grappling with the validity of e-signatures. The continent must have a protocol whose remit goes beyond electronic signatures. Issues such as time and place of dispatch and receipt, acknowledgement of receipt, party location, and automated message systems are critical to trade facilitation.[299] The AfCFTA should provide specific provisions to make paperless

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[296] ibid

[297] United Nations, *UN Global Survey on Trade Facilitation and Paperless Trade Implementation 2017* (, 2017)

[298] Digital and sustainable trade facilitation implementation in the UNECE region : UNECE regional report 2019 (United Nations 2020)

[299] UNECA and others, 'Next steps for the African Continental Free Trade Area' *, Assessing regional integration in Africa* (ECA 2019)

trade in AfCFTA acceptable.[300] This should include the use of electronic bills of lading and consignment notes (as the case may be). It is vital that AfCFTA must try to achieve digitalisation and consequently have a positive impact on transportation. African Countries must promote and facilitate the use of transport documents in an electronic format.

The majority of transport operations in Africa use paper documents. The use of paper documents and the lack of digitalisation add to the administrative costs for private and public stakeholders. One study notes that the challenges of implementing electronic documents are (a) limited recognition of electronic transport and (2) development of various incompatible and mode-specific/country-specific models or standards for electronic documents.[301]

It is crucial that issues such as this be addressed to foster the electronic exchange of information in the carriage of goods, particularly multimodal and cross-border transport operations.[302] The use of electronic documents will help improve transport operation reliability, cost-efficiency, competition, and the quality of services.

Issuing and processing paper transport documents is cost-intensive.[303] A large vessel carrying several shippers' goods may have to send several transport documents by courier to the receiver of the goods. Where the goods are traded in transit (this is possible in the case of carriage of goods by sea), the transport documents will continue to travel around the world with accrued cost. As a matter of fact, the use of multimodal transport seems to have accelerated the arrival of goods at their destination. There are times that the goods may even arrive before the documents gets to the custody of the receiver of goods.[304] The carrier in this case may have to wait for the delivery of the document or deliver without the presentation of transport documents. If they decide to wait for the document, it may lead to incurring the cost of warehousing or demurrage.

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[300] Karishma Banga, Jamie Macleod and Max Mendez-Parra. 'Digital trade provisions in the AfCFTA: What can we learn from South-South trade agreements?
' (2021) <https://repository.uneca.org/bitstream/handle/10855/43949/b11990405.pdf?sequence=1&isAllowed=y>

[301] European Parliament. 'Electronic Documents for Freight Transport' (2018) | European Parliament Research Service <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/615673/EPRS_BRI(2018)615673_EN.pdf>

[302] European Commission. 'European Commission inception impact assessment on electronic documents for freight transport
' (2017) <https://ec.europa.eu/info/law/better-regulation/initiative/27172/attachment/090166e5b26c91b3_en>

[303] Athanassios N. Yiannopoulos. 'Ocean bills of lading' (Kluwer, 1996)

[304] Raphael Brunner. 'Electronic Transport Documents and Shipping Practice - Not yet a Married Couple' (2018)

Estimates stipulates that the costs of issuing and processing paper transport documents, including the cost for eventual delays in delivery, could constitute up to 15 per cent of the total transportation costs.[305] Finally, it is easier to fraudulently create a paper transport document than an electronic one. Technologies like blockchain technology can share information in real-time, and all blockchain participants have event information to help detect fraud.[306]

It is therefore expedient that, irrespective of whatever efforts are taken to reduce the costs associated with multimodal transport, digitalisation of the transport documents must be kept in mind to achieve the object of AfCFTA. An electronic document will be faster, easier and more flexible; all these characteristics are essential to trade facilitation and reduction of cost. In fact, further sale, amendment and transfer can easily be achieved from a computer without creating a new paper document. With the advent of e-commerce, global markets and multimodal transport, a solution for electronic documents will be necessary for market access and the digitalisation of trade in West Africa and Africa as a whole.

[305] Amelia H. Boss. 'The International Commercial Use of Electronic Data Interchange and Electronic Communications Technologies' (1991) 46(4) The Business lawyer 1787 <https://www.jstor.org/stable/40687265>

[306] Imogen Brighty Potts. 'Blockchain & Fraud Prevention: What's Holding Back Progress?' (May 5, 2021) <https://www.businessbecause.com/news/insights/7592/blockchain-fraud-prevention?sponsored> accessed September 08, 2021

3 The current status and global understanding of multimodal transport law

3.1 The Concept of Multimodal Transport

3.1.1 The Development of Multimodal Transport and its Rising Importance

The use of integrated multimodal transportation is a relatively old phenomenon, dating back to the early 19th century when the Birmingham & Derby Railway launched an early type of multimodal transport in 1839 with the movement of containers between rail carriages and horse carriage.[307] The concept of Containerisation was introduced in the early 1900s, which consequently revolutionised logistics operations around the world. The New York Central Railway created and launched the first dedicated container service between Cleveland and Chicago in 1921.

Containers for sea transport became popular during the 1960s. Their advent has been ascribed to the creativity of Mr. Malcom McLean,[308] an American in the trucking business who was obsessed with cutting transport cost.[309] McLean was already thinking about the hardships of loading and unloading goods by 1937. In 1953, worried about highway congestion and competition from domestic ship lines, McLean thought about putting truck trailers on ships and ferrying them up and down

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[307] Johan Woxenius, *Development of small-scale intermodal freight transportation in a systems context*, vol 34 (Doktorsavhandlingar vid Chalmers tekniska högskola, 1st edn, Chalmers tekniska högsk 1998)

[308] Abrasheva G, Senk D and Häußling R, "Shipping Containers for a Sustainable Habitat Perspective" (2012) 109 Revue de Métallurgie 381

[309] Marc Levinson, *The Box : How the Shipping Container Made the World Smaller and the World Economy Bigger* (Princeton University Press 2016)
<https://ebookcentral.proquest.com/lib/[SITE_ID]/detail.action?docID=4336792>

the US (United States) coast.[310] On April 26, 1956, the vessel 'SS Ideal X' made its first commercial voyage from the Port Newark to Houston. It was loaded in just three hours, showing that container shipping could drastically reduce transportation cost.[311] Clearly, one of the most obvious advantages of the shipping container is that it makes the loading and unloading process easier and enables the rapid succession of different modes of transport.[312]

The invention of containers and the containerisation of cargo grew further as a means of 'door-to-door' transport, spurred on by the development of the Piggyback System where trailers themselves were carried aboard specialised 'flatcars'.[313] In 1965, just 5% of the ocean liners' cargo traveling between Europe and the United States was transported in containers; by 1975, estimates range from 50% to as high as 80%–85% of that cargo being containerized..[314]

Although it can be argued that multimodal transport existed before the introduction of shipping containers, the use of containers has aided the growth of multimodal transport and provided further reasons to develop it. The reason for this assertion is that the term multimodal transport gained increased popularity with the advent of the container in the 1960s.[315]

Arguably, containerisation can be referred to as the bedrock for developing multimodal transport, considering that most multimodal transport contracts use containers as the physical unit in which goods are transported. As Bissell states:[316]

> The theory of intermodal transport is based on the consolidation of several breakbulk units into a single interchangeable transportation unit that can be carried via a

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[310] Abhinayan Basu Bal. 'Multimodal Aspect of the Rotterdam Rules a critical analysis of the liability of the MTO' (Lund University 2011)

[311] Levinson, *The Box : How the Shipping Container Made the World Smaller and the World Economy Bigger*

[312] F Broeze The Globalisation of the Oceans: Containerisation from the 1950s to the Present (Research in Maritime History no 23 International Maritime Economics History Association St John's Newfoundland 2002) ch 1 `A Concept and its Realisation' p 9±25.

[313]R. Banomyong. 'Multimodal transport corridors in South East Asia: a case study approach (BL)' (ProQuest Dissertations Publishing 2001)

[314] Edward Schmeltzer and Robert A. Peavy. 'Prospects and problems of the container revolution' (1970) 1(2) Journal of maritime law and commerce 203 <http://www.econis.eu/PPNSET?PPN=485225336>

[315] Pierre-Jean Bordahandy. 'Containers: a conundrum or a concept?' (2005) <http://hdl.handle.net/2440/33803>

[316] Tallman Bissell. 'The Operational Realities of Conternerization and their effect on the Package Limitation and the "On Deck" Prohibition : Review and Suggestion' (1970) 45 Tulane Law Review 902

<https://search.proquest.com/docview/1291672721>

combination of modes of transportation under a single document and a single freight charge, from the shippers' warehouse.

The container is the interchangeable unit, which it was hoped would prove to be the integrating element of an intermodal system.

Before the advent of containers, most cargoes were carried by unimodal transport, and transportation of goods was majorly carriage of goods from one place to another. It entailed unpacking and transferring goods from one mode to another, which was slow and thus led to loss, damage and, at times, theft during the interface points.[317] Liabilities in unimodal carriages were consequently governed by liability regimes for the carriage of goods by air,[318] rail,[319] road,[320] and Sea,[321] depending on the unimodal carriage in which the loss occurred.

With the advent of containers and technological developments in improving the systems for transferring cargo between different modes, the practice of carrying goods using different modes of carriage expanded. Shippers and consignees frequently prefer to deal with a single party, known as a Multimodal Transport Operator (MTO), who arranges for the transportation of goods from door to door and bears contractual responsibility throughout, regardless of whether the goods are transported by the same party at each stage. Also, for many transport users, the issue of delay in delivery has become important – more particularly in connection with efficient supply chain management.[322]

3.1.2 Definitions of Key Concepts

3.1.2.1 Multimodal Transportation

When discussing international multimodal transport, there is little agreement as to the appropriate defining language, with such phrases as 'multimodal transport,'

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[317] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

[318] The Warsaw Convention for the unification of certain Rules relating to international Carriage of goods by air, 1929. As amended by the Hague Protocol, 1955 and of recent, the Montreal Convention on the unification of certain rules for carriage by air, 1999.

[319] Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), 1980.

[320] Convention on the Contract for the International Carriage of Goods by Road 1956, as amended by the Geneva Protocol 1980 (CMR)

[321] The International Convention for the Unification of Law Relating to Bills of Lading, 1924 (Hague Rules), as amended by The Hague Visby Protocol of 1968 and the SDR Protocol of 1979.

[322] Unctad Report. '*Multimodal Transport: the Feasibility of an International legal Instrument* (United Nations Conference on Trade and Development January 13, 2003)

'combined transport,' 'through transport,' and 'intermodal transport' used interchangeably and somewhat loosely.[323] However, the most popular term is 'multimodal transport'.

Multimodal Transport has been defined by several literatures. However, in the past decades, the transport world seems to have achieved unanimity in defining international multimodal carriage as the carriage of goods, by at least two different modes of transport, on the basis of a single multimodal transport contract, from a place in one country where the goods are taken in charge by the carrier, to a place designated for delivery situated in a different country.[324]

The United Nations Convention on International Multimodal Transport of Goods ('1980 MT Convention') defined International multimodal transport thus:

> International multimodal transport means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country[325]"

Similar to this definition, Vogel defines Multimodal transport as the transport of goods by at least two different modes of transport on the basis of a single multimodal transport contract.[326]

Alessandra Xerri[327] defines Combined Transport as a contract whereby the carrier undertakes to transfer goods from one place to another using two or more different modes of transport, against the payment of a single freight and the issuance of a single transport document.

The UNCTAD/ICC[328] rules does not expressly define multimodal transport. Rather, they define a multimodal transport contract.

Rule 2.1 of the UNCTAD/ICC Rules[329] states that:

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[323] D Rhidian Thomas. 'Multimodalism and through Transport - Language, Concepts, and Categories' (2012) (761) Tul. Mar L.J

[324] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[325] The United Nations Convention on International Multimodal Transport of Goods, Geneva. May 24, 1980"

[326] R. Vogel. 'Multimodal Transport: Impact on Developing Countries' 6(1) Ocean Yearbook Online 139 <http://booksandjournals.brillonline.com/content/journals/10.1163/221160086x00103>

[327] Alessandra Xerri. 'Combined Transport: A New Attempt At Unification' (1980) os-8(2) Uniform Law Review 138

[328] United Nations Commission on Trade and Development (UNCTAD) / International Chamber of Commerce (ICC)

[329] UNCTAD/ICC Rules for Multimodal Transport Documents 1992 (UNCTAD/ICC Rules).

[a] multimodal transport contract means a single contract for the carriage of goods by at least two different modes of transport

A careful look at the definition of multimodal transport contract in the UNCTAD/ICC Rules shows some similarities in the definition with the 1980 Multimodal Transport Convention.

Although the UNCTAD/ICC Rules 1992 rules do not provide a definition for multimodal transport, the ICC Uniform Rules for a Combined Transport Document 1975 (ICC Rules 1975), which are the predecessor of the UNCTAD/ICC Rules 1992, provide for the definition of combined transport thus:[330]

> combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country.

The Inland Transport Committee of the UNECE Secretariat defines intramodality as 'a system of transport whereby two or more modes of transport are used to transport the same loading unit or truck in an integrated way, without loading or unloading, in a [door-to-door] transport chain'.[331]

From all of the above definitions, it is important to note that in multimodal transport there is a prerequisite for at least two different modes of transportation. In addition, such carriage must be carried under one single international contract with one carrier being responsible for the entire transport, and this carrier must assume responsibility as principal in such contracts.[332]

For the sake of this work, the definition of multimodal transport in the 1980 MT Convention will be used as the working definition for multimodal transport.

3.1.2.2 Multimodal Transport Operator

A Multimodal transport operator ('**MTO**') is any person who, on their own behalf or through another person acting on their behalf, concludes a multimodal transport contract, and who acts as a principal, not as an agent or on behalf of the consignor or the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.[333]

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[330] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[331] Terminology on Combined transport (Trans/WP.24/2000/A, 1.2.2000, Para 1.2) For the European railway industry, combined transport refers to bimodal transport by road and rail.

[332] ibid

[333] Economic Commission for Africa, 'An overview of multimodal transport development in Africa' (2003)

The 1980 MT Convention defines the MTO in Art 1(2) as:

> any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as principal not as agent or on behalf of the Consignor or of the carriers participating in the multimodal transport operation and who assumes the responsibility for the performance of the contract.

The UNCTAD/ICC Rules for Multimodal Transport Document defines the MTO in rule 2.2 as,

> any person who concludes a multimodal transport contract and assumes the responsibility for the performance thereof as carrier.

In other words, the MTO is any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.

From the above definition, it is noteworthy that a major distinguishing factor of an MTO is that they must voluntarily assume the responsibility of the goods as principal, making them personally liable for any loss, delay or damage to the goods throughout the transport to the final destination. However, as the principal, the MTO may, on their own volition, decide how to effect carriage. They might choose to:

1. effect the whole carriage personally
2. sub-contract the whole to other carriers
3. personally carry some parts while contracting out other parts of the contract.[334]

In recent times, it has become increasingly common to see MTOs operate or control deep-sea vessels, railways, inland waterway barges and means of road transport. Many of them no longer confine their functions to providing transportation and have become specialists in logistics. Some MTOs may be involved in the entire distribution system used by manufacturers and retailers.[335]

Notwithstanding this recent development, the MTO may not own or control the modes of transport. He may be a non-vessel operating carrier (NVO), or a non-vessel owning common carrier (NVOCC). In such instances, the operator will enter

[334] Besong. 'Towards a modern role for liability in multimodal transport law'

[335] Diana Faber. 'The problems arising from multimodal transport' (1996) (Pt 4) Lloyd's maritime and commercial law quarterly

into agreements with subcontractors, e.g., unimodal carriers and terminal operators.[336]

The role of MTOs cannot be overemphasised in multimodal transport. Apart from ensuring a secure, personal and straightforward transportation of goods, MTOs are viaduct to the gaps created by differences in cultures, languages, and commercial practices.[337] An MTO's liaison role has further enhanced the accessibility and demands of multimodal transport from regions outside the MTO's immediate surroundings.

3.1.2.3 Multimodal Transport Document

A multimodal transport document is the document that evinces a multimodal transport contract, receipt of goods by the multimodal transport operator, and a promise to deliver the goods in accordance with the terms of the contract.

3.1.3 Attributes of Multimodal Transportation

3.1.3.1 A Single Contract

One very important attribute of multimodal transport is that the carriage is based on one single contract between a MTO and a shipper. This implies that a multimodal transport contract is the head contract, which will govern the relationship between the multimodal carrier and the consignor or consignee.[338] The MTO may either perform the various portions of the multimodal carriage itself or may subcontract with unimodal carriers for the various legs of the route. However, one salient issue in a multimodal carriage is that, in case of loss or damage, the MTO is liable to the shipper.[339]

A contract which merely links different modes by combining contracts cannot be said to be a multimodal carriage contract.[340] Accordingly, a true multimodal carriage

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[336] Samir Mankabady. 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) International and Comparative Law Quarterly 120 <http://journals.cambridge.org/abstract_S0020589300040215>

[337] Economic Commission for Africa, 'An overview of multimodal transport development in Africa'

[338] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

[339] Kurosh Nasseri. 'The Multimodal Convention' (1988) 19(12) Journal of Maritime Law and Commerce, <https://heinonline.org/HOL/Contents?handle=hein.journals/jmlc19&id=1&size=2&index=&collection=journals>

[340] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

is not a chain of contracts glued together but a seamless contract evidenced by one document irrespective of who has the goods for carriage and the modes of carriage.

> The idea of multimodal transport is to unite under a single contract of carriage a series of ancillary contracts needed to carry goods from one place to another, with one person assuming liability for the whole journey, instead of issuing several documents.

Although a shipper can conclude series of single contracts with different unimodal carriers, that contract will be subject to a variety of national or international law terms, depending upon the transportation regime to which the goods may be subject at any particular time. As such, the liability regime may remain unclear in certain situations, which will be discussed in this study[341]

3.1.3.2 Multiple Modes of Transport

Looking at the operational definition of multimodal transport in this work, it is clear that the performance of a multimodal transport contract involves at least two different modes of transport. Flowing from that, it would be apposite to consider exactly what 'Modes' means. Would the 'mode' referred to in Article 1 of the 1980 MT Convention be determined by the conveyance (ship, train, truck or plane) or the method of carriage (air, sea, and road) or both?[342] Unfortunately, the 1980 MT Convention fails to define the word 'mode'. Article 1(2) of the Draft Convention on the International Combined Transport of Goods, better known as the 'TCM draft'[343] seems to suggest that modes would be 'Transport by sea, inland waterways, air, rail, and road'.

Some scholars have suggested that the legal regime is the differentiating element in determining a mode of carriage.[344] This postulation insinuates that the number of modes would strictly be decided on the number of unimodal regimes applicable to each contract of carriage.[345]

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[341] William Driscoll and Paul B. Larsen. 'The Convention on International Multimodal Transport of Goods' (1982) 57(2) Tulane Law Review 193 <https://search.proquest.com/docview/1291701014>

[342] Besong. 'Towards a modern role for liability in multimodal transport law'

[343] This draft was the product of the UN/ECE and the Intergovernmental Consultative Organization (IMCO) during 1970 and 1971, and came to be known as the "Draft Convention on the International Combined Transport of Goods", better known as the "TCM draft

[344] Ralph DeWit. 'Multimodal transport: carrier liability and documentation' (London [u.a.]: Lloyd's of London Press)

[345] Besong. 'Towards a modern role for liability in multimodal transport law'

Besong[346] argues that the use of a legal regime as a determinative factor is artificial, considering that two different legal regimes might govern a single carriage by a single carrier, or a single regime may apply to different modes of carriage.

A good example of the above is Article 2(1) of the Convention on the Contract for the International Carriage of Goods by Road ('CMR') which states that:

> Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage…

In such an instance, although the carriage is by two means of transportation, just a single legal regime – the CMR – would apply. A similar issue arises in Article 2(2) of the CIM/COTIF Convention, which extends its scope beyond railway carriage. Article 2 (2) states that:

> The system of law provided for in 1 may also be applied to international through traffic using in addition to services on railway lines, land and sea services and inland waterways. Other internal carriage performed under the responsibility of the railway, complementary to carriage by rail, shall be treated as carriage performed over a line, within the meaning of the preceding subparagraph. [Emphasis mine]

Clearly, the use of the legal regime as a determinative factor cannot be a sufficient criterion to determine and define 'modes'.

Some scholars believe that a mode should be determined by the number of carriers. This subjective consideration is applicable only in Italian doctrine and case laws, which have had regard only to the multiplicity of the carriers and not the variety of the modes of transport.[347] This means that a multimodal carriage will be said to have occurred when two carriers carried goods, even in instances where only one conveyance was used. For instance, where Carrier A transports goods from Malmo to Copenhagen by sea, and Carrier B transports from Copenhagen to London by sea, such would amount to multimodal transport under this doctrine despite the fact that the whole transport took place by sea.

The most popular method of defining modes has been the method of carriage; however, this is not devoid of unclarities. One major question is that of what medium of carriage may be construed as a method of carriage? Would it be the

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[346] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

[347] Xerri. 'Combined Transport: A New Attempt At Unification' 138

medium in which transportation takes place – as air, land or water – or the medium/means of transportation, such as ships, truck, etc.? Using the medium in which transportation takes place would not efficiently define the term 'modes' in multimodal transport carriage. Rail and road carriage are usually on the land while sea and inland waterway carriage are on water. This means defining mode by such parameters would lead to an incongruous result. More importantly, in unimodal transport, carriage by inland waterways, sea, road and rail are all deemed separate modes of transport.[348]

In relation to the medium of transportation, there have been hypothetical questions from academics such that if oil is conveyed from a field in country A through a pipeline to a seaport, then from there by ship to country B, is that multimodal carriage? Scholars as Mankabady[349] submit that this hypothetical case is an instance of multimodal transport because a pipeline is a mode of transport. As stated above, the 1980 MT Convention does not define modes of transportation; however, it does not appear that pipeline was intended to be part of the methods of carriage in multimodal transport.

Another nagging issue is the issue of inland waterways and sea as the same means of transportation. De Wit submits that the transport of goods by one medium is unimodal if the goods are not transhipped. He contends that if a transport consists of a sea stage and an inland waterway stage without a transfer of the goods between the two from the sea-going vessel to a barge, such transportation would at best be a unimodal transport. Other scholars, such as Haak,[350] contend that the means of transportation used does not carry that much significance. Haak argues that medium is the decisive factor, and inland waterways and maritime waters are not considered the same medium. In Haak's opinion, transport by inland waterway and sea in one vessel is multimodal transport and not unimodal transport.

Mankabady submits that where goods are being carried by sea and lifted in and out of the mother ship to the barges at each end of the voyage by a crane on the mother ship for the barges to continue to inland points, since barges are considered part of the mother ship or as 'floating containers', this will be taken to be unimodal transport. The opposite view will regard the barges as separate units going through rivers or lakes and the system is a combination of sea and inland voyages. Consequently, the transport should be considered as multimodal.

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[348] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[349] Mankabady. 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' 120

[350] Haak, Zwitser & Blom 2006 ▪ K.F. Haak, R. Zwitser & A. Blom, Van haven en handel, Deventer: Kluwer 2006 (Cited by Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods')

Academics like De Wit[351] are of the view that mode is made up of two components: (1) the type of vehicle used and (2) the medium used. He argues that one on its own cannot constitute 'mode' and would not effectively define the concept of multimodal transport.

Clearly, it appears that there is no universally agreed standard of how a mode would be defined in multimodal transport. This research submits that the use of mode as the determinative criteria in the definition of multimodal transport is based on the traditional form of transport (such as sea, air and road, rail and inland waterway) in which the different vehicles used in the transportation were a determinative criterion. For the purpose of this work, the mode of transportation will be determined by the traditional form of transport.

3.1.3.3 Responsibility of a Single Carrier

The definition of multimodal transport stipulates that the person contracting with the cargo interest undertakes responsibility for the whole carriage of goods using different modes of transportation.[352]

In multimodal transport, the MTO must accept responsibility for the whole carriage of the goods.[353] In practice, the MTO may carry the goods themselves or subcontract this.[354] However, what is most pertinent is that where there is a loss or damage the MTO is responsible to the shipper. The carrier (the MTO) may subcontract to individual carriers, road, rail, shipping lines, port authorities, terminal operators, stevedores, and others after taking on carriage obligation in their name and not the shipper's or consignee's. [355] The MTO must deliver the goods at the destination in good condition. They are obliged to co-ordinate all modes of transportation used in the performance of a multimodal transport contract and determine the most favourable route for the carriage.[356]

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[351] DeWit. 'Multimodal transport: carrier liability and documentation'

[352] Diana Faber. 'The problems arising from multimodal transport'

[353] Ross Masud. ' The Emerging Legal Regime for Multimodal Transport' (1992) Int'l Bus. L.J. <HeinOnline> accessed Sat Jan 12 09:07:29 2019

[354] It is possible for a carrier to accept responsibility of the whole carriage without carrying out any of the carriage. See the case of Transcontainer Express Ltd v Custodian Security Ltd [1988] 1 Lloyd's Rep 128

[355] Banomyong. 'Multimodal transport corridors in South East Asia: a case study approach (BL)'

[356] Caroline Colebunders. 'Multimodal cargo carrier liability and insurance: in search of suitable regime' (Faculteit Rechtsgeleerdheid Universiteit Gent 2013)

3.1.3.4 Unspecified Modes of Carriage – an Indispensable Feature of Multimodal Transport?

From our above definition of multimodal transport, it is undisputed that multimodal transport is transport with two or more modes. However, there is no requirement that the modes to be used must be stated in the multimodal transport contract.

Some scholars opine that one of the features of a multimodal contract of carriage is the freedom of the carrier to choose by what mode of transportation the carriage would be operated.[357] In such instances, the multimodal carrier concludes the carriage contract in their own name, but has the liberty to choose not only the means of transportation but also the route to be taken by the subcarriers.[358] This non-specification of modes is asserted to be what makes multimodal transport different from unimodal transport.

This argument seems to have started in the early 1970s, when Lord Diplock recommended that it is more desirable for the modes to be left out in multimodal transport[359]

Proponents of not specifying the mode in a multimodal contract, as an attribute of a multimodal contract, state that the rationale behind multimodal transportation is to resolve the problems associated with choosing the best mode of transport or combination of modes.[360] This view seems to have gained acceptance because most multimodal transport contracts presently in use contain clauses to the effect that choice as to the mode(s) to be used is not important.[361]

Notwithstanding the above, it is asserted here that the whole concept of carrying goods without specifying the means of transportation is called unspecified contract of carriage. An optional contract of carriage is one in which the carrier has the right to replace the mode of transportation that was originally planned for the carriage of the goods entrusted to him with another mode of transportation.[362] It is not uncommon that parties agree upon carriage of goods (unimodally or multimodally)

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[357] Thume Kommentar zur CMR 1994 ▪ K.-H. Thume (ed.), Kommentar zur CMR, Heidelberg: Verlag Rechtund Wirtschaft 1994

[358] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[359] Lord Diplock, Genoa Conference on Multimodal Transport (1972) 74 Diritto Maritimo.

[360] Besong. 'Towards a modern role for liability in multimodal transport law'

[361] The FIATA Multimodal Transport Bill of Lading, Clause 11 states that: *Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods*.

[362] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

without specifically agreeing on the means of transport,[363] or giving an option to substitute the mode of transportation.

Scholars like Hoeks[364] submit that the freedom to choose the mode of transportation should not be treated as one of the main characteristics of a multimodal contract of carriage. The scholars of this school of thought believe that an unspecified contract or optional carriage may be either unimodal or multimodal, and so this is not peculiar to multimodal transport. Logically, this seems correct. The carrier may decide to carry the goods by one (thus making it unimodal) or two (multimodal) modes of carriage because the contract does not specify the mode of transportation. An unspecified or optional contract must have been carried by two modes of transport before it could be said to be multimodal. A good example of an optional carriage turned multimodal is the case between *Quantum Corporation Ltd v. Plane Trucking Ltd and Air France*.[365]

The facts of the case were that in September 1998, Air France issued a Singapore air waybill to Quantum Corporation, allowing them to transport hard disk drives from Singapore to Dublin.

The plan was scheduled to fly from Singapore to Paris, and then from Paris to Dublin by road and across the Irish Sea. The master air waybill contained this information. The air waybill had a liberty clause which states that:

> all goods may be carried by any other means including road or another carrier unless specific contrary instructions are given hereon by the shipper.

The trial judge, Tomlinson J, declared the contract was a contract by air carriage, thus making it a unimodal contract carriage by air. However, the Court of Appeal upturned this decision, holding that the contract was multimodal in nature because the contract recorded in the air waybill evidenced two stages of transport, the first to be performed by air, and the second by trucking, unless Air France chose to substitute another mode of transportation as permitted by their terms.

The above means that optional and unspecified contracts are not uncommon in practice. Previously, shippers found it preferable to enter a transport contract stating the modes of transport. However, the world has since moved away from this and

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[363] Leendert van Hee. 'The applicability of the CMR Convention from a Dutch perspective' (2017) <https://www.vantraa.nl/en/know-how/the-applicability-of-the-cmr-convention-from-a-dutch-perspective/> accessed February 2, 2019

[364] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[365] [2001] 2 Lloyd's Rep. 133

shippers are now more interested in the efficiency of carriage rather than the mode of carriage, hence the proliferation of this kind of contract.

The consensus by transport stakeholders is that the freedom to choose the mode is not considered an indispensable element of a contract of multimodal transport; however, it is desirable that modes should be left unspecified in a multimodal transport contract.

3.1.4 Multimodal Transport in the Context of Service

A multimodal transport system is an 'integrated logistics service provided by the MTO, including transportation, facilities, and communication and information functions in an international transport operation'.[366] Multimodal transport services have taken over traditional logistics, which have now become included in multimodal transport services. Multimodal transport gives room for service providers to optimise service with a possible reduction of cost to the company, which may positively affect the economy at large.[367]

Traditionally, services provided by MTOs are restricted to just container activities, such as full container load (FCL), less than container load (LCL), and consolidation services.[368] However, due to evolution and change in market trends, these traditional services are insufficient. Customers have continually clamoured for an increase in services that were usually not in the traditional services offered by MTOs. Multimodal Transport Operators may now provide services related to the use of information and communication technology (ICT)[369] and infrastructural capability, security and safety, coherent trade and transport facilitation measures, and market access.[370]

Accordingly, multimodal transport now includes complex forms of collecting, storage, transhipment and value-added logistics activities. This increasing complexity has encouraged much greater use of information technology to implement sufficient control of transport operations and inventory management in acquiring effective and efficient results.

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[366] Poti Chao. 'Impact of multimodal transport service value and relationships on business performance: the Thai shippers' perspective' (Cardiff University 2011)

[367] P. Faust, 'Multimodal Transport' in H. L. Beth (ed), *Port Management Textbook - Containerization* (Institute of Shipping Economic 1985) 219

[368] Cheong Yun Wan, *The practitioner's definitive: multimodal transport / The Singapore Logistics Association with Cheong Yun Wan in consultation with Stanley Lim and Thomas Sim* (Guides to international logistics. The Singapore Logistics Association 2006)

[369] Multimodal Transport operators may now use Electronic means of communication to exchange information, enter into contracts and trace goods during transit.

[370] UNCTAD, *Development o f Multimodal Transport and Logistics Services* (UNCTAD, 2003)

According to Kent and Flint (1997), logistics terminology has evolved in six eras, namely: (i) farm to market, (ii) segmented functions, (iii) integrated functions, (iv) customer focus, (v) logistics as a differentiator, and (vi) behaviour and boundary spanning (see the table below).[371]

Era Chronological Order	***Major Influences***	***Major Characteristics***	***Transport Evolution***
Era 1: Farm to Market (1916 – 1940)	*Agricultural Economics*	Farm to market, transportation, steam engine	***Unimodal Transport***
Era 2: Segmented Functions (1940 – 1960)	*Military*	In-bound and out-bound transport, wholesaling, inventory, physical distribution, international combustion	***Intermodal Transport***
Era 3: Integrated Functions (1960 – 1970)	*Industrial Economics*	Total cost, systems approach, integration of logistics	***Combined Transport***
Era 4: Customer Focus (1970 – 1985)	*Management Science*	Customer service, inventory carrying, productivity, link node	
Era 5: Logistics as a Differentiator (1985 – Present)	*Information Technology* → *Management Strategy*	Integrated supply, logistics channel, globalisation, reverse logistics and environmental logistics	***Multimodal Transport***
Era 6: Behavioural and Boundary Spanning (Future)	*Marketing* → *Social Science*	Service response logistics, behavioural aspects of interfirm, theory development	***Current research***

A look at the table above demonstrates that traditional services are not enough in modern multimodal transport. Presently, Multimodal transport operators must do more than just segmented functions. Simply transporting goods from origin to destination is no longer sufficient in the transport chain.

Multimodal transport is an integrated part of logistics services provided by the MTO.[372] Although there are different forms of logistics and transport practiced today, transport decision-making elements, such as safety and social regulation, escalating customer expectations, increased globalisation, improved technologies, and labour and equipment shortages in MTS are dependent upon a set of transport

[371] Chao. 'Impact of multimodal transport service value and relationships on business performance: the Thai shippers' perspective' (Cardiff University 2011)

[372] R. Banomyong. 'Multimodal transport corridors in South East Asia: a case study approach (BL)' (ProQuest Dissertations Publishing 2001)

service requirements. This has created 'an array of new challenges and opportunities in the current business environment'.[373]

Large liner shipping and logistics service provider companies – such as Maersk, Evergreen, Hanjin Shipping, NYK Line, P&O Nedlloyd and Yang Ming Line – see themselves as multimodal transport providers with integrated logistics services activities to meet customer needs.[374] Most importantly, such integration of services will help create a highly competitive market for these players.

Henstra and Woxenius[375] note that shippers generally do not specifically demand unique transport modes but rather transport performance, such as door-to-door service, from the MTO. Nevertheless, these services might vary in accordance with geographical location-to-location features, economic development of the country and other factors.[376]

In conclusion, multimodal transport has evolved from being just a mode of transport and is now an integrated service offered to transport customers.

3.1.5 Theories of Multimodal Transport

There has been continuous discussion in academia about the status of multimodal transport. Is it a contract 'sui generis', meaning it has no link with unimodal transport? Or is it a 'mixed contract', meaning that multimodal contract is a combination of a series of unimodal transport contracts? Or it could be an '**absorbed contract**', where a multimodal transport contract is divided into two types – a dominant contract and other subordinate modes of transport[377] – thus using the dominant mode to determine which legal instrument is applicable to the case.

3.1.5.1 The Sui Generis Theory

The word *sui generis* means 'of its own kind or class'. It means something peculiar.[378] The theory of sui generis stipulates that multimodal transport contracts

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[373] Theodore P. Stank and Thomas J. Goldsby. 'A framework for transportation decision making in an integrated supply chain' (2000) 5(2) Supply chain management 71 <https://www.emerald.com/insight/content/doi/10.1108/13598540010319984/full/html>

[374] Chao. 'Impact of multimodal transport service value and relationships on business performance: the Thai shippers' perspective' (Cardiff University 2011)

[375] Dirk Henstra and Johan Woxenius, *Intermodal transport in Europe*, vol 112 (Meddelande / Chalmers tekniska högskola, Institutionen för transportteknik, Chalmers tekniska högsk 2001)

[376] Alex Kuen-Chor Wong. 'The development of multimodal transport systems in China' (Cardiff University 1997)

[377] This theory is similar to *Gesamtbetrachtung in Germany, see Hoeks 57*

[378] Henry Campbell Black and Bryan A. Garner, *Black's law dictionary* (10th edition edn, Thomson Reuters 2016)

are contracts independent of all unimodal carriage of goods.[379] This theory views a multimodal contract as new and unique, and formed by several other contracts into a new contract.[380]

Those who believe in the sui generis doctrine have held on to this view on the justification that the multimodal contract is not simply a contract of carriage but may include other services, such as transferal and storage.[381] The greater burden of obligations afforded to a person who takes responsibility for the contract is one major reason proponents of this theory prefer to specify the multimodal carrier as a 'multimodal transport operator' or combined transport operator (CTO) instead simply as a carrier.[382] It is argued that the MTO as a carrier takes it upon themself to perform services that could all be the subject of separate contracts, but which are connected in such a manner that they form one indivisible whole.[383] It is submitted that the activities of the carrier may not be regarded as the characteristic performance of the contract, and they may not determine the legal nature thereof.[384]

Another argument for viewing multimodal contract as a contract sui generis may be based on the idea that unimodal contracts are confined to transportation where a single mode is employed. Once there is a combination of modes in the contract, such contract is no longer capable of being identified with any of the single modes of which is it is made up and as such there is no common ground with a unimodal convention.[385] This argument may be tenable with respect to some unimodal conventions, such as the CMR in jurisdictions such as Germany where the German Supreme Court refused to apply CMR to a multimodal carriage.[386]

In a case involving carriage of 24 containers from Tokyo by sea to Rotterdam and from Rotterdam by road to Monchengladbach (Germany), one container, containing 50 photocopiers, fell from the vehicle during the road transport. Cargo-underwriters sued the (Japanese) main carrier before the LG Monchengladbach, being the court of the place of delivery under the multimodal agreement. Relying on the waybill, which contained a clause granting the Tokyo District Court jurisdiction, the carrier contested the jurisdiction of the German court. The Bundesgerichtshof (BGH)

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[379] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law' (University of Southampton 2018)

[380] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[381] ibid

[382] ibid

[383] ibid

[384] Daniel Dąbrowski. 'The multimodal carrier's liability for non-localized loss' (2016) 36 Zeszyty Naukowe Uniwersytetu Szczecińskiego Problemy Transportu i Logistyki 2039

[385] David A. Glass, 'Multimodal Transport: Carrier Liability and Documentation' (LLP Limited 1997) 165

[386] BGH 17 July 2008, TranspR (2008), 365-368; ETL (2009), 196.

rejected the jurisdiction of the German courts, stating that CMR is in principle not autonomously applicable to multimodal contracts of transport except indirectly by means of national German law.[387] The same position has been reached by the Dutch Supreme Court in the Godafoss case, which stated that Article 31(1) was held not to apply to a contract covering carriage by sea from Reykjavik to Rotterdam with on-carriage by road to Naples.

However, the argument that a unimodal convention cannot, without loopholes, be applicable to multimodal transportation may not be entirely correct, Article 1(6) of the Hamburg Rules and Article 38 of the Montreal Convention already envisages the possibility of application of the unimodal rules to multimodal transport. It is, however, imperative to note that, with respect to the Montreal Convention, it is arguable that the Montreal Convention does not expand the rules to the Multimodal Convention except when agreed by parties.[388] Article 38(1) of the Montreal Convention is subject to the second and third sentences of Article18(4), which exceptionally provide for the application of the Montreal Convention 1999 outside the aerial segment in the cases of unlocalised loss, damage or destruction and unauthorised substitution of mode of transport.[389]

One other shortcoming of the sui generis rule is that, to effectively implement the sui generis rule, it would be necessary to completely avoid of the existing mandatory unimodal carriage law, which is unwanted because there is no international law governing multimodal contracts so as such, contracting parties would be left to define the aspects of their agreement contractually. However, a beneficial result of this approach is that there would be no conflicts and inconsistencies between a future treaty governing international multimodal carriage and (most of) the already-existing transport agreements.[390]

The case of a contract sui generis approach was adopted in preparing 1980 MT Convention was adopted although it appeared to have been departed from when one considers the provision of Article 19[391]. What is clear from the 1980 MT

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[387] This point of view is predominant in German doctrine but had not been expressed by any German Court before. See Krijn Haak, Carriage Preceding or Subsequent to Sea Carriage under the Rotterdam Rules, 2 EJCCL 63 (2010)

[388] See Article 38 of the Montreal Convention

[389] George Leloudas. 'Door to door application of the international air law conventions' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 3680

[390] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' 62

[391] It has been suggested that the intention behind Article 19 is to place the cargo owner in the same position that he would have been in had he concluded a contract under the appropriate unimodal regime. This is particularly relevant to situations in which a sea leg is included, in which the limits would have been lower.

Convention is that the relationship between the shippers and the MTO differs from the relationship between the shippers of the modal carriers;[392] However, due to the MT Convention's failure to gain traction, and the lack of an international mandatory convention governing multimodal transport, the sui generis approach appears to be losing favour.[393]

Although, the sui generis theory would be desirable for uniformity purposes and also as an international convention regulating multimodal transport, it would be quite exacting and would create a legal problem by pushing aside all unimodal connections.

3.1.5.2 Mixed Contract Theory

A mixed contract stipulates that a multimodal contract is a series of unimodal transport contracts, or a chain of contracts, thus subjecting the contract to the application of unimodal transport. Mixed contract theory admits that a multimodal contract is a series of unimodal transports and each of those stages of transportation should be regulated by the unimodal conventions.

This mixed approach is identical to the network approach to liability.[394] This approach implies that several unimodal liability systems would be applicable depending on the stage at which the loss or damage occurred. This liability system is described as a network system and is normally supplemented by a fall-back clause for situations where the event causing loss, damage or delay is not localised.[395]

Due to the absence of a uniform international convention, the majority of the rules and laws regulating multimodal transport perceives multimodal transport as a mixed contract. The UNCTAD/ICC Model Rules for Multimodal Transport Documents adopt the mixed contract theory and provide that where the unimodal stage of the transport where a loss occurs can be established, the liability shall be limited according to national or international law, which would have applied mandatorily if a separate (unimodal) contract had been made for that stage.[396] The Rotterdam

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By acting in this manner, this convention deviates from its starting position, which was that of a carriage mode that is unique to itself (Sui Generis).

[392] Driscoll and Larsen. 'The Convention on International Multimodal Transport of Goods' 193

[393] Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability'

[394] The network approach is a system used to determine the liability of the multimodal carrier based on the international or national unimodal liability rules and conventions relevant to the stage of the transport to which a particular loss can be attributed.

[395] Eftestøl-Wilhelmsson Ellen, Bask Anu and Rajahonka Mervi. 'Intermodal Transport Research: A Law and Logistics Literature Review with EU Focus' (2014) Vol. XLIX (No 6) European Transport Law 609

[396] See Rule 6.4 of the UNCTAD/ICC Model Rules for Multimodal Transport Documents

Rules, which is a wet multimodal convention, also adopts the mixed contract theory.[397]

This theory is far from ideal, though, as it leaves cargo owners unsure of their liability cap. Liabilities in such cases, where losses happen in connection with various modes of transportation, differ and are solely based on the stage at which the loss occurred. Another problem with this theory is that there would be times when, in the event of a future multimodal transport convention, certain parts of the carriage would be subject to unimodal transport conventions while other parts would be subject to the multimodal convention.[398] Clearly, that would not be a desirable outcome given the intention of unifying the liability regime under unimodal transport.

The theory of mixed contract has been abolished in the United States of America. The American Supreme Court, in the case of Norfolk & Southern Railway v James N. Kirby, Pty Ltd[399] abolished the 'mixed contract' doctrine as it applies to multimodal shipments. The Kirby case insists that only one legal system be used in one contract of carriage, even where the contract is a multimodal transport contract,[400] as the legal situation creates uncertainty regarding when to apply which liability regime.[401]

3.1.5.3 Absorption Theory

The absorption theory stipulates that the 'subordinate' aspects of the contract are 'absorbed' into this main element.[402] According to this theory, the dominant mode of the contract defines which regime applies to the entire contract, while the other, subordinate modes are absorbed into the dominant part. The most common criterion used in determining the predominant mode is the length of each stage of transport and the aim of the stage of transport (delivery to the seaport, delivery to the airport, transportation between airports or seaports, etc.).[403] Consequently, this theory is

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[397] See Article 26 of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules); see Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability'

[398] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law'

[399] 543 U.S. 14 (2004)

[400] Michael E. Crowley. 'The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem,' 1461

[401] Ellen, Anu and Mervi. 'Intermodal Transport Research: A Law and Logistics Literature Review with EU Focus' 609

[402] Leloudas. 'Door to door application of the international air law conventions' 368; Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[403] Daniel Dąbrowski. 'The Multimodal Carrier's Liability for Unlocalised loss' (2016) Problemy Transportu i Logistyki. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3155493>

meant to be used in situations where the elements of the various modes are not of equal weight.[404]

One major setback of this theory is that once the dominant aspect of the contract takes over, the nature of the contract changes from multimodal to unimodal; as such, the absorption theory cannot be applied to a multimodal contract.[405] A good example of this change in nature is evinced in Article 1 (1) of the 1980 MT Convention, which states that:

> The operations of pick-up 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**.

This absorbed contract approach could, however, apply to a unimodal contract of carriage. Article 18(4) of the Montreal Convention stipulates that where carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, such operations (usually referred to as pick-up and delivery of goods) are regarded as being of minor importance compared to the main mode of the unimodal contract, consequently being absorbed into the unimodal contract.[406]

Furthermore, the idea of placing one transport stage over another transport stage on the grounds that it covers a larger part of the distance than the other stages has been rejected by some scholars.[407]

The above clearly conveys the fact that the absorption theory cannot comprehensively explain the nature of multimodal transport.

3.1.6 The Systems of Liability in Multimodal Transport

3.1.6.1 The Uniform System

In a uniform system, the same principle applies to the whole carriage irrespective of where the loss, damage or delay occurs. In this system, the issue of whether a loss

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[404] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[405] ibid

[406] Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability'

[407] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' ;A. Van Beelen. 'Multimodaal vervoer: het kameleonsysteem van Boek 8 BW / Door Anneliet van Beelen.' (1996)

can be localised is not considered.[408] Accordingly, a uniform system applies the same set of rules to all segments of transportation.[409]

In academia, it is agreed that a uniform system is an ideal system for governing multimodal transport.[410] The uniform approach is most desirable due to its simplicity and transparency, because the applicable liability rules are predictable from the beginning of the carriage. A uniform system can avoid the sort of issue that occurred in the case of Quantum Corporation Ltd v. Plane Trucking Ltd and Air France.[411] A carrier would no longer need to make an argument in a bid to take advantage of liability rules, which are less burdensome (an option that the current fragmented situation enables). During the drafting of the 1980 Convention, the United States proposed that the convention should adopt a uniform strict liability system, however, the suggestion was not accepted, and the 1980 Multimodal Convention reached a comprise[412] and adopted a modified system by the inclusion of article 19, which stipulates that the localised damage shall be determined by reference to any applicable international convention or mandatory national law. The modified system will be discussed later in this work.

The uniform system is also the most supported of the three liability systems. In the survey conducted by the UNCTAD Secretariat, 48 per cent of the participants were in support of a uniform liability regime.[413]

The uniform system is not devoid of shortcomings. There is the problem of a recourse action. Where a uniform system is applicable, the multimodal transport carrier would be liable under the uniform liability system. However, where the multimodal carrier intends to bring a recourse action against a subcontracting carrier who was contracted by the carrier to perform a segment of the transport, the multimodal carrier will be bound by the unimodal rules applicable to the (sub)contract between them and the multimodal carrier. The applicable unimodal regulations may be less onerous than the uniform regime the multimodal carrier is bound by. As a result, the multimodal carrier would be liable for paying damages in

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[408] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

[409] C. Hancock, "Multimodal transport and the new UN Convention on the carriage of goods" in (2008) JIML 484 – 495, at p. 488.

[410] Ralph DeWit, *Multimodal transport: carrier liability and documentation* (Lloyd's of London Press 1995) 583

[411] [2001] 2 Lloyd's Rep. 133

[412] TD/B/C 4 Supp 7 o f 21 April 1972. Consultation Machinery TD/A/A C /13/28 of 20th Sept 1977

[413] UNCTAD Questionnaire on Multimodal Transport Regulation; UNTCAD secretariat, *Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade* (8-12 December, , 2003)

excess of what he could recover from the subcontracting carrier.[414] This creates a recourse gap.[415]

If a uniform liability system were applicable to multimodal transport, a multimodal transport contract must be considered a contract sui generis.[416] As a sui generis contract, none of the existing unimodal conventions would apply. For instance, if, hypothetically speaking, there is a multimodal transport instrument which uses a uniform liability system, the implication is that even when two different losses occur during a sea carriage, the consignors may still not be entitled to the same damages. To determine their damages, the type of carriage contract (whether it is a multimodal carriage contract or unimodal carriage contract) must be considered. It is only upon determining the type of carriage that the applicable rules/legislations will be determined.[417]

The uniform liability system would also face possible challenges with respect to the co-existence of unimodal transport conventions and uniform multimodal transport liability. To address this issue, it is important that the scope of unimodal conventions is limited to a unimodal carriage and cannot apply to the unimodal stage of a multimodal contract.[418]

3.1.6.2 Network System

The current regime utilises the network system to a large extent. As described in Section 3.1 of this work, multimodal transport involves the carriage of goods by at least two modes of transportation. A broader way to look at multimodal transport is to see it as a carriage with at least two unimodal carriages.

The network system approach means that each unimodal carriage is governed by the unimodal transport rules governing that mode of transportation. Hoeks[419] describes it beautifully as a system that 'knits' different liability regimes together, consequently creating a colourful patchwork in various legal hues. The applicable

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[414] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[415] ibid

[416] Paula Backden, *The Contract of Carriage* (Contemporary commercial law, 1st edn, Routledge 2019)

[417] J. Ramberg, "Is Multimodal Transport a Contract *sui generis* also within the Field of EU Competition?" in H-J. Bull and H. Stemshaug (eds), *EC Shipping* (1997) pp. 163–168, at pp. 166–167.

[418] See report by the United Nations Commission on International Trade Law Secretariat, 'Transport Law: Preparation of a draft instrument on the carriage of goods [by Sea] – Proposal by the Netherlands on the application door-to-door of the instrument', UNCITRAL WG, 12th Sess., UN Doc. A/CN.9/WG.III/WP.33 (2003), 6.

[419] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

legal regime will continually change, depending on the segment of the transported goods.

A network system is like a chain of different transport segments. The problem of the recourse gap, highlighted in the uniform system section discussion above, would not ensue with the network system. The multimodal transport carrier would be able to reclaim the damages or loss for which he has indemnified the cargo/consignee from the subcontractor. It is noteworthy to state that the compensation a multimodal transport will be liable to may not exceed the compensation he will be able to claim from the subcontracting carrier. However, the network system faces challenges when the place of loss cannot be ascertained.

One vivacious point from a network system is that stakeholders are likely to agree on a pure network system. This is because the network system does not ruffle the current legal regime governing unimodal carriage. The network system avoids possible major conflicts with the existing legal framework since unimodal carriage conventions have co-existed with each other for many decades.[420] Furthermore, where unimodal regimes are amended, such unimodal regimes would automatically fit into multimodal carriages, accordingly, there is no need to tweak the multimodal legal regime.

The network system can also prove to be very difficult in establishing a predictable legal regime for multimodal transport. For example, where the loss or damage occurred on one segment of the transport and was further aggravated in another segment, which of the unimodal legal regimes would be applicable? It does not end there! Some problems relate to transition and points where these carriages are 'knitted' together. Is a storage part of a unimodal carriage? Which segment of the carriage would the storage be a part of? Which convention would be applicable? When does a sea stage end? Would national rules be applicable in those liability gaps? Where no legal regime is applicable, can the law on bailment be applicable? Any court faced with such a challenge would face an arduous task determining the legal regime for damages and loss during these carriages. Accordingly, localisation of damages would be a challenge within the network system, and no unimodal system would be applicable where the loss cannot be localised. In multimodal transport, most losses are unlocalised losses or damages.[421] Where a system finds it difficult to establish compensation for unlocalised loss or damages for multimodal

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[420] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010); A. Van Beelen. 'Multimodaal vervoer: het kameleonsysteem van Boek 8 BW / Door Anneliet van Beelen.' (1996)

[421] MG Graham. 'The economic and commercial implications of the multimodal conventions' (Multimodal Transport-The 1980 UN Convention seminar at Southampton University 1980 12 September 1980)

transport, such a system will create liability gaps and may be inadequate for multimodal transport contracts.

In practice, there is a need for an alternative liability system, by contractual provisions. For popular standard contracts such as Bimco's Multidoc or the FIATA Bill of lading, there are usually 'fall-back solutions' for situations where the loss cannot be localised. These fall-back solutions are provided for in the UNCTAD/ICC Rules. However, it is essential to note that the UNCTAD/ICC Rules provide the same defences and liability limit as those under the Hague/Visby Rules, which are 'carrier friendly'. Accordingly, a cargo interest, who will suffer a greater burden, will be saddled with the extra burden of figuring out at which stage the loss occurred.[422]

3.1.6.3 Modified Liability System

A modified liability system is a 'mix of both worlds'. It combines the advantages of the two system to create an acceptable legal regime. A modified system denotes that some provisions are uniform throughout the whole transport, but some provisions may differ depending on the segment of transport in which damage occurs. A modified system could be 'modified uniform liability' or the 'modified network principle'.

In the modified uniform system, specific rules will apply irrespective of the unimodal stage where the damages or loss occurs, while the application of other rules will be subject to the segment of transport where the loss occurred.

Scholars like De Wit[423] opine a modified network system is the solution because it can avoid the problems caused by unlocalised damage, gradual damage and delay during multimodal transport, and can also address the possible gaps in uniform law. A good example of a modified system is the UNCTAD/ICC Rules. These rules are standard rules usually incorporated in multimodal transport contracts.

A modified network system works because a fall-back or catch-all[424] clause is included. Accordingly, where there is any damage that cannot be regulated by a general liability rule, the catch-all clause will apply. The advantage of this modification is that it provides foreseeability. Parties are not left with the

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[422] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law' (University of Southampton 2018)

[423] Ralph DeWit, *Multimodal transport : carrier liability and documentation* (Lloyd's of London Press 1995) 583

[424] Paula Backden, *The Contract of Carriage* (Contemporary commercial law, 1st edn, Routledge 2019)

unpredictability of being governed by national legislation they have no knowledge of.[425]

In any modified system, it is important to note that some of its provisions are uniform and others will depend on the segment or stage where the loss occurred. Limitation of liability is usually a key element where this modification will be used. This is because the limitation of liability varies from one unimodal transport regime to another. A modified system is used by both the 1980 MT Convention and the UNCTAD/ICC Rules.[426] An example of the modified system employed in the MT Convention is that the liability system adopted is uniform except in situations where the limits provided in a unimodal transport regime for a localised damage are higher than the MT Convention.

The modified system is advantageous because it provides a workable consensus by combining both the uniform and network systems,[427] and can address the liability gap which will be evident in a network system. However, the application of a network system may be excessively complex. It may also fail to appeal widely because it does not provide the full benefits of a uniform system, nor does it entirely alleviate the concerns of a network system.

While it may appear to solve the 'liability gap' between the application of the unimodal conventions, it does not solve the issue of gradual loss or damage over the journey.[428] It also does not totally mitigate the 'dangers of unpredictability'.[429]

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[425] ibid

[426] See Article 19 of the 1980 MT Convention and Rule 6.4 of the UNCTAD/ICC Rules

[427] United Nations Conference on Trade and Development, *Multimodal Transport: the Feasibility of an International legal Instrument* (United Nations Conference on Trade and Development January 13, , 2003)

[428] D. R. Thomas (ed), *A new convention for the carriage of goods by sea: the Rotterdam Rules: an analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Multim*odal transport under the Convention, Lawtext Pub 2009) 41

[429] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

3.2 International Conventions Applicable for Unimodal Transport Modes and the Relevance for Multimodal Transport

3.3 Introduction

The current preference for international trade is that it be done on a door-to-door basis vide a single contract. The current legal framework for multimodal transport does not adequately reflect this development. At the moment, there is no uniform international liability regime for losses, damages or delays in multimodal transport. The current legal framework for multimodal transport is made up of a series of complex international agreements regulating unimodal transport, and various regional/subregional agreements, national laws and standard term contracts. As a result, the applicable liability rules and the scope and responsibility of a carrier vary considerably from case to case and are largely unpredictable.[430]

In the past decades, there have been several attempts to regulate international multimodal transportation; however, these attempts are yet to bring forth international uniformity. A good example is the 1980 United Nations Convention on International Multimodal Transport of Goods, which was adopted but was never able to attract the necessary number of ratifications. A fragmented and complex legal framework creates uncertainty and can increase transaction costs by giving rise to legal inquiries that attract a cost, expensive litigation processes and increased premiums to be paid by the assured. This concern is certainly of more importance for developing countries, especially for small and medium-sized transport users. Without a predictable legal framework, fair access to markets and participation in international trade is much more difficult for small businesses. In this regard, many countries have had to seek a solution by adopting regional and sub-regional strategies.

The following section will consider the unimodal conventions and how they have been adapted to deal with multimodal transport contracts. We will also consider the past attempts to deal with the imbroglio which multimodal transport carriage contracts face globally.

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[430] United Nations Conference on Trade and Development, *Development of multimodal transport and logistics services*

3.3.1 Carriage of Goods by Sea

There are three (3) major international maritime conventions governing the carriage of goods by sea. These conventions include the Hague (Visby) Rules 1924,[431] the Hamburg Rules 1978[432] and the Rotterdam Rules 2008.[433]

At the time of adoption of the Hague Rules in 1921, goods were normally received and delivered together. Hence, the period of responsibility for a carrier is tackle to tackle. However, it later became necessary for the carrier to receive and deliver goods at the carrier's warehouses or warehouses of its agents, causing the period of its responsibility to become longer than the period of application of the Hague (Visby) Rules. A solution was found in Hamburg Rules. Under the Hamburg Rules, the Carrier's period of responsibility covers the period during which the carrier has direct charge of the goods at the port of loading during the carriage and at the port of discharge.[434]

Despite the wider period of responsibility, there were still gaps. One of those gaps is the lack of rules on the carriage preceding and subsequent to the carriage by sea.[435]

Consequently, the Rotterdam Rules were drafted. The Rotterdam Rules are designed to provide a range of innovative solutions to a wide range of modern problems arising from the transport of goods wholly or partly by sea[436] bearing in mind that the Rotterdam rules can be a step toward regulating multimodal transport law, considering that 90 per cent of multimodal transport contracts have a sea segment of transportation.[437]

The influence of all of these conventions and their scope of application to multimodal transport will now be considered in further detail below.

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[431] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading

[432] United Nations International Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978

[433] The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted ain December 2008

[434] Berlingieri Francesco. 'Multimodal Aspects of Rotterdam Rules
' (2009) 4
<%20Berlingieri%2013%20OKT29.pdf>

[435] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[436] R. I. Ortiz. 'What Changes in International Transport Law after the Rotterdam Rules?' (2009) 14(4) Revue de droit uniforme 893

[437]Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010); D. Rabe, 'Die Probleme bei einer multimodalen Beförderung unter Einschlubeiner Seestrecke', *TranspR* 2000, p. 189

3.3.1.1 The Hague and Hague Visby Rules

At present, the most popular and widely accepted legal regime governing the international carriage of goods by sea is the Hague (Visby) Rules. When the Hague Rules were being drafted, carriage of goods by sea was a high-risk activity, and there was a high number of losses and/or damages from accidents at sea. Carriers were interested in protecting their interests and leveraging their powers by creating exceptions to their liabilities arising from such damages.[438] The Hague Rules, as adopted in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed on 25 August 1924 at Brussels. The original intention was to make the Hague Rules a set of rules that could be voluntarily incorporated into a carriage contract;[439] however, it was eventually adopted as a mandatory convention. It consequently became the first international instrument to regulate the terms of a bill of lading.[440]

In 1968, upon successful deliberations of the Comité Maritime International Conference in Stockholm in 1963, the Visby Rules[441] were adopted. The Comité conveyed in the historic City of Visby after the conference and gave the Visby Rules the city's name.[442]

As of 23 March 1977, ten countries (the number and tonnage which were required in compliance with Article 13 of the Brussels Protocol of 1968 to enter into force) had ratified or acceded to the rules. On 23 June 1977, the Visby rules came into force. A final amendment was made to the SDR Protocol in 1979.

It is important to note that the Visby Rules (Brussels Protocol of 23 February 1968) is not a separate convention. The Visby Rules are an amendment to the Brussels Convention of 1924. Article 6 of the Protocol provides that:

> As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.

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[438] Ross Masud. ' The Emerging Legal Regime for Multimodal Transport' (1992) Int'l Bus. L.J. <HeinOnline> accessed Sat Jan 12 09:07:29 2019

[439] Ralph DeWit, *Multimodal transport : carrier liability and documentation* (Lloyd's of London Press 1995) 583

[440] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[441] The Brussels Protocol of 1968 amending the Brussels Convention of 1924

[442] W Tetley, 'The Hague Visby Rules' (*Euro Marine Logistics*, 2017) <http://euro-marine.eu/sites/default/files/related_documents/The%20Hague%20Visby%20Rules_0.pdf> accessed 29 July 2020

When a nation ratifies or accedes to the Visby Protocol, that nation consents to be bound by the Hague/Visby Rules.[443]

The Scope of Application as it Relates to Multimodal Transport

The Hague (Visby) Rules clearly, through their provision, do not extend their scope of application of multimodal carriage of goods, so there is no question about the fact that the Hague (Visby) Rules do not create a sea plus convention.[444] The only plausible question is, do the Hague (Visby) Rules apply to the international sea carriage segment of a multimodal carriage contract? This question is vital in determining the scope of application of the Hague Rules in multimodal transport, considering that the Hague (Visby) Rules demand that a bill of lading or a similar document be issued before the rules are applied. If such documents are not issued, the Hague (Visby) Rules will not apply. Also, the Hague (Visby) Rules do not mandatorily cover the entire period from when the carrier takes over the goods to when delivery is made. The rules are only applicable from when the goods are loaded on a ship to when they are discharged,[445] thus giving them a very short application.[446]

The English court in Pyrene v Scindia[447] gave a clear insight as to the response to the question regarding the scope of the Hague Rules. In that case, the plaintiff delivered a fire tender. In lifting the cargo onto the ship, before it crossed the rail, one of the tenders being lifted aboard dropped and was seriously damaged. The remaining tenders were consequently loaded safely. As a result of the sale contract between the parties, the possession of the property had not passed at the time the damage occurred. The bill of lading had been drawn up but not issued. The shipowners accepted liability for the damage and sought to limit their liability under Art IV rule 5 of the Hague Rules. The shipper argued that he was unable to do so because the carriage of the damaged tender was not 'covered by a bill of lading'. Delivin J, whilst disagreeing with the shipper, noted that:

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[443] A state can decide not to adopt the subsequent amendment and be bound just by the 1924 convention. The ratification of the 1968 Protocol by a state which did not ratify the 1924 Convention constitutes accession to the 1924 convention; see art. 11(2) of the 1968 Protocol. Ratification of the 1979 Protocol by a state not a party to the 1924 Convention constitutes ratification of that Convention, as amended by the 1968 Protocol (arts. I and VI(2) of the 1979 Protocol). Accession to the 1968 Protocol by a state which did not ratify the 1924 Convention constitutes accession to the 1924 Convention as well (art. 12(2) of the 1968 Protocol). Accession to the 1979 Protocol constitutes accession to the 1924 Convention, as amended by the 1968

[444] Article 1e of the Hague Rules

[445] This is popularly called tackle to tackle

[446] Article 10 in combination with Article 1(e) of the Hague Rules

[447] [1954] 1 Lloyd's Rep. 321

> I think they attach to a contract or part of a contract. I say 'part of a contract' because a single contract may cover both inland and sea transport; and in that case the only part of it that falls within the Rules is that which, to use the words in the definition of 'contract of carriage' in Art. I (b), 'relates to the carriage of goods by sea'.[448]

Delivin J, in this decision, further noted that:

> The operation of the Rules is determined by the limits of the contract of carriage by sea and not by any limits of time. The function of Art. I (e) is, I think, only to assist in the definition of contract of carriage. As I have already pointed out, there is excluded from that definition any part of a larger contract which relates, for example, to inland transport. It is natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a period of inland transport."

In the case of Mayhew Foods v. O.C.L.[449], there was a carriage contract from Sussex to Jeddah for the carriage of frozen poultry. The cargo was to be carried from Uckfield to a south coast port and then be shipped from there to Jeddah. The bill of lading which was issued stipulated that the carrier accept liability from Sussex to Jeddah, although the liability was limited to US$2 per kilogram (lower than the limits provided for by the Hague Visby Rules). The goods were shipped from Shoreham and transhipped at Le Havre. Upon the poultry's arrival at Jeddah, it was discovered that the poultry was not in good condition. It was discovered that the damage occurred when the cargo was at Le Havre awaiting transhipment. The carrier contended that the Hague Rules are not applicable during transhipment and, accordingly, he could limit his liability to US$2 per kilogram. The English High Court held that the Hague Visby Rules apply to the temporary storage period (between two separate periods of sea carriage) of a container at the port. More particularly, the shipper had no knowledge that there would be transhipment in Le Havre. Further, the court noted that, in this case, it was agreed that the Hague-Visby Rules applied throughout the entirety of the transport operation.

Bingham J reiterated the point when he stated that:

> The contract here was for carriage of these goods from Uckfield to the numbered berth at Jeddah. The rules did not apply to inland transport prior to shipment on board a vessel, because under s. 1 (3) of the 1971 Act, they are to have the force of law only in relation to and in connection with the carriage of goods by sea in ships. But the contract here clearly provided for shipment at a United Kingdom port, intended to be Southampton but in the event Shoreham, and from the time of that shipment, the Act and the rules plainly applied.

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[448] *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd.,* [1954] 1 *Lloyd's Rep*. 321.

[449] 1984, 1 Lloyd's Rep. 317)

Similarly, the Dutch judiciary appears to support the view that the rules may apply to the carriage of goods by the sea segment of a multimodal transport looking at the court's subjective approach in the case of the Duke of Yare[450]. However, countries like Germany hold a stricter view on the applicability of the Hague (Visby) Rules to multimodal transport. Some German Academics[451] believe that since the rules do not extend their scope to multimodal transport, they cannot apply to a sea leg of a multimodal transport carriage. However, this is not fatal to German multimodal transport law since both the Hague and the Hague-Visby can be applied by national legislation in Germany because both regimes have been incorporated in the German Commercial Code, the Handelsgesetzbuch ('**HGB**'). Therefore, where a loss occurs in a sea segment, the HGB will apply.

Can a Multimodal Document Qualify as a Bill of Lading Under the Hague (Visby) Rules?

The Hague (Visby) Rules pursuant to Article 1(b) of the Rules state that:

> 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same. [Emphasis mine]

Article 10 of the Hague Rules states that 'the provisions of this Convention shall apply to all bills of lading issued in any of the contracting States'. A similar but slightly modified provision is in Article 10 of the Hague-Visby Rules. Clearly, a contract of carriage to which the Hague Rules will be applicable must be covered by a bill of lading. In multimodal carriage, the documents issued when one or more leg of the carriage is to be carried by sea is usually called the 'combined transport bills of lading'. Examples of these bills of lading include BIMCO Multiwaybill, FIATA Bill of Lading and Combiconbill. These bills of lading always adopt a network approach wherein the applicable liability rules will depend on identifying the unimodal stage of transport where the loss or damage occurs.[452]

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[450] Rb Rotterdam 1 July 1994*, S&S* 1995

[451] The German scholars mentioned include Professor R Herber, K Ramming, M Rogert, K Drews and D Rabe

Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[452] Mahin Faghfouri. 'International Regulation of Liability for Multimodal Transport In Search of Uniformity' (2006) 5(1) WMU J Marit Affairs 95

<http://www.ingentaconnect.com/content/wmu/wmujma/2006/00000005/00000001/art00007>

To understand whether multimodal transport bills of lading are 'bills of lading' within the scope of the Hague (Visby) Rules, it is important to consider the three characteristics of a bill of lading:

- as a receipt for goods shipped[453]
- evidence of the contract of carriage[454]
- document of title: which means that the holder must be entitled to delivery at the port of discharge upon presenting the bill of lading.[455]

In relation to the two features (a receipt of goods and evidence of contract of carriage), there are no contentious issues regarding a multimodal transport bill of lading having these two features. The only feature that requires discussion is the requirement of 'document in title'.

In Article 1b, the Hague (Visby) Rules state that the Hague Rules will be applicable to a contract of carriage 'covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea'. From the said provision, it is clear that a bill of lading is not the only document accepted as a contract of carriage. The words 'or similar document of title' have been held to be words of expansion as opposed to restriction.[456] However, the similar document must be a document of title.

It is worth noting that a bill of lading represents that the goods are in transit. It is possible to transfer a bill of lading by endorsing the document. The bill of lading stands out among other shipping documents because of this function of the document of title

The Court in Lickbarrow v Mason case states the criterion to determine when a transport document can be considered a document of title. The Court noted that one of the bases for a transport document to be considered as a document of title is for the document to meet the basis of mercantile custom. To meet this criterion, it must be shown that the document enjoys widespread and consistent acceptance.

Traditional bills of lading have long enjoyed widespread acceptance compared to multimodal transport documents because the sea carrier does not commonly issue

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[453] *Gosse Millard v Canadian Government Merchant Marine* [1929] AC 223, 234); Smith v Bedouin Steam Navigation Co

[454] The Ardennes {1951} 1 KB 55; Cho Yang Shipping Co Limited v Coral (UK) Limited [1997] 2 Lloyd's Rep 641

[455] Sanders v Maclean (1883) 11 QBD 327 at p. 371

[456] Royston Miles Goode and Ewan McKendrick, *Goode on commercial law* (4th ed. edn, Penguin 2010)

them, and they cover carriage of goods by sea partly rather than wholly.[457] Multimodal transport documents do not enjoy widespread acceptance as a document of title.[458]

Another argument against the recognition of multimodal transport documents is the scepticism that arises from the fact that a multimodal transport document is issued by a MTO who may not be the carrier of the sea segment of the goods. The subcontractor of the sea segment would also issue a bill of lading for the carriage of cargo by sea. Accordingly, this may lead to more than one document of title covering the same goods.[459] However, this argument is weakened by the fact that a transport document cannot transfer better rights than the right held by the transferor.[460]

Furthermore, multimodal transport documents are usually 'received for shipment' bills of lading rather than 'shipped' bills of lading. Prior to shipment, the MTO accepts the shipper's cargo and records that the cargo has been 'received for shipment'. While there is nothing wrong with a 'received for shipment' bill of lading, there are arguments that do not support the use of 'received for shipment' bills of ladings. 'Received for shipment' bills have a weaker evidentiary function than 'shipped' bills.[461] A sale may require the date of shipment of goods contracts where the seller is required to ship the goods (for example, CIF, FOB, C&F etc). This may not always be included in 'Received for shipment' bills.

Furthermore, with a 'shipped' bill, the shipper is sure that the goods are ready for shipment and accordingly, it is impossible to deal with the cargo physically anymore. Thus, any further transfer of property with respect to the cargo will be by endorsing the bill of lading. This is the conceptual ideology behind recognising a bill of lading as a document of title.[462]

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[457] M. G. Bridge and J. P. Benjamin, *Benjamin's sale of goods* (Common law library, 10th edition. edn, Sweet & Maxwell 2017)

[458] Ralph DeWit, *Multimodal transport : carrier liability and documentation* (Lloyd's of London Press 1995) 583

[459] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law' (University of Southampton 2018)

[460] ibid

[461] Caslav Pejovic. 'Documents of title in carriage of goods by sea: present status and possible future directions' (2001) Journal of business law 461 <https://search.proquest.com/docview/194418508>

[462] Judah P. Benjamin and M. G. Bridge, *Benjamin's sale of goods* (Sweet & Maxwell 2016)

Lastly, only a 'shipped' bill of lading was recognised in Lickbarrow[463] to be a document of title of the goods.[464]These assumptions may be cured by making a 'shipped' annotation once the goods are put on board.

It may also be argued that a bill of lading or similar document does not need to be negotiable for it to qualify as a document of title. The general rule is that a straight bill of lading is not subject to the Hague-Visby Rules, unlike the classic bills of lading. 'Straight' bills of lading are not negotiable or transferable documents.[465] However, recent developments stipulate that a 'straight' bill of lading may fall within the definition of a contract of carriage.

In Rafaela S[466], the question as to whether a 'straight' bill of lading[467] – meaning a bill of lading which provides for the delivery of goods to a named consignee but was not 'made to' order or assigns or bearer and thus not transferable by endorsement – was a bill of lading or any similar document of title within the Hague Rules. The court of Appeal and the House of Lords overruled the Arbitration Tribunal's initial decision and the Commercial Court of first instance; Justice Langley's judgment. Rix LJ, in the Judgment, stated that:

> Whatever the history of the phrase in English common or statutory law may be, I see no reason why a document which has to be produced to obtain possession of the goods should not be regarded, in an international convention, as a document of title. It is so regarded by the courts of France, Holland and Singapore.

The implication of the Rafaela decision is that a 'bill of lading or any similar document of title' at least include the classic bills of lading (that are made out to order or bearer), and a straight bill of lading (that names the consignee explicitly). Once the document is needed to obtain possession of the goods, it is a document of title. It can fulfill the transferability requirement by delivery to a named consignee. The Singaporean Court of Appeal has given the nod to this position in the case of Peer Voss v A.B.P.L. Co. Pte Limited.[468]

As it relates to a multimodal transport bill of lading, once the bill of lading states clearly the place where goods will be delivered inland, it may be said to be a document of title. in so far as the document's issuer agree to deliver the goods only to the person who delivers the original document in payment for the goods, and bills

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[463] Supra

[464] ibid

[465] John F. Wilson, *Carriage of goods by sea* (7. ed. edn, Pearson Longman 2010)

[466] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* (*Rafaela S*), [2003] 2 *Lloyd's Rep*. 113.

[467] A bill of lading which provides for the delivery of goods to a named consignee and not to order, assigns or bearer. This type of bill of lading is not transferable

[468] [2002] 2 Lloyd's Rep. 707

of lading are typically issued "to order" or "to bearer" to assure transferability of both the bill and the items it represents, there is no reason to restrict such transferability to bills of lading issued for carriage of goods by sea transport only.[469] Accordingly, a multimodal bill of lading should have transferability status. In any event, most multimodal transport documents have 'negotiable' inserted into the document.

Conclusively, a multimodal transport document has similar characteristics to bills of lading. Considering that Hague Rules will only apply to only the sea stage, there is no further reason why a multimodal transport document would not be recognised as a bill of lading. Even if it is not a bill of lading, the use of the word 'similar document of title' is wide enough to include multimodal transport documents.

3.3.1.2 Hamburg Rules

The Hamburg Rules originated from a report of the UNCTAD Secretariat in 1970. The report noted the defects of The Hague rules disadvantaged developing countries and cargo-owning countries.[470] Accordingly, the Hamburg Rules of 1978 were drafted under the auspices of the United Nations with the intention to create a regime that would replace the Hague and Hague-Visby Rules.

There were several complaints against the Hague (Visby) rules because they clearly favoured the carrier. As the cargo-owning countries became more active participants in international trade and garnered more influence, they complained about the many exceptions in the Hague (Visby) Rules.

The Hamburg Rules were drafted to address the wrongs complained about by cargo-owning countries and harmonise the carriage of goods by sea law, considering the Hague (Visby) rules were not ratified by all members of the Hague Rules. However, the Hamburg Rules took fourteen years before their entry into force on 1 November 1992. Furthermore, the Hamburg Rules were only able to garner 33 ratifications as against the 70 ratification which the Hague Rules garnered.[471]

The argument made by proponents of the Hamburg Rules was that the Hague Rules' provisions contained many excessively protective provisions and were crafted in favour of the carriers. An example of such provisions is the exoneration of the

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[469] J. Ramberg. 'Unification of the Law of International Freight Forwarding' (1998) 3(1) Uniform Law Review - Revue de droit uniforme 5

[470] Francis Reynolds. 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 Australian and New Zealand Maritime Law Journal 16

[471] United nations, 'United Nations Treaty Status' (*United Nations*)
<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280042179> accessed 20 May 2020

shipowner from negligence as it relates to nautical faults and management.[472] Other challenges include that the excepted perils of Hague and Hague-Visby do not apply to deck cargo. Another source of contention was the issue of the shipowner being exempted from liability for nautical fault and negligence in management and navigation.

Furthermore, the issue of a special exception for fire, unless caused by the carrier's actual fault or privity, was another concern. There is also the so-called 'before and after' problem. When does the application of the Rules start, and when does it stop? Is the Hague Rules applicable to storage? Fourthly, there are certain matters hardly touched on at all – for instance, delay. In addition to the many problems, why should there be such a short time bar for actions against the shipowner, especially if there is no such special bar for an action against the shipper? Other issues are the low monetary unit and lack of rules on jurisdiction and arbitration.[473]

The Hamburg Rules were drafted with the realities of modern transport in mind. The period of a carrier's liability under Article 4 of the Hamburg Rules is based on the port-to-port criteria, which imposes a duty of care on the carrier while in charge of the goods, from receipt to delivery, unlike the Hague Rules which is tackle-to-tackle.

Another significant difference between Hamburg and Hague (Visby) Rules is the provision of Article 5 of the Hamburg Rules, which states that:

> The carrier is liable for loss resulting from loss of or damage to the goods as well **as** from delay in delivery if the occurrence which caused the loss damage or delay took place while the goods were in his charge as defined in Article 4 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.

So, the implication is that the carrier is responsible for losses if the goods were under their charge unless they prove that they, their servants, or agents took all measures that could reasonably precautions required to avoid the occurrence and its consequences. Accordingly, under the Hamburg Rules, it is more difficult to escape liability than against the Hague Rules.

The Hamburg Rules also increase the monetary limit of liability by circa 25 per cent. The Hague Rules provide a limit of £100 per package or unit, leading to wide variation in calculating the limitation figure. As amended by the 1979 Protocol, the

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[472] M. J. Shah, 'The Revision of the Hague Rules – Key Issues' in S. Mankabady (ed), *In The Hamburg Rules on the Carriage of Goods by Sea* (Sijthoff 1978) 1

[473] Francis Reynolds. 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 Australian and New Zealand Maritime Law Journal 16

Hague (Visby) Rules provide for a limit of 666.67 SDR[474] per package or 2 SDR per kilo. Under the Hamburg Rules, the limits are 835 units of account per package or other shipping unit, or 2.5 units of account per kilogram of gross weight of the goods, whichever is greater. This nominal increase of about 25 per cent was seen as a generous increase to cargo owners.[475]

A look at the provisions of the Hamburg Rules shows the rules deviate from the principles of Hague (Visby) Rules in many ways. The Hamburg Rules remove the defence of nautical fault. The Hamburg Rules also extend the time within which an action may be brought against a carrier to two years and extends the time for giving notice of non-apparent damage from 3 days to 15. The Hamburg Rules also provide for liability for delay, with special limits on damages for it.[476] Finally, unlike the Hague (Visby) Rules, Article 21 and 22 of the Hamburg Rules provide the rules for litigation or arbitration. Article 21 of the Hamburg Rules particularly provides that the plaintiff is entitled to choose among a long list of competent forums.[477]

However, it appears that the Hamburg Rules are a casualty and have failed to garner acceptance from the international community as an acceptable mandatory maritime cargo liability regime, which would regulate the carriage of goods by sea in private maritime commerce. The Convention has not been ratified by any major maritime state. One reason for the Hamburg Rules' failure was opposition from shipowners' associations and insurers to the new regime. They were concerned that the Hamburg Rules would increase carrier liability and, as a result, raise the cost of insurance through the Protection and Indemnity Clubs.[478] The Hamburg Rules have attracted 34 ratifications – the current state parties who have ratified the convention amount to only 6 per cent of total world trade.[479]The Hamburg Rules, like a stranger in a remote village, continue to be isolated and treated with suspicion by ship-owning

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[474] Special drawing rights are supplemental foreign exchange reserve assets that the International Monetary Fund maintains.

[475] A. J. Waldron. 'The Hamburg Rules - a boondoggle for lawyers?' (1991) Journal of business law 305 <https://search.proquest.com/docview/1304333756>

[476] See Article 6(b) of the Hamburg Rules

[477] Article 21 list the forum to include : 1) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or 2) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; 3) the port of loading or the port of discharge; or 4) any additional place designated for the purpose in a contract by sea; or 5) where the ship was arrested.

[478]Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[479] S. V. Pravin Rathinam. 'The Hamburg Rules, Failure or Success' (2011)
<http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html> accessed August 8, 2021

countries.[480] This explains the unwillingness around the general acceptance of the rules and, as a consequence, the inability to replace the Hague Rules, which was the intention of the Hamburg Rules.

The Scope in Relation to Multimodal Carriage

Unlike the Hague or the Hague (Visby) Rules, the Hamburg Rules expressly contain a reference to multimodal carriage. Article 1(6) of the Hamburg Rules states the exact scope of application of the Convention.

> 'Contract of carriage by sea' means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

A look at the second paragraph of this provision shows that a contract of carriage may involve the carriage of goods by some other means. This clearly shows the Hamburg Rules are aware of the reality of door-to-door transportation in modern-day carriage of goods and international trade. Despite this seeming awareness, the Hamburg Rules strictly apply to the sea stage, not the whole combined transport.

A glean of Article 4(1) of the Hamburg Rules provides that the carrier of the goods shall only be responsible for the goods at the port of loading, during the carriage and at the port of discharge and will not extend beyond the port of discharge.

Conclusively, The Hamburg Rules seem to rectify the problems with the Hague (Visby) Rules in order to adapt them to the development of multimodal transport. For example, the scope of application of the Hamburg Rules is broader than the Hague (Visby) Rules because they apply to contracts of carriage of goods by sea regardless of whether the contract is a bill of lading or a contract for carriage of goods by more than one mode of transportation.[481] Also, containerised goods are mentioned in the Hamburg Rules, thus giving credence to the understanding that multimodal transport is developing.[482] In addition, the scope of responsibility under the Hamburg Rules covers the period from port to port as against tackle to tackle. However, there are some points that remain unclear, such as whether or not the MTO can invoke the defences and limitations available in the Hamburg Rules where the multimodal transport contract does not specify the mode of carriage to be used.

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[480] C. C. Nicoll. 'Do the Hamburg Rules suit a shipper-dominated economy?' (1993) 24(1) Journal of maritime law and commerce 151

[481] Article 2 of the Hamburg Rules

[482] Article 1(5) of the Hamburg Rules

As earlier noted in this chapter, most multimodal transport contracts do not specify the mode of transportation that the MTO may use. If the contract does not clearly state the mode, it is arguable that the Hamburg Rules may not apply.

The Hamburg Rules defines a Contract of carriage by sea as

> any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

A look at this stipulates that for the rules to be applicable, it must be stated that the contract involves carriage by sea. We are then left with the unanswered question of what happens if the contract is unspecified.

3.3.1.3 The 'Sea Plus' Approach of the Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as 'the Rotterdam Rules' was adopted on 11 December 2008 by the UN General Assembly. The Rotterdam Rules are a result of intensive work done for almost twelve years by the International Maritime Committee **(CMI)** and the Working Group III on Transport Law of the **UN** Commission on International Trade Law **(UNCITRAL)**.[483] The Rotterdam Rules are to enter into force after 20 ratifications.

This new Convention provides mandatory standards of liability for loss or damage arising from the international carriage of goods by sea. The Rotterdam Rules are intended to replace earlier international conventions such as the Hague Rules 1924, the Hague (Visby) Rules 1968 and the Hamburg Rules 1978.[484] The Rotterdam Rules were initially conceived as a port-to-port instrument but were later extended to cover door-to-door contracts.[485] The Rotterdam Rules are drafted to apply to the carriage of goods by sea and any other transport mode as long as such contract of transport includes the carriage of goods by sea. This means that the Rotterdam Rules is a 'maritime plus' convention.

Article 1.1. of the Rotterdam Rules defines a contract of carriage as a contract which must provide for carriage by sea and may also provide for carriage by other modes

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[483] Hakan Karan. 'Any need for a new international instrument on the carriage of goods by sea: the Rotterdam Rules?' (2011) 42(3) Journal of Maritime Law and Commerce 441 <https://search.proquest.com/docview/898438154>

[484] Unctad.org. 2010. *UNCTAD | The Rotterdam Rules*. [online] Available at: <https://unctad.org/en/Pages/DTL/TTL/Legal/Rotterdam-Rules.aspx> [Accessed 25 May 2020].

[485] Nikaki Theodora and Soyer Baris. 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just another one for the Shelves?' (2012) 30(2) Berkeley Journal of International Law 303 <https://search.proquest.com/docview/1082410303>

of transport in addition to the sea carriage. It expresses the clear intention of the convention to apply to other modes of transportation as long as those modes are complementary to the carriage of goods by sea.

The Scope of Application to Multimodal Transport

The Rotterdam Rules adopt a somewhat modified network system. Article 26 of the Rotterdam Rules deals with 'Carriage preceding or subsequent to sea carriage'. It also deals with loss, damage or delay occurring before the loading of the goods on the ship or after their discharge from the ship[486]. Article 26 of the Rules state as follows:

> Article 26. Carriage preceding or subsequent to sea carriage
>
> When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:
>
> a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
>
> b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
>
> c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument."

From the provisions of Article 26, it can be seen that the provisions apply on three conditions. First, the loss or damage to goods or such event causing delay must have occurred before or after discharge from the ship. Second, the international instrument would have applied had there been a separate contract for the stage of carriage at which the loss occurred providing for liability, time-bar and limitation of liability. Finally, the said liability, time-bar and limitation of liability cannot be departed from to the detriment of the shipper.

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[486] Berlingieri Francesco. 'Multimodal Aspects of Rotterdam Rules
' (2009) 4 <%20Berlingieri%2013%20OKT29.pdf>

For example, in Europe, carriage by road or rail is regulated by the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Convention concerning International Carriage by Rail (*COTIF*) (COTIF-CIM) respectively. Both instruments are solely applicable to international transportation. As a result, the CMR/COTIF-CIM will apply to any international carriage. The Rotterdam Rules, on the other hand, will apply to all road and rail carriage within the port area, as well as national carriage from the port area to a final destination outside the port area.[487]

The Rotterdam Rules also apply to other activities in the port area, such as handling and storage, as there is in fact no international instrument regulating the activities of those segments.[488]

Except for liability, limitation of liability and time for suit, the Rotterdam rules is applicable mandatorily. Therefore, chapters 3, 7,8, 9, 10, 11, 14 and 15 are always applicable even where there is another segment preceding and subsequent.

As explained above, Article 26 stipulates that mandatory provision of international instruments on issues like limitation, liability and time of suit of other unimodal conventions that would have applied to the other segment where the loss, damage, or event causing the delay occurred will supersede Rotterdam Rules[489]. However, the remaining provisions of the Rotterdam Rules will apply to other issues, such as transport documents, delivery of goods, transfer of rights, rights of the controlling party, or issues of jurisdiction. In such matters, the Rotterdam Rules will supersede the unimodal conventions applicable.[490]

It may appear that this resolves the issue of possible conflicts; however, the unclear patchworks are not complementary and are certain to lead to confusion and unpredictability. Different national courts may differ on applying different conventions to the same segment, consequently leading to unpredictability.

Furthermore, another flaw of Article 26 is that it was not drafted in a way that deals with overlaps of the convention in cases where the losses or damage is progressive. The clause restricts its ambits to damage to, loss or delay of the goods that has occurred ‘solely before their loading onto the ship or solely after their discharge

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[487] Francesco Berlingieri. 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (General Assembly of the AMD, November 2009 November 5, 2009)

[488] ibid

[489] Tomotaka Fujita. 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44(3) Texas International Law Journal 349 <https://search.proquest.com/docview/213928546>

[490] Nikaki Theodora. 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just another one for the Shelves?' (2012) 30(2) Berkeley Journal of International Law 303 <https://search.proquest.com/docview/1082410303>

from the ship'. Accordingly, Article 26 only deals with claims wherein the loss of, damage to, or delay in delivery of the goods occurred 'solely' in the course of one of these stages of transportation. It may be preferable for the Rotterdam Rules provision to be given precedence in circumstances where the loss occurred in more than one stage (as it usually occurs in multimodal transport). The Rotterdam Rules do not mandatorily apply in relation to carrier liability, limitation of liability or time for suit in such instances. This is clearly a lacuna.

It has been argued that Article 26 is not an efficient network system (who bears the onus of proof of the cause of the damage[491]) would prefer to prove that the damage was caused during the inland part of the carriage. This is due to the fact that the inland liability regime is more favourable to the cargo claimant than the Rotterdam Rules liability regime.[492]

Article 26 is restricted to international conventions only, and does not resolve conflicts in national laws. Thus, in a circumstance where national law would have applied to a carriage segment preceding or following the sea leg, Article 26 is not applicable, and the Rotterdam Rules will apply. Would the national court give effect to this? This is yet to be seen since the Rotterdam Rules have never come into force.

Also, Article 82 of the Rotterdam Rules governs the status of international conventions governing the carriage of goods by other modes of transport. Article 82 provides that nothing in the Rotterdam Rules affects the application of any of the conventions to which reference is made.

To aid in the resolution of possible conflicts against other unimodal conventions, Article 82 stipulates that unimodal conventions shall supersede international conventions on road, rail, air and inland waterway carriage currently in force (and any future amendments thereto 'on carrier liability for loss of or damage to the goods'), to the extent that they apply, according to their own provisions, beyond pure unimodal transportation by road, rail, air and inland waterway, respectively.[493] Accordingly, Article 82 gives the existing transport conventions precedence if the specific requirements in the Article are fulfilled.

Article 82 was added to avoid certain conflict situations identified with other unimodal conventions. Article 82 goes beyond Article 26. Article 82 deals with existing conventions and their future amendments but does not include future conventions within its scope. A good illustration of Article 82 as it relates to air

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[491] Article 17 of the Rotterdam Rules

[492] The air convention does not suffer this kind of criticism as it relates to Rotterdam Rules. However, we would be unlikely to see an air convention precede a carriage of goods by sea.

[493] UNCTAD, *UNECE Expert Group on the Rotterdam Rules: The scope of application and the practical consequences of the Rotterdam Rules for pan-European land and intermodal transport operations* (, 2011)

conventions is that the Rotterdam Rules shall not affect the application of any carriage by air convention that applies to any part of the voyage.

Conflict can arise when a multimodal transport contract involves both sea and air carriage. In the instance of a loss that occurs during such sea carriage, but which the underlying cause is because of an occurrence during air carriage, Article 26 does not exclude the application of the Rotterdam Rules because the damage occurred during carriage of goods by sea – accordingly, the Rotterdam Rules should apply. However, Article 18(1) of the Montreal Convention would apply since it is applicable if the 'event which caused the damage so sustained took place during the carriage by air'. In such instances, Article 82(a) therefore comes into play and gives preference to the Montreal Convention to apply in such instances because, by the provisions of the Montreal Convention, it applies to an instance where the 'event which caused the damage so sustained took place during the carriage by air"[494]

There is no doubt that expanding the scope of the Rotterdam Rules creates potential conflict between the Rotterdam Rules and existing conventions. These conflict situations will, theoretically, cause problems on an international law level.

The conflict of conventions problem is only partially solved by the provisions in Articles 82 and 26. These provisions, however, fall short of accomplishing what the drafters intended. Article 82 is prone to misunderstanding and is insufficient to solve the conflict problem. The inadequacy of Article 82 is partly due to polarised interpretation of the scope of unimodal conventions. The Inadequacy of Article 26 has also been discussed above and it is agreed that Article 26 does not resolve all possible conflicts of international instruments.

Non-Localised Damages

The Rotterdam Rules can only be applied when it is possible to localise the loss or damage. The determination of a legal regime in the event of unlocalised loss appears to be a major challenge of multimodal transport. The Rotterdam Rules fails to provide for any provision that deals with non-localised loss.

Although it has been argued by some authors[495] the instrument functions as a kind of trawl net because neither the early draughts nor the final version contain any provisions on unlocalized loss; in cases of unlocalized loss, the provisions of the new sea carriage instrument automatically apply, unless the specific provisions of Article 82 RR prevent this. Even though the distance to be travelled by sea is

[494] Adamsson Joakim. 'The Rotterdam Rules - A transport convention for the future?' (Lund University 2011) 1

[495] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

relatively short in these circumstances, the Rotterdam Rules still apply to the entire multimodal transport. This is too expansive and cannot be an excellent model to deal with non-localised loss. Why should the maritime regime deal with non-localised loss and no other unimodal regimes do so?[496]

The application of the Rotterdam Rules to automatically apply to non-localised loss is an incentive for carriers to conceal where the loss or damage, or delay occurred if it did not occur during the sea leg of carriage. The carrier will, rather, invoke the limitation in the Rotterdam Rules, which is far lower than any of the limitations in the inland or air carriage regimes.

Other Issues

A further flaw of the Rotterdam Rules, as defined by William Tetley as well as the majority of signatories, is the volume contracts exemption. It is believed that a convention ought to be mandatory and parties should not be allowed to opt out of the Convention regime just because of the contracts.[497]

The expansion of the Rotterdam Rules to other modes of transportation creates potential conflicts with the existing unimodal conventions. It may lead to states breaching treaty obligations

The proposed attempt by Articles 26 and 82 to address the conflicts between the Rotterdam Rules and other unimodal regimes arising out of the prior or subsequent carriage by road, rail, or inland waterway fails and does not offer a solution to all possible conflicts. Article 82's specific restriction, as explained above, is susceptible to misinterpretation. Accordingly, the network system employed is inadequate, and the provisions intended to resolve potential conflicts cannot deal with the conflicts when they arise.

The drafting of the Rotterdam Rules was to ensure that there was a uniform law governing carriage of goods by sea. The Rotterdam Rules may generate some uniformity in the areas of international sea carriage. However, there is less uniformity in the area of multimodal transport. The Rotterdam Rules may just be able to generate a partial uniformity and may just not be a suitable regime in the

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[496] Erik Røsœg. 'The Rotterdam Rules as a Model for Multimodal Transport Law' (2010) 2(1) European Journal of Commercial Contract Law 94

[497] William Tetley, 'A summary of some general criticisms of the UNCITRAL Convention (the Rotterdam Rules)', *Serving the Rule of International Maritime Law* (Routledge 2010) 315

murky waters of multimodal transport.[498] Little wonder that the Rotterdam Rules have only been ratified by five countries[499] after circa 12 years since it was drafted.

Conclusively, the carriage of goods by sea convention was not conceived to regulate multimodal transport and cannot be perfect for the system. Even the Rotterdam Rules was not conceived to govern multimodal carriage. It was conceived to regulate contracts of carriage by sea, in which the carrier agrees to extend its services beyond carriage of goods by sea. Accordingly, it is, at best, complementary.

3.3.2 Carriage of Goods by Air

3.3.2.1 Overview of Carriage of Goods by Air

Carriage of goods by air has been governed by international conventions for several years. The first of these conventions is the Convention for the Unification of Certain Rules Relating to International Carriage by Air, known as the Warsaw Convention. The Warsaw Convention was signed in Warsaw on 12 October 1929 and was amended in 1955 at the Hague in the Netherlands. A supplementary convention, the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, was Signed on 18 September 1961 in Guadalajara. It was further amended in Guatemala City, Guatemala in 1971 (Guatemala City Protocol). The International Conference on Air Law, convened by the International Civil Aviation Organization (ICAO), met in Montreal from 3–25 September1975 and consequently adopted four protocols to amend the Warsaw Convention, as amended by the Hague Protocol and the Guatemala City Protocol. (Montreal Protocols).

Because of its many amendments, the Warsaw Convention created a fragmented and complicated system.[500] The Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) was drafted to replace the patchwork of regimes and deal with the changing needs of the international landscape of carriage of goods by air. The Convention entered into force on 4 November 2003. Today, 136 countries have ratified the Montreal Convention[501] and

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[498] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[499] Republic of the Congo, Spain, Togo, Cameroon and Benin

[500] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law' (University of Southampton 2018)

[501] ICAO. 'Current Status of the Convention For The Unification Of Certain Rules For International Carriage By Air Done At Montreal On 28 May 1999'
<https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf> accessed May 12, 2020

it largely supersedes the Warsaw Convention in most jurisdictions. However, because the Montreal Convention does not explicitly request the denunciation of the Warsaw Convention, this means that both systems currently operate.

3.3.2.2 Application of the Conventions of Carriage by Air

The Montreal and Warsaw conventions both made efforts to delineate the scope of their application. A look at Article 1(2) of both conventions when defining 'international carriage' shows that the conventions necessitate the existence of an agreement that the carriage is premised upon.[502]

Mance LJ in Western Digital v British Airways stated that:[503]

> While it is clear that in certain respects the Convention scheme provides general rules rather than merely statutory contractual terms, it is also clear that the draughtsmen had very much in mind as a premise to its application the existence of a relevant contract of carriage.

Consequently, for the conventions to be applicable there must be:

- existence of an agreement; which concerns
  - international carriage
  - cargo
  - performed by aircraft.

Although the air conventions are based on unimodal philosophy, some provisions of these conventions have appeared to create an 'air plus' regime.[504]

3.3.2.3 Ascertaining the Applicable Regime

In any dispute or claim concerning carriage of goods by air, it is pertinent to ascertain which of these regimes will be applicable. Is it the Montreal Convention or the Warsaw system? Where it is the Warsaw system, which of the versions apply? To determine this, recourse will be made to the Vienna Convention.[505]

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[502] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[503] [2000] 2 *Lloyd's Rep.* 142

[504] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient,

but doctrinally dubious' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 368

[505] The Vienna Convention on the Law of Treaties is an international agreement that regulates treaties between nations. It is referred to as the 'treaty on treaties'. It contains detailed rules, procedures, and guidelines for defining, preparing, amending, interpreting, and generally

Article 30(3 & 4) of the Vienna Convention is instructive on this, particularly Article 30(4). The provision states that:

> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
> (a) As between States parties to both treaties the same rule applies as in paragraph 3;
> (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

This implies that the later treaty, which both the state where the port of departure is situated and the state where the port of destination is signatory to, will govern their mutual rights and obligations. Article 55 of the Montreal Convention also stipulates that it shall prevail over any other regime in which both states (place of destination and departure) are party to any of the earlier conventions. However, the position will not be the same where one of the states involved is not a party to the Montreal Convention. For example, where there is a shipment from Lagos in Nigeria to Abidjan in Côte d'Ivoire, where both parties are signatories to the Montreal Convention, the Montreal Convention will apply. However, the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on 12 October 1929,[506] will be applicable for a shipment from Liberia to Togo by air Because one of these (Liberia) is not signatory to the MC?.[507]

Considering that this study deals with multimodal transport, it is important to determine where a place of departure or place of destination is, particularly because the place of departure in the multimodal transport contract may be a different place of departure of a unimodal air carriage.

Koning[508] opines that the Place of destination in the Warsaw and Montreal Conventions is the place where the air segment of a multimodal contract of carriage ends. She further states that the airports where the carriage starts and ends are very instructive in determining both the place of departure and place of destination. Her

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applying treaties. The Convention was adopted on 23 May 1969, and entered into force on 27 January 1980.

[506] Article 30(4b) of the Vienna Convention

[507] Liberia is not a party to Montreal Convention but Togo is a party to Montreal Convention

[508] I. Koning. 'Aansprakelijkheid in het luchtvervoer' (2007); Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

argument is based on Article 31 of the Warsaw Convention and Article 38 of the Montreal Convention, which provide that the conventions apply to only the air segment in the case of combined carriage.

Hoeks[509] also aligns herself with the thoughts of Koning. She believes that the Place of destination and departure are connected to the air stage and not the multimodal transport carriage. While it appears that the place of destination and departure should not pose an issue on the principles stated above, it is necessary to note that some complications may arise.

Suppose, for example, there is a multimodal transport contract from Banjul, Gambia, to Cotonou, Benin. Parties agree to a multimodal contract with terms that the trip should be from Banjul to Dakar by road and from Dakar to Cotonou by air. Should the air carrier move the goods from Dakar to Lomé by air and put the goods on a truck to Cotonou, where will the place of destination be? In such instances, the place of destination is Cotonou and not Lomé. This is supported by the provision of Article 18(4) of the Montreal Convention, which states:

> 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.

The place of destination may also be difficult to ascertain in the case of successive carriage. It is not uncommon for cargo to be transported by a combination of carriers. For example, ABC airlines may carry cargo from Lagos to Ghana and XYZ from Ghana to Liberia. As long as Liberia is the place of destination for air carriage, agreed by parties, Liberia is the place of destination.

Article 1(3) of Montreal Convention states that:

> Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

Accordingly, it will be regarded as a single operation. The place of departure and destination under a successive carriage will not be the place of departure of each

[509] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

carriage or place of destination of each carriage but the place of departure of the entire air segment and place of destination of the entire air segment.

3.3.2.4 Multimodal Transport and the Warsaw Convention

A look at the *travaux préparatoires* shows that the drafters of the Warsaw Convention did not intend the Warsaw Convention to be an air plus regime. Notably, the French delegate at the Warsaw International Conference proposed that the Warsaw Convention 1929 cover 'door-to3-door' shipments; however, the proposal was eventually turned down.[510]

The possible extension of the scope of air conventions (i.e., Warsaw and Montreal Conventions) to other modes of unimodal transport is stipulated in Article 18 and Article 31 of the Warsaw.

Article 18(3) of the Warsaw Convention provides that;

> The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, **however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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**.

An analysis of Article 18 (1) and (2) of the Warsaw Convention 1929 shows that the goods must be lost, damaged or destroyed while in an air carrier's charge and they must be in the carrier's charge either on board an aircraft or inside an airport before an air carrier can be held responsible for losses or damages. Accordingly, the Warsaw Convention system is an 'airport-to-airport' cover.[511]

Also, the Warsaw Convention system states in all versions and amendments that carriage of air does not extend to the carriage by other modes of transportation.[512] This reiterates the earlier position on the rejection of the French delegate's proposal seeking that the Convention applies to the land carriage. Article 31 of the Warsaw Convention goes on to state that:

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[510] The British delegate argued that the Warsaw Convention should be restricted to carriage by air only.

[511] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient,

but doctrinally dubious' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 368

[512] See Hague Protocol 1955, Art.18 (3) of the Warsaw Convention 1929 and Montreal Protocol No 4, Art.18(5).

> in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

Accordingly, even where there is an Air Waybill (AWB), which covers an aerial and non-aerial segment of transportation, the Warsaw Convention will only govern the aerial segment and will not cover the non-aerial segment, such as the land segment. The Warsaw Convention gives a nod to the use of AWB as a document of multimodal transport in Article 31(2). The Warsaw Convention is unambiguous that it is a unimodal convention. Although it acknowledges the reliance of air transportation on ancillary carriage, the Warsaw Convention was designed to cover only unimodal transportation. The only time the Warsaw Convention systems accepts multimodalism is in Article 18.

Therefore, only damages in the ancillary transport segment, which may be carriage by land, by sea or by river, performed outside an aerodrome in the performance of a contract for carriage by air, for the purposes of loading, delivery or transhipment are exceptions to the period where the Warsaw Convention may apply to other modes of transportation. In such instances, any loss or damage is presumed to have occurred during the period of air transportation.[513]

3.3.2.5 Multimodal Transport and the Montreal Convention

Cargo was not a cornerstone discussion when the 1999 convention was prepared.[514] After the drafting of the Montreal Convention, there was a unanimity that the Montreal Protocol No 4 was a successful legal instrument that only required little adjustment. A proposal by the Japanese delegate to open the discussion on unbreakable liability limits was largely rejected because most people had come to terms in the international aviation sector that cargo liability was unbreakable.[515] As a result, the 'multimodal provisions' of the Montreal Convention 1999 only had two amendments from the Warsaw Convention in Article 18(3) and 18(4); the second of which is not necessary to the discussion of multimodal transportation in this work.[516]

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[513] Pimkamol Kongphok. 'Multimodal Transport Documents in the Context of International Trade Law' (University of Southampton 2018)

[514] Leloudas George, 'Multimodal Transport Under The Warsaw And Montreal Convention Regimes: A Velvet Revolution?', *Carriage of Goods by Sea, Land and Air* (Informa Law from Routledge 2013) 123

[515] ICAO, *International Conference on Air Law at Montreal. Convention for the Unifi cation of Certain Rules for International Carriage by Air, Volume 1—Minutes* (Doc 9775-DC/2, 10–28 May 1999) ("*travaux préparatoires* of the Montreal Convention 1999").

[516] The last paragraph of 18(4) of the Montreal Convention states that "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". Accordingly,

It is important to note that, similar to Article 31 of the Warsaw Convention, Article 38(1) states that in the case of multimodal carriage[517] performed partly by air and partly by any other modes of transport, the Convention only applies to international carriage by air. The implication of this is that the Montreal Convention will not apply to the whole multimodal contract but just the air segment, provided that the carriage by air falls within the terms of Article 1 of the convention. This provision is, however, subject to Article 18(4), which is one of the amendments in the Montreal Convention, as against the Warsaw Convention system.

A look at Article 18(2) of the 1929 Warsaw Convention vis a vis Article 18(3) of the Montreal Convention provides that the goods shall be in the air carrier's charge. The phrase '… in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever' was deleted.[518] The deletion of the final sentence in Warsaw Convention Article 18(2) simply explains that the Montreal Convention does not intend to limit the definition of a carrier to landing in airports or aerodromes. An isolated review of that section therefore suggests that if the carrier enters a contract to transport the goods from the consignor's warehouse to the airport of destination, it is covered by the Montreal Convention, which consequently can be said to be door-to-door transport. Does this then mean that Article 18(3) of the Montreal Convention extends the period of carriage by air?

It is pertinent to note that although drafters of the convention intended that the carrier be liable when the goods are in his charge, it is not uncommon to have airports which have road or rail movement within the airport area in which carriage of goods by air applies.[519] To prevent the assumption that the Montreal Convention applies to such carriage, Article 18(4) restricts the scope of the application. A combined reading of Article 18(3) and the first sentence of 18(4) shows that the drafters intention was not to create such an air plus convention. The first line of Article 18(4) states that 'The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport.'

The literal implication of the provisions stating the exception is that carriage of goods by land, sea or rail from airport to warehouse (outside the airport) is not covered by the Montreal Convention. However, the storage of goods by an air

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even where the carrier splits the trip and carries the trip by two modes of transportation, such trip will still be an air carriage

[517] The Convention uses the word "Combined carriage", however, it is important for uniformity that this term be interpreted as "multimodal transport"

[518] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient,

but doctrinally dubious' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 368

[519] *Rolls-Royce v Heavylift Volga Dnepr Ltd.,* [2000] 1 *Lloyd's Rep.* 653

carrier in the warehouse is subject to it, since they are in the charge of the carrier. Leloudas, G[520] explains this perfectly well when he says that:

> the Montreal Convention 1999 is disapplied from the moment the truck passes the perimeter fence of the airport and reapplied as soon as the goods are unloaded in the air carrier's warehouse. Surely, this result could not have been the intention of its drafters: it certainly does not make any commercial sense. One way of resolving this paradox would be to treat this land movement as ancillary to aerial operations: in other words, not as land carriage at all, but as air carriage subject to the Montreal Convention 1999.[521]

This is totally agreeable and the land carriage from the airport to the warehouse for storage should be seen as an ancillary aerial operation.

To further buttress the fact that the Montreal Convention is a unimodal convention, similar to Article 31 of Warsaw Convention, Article 38(1) states that in case of multimodal carriage performed partly by air and partly by any other modes of transport, the Convention only applies to international carriage by air. The implication of this is that the Montreal Convention will not apply to the multimodal contract but just the air segment of that trip.

Just after the first sentence, which restricts the period of the carriage by air, the Montreal Convention gives two exceptions where carriage by air may be extended to other mode. Article 18(4) states that:

> If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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.

This means that if damage occurs during land, sea or road carriage for the purpose of loading, delivery or transhipment, performed outside an airport based on a contract of carriage by air, it is assumed that this damage is solely due to an event that occurred during air travel. The rationale behind this is to relieve the party that suffered damage or loss from the difficult task of proving that the incident, which

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[520] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient, but doctrinally dubious' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 368

[521] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient,

but doctrinally dubious' (2015) 368

caused damage, occurred during the carriage by air and not by an event which occurred during the ancillary operation of the carriage of goods by air.[522]

This will, however, only apply where the cause of the loss or damage remains unlocalised.[523] In such a case, the rules of the Montreal Convention also apply to carriage which involved modes of transport other than by air.

The second exception relates to the second amendment stated earlier, and is in the last paragraph of 18(4). The provision states: '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'. Accordingly, even where a carrier is contracted to carry goods by air but the carrier splits the trip and carries the goods partly by air and partly by another mode of transportation without the consent of the consignor, such trip will still be an air carriage and subject to the Montreal Convention.

3.3.2.6 Do Multimodal Transportation Documents Qualify as an Air Waybill?

It is important to note that the term 'air consignment note' is only used in the Warsaw Convention 1929. Other international air conventions use the term 'air waybill'. This work will use the term 'air waybill'.

An air waybill is an essential document with respect to carriage of goods. It is evidence of carriage and would usually state the terms of carriage. This is not a document of title, but it is *prima facie* evidence of the conclusion of the contract, receipt of the goods, conditions of carriage, along with weight, dimensions, packing and quantity.[524] It comes in three original parts:

- one is for the carrier (signed by the consignor)
- the second is for the consignee (signed by the consignor and accompanying the goods)
- the third is signed by the carrier and handed to the consignor after the goods have been accepted for carriage.

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[522] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

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

[524] Takis Kalogerakos, 'Carriage by air' (*Greenwood Insurance Brokers*, 2019) <https://greenwoods.org/carriage-by-air/> accessed 18 August 2020

Article 8 of the Warsaw Convention 1929 states the particulars that must be contained in an air waybill.[525] Article 19 of the Warsaw Convention then provides that failure to include the particulars in Article 8 on an air waybill leads to loss of the carrier's right to limit its liability.

Article 8 of the Warsaw-Hague Convention of 1955, as an improvement, reduces the particulars to be contained in an airway bill to three. The Warsaw-Hague-MAP 4 Convention of 1975 and the Montreal Convention of 1999 simplify the list of particulars that must be included on an air waybill or cargo receipt. It specifies that the air waybill must contain:

a) an indication of the places of departure and destination

b) if the places of departure and destination are within the territory of a single [Contracting State], one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place

c) an indication of the weight of the consignment.

A major difference of both regimes is that the Montreal Convention stipulates that the absence, irregularity or loss of an air consignment note or air waybill does not affect the validity of the contract of carriage.[526] Article 9 of the Montreal Convention states that even where there is no air consignment note, the convention shall still be applicable. However, the Warsaw Convention in Article 9 states that the absence of such air consignment note robs the carrier the right to limit or exclude his liability in accordance with the rules in the Warsaw Convention[527].

The question arises of whether an MT document issued by a MTO in a multimodal contract of carriage is an air consignment note. For it to be an air consignment note

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[525] the place and date of its execution; (b) the place of departure and of destination;(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the consignor;(e) the name and address of the first carrier; (f) the name and address of the consignee, if the case so requires; (g) the nature of the goods; (h) the number of the packages, the method of packing and the particular marks or numbers upon them; (i) the weight, the quantity and the volume or dimensions of the goods; (j) the apparent condition of the goods and of the packing; (k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it; (l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred; (m) the amount of the value declared in accordance with Article 22 (2); (n) the number of parts of the air consignment note; (o) the documents handed to the carrier to accompany the air consignment note; (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon; (q) a statement that the carriage is subject to the rules relating to liability established by this Convention

[526] Article 9 of the Montreal Convention; Article 5 of the Warsaw Convention.

[527] The Montreal Protocol no 4 of 1975 however deleted the exception from the Warsaw Regime.

under the Warsaw Convention, a document needs to contain all the particulars set out in Article 8 (a-i) and Article 8(q) of the Warsaw Convention to ensure that the carrier enjoys the limitation of liability provisions of the Warsaw Convention. Article 31(2) of the Warsaw Convention states that 'nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air'.

This further buttresses the argument that as long as all the requirements stated above are complied with, there is no reason why an MT document will not serve as an air consignment note. Concerning the use of MT documents subject to the Montreal Convention, these requirements are not necessary and, accordingly, the MT document will function as an air waybill whether the requirements are contained therein or not.

3.3.2.7 Carriage by Air - Conclusion

A holistic view of the various air conventions shows that the conventions, while they consider the existence of multimodal transportation, do not provide for multimodal transportation or door-to-door transport. They merely deal with multimodal transport in a marginal fashion. More particularly, this is demonstrated by that fact that Article 18 of the Montreal Convention, which contains the major provision on 'multimodal transport', is not in the chapter that deals with scope of application; rather, it is linked to the chapter that deals with Liability of the Carrier and Extent of Compensation for Damage. It may have been more compelling if the Article was a stand-alone Article.[528] The air convention holds tight to its unimodal philosophy and has simply incorporated the realities of multimodal transport in international carriage of goods by air. These conventions can in no way replace the international and domestic rules for multimodal transport or door-to-door transportation.

This work will not consider international regulations on road and rail because no West African Country is a party or signatory to any road or rail convention

3.4 The International Approach and Efforts towards a Multimodal Transport Liability Regime

[528] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

During its conferences in 1911 and 1913, the Comité Maritime International (CMI) devoted time to discuss the legal issues concerning through carriage. These led to the drafting of *Code international d'affrètement* which regulated multimodal carriage as long as there is a sea leg. This proposal was rejected because it would lead to a decline in the concept of through transport if the last carrier was responsible for the liability for the whole transport.[529]

Shortly thereafter, the Institut international pour l'unification du droit privé (UNIDROIT) began working on a multimodal regime. This work resulted in the Bagge Draft in 1948 and a draft containing a pure network system in 1961 inspired by the CMR. Both documents were modified to create the UNIDROIT Draft in 1965. The Comité Maritime International decided to Investigate legal issues related to multimodal transport. Based on the answers to the questionnaire, a series of draft conventions were drafted and culminated into the 1967 Genoa Convention and the 1969 Tokyo Rules[530].

The UNIDROIT Draft in 1965 and the Tokyo Rules in 1969 were different in many ways. The UNIDROIT Draft is based on CMR and regulates the combined transport of containerised goods. However, the Tokyo Rules are consistent with the Hague rules in terms of Maritime Liability and regulate the combined transport involving the sea leg. It was regarding this that, in 1970, the UNIDROIT convened a Roundtable meeting which reconciled both regimes and named produced the Rome Draft.[531] Further negotiations were made on the draft at the joint meetings of the Inter-Governmental Maritime Consultative Organization (*IMCO*) and the Inland Transport Committee of the United Nations Economic Commission Europe (ECE), which resulted in the *Transport Combine de Merchandises* Draft convention of 1972. Accordingly, the TCM can be said to have begun the formal negotiation of a multimodal convention.[532]

3.4.1 Failure of the United Nations Convention on International Multimodal Transport of Goods, 1989

3.4.1.1 The Approach and Legal Substance of the Convention

The United Nations Inter-Governmental Maritime Consultative Organization (UN/IMCO) /container conference called for further studies on many aspects of multimodal transport, including its fundamental economic impact, with special

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[529] DeWit. 'Multimodal transport : carrier liability and documentation'

[530] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods'

[531] Driscoll and Larsen. 'The Convention on International Multimodal Transport of Goods' 193

[532] Kurosh Nasseri. 'The Multimodal Convention'

attention to developing countries. UNCTAD was recommended as the body responsible for carrying out this work. In Resolution 1734 (LIV), the United Nations Economic and Social Council (ECOSOC) approved the recommendations of the UN/IMCO Conference and called on the UNCTAD Trade and Development board to set up an intergovernmental preparatory group. Within six (6) years, the IPG held six sessions and came out with a draft known as the IPG 6 draft. In May 1980, the IPG 6 draft was brought before the United Nations at a Conference on a Convention on International Multimodal Transport (Geneva Conference) and was consequently adopted as the United Nations Convention on International Multimodal Transport of Goods.

The objectives of the MT Conventions are:

a) That international multimodal transport is one means of facilitating the orderly expansion of world trade

b) The need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned

c) The desirability of ensuring the orderly development of international multimodal transport in the interest of all countries and the need to consider the special problems of transit countries

d) The desirability of determining certain rules relating to the carriage of goods by international multimodal transport contracts, including equitable provisions concerning the liability of multimodal transport operators

e) The need that this Convention should not affect the application of any international convention or national law relating to the regulation and control of transport operations

f) The right of each State to regulate and control at the national level multimodal transport operators and operations

g) The need to have regard to the special interest and problems of developing countries, for example, as regards introduction of new technologies, participation in multimodal services of their national carriers and operators, cost efficiency thereof and maximum use of local labour and insurance

h) The need to ensure a balance of interests between suppliers and users of multimodal transport services

i) The need to facilitate customs procedures with due consideration to the problems of transit countries.[533]

[533] See MT Convention

One essential essence of the convention was to have a predictable regime regulating multimodal transport from origin to destination.[534] This can be gleaned from the convention which stipulates that a Multimodal Transport Operator takes responsibility for the goods from the moment he takes up the goods until the goods are delivered.[535]

The MTO has an express or implied right to subcontract the contractual performance or leg of the carriage to another carrier, but the MTO will continue to be responsible for any loss or damage that occurs, even if such loss occurs in possession of the subcontractor.[536]

One thing the convention does perfectly is that it preserves the applicability of unimodal conventions and domestic laws in the case of unimodal carriages. The convention creates two levels of relationship – the first between the MTO and the Shipper, and the second between the MTO and the carrier of each mode of transportation. The implication of this is that the second relationship between the carrier and the MTO is governed by unimodal conventions, and the relation between the MTO and shipper is governed by the MT Convention.

Article 3 of the MT Convention also provides its provisions are mandatory when there is a multimodal transport contract. The effect of this is that a multimodal transport contract based for example on the TCM draft cannot be given effect to, and the court will interpret such contract on the basis of the MT Convention.

The MT Convention emphasises the fact that a multimodal transport is by a single contract of carriage[537] and that in the event of loss, the MT Operator is liable to the shipper.[538]

In addition to the above, the MT Convention also governs only International Multimodal Transportation. This means that the convention does not apply to national multimodal transport operations, except where its provisions are incorporated into a contract by parties.

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[534] See Objective d of the 1980 United Nations Convention on International Multimodal Transport of Goods

[535] See article 1(1) of the 1980 United Nations Convention on International Multimodal Transport of Goods

[536] See aricle 16 of the 1980 United Nations Convention on International Multimodal Transport of Goods

[537] See Article 1(3) of the 1980 United Nations Convention on International Multimodal Transport of Goods

[538] Article 15 of the MT Convention states that 'The responsibility of the multi modal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery'.

Article 5 of the MT convention clearly states that the MTO must issue a multimodal transport document which will be endorsed either as negotiable or non-negotiable. It also states that such document must be signed by the MTO or any person whom he gives authority to sign the document. The signature may be handwritten, printed in facsimile, perforated, stamped, or imputed electronically. Where a multimodal transport document is issued as a non-negotiable document, the name of the consignee must be indicated on the multimodal transport document.

Where there is an occurrence of damage, a shipper must notify the MTO of such damage within six (6) days in the event such damage is non-apparent and one (1) day in the event of apparent damage.[539] Where a shipper/consignee does not notify the MTO of a damage within six (6) days in the case of non-apparent damage and one (1) day in the case of apparent damage, such failure will be treated as *prima facie* evidence that the cargo was delivered in perfect condition.[540] Article 25 of the MT convention reiterates that where judicial or arbitral proceedings were not instituted within two (2) years, the action becomes statute barred. The same Article 25 of the MT Convention states that where a claim for damage was not brought to the notice of the MTO within 6 months, it became time barred.

In the event of a conflict between two conventions. Article 38 leaves the arbitrator or court to resolve such conflicts.[541]

3.4.1.2 Liability under the Multimodal Convention

The MT Convention bears a presumed liability regime. The MTO is presumed to be liable for loss or damage during the period of responsibility. This presumption can be rebutted if the MTO or their agent has taken all steps or measures required of them to ensure that such loss or damage does not occur.[542]

The basis for the MTO's obligation is laid out in Article 16. It stipulates that the MTO, its agents, and servants will be accountable for 'loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge'.

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[539] Article 25 of the 1980 United Nations Convention on International Multimodal Transport of Goods

[540] See Article 24(1) of the 1980 United Nations Convention on International Multimodal Transport of Goods

[541] This might have been a source of criticism if the MT Convention ever took effect.

[542] Gerald F. FitzGerald. 'The Proposed Convention on International Multimodal Transport of Goods: A Progress Report' (1980) 17 Canadian Yearbook of international Law/Annuaire canadien de droit international 247; see also Article 16 of the 1980 United Nations Convention on International Multimodal Transport of Goods;

Article 16 demonstrates the MT Convention's use of presumptive liability. A consignor merely needs to show that the goods were lost, delayed, or damaged while they were in the carrier's custody. Once this can be proven, there is a prima facie case against the MTO. An exception is where the MTO can demonstrate that he took all reasonable precautions to prevent the occurrence and its consequences. When there are concurrent causes, i.e. another cause in addition to a cause attributable to the MTO's (or agent's) fault, Article 17 states that the MTO is only liable to the amount that the loss, damage, or delay is attributable to his alleged fault or neglect.

Article 18 of the MT Convention states that the liability limit for a MTO is 920 IMF Special Drawing Rights (SDR) per package, or 2.75 SDR per kilogram, whichever is greater. In instances where there is no carriage of goods by sea or by inland waterways, the MT Convention proposes a limit of 8.33 SDR per kilogram. Where a loss occurs during the leg of the transport and the applicable convention or national law provides a higher limit of liability, Article 19 of the MT Convention states that the MTO's liability is to be assessed on the basis of such convention or national law. These limitations can only be benefited from if it can be proved that the loss, damage or delay in delivery occasioned from an act or omission of the MTO where the MTO should know that such act or omission may cause loss or damage.[543]

Article 22 of the MT Convention also holds the consignor responsible for any loss suffered by the MTO as a result of the fault of the consignor or his agents.

3.4.1.3 A Truly Uniform System?

The idea has always been mooted that an international uniform convention is the best possibility in regulating multimodal transport.[544] However, it was not an easy task for member states to agree to a uniform system liability.

In determining the basis of liability for the MT Convention, there were issues as to whether a multimodal transport contract was sui generis and should have a regime distinct from unimodal transport or not. There were also debates as to whether the liability system should be uniform or network.[545] The Convention finally adopted a uniform liability system.[546] In a uniform liability system, the uniform rules apply regardless of the unimodal phase of transport where there is loss, damage or delays.

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[543] Article 21 of the 1980 United Nations Convention on International Multimodal Transport of Goods

[544] Outi Toivonen. 'A regional regime - as a step towards an international regime in multimodal transport?' (2015) 5(4) World Review of Intermodal Transportation Research 387

[545] United Nations Conference on a Convention on International Multimodal Transport Geneva, Switzerland, *United Nations Conference on a Convention on International Multimodal Transport: held at Geneva from 12 to 30 November 1979 (first part of the session) and from 8 to 24 May 1980 (resumed session)* (1981)

[546] Besong. 'Towards a modern role for liability in multimodal transport law'

The uniform system offers a uniform set of rules. The MT Convention adopts this as its liability basis and was expected to bring forth legal certainty and predictability to multimodal transport.[547]

When a uniform liability regime is used as the basis of a liability, the proper meaning is that there is essentially no need to differentiate between 'localised loss' and 'unlocalised loss'.[548] However, the MT Convention appears not to have adopted this truly uniform liability regime. While the MT Convention claims to employ a uniform system of liability, the truth is that the MT Convention only applies a uniform liability in unlocalised damage cases. In cases of localised damage, it did not adopt a uniform liability. From the way Article 18 was drafted; it sets out one financial liability when the contract includes carriage of goods by sea or inland waterway and a different financial liability when the contract does not include carriage of goods by sea or inland waterway. This sort of provision is clearly in derogation of the principle of a uniform liability system. Scholars were of the view that this sort of provision would make it easy for operators to exclude their liabilities, relying on some of the defenses available in unimodal conventions like the Hague Rules.[549]

In addition, Article 19 of the MT Convention employs a modified uniform system as a compromise between a network and uniform system for localised losses. When loss or damage occurs during one stage of the carriage and the international unimodal convention or necessary national law establishes a higher level of liability than the limit that would be derived from Article 18(1) to (3) of the MT Convention, the higher limit is to be applied.

It's understandable to wonder why the drafters of the MT Convention included Article 19. They presumably thought that, because the limit already set out in Article 18(1) to (3) was already so high, a claimant would rarely need to seek to apply the higher maximum.[550]

Accordingly, the MT convention utilises the network system for localised losses, whilst for unlocalised loss, the uniform approach was employed by the MT Convention.

3.4.1.4 Conclusion on MT Convention

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[547] Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability'

[548] Jasenko Marin, 'The Harmonization of Liability Regimes Concerning Loss of Goods during Multimodal Transport'

[549] Mankabady. 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' 120

[550] Adeline Marie Briant. 'A critical look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24th May 1980)' (1996)

As ambitious and well-crafted as the MT Convention seems, with just 12 countries ratifying it (two of which belong to ECOWAS), it never racked up the required number of ratifications needed to come into force. After circa 39 years, it is safe to say the Convention is unlikely to enter into force. Several reasons have been attributed to this. One reason is that the number of ratifications required is high. Another reason is that the 'western countries' did not support the MT Convention because of its close identity with the Hamburg Rule, which is largely considered unfriendly to carriers.

During the negotiation of the MT convention, there was a strong emphasis on maritime law. As a result, organisations such as the International Air Transport Association (IATA) and the International Civil Aviation Organization (ICAO) did not completely embrace the agreement. In addition, the ICAO Legal Committee was split on whether there was a risk of contradiction between the Warsaw system and the MT Convention. As a result, there was no comprehensive intergovernmental stance created in ICAO.[551]

The question of whether a multimodal transportation contract was sui generis or not was also a concern. Some contended that because multimodal transport contracts are sui generis, the MT Convention should only govern the interaction between the MTO and the consignor/consignee, leaving the relationship between the MTO and the underlying carriers to the underlying unimodal convention. There was however a counterargument that the multimodal transport contract was not sui generis, and hence there was no chance of conflict between the MTC and the Warsaw system.[552]

In 1981, IATA repeated its position from 1979, that the air mode should be excluded from the MT Convention's scope. It was stated that the generally accepted Warsaw system contained a number of required elements that, if in conflict with the MT Convention, would generate major difficulties and undermine the current uniformity. The IATA specifically suggested that the MTC be amended to make its provisions compatible with the Warsaw system in terms of air transport.[553]

Also, the Monetary limitation in the MT Convention was significantly higher than the Hague and Hague (Visby) rules. The MT Convention limitation was 2.75 SDR/kg whilst the Hague and Hague Visby rules was 2 SDR/kg.

It is also argued that at the time the MT Convention was made, the use of multimodal transport was not as significant as it has become, as such making the timing of the

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[551] Gerald F. FitzGerald. 'The implications of the United Nations Convention on International Multimodal Transport of Goods for international civil aviation' (1982) 7 Annals of air and space law 41 <https://search.proquest.com/docview/1303866275>

[552] ibid

[553] Adeline Marie Briant. 'A critical look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24th May 1980)' (1996)

MT Convention unfortunate. Whilst the convention did not garner the required numbers, it continues to be a model for regional and domestic regulation to govern multimodal transport.[554]

3.4.2 UNCTAD/ICC Rules for Multimodal Transport Documents

3.4.2.1 Application of ICC Rules in Multimodal Transport Documents

Due to the lack of an international uniform law regime, there was a consequent need for a standardised rule. An example of such standardised rules is the ICC Uniform Rules for a combined transport document (URC).[555] The ICC Rules were based on the TCM Convention and the Tokyo Rules, and have gained prominence. They were already incorporated in multimodal documents like the FIATA combined transport bill of lading and the BIMCO/INSA COMBIDOC. UNCTAD was consequently mandated by the Committee of Shipping, UNCTAD to produce a document that could encourage uniformity in commercial practice, and that such rules be modelled along the Hague and Hague (Visby) Rules pending the coming into effect of the MT Convention. A joint working group was created between UNCTAD and the International Chamber of Commerce. The working group came out with a contractual standard rule – the UNCTAD/ICC Rules for Multimodal Transport Documents ('URM').[556] The Rules replaced the URC in 1992. They do not apply to multimodal contracts or any type of contract of carriage when they are not incorporated into the contract. They only apply when parties agree for the URM to govern their contracts.

In recent times, the ICC/ UNCTAD Rules often regulate MTO liability in standard contractual terms. The rules are usually incorporated in widely used multimodal transport documents, such as MULTIDOC 95 by Baltic and International Maritime Council (BIMCO)[557] and the FIATA FBL 1992.[558] An element that seems to militate against the incorporation of the ICC/ UNCTAD Rules as an ideal contractual

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[554] Mahin Faghfouri. 'International Regulation of Liability for Multimodal Transport In Search of Uniformity' (2006) 5(1) WMU J Marit Affairs 95 <http://www.ingentaconnect.com/content/wmu/wmujma/2006/00000005/00000001/art00007>

[555] The Uniform Rules for a Combined Transport Document were first issued as ICC Publication degree 273 in November 1973. It was adopted by the ICC Executive Committee in June 1975 published in October 1975 as ICC Publication 298.

[556] The text of the Rules can be found in ICC publication No. 481.

[557] In the forms, the phrase 'subject to UNCTAD / ICC Rules for Multimodal Transport Documents' is always included to incorporate the provisions of the Rules

[558] FIATA is Fédération Internationale des Associations de Transitaires et Assimilés. It is an organisation that represents the interests of forwarding and logistics firms in about 150 countries across the globe.

solution is the fact that it adopts a network liability regime.[559] This type of liability creates legal uncertainty, particularly for allowing determination of liability to a case-by-case inquiry, thus relying on many unimodal conventions. In addition, the rules are further complicated because the determination of applicable rules do not only depend on the particular leg of cargo loss but also on the domestic jurisprudence and court interpretation of unimodal rules.[560] URM appears to be simple and easy to understand.

Parties that want to subject their multimodal transport relationship to URM may need to add clauses on jurisdiction, arbitration and applicable law, which are not covered by the Rules. Parties can also include additional clauses on issues though covered by the rules are not satisfactory to parties, as long as those additional clauses comply with Rule 1.2. of the URM which states that:

> Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator.

Accordingly, once incorporated in a contract, they take precedence over conflicting contractual terms, unless the clauses increase the liability or obligations of the multimodal carrier.

3.4.2.2 Documentation – Negotiable or Non-Negotiable

Rule 2.6 envisages that multimodal transport documents may be issued in both 'negotiable' and 'non-negotiable' form. However, it is doubtful whether the incorporation of the rules into the multimodal transport documents would automatically make the documents a negotiable document in all jurisdictions. In some countries, like Germany,[561] A document of title cannot be created by an agreement between the parties; it may only be done so by custom, law, or statute. However, some other countries permit the creation of negotiable instruments by parties' agreement[562].

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[559] Outi Toivonen. 'A regional regime - as a step towards an international regime in multimodal transport?' (2015) 5(4) World Review of Intermodal Transportation Research 387

[560] Theodora Nikaki. 'Bringing multimodal transport law into the new century: is the uniform liability system the way forward?' (2013) 78(1) Journal of Air Law and Commerce 69

[561] This system is called Typenzwang–numerus clausus. It excludes from the status of negotiable transport document any document not listed in the commercial code and, from the status of document of title any document not expressly recognized as such by statute.

[562] M. Bools, 'The Bill of Lading: A Document of Title to Goods, An Anglo-American Comparison' , vol 29 (Anderson Publishing Ltd 1998) 467;Ralph DeWit, *Multimodal transport : carrier liability and documentation* (Lloyd's of London Press 1995) 583

Pursuant to Rule 3, the content in the multimodal transport document shall also be a prima facie evidence of the MTO's taking charge of the goods as stated in the document unless expressions like 'shipper's weight, load and count', 'shipper-packed container' have been included in the printed text on the document. This would mean that such printed clauses would supersede the already contained information on the document.

3.4.2.3 Claims and Actions - Liability of a Multimodal Transport Operator in Localised Loss and Unlocalised Loss

The UNCTAD/ICC Rules establish a consistent liability scheme. Rule 5.1 of the UNCTAD/ICC Rules expresses the basic liability principle, which does not distinguish between unlocalised and localised damage.

The URM liability, pursuant to Rule 5.1, is founded on the principle of presumed fault of the MTO. The MTO is held liable for loss or damage of goods if such damage occurs when the goods are in the MTO's charge. The exception to this presumption is only where the MTO can prove that such damage did not occur as a result of his fault or the neglect of this agent and servant.[563] Like the MT Convention, Rule 5.4 of the URM also allows the MTO to enjoy some defences when the carriage includes sea or inland waterway stage. A MTO will not be liable for the loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

- 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
- fire, unless caused by the actual fault or privity of the carrier.[564]

These defences are subject to the requirement that the MTO must demonstrate that due diligence was exercised in ensuring seaworthiness at the beginning of the voyage. Clearly the provisions of Rule 5.4 were modelled after the Hague (Visby) Rules.[565]

Like the MT Convention, the MTO's responsibility is from the time they take charge ... of the goods to the time of delivery. In addition, the MTO is also responsible for

[563] Article 5.1 of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992

[564] Article 5.4 of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992

[565] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

the acts and omissions of their servants, agents or any other person of whom they make use during the performance of the contract[566]

The URM provides for lower limitation amounts than those in the MT Convention. They are based on the Hague (Visby) SDR protocol of 1979. Rule 6.1 of the URM stipulates that the MTO shall not be liable for any loss of, or damage to, the goods in an amount exceeding the equivalent of 666.67 SDR (Special Drawing Rights) per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher

Just like the MT Convention, there are clauses on the limitation of liability by a multimodal transport operator in instances of localised losses. In multimodal contracts where the URM is incorporated into the contract, liability is usually determined in accordance with Rule 6.4 of the URM. The rule makes reference to the applicability of international convention or mandatory national law which would have been applicable if a separate contract was made for that stage of transportation where loss occurred. The URM sets the limits of 2 SDR per kilogram or 666.67 SDR per package, for contracts which include the carriage of goods by sea or inland waters. However, for contracts which do not include carriage of goods by sea or inland waterway, it adopts the same limit as the Convention on the Contract for the International Carriage of Goods by Road, which is 8.33 per kilogram.

Rule 6.5 also provides that the MTO's liability for delays in delivery of goods or consequential loss or consequential damage arising from such delay is limited to an amount not exceeding the freight under the multimodal transport contract. Where the loss, delay or damage is as a result of the MTO's personal omission, the MTO cannot limit his liability.[567] For an action to be brought, notice of loss of or damage to the goods must be issued by the consignee. Such notice should be made in writing. The notice must specify the general nature of such loss or damage at the time of handing over the goods to the consignee. However, where the loss or damage is not apparent, the consignee is expected to give the notice within 6 consecutive days after the day when goods were handed over. Where such notice is not given, it shall be prima facie evidence that the goods were delivered as described on the MT document.[568]

Rule 10 of the URM also stipulates a time bar period of nine months. Accordingly, a MTO is free of liability after the delivery of the cargo if an action is not brought within 9 months. The idea behind this is to afford the MTO the opportunity to file a

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[566] United Nation Conference on Trade and Development, 'Implementation of multimodal transport rules' (2001)

[567] Rule 7 of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992

[568] Rule 9 of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992

recourse action against the carriers of the unimodal transport leg considering that most unimodal transport conventions have a higher time bar.

3.4.2.4 Non-Contractual Claims

The URM are also applicable to non-contractual claims. Pursuant to Article 11 of the URM, the Rules are applicable to all multimodal contracts, even when the claim is founded on a multimodal transport contract, whether the claim be founded in contract or in tort. This is similar to Article 20 of the MT Convention.

Article 12 of the URM further states that the rules will apply in a claim against a multimodal transport operator's servants, agents and other persons employed by them whether such claims are founded in contract or tort.

3.4.2.5 The Limitations of the Rules

Lack of Force of Law

As clearly articulated above, the UNCTAD/ICC Rules are not mandatory and have no force of law. They are only applicable when incorporated into a contract and are accordingly subject to international laws, national and domestic regulation. This is due to the fact that it is contractual and the provisos will apply only when incorporated by parties as long as they are not contrary to international law. Where these rules conflict with binding laws that have legal force, they are overridden by such mandatory international conventions or national laws. Even if there are no international conventions conflicting with the provision, there may be domestic legislations which affect the performance of the unimodal segment of transport.[569] Also, the fact that the document lacks the force of law makes it doubtful whether the incorporation of URM automatically confers the multimodal transport document the characteristic of a document of title at common law – although it may be said to be an evidence of a custom if the use of such documents is widespread[570].

Lack of Certainty

Whilst the URM appears to be working at the moment as a result of a lack of a multimodal convention, many scholars believe that there is a need for a new effective system which will have the force of law. The multimodal rules fail to make provision for issues such as arbitration, jurisdiction and applicable laws to the

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[569] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

[570] G. H. Treitel, Thomas Gilbert Carver and F. M. B. Reynolds, *Carver on bills of lading* (British shipping laws, 3rd ed. edn, Sweet & Maxwell 2011)

contract. This may further lead to confusion and uncertainty.[571] The effect of the lack of mandatories and the inability to cover the entire field means that the URM still does not give stakeholders, such as the MTO, the insurance industry or the consignor the uniformity they desire with regards to the extent of the carrier's liability in multimodal operations[572] and as such cannot help to achieve the uniformity desired in multimodal transport practice.[573]

[571] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[572] Economic Commission for Inland Transport Committee, *Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport - Report of an informal group of experts* (12 -13 July, , 1999)

[573] Bal Abhinayan Basu. 'Multimodal Aspect of the Rotterdam Rules: a critical analysis of the liability of the MTO' (Lund University 2011)

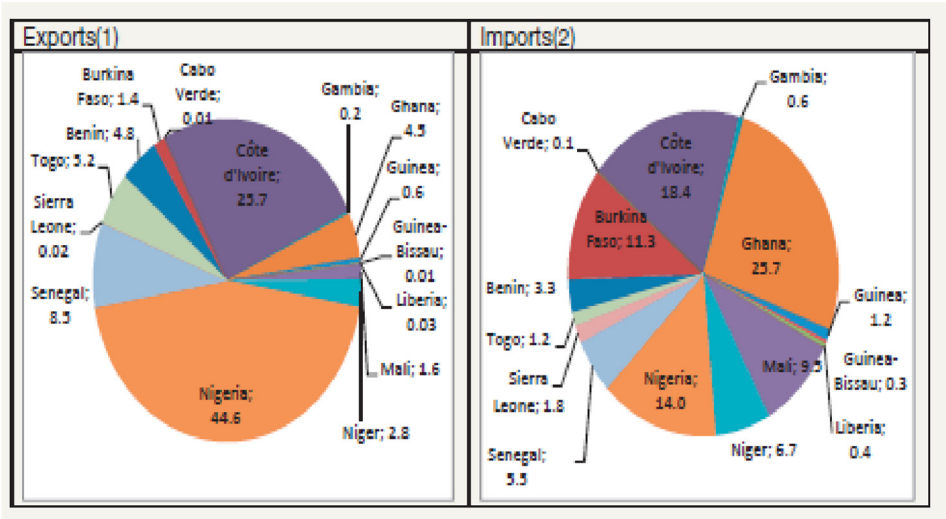
4 Multimodal transport law in West Africa

4.1 Overview of the ECOWAS Region and Selected Countries in ECOWAS

This study seeks to examine the status of ECOWAS multimodal transport law. In a bid to achieve this, four (4) countries will be picked in the ECOWAS region. The multimodal transport law regime of those countries will be reviewed to ascertain the status of multimodal transport in West Africa. The countries chosen are Nigeria, Ghana, Togo, and Côte D'Ivoire. These countries were picked based on the premise that out of the 15 member states that make up ECOWAS, these four countries capture a significant share of the intra-group trade in the region. Statistics show that these four countries account for circa 83.3 per cent and 63.6 per cent of intra-group exports and imports, respectively.[574]

[574] Shamika Sirimanne. 'Regional Integration and Non Tariff Measures in the Economic Community of West African State' (2018) United Nations Conference on Trade and Development; Division on International Trade in Goods and Services, and Commodities <https://unctad.org/en/PublicationsLibrary/webditc2017d1_en.pdf>Shamika Sirimanne. 'Regional Integration and Non Tariff Measures in the Economic Community of West African State' (2018) United Nations Conference on Trade and Development; Division on International Trade in Goods and Services, and Commodities <https://unctad.org/en/PublicationsLibrary/webditc2017d1_en.pdf>

The figure below shows the percentage of intra-African exports and imports.



Source: UNCTAD Statistics 2018

In addition, Nigeria and Ghana are common law jurisdictions, while Togo and Côte D'Ivoire are civil law jurisdictions. This distinction aids in understanding the nature and features of the different legal systems and how these regulate multimodal transport.

The previous chapter, dealing with international transport law conventions, may not suffice in understanding the applicability of multimodal transport law in West Africa. To gain a complete picture of the status of multimodal transport law in West Africa, it is crucial to consider how each country deals with multimodal transport.

4.1.1 Nigeria

Nigeria is a West African country bordered by the Republic of Benin to the west, Chad and Cameroon to the east, and the Republic of Niger to the North. The coast is located south of the Gulf of Guinea and borders Lake Chad to the northeast. Nigeria's total land area is 923,763 km².

Data from the World Bank show that Nigeria (a member of ECOWAS) is the most populous African Country (with a population of over 202 million people in 2020[575]) and a key regional player in West Africa. Nigeria accounts for half of West Africa's

[575] World bank, 'Nigeria' (*The World Bank International Bank for Reconstruction and Development (IBRD)*, 2018) <https://data.worldbank.org/country/nigeria> accessed 18 February 2020

population and currently has one of the largest populations of youth in the world. The Federal Republic of Nigeria is a constitutional republic.

Currently, Nigeria is made up of 36 states and a federal capital territory (FCT), located in Abuja. In Nigeria today, over 500 languages are spoken. However, the official language is English, a result of the British colonial rule of Nigeria pre-independence.[576]

Nigeria's intra-ECOWAS exports amount to about 45 per cent of ECOWAS trade and of only 16 per cent of intra-Africa imports, making it a key player in the ECOWAS region and Africa at large.[577]

4.1.1.1 Sources of Nigerian law

In every society governed by laws, it is expedient to know where to find the law of that society. The term 'Sources of Law' simply refers to the origin of the laws and rules that enable states to be bound by the laws that govern its territory.[578]

As earlier remarked, Nigeria's legal system is shaped by the country's colonial history and ,accordingly, its laws are deeply rooted both in common law principles and Nigerian customary law. Several authors[579] are unanimous on the different sources of Nigerian law. Nigerian courts have also validated the recognition of the pluralistic nature of the sources of the Nigerian legal system.[580] The practicability of the pluralistic nature can be seen in the case of Olowu v Olowu.[581]

The sources of Nigerian law are:

- The Constitution
- Nigerian Legislation

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[576] World population review, 'Nigeria Languages' (*Nigeria population*, December 2019) <http://worldpopulationreview.com/languages/nigeria/> accessed 18 February 2020

[577] Tralac, 'Nigeria: Intra-Africa trade and tariff profile' (*Tralac*, 2019) <https://www.tralac.org/resources/our-resources/13595-nigeria-intra-africa-trade-and-tariff-profile.html> accessed 5 July 2020

[578] Edefe Ojomo, 'Sources of Law: The Application of English Law in Nigeria' (Young African Research Arena 2014)

[579] John Ohireime Asein, *Introduction to Nigerian legal system* (2nd ed. edn, Ababa Press 2005);Akintunde O. Obilade, *Theœ Nigerian legal system* (Sweet & Maxwell 1979);ibid;ibidJohn Ohireime Asein, Introduction to Nigerian legal system (2nd ed. edn, Ababa Press 2005);Akintunde O. Obilade, Theœ Nigerian legal system (Sweet & Maxwell 1979)John Ohireime Asein, Introduction to Nigerian legal system (2nd ed. edn, Ababa Press 2005);Akintunde O. Obilade, Theœ Nigerian legal system (Sweet & Maxwell 1979)

[580] Ayinla Lukman Alabi. 'Jurisprudential Perspectives On The Fountain Of Nigeria Legal System' (2019) 2 AGORA International Journal of Juridical Sciences 15

[581] (1985) 3 NWLR (pt. 13) 372

- Case law
- Received English law
- Customary law and Islamic law

4.1.2 Ghana

Ghana is a West African state along the coast of the Gulf of Guinea. It is a member of ECOWAS. The land area of Ghana is approximately 238,535 km^2. The country is bordered to the west by Côte d'Ivoire, to the north by Burkina Faso, to the east by Togo, and to the south by the Gulf of Guinea and the Atlantic Ocean. Ghana became independent from British colonial rule on 6 March 1957. The law and legal system of Ghana are shaped its history.

According to World Bank data, as of 2018 Ghana's population stood at 29,767,108.[582]It is a multilingual country, with about eighty languages spoken. The official language is English, a result of the British colonial rule of Ghana pre-independence.

Ghana's economy has experienced continued growth; in 2019, the growth rate was estimated at 6.7 per cent compared with 5.4 per cent in 2018. The growth rate without crude oil was also 6.0 per cent. A strong resurgence in the service sector was driven by strong growth, which increased to 7.2 per cent from 1.2 per cent in 2018. Economic growth is expected to increase in the coming years. Non-oil growth is expected to accelerate in the agricultural sectors. In the medium term, inflation is expected to remain within the central bank's target range of 6−10 per cent.[583] Ghana is one of the region's fastest growing economies, with an average GDP growth rate of around 6 per cent, and is the second-ranked economy according to the United Nations Human Development Indicators. As such, Ghana is expected to play a significant role once the AfCFTA is fully operational.[584]

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[582] World bank, 'Nigeria' (*The World Bank International Bank for Reconstruction and Development (IBRD)*, 2018) <https://data.worldbank.org/country/nigeria> accessed 18 June 2020

[583] World bank, 'The World Bank In Ghana ' (*World Bank* , 2019) <https://www.worldbank.org/en/country/ghana/overview> accessed 29 June 2020

[584] Ghana has been chosen by the African Union (AU) to host the secretariat of the African Continental Free Trade Area.

4.1.2.1 Sources of Ghanaian law

The sources of Ghanaian laws are:

- The Constitution
- Enactments made by the Parliament established by this Constitution
- Orders, Rules and Regulations made by persons or authority under a power conferred by this Constitution
- The common law[585]
- Case Law.[586]

As can be gleaned from the above stated sources of law, there is a huge similarity between the sources of law of Nigeria and Ghana. This is connected to the fact that they are both common law jurisdictions and have the same colonial antecedents. Accordingly, this work will not discuss these sources of law in detail considering that they have been discussed under the Nigerian section of this work.

4.1.3 Côte d'Ivoire

Côte d'Ivoire is a country in West Africa. The nation's de facto capital is Abidjan and the administrative capital designate is Yamoussoukro. Côte d'Ivoire is a member of ECOWAS. Its land area is approximately 322,462 km^2. The country is bordered by Mali and Burkina Faso to the north, Ghana to the east, the Gulf of Guinea to the south and Liberia to the southwest. Côte d'Ivoire is a country of approximately 26 million people and has a GDP of US$58.79 Billion.[587]

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[585] British law was introduced into the Ghanaian legal system by a Supreme Court Ordinance of 1876 in 1876. Section 14 of the law reads as follows:

'the common law, the doctrines of equity, and Statutes of general application which were inforce in England at the date when the colony obtained a local legislature, that is to say, on the 24th of July 1874, shall be in force within the jurisdiction of the court'.

The Ordinance made common law a part of the laws of Gold Coast (now Ghana) at that time. As a result, the body of law known as private international law has become part of Ghanaian law. See Article 11 of the Ghana 1992 Constitution; Richard Frimpong Oppong. 'Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance' (2005) 31(4) Commonwealth Law Bulletin 19.

<http://www.tandfonline.com/doi/abs/10.1080/03050718.2005.9986724>Richard Frimpong Oppong. 'Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance' (2005) 31(4) Commonwealth Law Bulletin 19 <http://www.tandfonline.com/doi/abs/10.1080/03050718.2005.9986724>

[586] Victor Essien, 'Researching Ghanaian Law' (*NYU Law*, 2020)

<https://www.nyulawglobal.org/globalex/Ghana1.html> accessed 29 June 2020.

[587] World bank*, 'Cote d'Ivoire'* (*World Bank*, 2019) <https://data.worldbank.org/country/cote-divoire> accessed 21 August 2020

Côte d'Ivoire enjoyed a good financial reputation for many years. However, in the late 1980s, things started to change, and the country experienced a seven-year recession from 1987 to 1993. During this period, Côte d'Ivoire was unable to fulfil its foreign debt obligations. The strategies adopted (for example, new financial arrangements for lending banks and a 50 per cent devaluation of the CFA franc[588]) helped the country achieve recovery in the mid-1990s.[589]

In recent times, Côte d'Ivoire's economy has been stable and is currently growing in the aftermath of political instability in recent decades. The country is mainly market dependent, and is heavily dependent on the agricultural sector. Almost 70 per cent of the Côte d'Ivoire's population is engaged in some form of agricultural activity. The Country is the world's largest exporter of cocoa beans and raw cashew nuts, is a net exporter of oil, and has a significant manufacturing sector. Côte d'Ivoire is the largest economy in the West African Economic and Monetary Union.[590]

According to the World Bank,[591] the Côte d'Ivoire economy has grown at an average of 8 per cent annually since 2011, making it one of the fastest growing countries in the world. However, the country's GDP growth has gradually declined from 10.1 per cent in 2012 to 7.7 per cent in 2017, and is estimated at 7.4 per cent in 2018. In 2018 and 2019, economic growth in Côte d'Ivoire exceeded 7 per cent and could remain above 7.0 per cent during 2020–21.[592]

Côte d'Ivoire has strong economic advantages and influence in West Africa due to its geographical location in the Gulf of Guinea and the quality of its infrastructure. It is guaranteed that the country will play an important role in the AfCFTA regime.

4.1.3.1 Côte d'Ivoire legal system

Côte d'Ivoire is a civil law jurisdiction with French law influence. The sources of Ivorian law are essentially domestic law, international treaties and jurisprudence.

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[588] The West African CFA franc is the currency used in Eight West African States

[589] Jean L. Comhaire, *'Cote d'Ivoire'* (*Encyclopaedia Britannica*, Aug 5, 2020)
<https://www.britannica.com/place/Cote-dIvoire/Settlement-patterns> accessed 21 August 2020

[590] World bank, *'The World Bank in Côte d'Ivoire'* (*World Bank*, November 2019) <https://www.worldbank.org/en/country/cotedivoire/overview> accessed 21 August 2020; The members of WAEMU are Benin, Burkina Faso, Côte D'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo. WAEMU is also working toward achieving greater regional integration.

[591] World bank, *'The World Bank in Côte d'Ivoire'* (*World Bank*, November 2019) <https://www.worldbank.org/en/country/cotedivoire/overview> accessed 21 August 2020

[592] African development bank group, 'Côte d'Ivoire Economic Outlook' (*African Development Bank Group*, 2020) <https://www.afdb.org/en/countries/west-africa/cote-d'ivoire/cote-divoire-economic-outlook> accessed 21 August 2020

The Ivorian legal system provides a comprehensive system of rules, usually codified, which are applied and interpreted by judges.

There are first instance courts, which intervene in all matters. Appeals from first instance courts go to the Court of appeal then to Supreme Courts. The Supreme Court is divided into:

- The Council of State (Conseil d'Etat);
- The Court of Cassation for civil and criminal cases
- The Constitutional Court for all constitutional matters.[593]

There is also a commercial court, which was established in 2012 to handle commercial matters.[594] The creation of this court was an attempt by authorities to improve the legal system for companies and investors.[595]

4.1.4 Togo

Togo is bordered on the west coast of Africa and has a land area of 56,785 km^2. Ghana borders the nation to the west, Benin to the east, and Burkina Faso to the north. Its capital is Lome. Togo is at the heart of the Gulf of Guinea, has a coastline of about 56 km and offers 20,780 km^2 of maritime space. Togo is a member of the ECOSA. Its population is circa 8 million people, and it has a GDP of US$5.49 billion.[596]

From an economic point of view, Togo's real GDP is expected to grow by 4.3 per cent in 2021 and 5.6 per cent in 2022. Inflation is expected to remain high at 1.21 per cent in 2021 and 2.1 per cent in 2022. The budget deficit will only improve slowly because the government will maintain public expenditure to support investment and economic activity revival. The budget deficit will reach 4 per cent of GDP in 2021 and 3.4 per cent in 2022. The current account deficit fell to 5 per

[593] Article 126, 127 and 147 of Act No. 2016-886 of November 08, 2016 relating to the constitution of Côte D'Ivoire and article 1 et seq. of Ordinance No. 2019-586 of July 3, 2019 amending Act No. 72-833 of December 21, 1972 of the Code of Civil, Commercial and Administrative Procedure (Gazette of Côte D'Ivoire No.12 of July 17, 2019).

[594] Decision of the President of the Republic n ° 001 / PR of January 11, 2012 on the creation, organization and functioning of the Commercial Courts.

[595] Oxford Business Group, 'Overview of Cote d'Ivoire's legal system and recent reforms' (*Oxford Business Group*, 2018) <https://oxfordbusinessgroup.com/analysis/judicial-framework-overview-legal-system-and-recent-reforms> accessed 4 September 2020

[596] The international bank for reconstruction and development (ibrd), 'The World Bank Data' (*World Bank*, 2021) <https://data.worldbank.org/country/togo> accessed 14 April 2021

cent of GDP in 2021 and is expected to fall by 2.3 per cent of GDP in 2022, If exports increase.[597]

According to the data from the World Bank, foreign trade represents 72 per cent of GDP.[598] Togo has been a member of the World Trade Organization since 1995. Togo's most prominent exports are food, plastics, phosphates, cement and cotton. The main imported products are chemicals, oil products, food and machinery. The main export destinations are Burkina Faso, Benin, India, Niger, and Ghana,[599] while imported products mainly come from China, France, the USA and the Netherlands.[600]

In 2019, exports totalled US$1.1 billion, while total imports increased to US$2.1 billion.[601] In 2019, Togo's service imports amounted to US$506 million, while service exports rose to US$607 million. Some of Togo's most significant growth challenges are trade liberalisation, abolishing certain government monopolies, and easing customs procedures. The Country's customs duties are significantly higher than neighbouring countries (average 10.3 per cent). However, Togo has built a network of transport infrastructure that will enable it to improve its position as a regional stakeholder.[602]

4.1.4.1 Togolese Legal System

The Togolese legal system is based on the civil law system. It is a monist system in which international treaties and the constitution have supremacy on the domestic law.

Togo's judicial organisation comprises of two orders – the judicial order and the administrative order.[603] Ordinance 78–35 of 7 September 1978 created the judicial organization and has been amended successively, the last of which is the Togolese Constitution of 1992.

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[597] Trade Economics. 'Togo Current Account to GDP' <https://tradingeconomics.com/togo/current-account-to-gdp>

[598] Lloyds bank, 'Togo: Economic and Political Overview- Foreign trade figures of Togo' (*Lloyds Bank*, 2021) <https://www.lloydsbanktrade.com/en/market-potential/togo/trade-profile> accessed 14 April 2021

[599] Four of these five countries abelong to the Economic Community of West African States

[600] Lloyds bank, 'Togo: Economic and Political Overview- Foreign trade figures of Togo' (*Lloyds Bank*, 2021) <https://www.lloydsbanktrade.com/en/market-potential/togo/trade-profile> accessed 14 April 2021

[601] World Trade Organisation. 'World Trade Statistical Review 2020' (2020) World Trade Organization

[602] ibid

[603] Article 119 of the Togolese Constitution

Justice is administered by two types of ordinary courts, according to Article 1 of Order No. 78–35: 'ordinary courts of common law' and 'specialised ordinary courts'.

Articles 120–125 of the Constitution establish the Supreme Court, which is governed by Organic Law No. 97-005 of 6 March 1997, the Court of Appeal, and First Instance. The kinds of disputes these courts can deal with are stated below:

- The tribunal: civil tribunal, labour tribunal and commercial tribunal
- The courts of appeal: composed of civil chambers, labour chambers and commercial chambers. Besides these three chambers, there are criminal chambers that deal with criminal matters
- The Supreme Court: the high and last court of the country, composed of the chambers of appeals courts

There is also a constitutional court that deals with political matters and control of the compliance of any law with the constitution of the country.

Issues relating to transport contracts are heard by the Commercial Tribunal. An appeal in the event of a dispute is heard by the Court of Appeal and finally the Supreme Court. The constitutional court deals with political matters and compliance of any law with the Togolese Constitution.

4.1.4.2 Sources of Laws

In Togo, there are two main sources of law, which can be termed the primary and secondary sources. The primary sources of law include:

- International treaties
- Constitution
- Parliamentary Acts

The secondary sources of law include:

- Customary Law
- Case Law

4.2 Transport Laws Applicable to a Multimodal Transport Contract in Selected Countries within the ECOWAS Region

4.2.1 Introduction

There is no uniform domestic regime governing liability in any West African country. West African countries see multimodal transport as a mixed contract made up of various unimodal transport carriages. In all four West African countries which this work studies, liability arising from the carriage of goods by multimodal transport is governed by unimodal regulations and legislation governing the mode of transport where the loss occurs. The succeeding paragraphs will now consider the relevant transport laws applicable in these countries.

4.2.2 Applicable Unimodal Transport Laws in Nigeria

4.2.2.1 Carriage of Goods by Sea

In Nigeria, carriage of goods by sea is governed by the Carriage of Goods by Sea Act ('COGSA'),[604] which is essentially the codification of the Hague Rules. Pursuant to Section 2 of the COGSA, the Act mandatorily applies to outward carriage, i.e. a cargo carrier out of any Nigerian port to any other port.

The Section, which is the same as the English position in Section 1 of the 1924 English COGSA, states that:

> Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Nigeria to any other port whether in or outside Nigeria.

Under Nigerian Law, the Hague Rules can only apply to inward carriage if incorporated into the bill of lading by virtue of a paramount clause[605] or by virtue of a choice of law clause. The Nigerian Supreme Court confirmed this in Leventis technical limited v. Petrojessica Enterprises Limited[606] wherein the Supreme Court held:

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[604] *Cap* C2, LFN *2004* ("COGSA")

[605] A paramount clause is essentially a clause that incorporates a cargo liability regime, usually the Hague or Hague (Visby) Rules (the Rules), into the charterparty.

[606] (1999) LPELR-1781(SC)

> The provisions of Section 2 of the Act applies only to the carriage of goods by sea in ships carrying goods from any port of Nigeria to any other port whether in or outside Nigeria. In this case, the ship was carrying goods from a port outside Nigeria, Spain, and so the rules that apply to the carriage of the goods are in clause 2 of the paramount clause and these are contained in each bill of lading.

Therefore, the rules which will apply to an inward carriage of goods by sea contract will depend on the paramount clause or the choice of law in the bill of lading.[607] In the event that there is no paramount clause or choice of law, the Hague Rules will be applicable to the inward and outward carriage of goods by sea.[608]

Nigeria is also a party to the Hamburg Rules, and domesticated the convention at its National Assembly. The enactment for the Hamburg Rules is the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005. This enactment was made without a formal repeal of the COGSA.

The Author's perspective of the applicability of the Hague Rules in the event of an absence in paramount clause or choice of law differs from the general consensus. Nigeria being a party to the Hague Rules and the Hamburg Rules means that both the Hamburg Rules and the Hague Rules are simultaneously in operation in Nigeria.

Pursuant to Article 25, Rule 5 of the Hamburg Rule, the Convention applies mandatorily to contracts of carriage in force as of the date of this convention.

Article 31 of the Hamburg rules also states that:

> Upon becoming a Contracting State to this Convention, any state party to the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on August 25 1924 (1924 Convention) must notify the Government of Belgium as the depository of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.

The Nigerian government has neither notified the Belgian government of its denunciation of the Hague Rules, nor has the COGSA been formally abolished by

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[607] Igbokwe Micheal. 'Effect of Section of Nigerian Carriage of Goods by Sea Act (COGSA) Cap 44 on Inward Bills of Lading Transactions' (2000) <https://mikeigbokwe.com/wp-content/uploads/2018/06/Effect-of-Section-2-of-COGSA.pdf> accessed April 3, 2021Igbokwe Micheal. 'Effect of Section of Nigerian Carriage of Goods by Sea Act (COGSA) Cap 44 on Inward Bills of Lading Transactions' (2000) <https://mikeigbokwe.com/wp-content/uploads/2018/06/Effect-of-Section-2-of-COGSA.pdf> accessed April 3, 2021

[608] ibid

the National Assembly in conformity with the Constitution of the Federal Republic of Nigeria.[609]

In the case of Ibidapo v. Lufthansa Airlines,[610] the Supreme Court ruled that:

> Where it is intended to repeal a legislation, this should be expressly so stated as the Courts generally lean against implying the repeal of an existing legislation **unless there exists clear proof to the contrary …** The Court will not imply a repeal **unless two Acts are so plainly repugnant to each other that effect cannot be given to each other at the same time.** [emphasis mine]

It is based on the *grounds* that there has been no denunciation, no formal repeal of the COGSA. Therefore, COGSA continues to apply mandatorily to outward carriage.

Furthermore, based on the decision of the court in *Leventis Technical Limited v Petrojessica Enterprises Limited*,[611] COGSA only applies to inbound carriage where there is no corresponding statutory enactment applicable to inward carriage.

It is arguable that the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005 should mandatorily apply to carriage. Article 2 of the Hamburg Rules provides that the Rules apply to all carriage by sea contracts between two separate States, provided that the ports of loading or discharge, or the place where the bill of lading or other transport document was issued, are in a contracting State.

The implication is that the Hamburg Rules apply to both inbound and outbound carriage of goods by sea. The Supreme Court in *Rotimi Williams Akintokun V. Legal Practitioners Disciplinary Committee* (LPDC)[612] seems to infer that it is possible for two Acts to be in force and given effect at the same time as long as they are not so plainly inconsistent or repugnant to each other.

Therefore, the author suggests that, while it is settled law that the COGSA Act is applicable to an outbound carriage, the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005 can be mandatorily applicable to inward carriage.

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[609] Osinuga, D., 2019. *Limitation Of Time: The Conflicting Regimes Of The Hague And Hamburg Rules In Nigeria*. [online] Mondaq. Available at: <https://www.famsvillelaw.com/limitation-of-time-the-conflicting-regimes-of-the-hague-and-hamburg-rules-in-nigeria/> [Accessed 6 April 2020].

[610] (1997) 4NWLR (PART 498) 124 AT 163 PARAS. E-F

[611] (1999) 6 NWLR (Pt 605, 45)

[612] (2014) LPELR-22941(SC)

The Hamburg Rules, interestingly, do not allow parties to contract out of its provisions. As a result, under the Hamburg Rules regime, the doctrine of pacta sunt servanda is only marginally applicable. Any provision in a carriage by sea contract, bill of lading, or other document evidencing the contract for an inbound carriage that states that the parties are desirous to governed by the Hague Rules is null and void.[613]

Therefore, it is arguable that since the Hamburg Rules is the only law in place for inward carriage, the Hamburg Rules is mandatorily applicable for inward carriage from any port outside Nigeria to Nigeria. However, this position has not been canvassed before any Nigerian court, and it will be interesting to see how the courts will decide on such an argument if ever brought before the Nigerian Court.

Accordingly, the current law applicable to outbound carriage is the COGSA Act and the applicable 3law for inbound carriage will solely depend on the paramount clause or choice of law clause.

4.2.2.2 Carriage of Goods by Air

Nigeria is a party to both the Warsaw Convention and the Convention for the Unification of certain rules relating to International Carriage by Air. ('**Montreal Convention**')

Carriage by air was first governed in Nigeria by the Warsaw Convention. As the treaty practice of the United Kingdom of Great Britain and Northern Ireland was based on the duality doctrine, the Warsaw Convention, signed on October 12, 1929, did not have legal force within the United Kingdom until Parliament passed legislation to implement it. This was done by virtue of the Carriage by Air Act, 1932. Nigeria was then a colony and protectorate under the authority of the United Kingdom of Great Britain and Northern Ireland and, to extend the provisions of Sections 1 and 2 of the Carriage by Air Act, 1932, to the colony and protectorate of Nigeria, there was an Imperial Order-in-council, viz the 1953 Order.[614] Accordingly, by virtue of the 1953 order, Nigeria inherited the Warsaw Convention at independence.

By virtue of Section 48 of the Civil Aviation Act 2006, Nigeria ratified the Montreal Convention and adopted its provisions into national law.. Section 48 (1) provides as follows:

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[613] Akabogu, E., 2016. *Which Cargo Liability Regime Applies To Your Carriage By Sea Contract?* [online] International Law Office. Available at: <https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Nigeria/Akabogu-Associates/Which-cargo-liability-regime-applies-to-your-carriage-by-sea-contract> [Accessed 6 April 2020]. See also Article 23(1) of Hamburg Rules

[614] Joseph Ibidapo v. Lufthansa Airlines (1997) LPELR-1397(SC)

> The provisions contained in the Convention for the Unification of certain rules relating to International Carriage by Air signed at Montreal on May 28, 1999 set out in the Second Schedule of this Act and as Amended from time to tune, shall from the commencement of this Act have force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons.

Accordingly, the Montreal Convention is applicable to carriage of goods by air to and from Nigeria. Pursuant to Section 77 (1) Civil Aviation Act, 2006, further repealed the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953, which domesticated the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929.

4.2.2.3 Carriage of Goods by Road and by Rail

There is no specific domestic legislation in relation to carriage of goods by road and rail. Neither are there mandatory conventions domesticated that deal with the carriage of goods by road and rail. However, it is an elementary principle of law that where there is a right, there is a remedy, which is expressed in Latin as *ubi jus,ibi remedium*. See the case of *Nedlloyd Lijnen B.V. Rotterdam V. Ofelly Agro-Farms & Equipment Co. ltd*.[615]

When faced with a claim relating to the carriage of goods by road or rail, Nigerian courts will treat a contract of carriage by rail and road as a simple contract and liability will be determined by terms of contracts. Even in cases where there are no terms of contract, a contract of bailment may be said to have been created by the shipper handing over the goods to the carrier, as was enumerated in **Coggs v. Bernard**[616] where Holt CJ listed six categories of bailment. In the present instance, the relevant category of bailment is 'when goods or chattel are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them'.

The Nigerian court, in *Nedlloyd Lijnen B.V. Rotterdam V. Ofelly Agro-Farms & Equipment Co. Ltd &Anor* **(**2013) LPELR-20760(CA), have cited in approval the principle established in Coggs v Bernard. In determining liability under such bailment category, such liability is not a strict liability but is based on fault.[617] The

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[615] (2013) LPELR-20760(CA)

[616] (1703) 2 LD Raymond 909

[617] Coggs v Bernard (1703) 2 LD Raymond 909

obligation of that category of bailees 'is only to do the best he can'. Accordingly, a carrier is only liable for loss or damage caused by his own negligence or that of his servant, employer or agent. In order to succeed in a claim for loss of goods, the principle lays an onus on the owner of the goods (the bailor) to prove fault against the carrier (the bailee). However, a contrary decision was reached in Haymn v. Hourt,[618] which established that the carrier bears the burden of establishing negligence.

Accordingly, Nigerian courts will rely on contracts and where there is no contract, the court will deal with it as a bailor and bailee's relationship, which is known legally as bailment.

4.2.3 Applicable Unimodal Transport Laws in Ghana

4.2.3.1 Carriage of Goods by Sea

In Ghana, the applicable law for the carriage of goods by sea is the Hague Rules. The Hague Rules was ratified and incorporated in Ghanaian law by section 1 of the Bills of Lading Act 1961 (Act 42). Under section 1 of the Act, Articles 1–8 of the Hague Rules will apply to a contract of carriage of goods by sea carrying goods from any port in Ghana to any other port. This means it applies to only outbound carriage. Pursuant to section 2 of the Bills of Lading Act:

> A bill of lading or similar document of title issued in the Republic which contains or is evidence of a contract to which the Rules apply shall contain an express statement that it is to have effect subject to the Rules as applied by this Act, and the Rules as so applied shall be deemed to be incorporated in that bill of lading or similar document although
>
> a) it does not contain the express statement required by this section, and
>
> b) the contract pursuant to which that bill of lading or similar document is issued, is not governed by the Laws of Ghana.

Accordingly, where the carriage is outbound, the Bill of lading Act presupposes that Hague Rules will be deemed to be incorporated, even where it is not expressly stated on the bill of lading. It is, however, trite to note that the Bill of Lading Act does not automatically and mandatorily apply to inbound carriage.

In *Scanship Ghana Ltd V. Effasco Ltd*,[619] two road rollers that were shipped from England to Ghana were not on board the ship upon arrival. In an action for damages,

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[618] (1789) Peake Add. Cas 170

[619] [1999–2000] G.L.R. 448

the trial judge applied the principle of *restitutio in integrum* and awarded damages to the respondent. On appeal, the appellants argued that the limitation on liability in Article 4(5) of the Hague Rules applied. The Court of Appeal rejected this argument and held that by virtue of section 1 of the Act, the Hague Rules apply in relation to the carriage of goods by sea in ships carrying goods from any port of Ghana. Since, in the instant case, the cargo was being carried from a port in the United Kingdom, the provisions for limitation in liability in Article 4(5) of Hague Rules did not apply.

Therefore, for inbound carriage, there is no mandatory regime in Ghana. The applicable regime is dependent on the paramount clause or choice of law clause. This position is similar to the position in Nigeria.

Furthermore, according to Ghanaian law, the contract of carriage by sea spans the period from when the cargo are put on board to when they are discharged from the ship. Atuguba JSC stated at the Ghanian Supreme Court decided case of *Delmas Africa Line Inc V Kisko Products Ghana Ltd*[620] that 'the contract of carriage began the moment the defendants received the goods'. A similar position was reached in *John Holt Shipping Services v. Edward Nassar Ltd.*[621]

4.2.3.2 Carriage of Goods by Air

The Ghana Civil Aviation Act 2004, (Ac 678) and the Ghana Civil Aviation Amendment Act, 2019, regulates the International Carriage of goods by air (Act 985). Section 28 of the Act domesticates the Montreal Convention.

Ghana considers itself to be a dualist state. As a result, when Ghana ratifies an international treaty, it must domesticate the treaty in order for it to be applicable domestically.

Article 75 of the 1992 Constitution ratified the Montreal Convention on February 18, 2016, under Article 28 of the Ghanaian Civil Aviation Act (GCA) (Amendment) Act 906. The Convention is set out in the second and third schedule of the Act. The scope of the domesticated law extends beyond the Convention, as the Convention applies to international air transport to and from Ghana in relation to air transport. In Ghana, regardless of whether domestic or international, the law will apply to regulate the rights and obligations of air carriers, passengers, cargo, manufacturers and others.

Claims for damages in carriage by air may be brought at the discretion of the applicant against a carrier either in a court at the domicile of the carrier, a court at

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620 [2005-06] SCGLR 75

621 [1971] 1 G.L.R. 205, at 212. The Court of Appeal in that case held that the Hague Rules applied only during the actual carriage of goods on a ship, and, since the goods had been discharged, the Hague Rules did not apply to the case.

the principal place of business, or where it has a place of business through which the contract was entered or before the court at the place of destination. Where a plaintiff on the basis of the above principle decides to bring an action in Ghana, such actions will be initiated at the High Court of Ghana.[622]

The Ghanaian courts have shown its willingness to uphold the provisions of the Montreal Convention. In *Dr. R.S. D Tei & Evelyn Jumbo V. Ceiba Intercontinental*[623], on 5 October 2014, the appellant boarded a respondent's aircraft at the Kotoka International Airport in Accra as a fee-paying passenger to fly to Malabo, Equatorial Guinea, with his executive secretary and his lawyer. A co-passenger unlocked the overhead carry-on baggage compartment as he took his seat on the plane, and a piece of luggage dropped on his left eye, causing a gash from which blood gushed. The appellant's injuries eventually caused him to lose his vision in that eye. He filed a claim for damages in the High Court of Accra, citing the Montreal Convention.

The Montreal Convention's provisions relating to the carrier's strict duty to pay damages for physical injury or death caused by a passenger were affirmed by the Supreme Court.

The Court further applied Article 21 (2) (a) & (b) to limit the damages and awarded the Appellant 113,100 SDR.

Accordingly, international carriage by air in Ghana is governed by the Ghana Civil Aviation Act 2004, (Act 678) and the Ghana Civil Aviation Amendment Act, 2019 which domesticates the Montreal Convention.

4.2.3.3 Carriage of Goods by Road and Rail

With respect to carriage of goods by road and rail, the Courts in Ghana will apply general commercial law rules, including legislation, on the sale of goods where applicable. Claims in relation to carriage of goods by rail and road will be instituted at the Commercial division of the High Court, Ghana. Accordingly, the implication is that Ghana does not have a standard set of rules that aid the determination of damages and compensation in relation to carriage of goods by road and rail. This is left to the Court's discretion, as in the case of Nigeria.

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[622] Limann A. Mohammed, 'Applicable laws in respect of aviation accidents caused by international airlines – Ghana's perspective' (*Ghana Web*, 23 December 2019)
<https://www.ghanaweb.com/GhanaHomePage/features/Applicable-laws-in-respect-of-aviation-accidents-caused-by-international-airlines-Ghana-s-perspective-822175> accessed 25 August 2020

[623] (J4/02/2018) [2018] GHASC 75 (02 November 2018)

4.2.4 Applicable Unimodal Transport Laws in Ivory Coast

4.2.4.1 Carriage of Goods by Sea

In Côte d'Ivoire, the Act No. 2017-442 of June 30, 2017 of the Ivorian Maritime Code governs the international carriage of goods by sea in Côte d'Ivoire. This Act was drafted based on the Hague Rules and applied to outbound carriage of goods by sea. The Ivorian regime seems to have given rise to a hybrid regime blending the Hague Rules and the Hamburg Rules. This is similar to the approach of the Chinese 1992 Maritime Code, which mixes the Hague Rules and the Hague (Visby) Rules, and some novel points, which are not included in the conventions. Accordingly, in the event of loss, delay or damage in carriage of good by sea outward of Côte d'Ivoire, the Ivorian Maritime Code will apply. However, for inward carriage, the court will give effect to the rules stated on the bill of lading. Where there are no rules stated in the bill of lading, the Ivorian Maritime Code will apply.

In La *Société Bolloré Transport et Logistics Côte D'ivoire v La Société Saham Assurances*,[624] the commercial court of Abidjan applied the Hague Rules. The appellant in this case states that SUCAF-CI purchased sugar from a company in Paris, France. The said goods were insured by the Saham Assurance. The cargo was loaded at the Guatemalan Port of Puerto Quetzal on the ship *Anemone*, bound for the Port of Abidjan. While the cargo was at the quay, under the responsibility of the appellant in Abidjan, the goods were discovered to be wet from rainwater. The appellant contended that the goods were wet before they had been delivered to them. The carriers, Anemone Navigation, Ariston Navigation Corporation – also a respondent in the suit – argued that the goods became wet with rainwater while they were stored at the quayside. Expert opinions exonerated the carrier and indicted the appellant. The trial court and appellate court held that there is a presumption of correct delivery of the 80,000 bags of sugar to the stevedore, Bolloré, pursuant to Article 3(6) of the Hague Rules and that, consequently, it is the appellant who is in breach of its obligation under Article 3(2) of the Hague Rules. Accordingly, the respondent should compensate the first respondent, Saham Assurances.

Whilst some portions of the judgment may be criticised, the information sought from the case illustrated above is that the Ivorian court will uphold the provision of the Hague Rules in the case of inward carriage as long as parties include them in their bills of lading

4.2.4.2 Carriage of Goods by Air

Côte d'Ivoire has ratified the Montreal Convention of May 28, 1999, by Decree No. 2014-716 of 17 November 2014. The Montreal Convention is the applicable

[624] Appeal judgment No.331/2018 of March 7, 2019 given by commercial court of Abidjan

domestic regulation for international carriage of goods by air in Côte d'Ivoire. The Montreal Convention is also applicable in the determination of loss and liability occurring during international carriage of goods by air.

The commercial court of Abidjan has applied the Montreal Convention in the case of *Specimen and Sogescom V. Air France and National Aviation Services Ivoire*[625]. In the case, the plaintiff brought proceedings against Air France and National Aviation Services Ivoire at the commercial court seeking that the defendants pay damages for the loss of the cargo on the arrival of the flight in Abidjan, consisting of a package of 128 kilograms. They claim that the defendants failed in their obligation to deliver the goods and sought that the commercial court award damages pursuant to Articles 18 and 25 of the Warsaw Convention of 12 October 1929. The defendants explained that, contrary to the claims of the plaintiffs, disputes relating to carriage by air are governed by the Montreal Convention, which establishes in its article 22 the principle of the limitation of the compensation due by the air carrier.

The Commercial Court in its decision noted that the Montreal Convention has repealed the Warsaw Convention. It stated that the Montreal Convention had been ratified by Côte d'Ivoire and entered into force on 5 April 2015. The Court held that the principle of the liability of the air carrier for loss of goods, article 18 and 22 paragraph 3 of the Montreal Convention on May 28, 1999 applies. Accordingly, the Court held that Air France was able to limit their liability to a compensation equal to 19 special drawing rights (SDR) per kilogram.

4.2.4.3 Carriage of Goods by Rail

There are no domestic regulations for carriage of goods by rail. Where a loss occurs during carriage by rail, the court will determine liability based on contractual agreements between parties. Where there is no contract or these contractual stipulations do not provide for the value of liability, the court will determine liability by common civil liability law provided by the Ivorian Civil Code.

4.2.4.4 Carriage of Goods by Road

The applicable law for carriage of goods by road is the Uniform Act relating to contracts for the transport of goods by road dated 22 March 2003. In French, the law is called *Acte uniforme relatif aux contrats de transport de marchandises par route* (OHADA Uniform Act on Road Transport). The Act is one of the eight uniform Acts of OHADA.[626] This Uniform Act applies to any contract for the

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[625] Contradictory judgment No.2385/2018 of October 30, 2018 given by commercial court of Abidjan

[626] The Organisation for the Harmonisation of Business Law in Africa (OHADA) was created by the Treaty on the Harmonisation of Business Law in Africa signed on 17 October 1993 at Port-Louis, Mauritius. Pursuant to article 53 of the OHADA Treaty, any Member State of the African Union

transport of goods by road when the place of taking charge of the goods and the place provided for their delivery as indicated in the contract are located either in the territory of a member State of OHADA or on the territory of two different States of which at least one is a member of OHADA. Primarily inspired by the Convention on the contract of international carriage of goods by road (hereinafter CMR) signed in Geneva on 19 May 1956, the Uniform Act applies to both internal and international transport. It is now the common law for the transport of goods by road carried out against payment in the area covered by OHADA.

Transportation by road is one of the key vectors of sub-regional integration and an instrument of trade between the States Parties to OHADA. Adopting standard rules in this area contributes to strengthening legal integration, which is OHADA's priority objective.[627] Before the advent of the Uniform Act, road freight transport in different countries was governed by domestic laws, some of which have become obsolete.[628]

The bindingness and supranational character of the uniform Act, which allows the uniform Acts to override the domestic law provisions of member states, stem from the provisions of Article 10 of the OHADA Treaty.[629] The provision of Article 10 states that:

> Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law.

The scope of application is defined in Article 1 of the OHADA Uniform Act on Transport. It stipulates that the Uniform Act on Transport applies to any contract for

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may become a member of the organisation. OHADA currently has 17 OHADA Member States: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of the Congo, and Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Côte d'Ivoire, Mali, Niger, Senegal, and Togo. The organisation aims to establish a unified, secure, and up-to-date legal environment with a view to boosting economic activity and investment in its member States. As at today, OHADA has completed eight uniform Acts which are on general commercial law – 1997; on commercial companies and economic interest groups – 1997; on organising securities – 1997; on simplified recovery procedures and measures of execution – 1998; on organising collective proceedings for wiping off debts – 1998; arbitration law within the framework of the OHADA Treaty – 2000; on organising and harmonising company accounting systems – 2000; on contracts for the carriage of goods by road – 2003.

[627] Akam A. Akam. 'L'OHADA et l'intégration juridique en Afrique, in Les mutations juridiques dans le système OHADA
' (2009) ouvrage collectif, L'Harmattan 21

[628] Senegalese law art. 651 to 668 of the Civil and Commercial Obligations Code; Mali Ordonnance no 53/CMLN du 19 septembre 1973

[629] Paul Gerard Pougue. 'Encyclopédie du droit OHADA' (2011) Lamy <http://bibliotheque.pssfp.net/livres/ENCYCLOPEDIE_DU_DROIT_OHADA.pdf>Paul Gerard Pougue. 'Encyclopédie du droit OHADA' (2011) Lamy

<http://bibliotheque.pssfp.net/livres/Encyclopedie_Du_Droit_Ohada.pdf>

the transport of goods by road when the place of taking charge of the goods and the place provided for delivery, as indicated in the contract, are located either in the territory of a member state of OHADA, or on the territory of two different states, at least one of which is a member of OHADA. The Uniform Act on Transport applies regardless of the domicile and nationality of the parties to the contract of carriage. However, the treaty does not cover the transportation of dangerous goods, transport of funerals, or transport carried out under international postal conventions.

Like most transport contract, the contract for the carriage of goods is formed as soon as the principal and the transporter agree to the movement of goods for an agreed price.[630] A consignment note issued by the carrier constitutes a simple presumption of the taking over of the goods by the carrier and must, as such, meet certain formal conditions (contact details of the sender and recipient, nature and quantity of goods transported, etc.) listed in Article 4 of the OHADA Uniform Act on Transport.

In the event that the goods are dangerous or of great value, it is the shipper's responsibility to inform the carrier of this through a specific declaration. Where the shipper does not inform the carrier that the goods are dangerous, the shipper is liable for any damage suffered as a result of the transport of such goods.[631] In particular, he must pay the storage costs and expenses incurred by such goods and assume the risks thereof. The carrier may adequately unload, destroy or render harmless dangerous goods which he would not have consented to take over had he known their nature or character, without any compensation.[632]

Article 10 stipulates that the carrier is required when taking over the goods to check the accuracy of the information in the waybill relating to the number of packages, their brands and their numbers and also the apparent condition of the goods and their packaging.

When delivering the goods, the carrier has an obligation to:

- deliver the goods to the recipient at the place provided for delivery
- give the consignee a copy of the consignment note
- notify the recipient of the arrival of the goods, unless delivery is made to the recipient's residence or establishment.

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[630] Article 3 of Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

[631] L'expansioncom, 'Acte Uniforme OHADA relatif aux contrats de transport de marchandises par route' (*L'Expansioncom*, 17 March 2010) <https://www.lexpress.fr/actualite/monde/afrique/acte-uniforme-ohada-relatif-aux-contrats-de-transport-de-marchandises-par-route_1420302.html> accessed 14 September 2020

[632] Article 8 of Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

The OHADA Uniform Act on Transport provides that the carrier has the right to withhold the goods until full payment of the claims resulting from the consignment note. Particular attention should be paid to the terms of the consignment note insofar as it is provided that the aforementioned debts are due by the recipient, the carrier must demand payment thereof prior to delivery. Where such demand is not made, the carrier stands the risk of losing its right to claim payment of the sums due from the principal[633].

Accordingly, the provisions of the OHADA Uniform Act on Transport are directly applicable and overriding in member states. Accordingly, the applicable law for Côte D'Ivoire, being a member state of OHADA, is the OHADA Uniform Act on Transport.

In the case of *La Societe Ivoirienne De Manutention Et D'acconage En Abrege (Socimac Sa) V La Societe Microdis*,[634] the Court of Appeal in Abidjan found that only the provisions of the OHADA Uniform Act on Transport are applicable to carriage of goods by road. Once a carriage of goods by road contract is entered, the carrier is responsible until the goods are delivered to the consignee. The fact of this case is that the appellant had a contract to carry goods by road on behalf of the respondent. Some of the goods were stolen and subsequently found with people who had no connection with the appellant. The appellant argued that loading was not performed by the appellant and as such they cannot be responsible for the loss that occurred during the loading of cargo. The Court of Appeal rejected this and relied on Article 9 of the OHADA Uniform Act on Transport stating that the transport of goods covers the period which extends from the taking over of the goods by the transporter with a view to their movement, until the delivery of said good.

4.2.5 Applicable Unimodal Transport Laws in Togo

4.2.5.1 Carriage of Goods by Sea

While the Rotterdam Rules are a long way from gaining the global acceptance that they require, Togo has taken steps to incorporate the Rotterdam Rules into their laws.

In Togo, the relevant law applicable for carriage of goods by sea is the merchant marine code of 11 October 2016. Pursuant to Article 396 of the *Loi no 2016-028 portant code de la marine marchande*, carriage of goods by sea is governed by the

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[633] Article 13(3) and 15(3) of Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

[634] Aboua No 164, Du 12/02/2019; Arret Civil Contradictoire, 4ème Chambre Civile Commerciale Et Administrative

Convention of Contracts for the International Carrying of Goods Wholly or Partly by Sea, also called the Rotterdam Rules. Togo is the only West African Country that has adopted this convention and consequently included the convention in its maritime code. The Rotterdam Rules are mandatorily applicable to both inward and outward carriage.

Togo is not a signatory State of the Hague Rules and the protocol of signature. However, where parties expressly incorporate the provision of the Hague Rules in a bill of lading, then the Court will uphold the provision of the Hague Rules. However, where the clause states that the applicable law should be the enactment in the country of destination and the goods are being carried into Togo, the Rotterdam Rules will be applicable. Where the bill of lading is also silent on the carriage of goods regime, the Rotterdam Rules will also be applicable.

The Rotterdam Rules are discussed in Chapter 3 of this study so they are not thoroughly discussed here. However, it is crucial to note that in Togo, to date, there is no case law giving effect to the Rotterdam rules.

4.2.5.2 Carriage of Goods by Air

On 25 May 2016, the National Assembly of Togo adopted the draft law on the Civil Aviation Code – which had been under consideration since 24 May 2016 – during the fourth plenary session. The draft law on the civil aviation code contains 325 articles grouped into ten (10) books. It is an overhaul of the law no 2007-007 of 22 January 2007. Its purpose is to ensure a better organisation of the provisions and their harmonisation with the conventions and agreements signed by Togo, as well as the new standards and practices adopted by the International Civil Aviation Organization (ICAO). The draft law eventually became law on 7 June 2016.

The contract for the carriage of goods by air is evidenced by an air waybill (LTA). Pursuant to Article 246 of the *Loi N°2016-011 du 07 Juin 2016 portant Code de l'Aviation Civile du Togo*. The liability of the carrier of goods or baggage is governed by the provisions of the Montreal Convention or the Warsaw Convention. However, it is imperative to note that the Warsaw Convention will only be applicable if the Montreal Convention is inapplicable.

4.2.5.3 Carriage of Goods by Road

In relation to carriage of goods by road in Togo, the applicable law is the Uniform Act relating to contracts for the transport of goods by road dated 22 March 2003. As stated above, the Act is one of the eight uniform Acts of OHADA. As stated, the OHADA Uniform Act, once in force, becomes directly applicable and binding on

member states, notwithstanding any contrary provision of the domestic law whether the law was made before or after the coming into force of the Uniform Act.[635]

The direct and immediate applicability, the repealing, and mandatory nature of OHADA treaties are similar to the European regulation, which also directly apply to member states.[636] They are, however, distinguishable from the European Directives,[637] whose implementation depends on the willingness of states, which must domesticate them into national law.[638]

Therefore, the same instrument which applies to Côte d'Ivoire on carriage of goods by road is applicable to Togo.

4.2.5.4 Carriage of Goods by Rail

Like most countries in West Africa, there is no legal framework for carriage of goods by rail. The Togolese courts will be bound by the contract of parties where a loss occurs by carriage of goods by rail. Where there is no contract, then the courts will resort to the law of torts. Torts law have generally evolved in a manner wherein

> The law of civil liability not only allows the courts to uphold against those who would disregard the rights already acknowledged to exist, but also contributes to the emergence and protection of rights as yet inchoate and unrecognized. **It thus constitutes a method of complementing and improving the legal system and bringing it up to date**.[639] [Emphasis mine]

Under the French jurisprudence, there are three elements which are essential to prove a tortious liability. These elements are (1) a fault, (2) a damage, and (3) a causal link between the two. The burden of proof of all these elements falls on the claimant who is alleging the loss or damage.

As soon as these three criteria are proven, the claimant is entitled to claim compensation for a broad scope of injuries, namely material and financial injuries, bodily injuries, moral injuries (which include several aspects, notably pain,

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[635] See Article 10, of the OHADA Treaty

[636] Article 288 of the Treaty on the Functioning of the *European* Union (TFEU) explicitly *states* that *EU regulations are directly applicable*

[637] MOULOUL Alhousseini, 'Understanding the Organization for Harmonisation of Business Laws in Africa'(2009)

[638] Georges Cavalier. 'L'environnement juridique des affaires en Afrique noire francophone' ()

[639] W. Van Gerven and others. ' Cases, Materials and Texts on National, Supranational and International Tort Law' (1998) 50(3) Revue internationale de droit comparé 991 <https://www.persee.fr/doc/ridc_0035-3337_1998_num_50_3_1035>W. Van Gerven and others. ' Cases, Materials and Texts on National, Supranational and International Tort Law' (1998) 50(3) Revue internationale de droit comparé 991 <https://www.persee.fr/doc/ridc_0035-3337_1998_num_50_3_1035>

suffering and loss of enjoyment). This is because the French system believes in full compensation (*reparation integrale*).[640]

Accordingly, a claimant claiming for loss arising from carriage of goods by rail cannot rely on any domestic legislation because there is none; the courts will be left to rely on contracts. Where there are no contract, the courts will resort to tort laws, which are governed by the French Civil Code. Its procedures are governed by the procedural rules, called *Le Code de Procedure Civil*, to enforce the provision of the French Civil Code.

4.3 The Liability of the Contracting Carrier for Multimodal Transport Contracts on Selected Countries within the ECOWAS Region

4.3.1 Localised Loss

There is no conflict or difficulty as to ascertaining the law when it comes to localised loss. The liability regime that will be applicable to localised laws or damages will be dependent on where the loss took place, where it is determined that the loss actually occurred during the carriage by sea, or by road or rail, then the different regimes applicable under the domestic transport law or choice of law clause as stated above will be applicable.

A matter may become more complex in cases where the loss gradually occurs in more than one mode of transport. This means that more than one applicable regime may be applicable at the same time.

4.3.1.1 The Liability of the Contracting Carrier in Carriage of Goods by Sea

Under the Nigerian Carriage of Goods by Sea Act, Schedule 1, Article III, before and at the beginning of the voyage the carrier is obligated to make the ship seaworthy; properly man, equip, and supply the ship; and fit and safe the hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried for their reception, carriage, and preservation. The COGSA basically adopts every provision of the Hague Rules.

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[640] For more information, see *Seminaires Cour de Cassation 'Risques, assurances, responsabilites', Une reconsideration du principe de la reparation integrale, V. Heuze. Courdecassation.fr*

A carrier of goods by sea subject to Nigerian law is discharged from all obligation for loss or damage unless a lawsuit is filed within one year of the cargo being delivered or the date when they should have been delivered. Accordingly, a person who has suffered damages due to a carriage of goods by sea must bring an action within one year. The Supreme Court per Karibe Whyte in *Kaycee (Nig.) Ltd. V. Prompt Shipping Corporation Nigerian Ports Authority*[641] upheld the one-year limitation. It is vital to note that the limitation of one year under the COGSA relates to only loss and damages and does not include delay or misdelivery.

Pursuant to Article 3 rule 6 of the Hague rules, a notice of loss or damage must also be issued in writing to the carrier or his agent at the port of discharge before or at the time of the delivery, or within three days if the loss is not apparent. The removal of the cargo shall be prima facie evidence of the carrier's delivery of the goods as indicated in the bill of lading.

Article IV (5) of the COGSA schedule states that:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding N200 per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The monetary limit of 200 Naira as of time of writing is circa US$0.5251,[642] which definitely does not consider today's current reality. Limiting a carrier's liability to US$0.5251 per package or unit is unreasonable and unfair to a shipper.

However, in cases of inward carriage (which, in practice, constitutes most of the carriage of goods cases in Nigeria), the limitation above would not be applicable. The limitation of liability applicable will be the international convention agreed by parties in the paramount clause or choice of law clause.

In Ghana, the position regarding the liability of a contracting carrier for losses incurred during the carriage of goods by sea is the same as in Nigeria, mainly because Ghana's Bills of Lading Act, 1961 (Act 42) also domesticates the Hague Rules. However, it is expedient to note that while the Nigerian domestic legislation on carriage of goods by sea provides that the monetary limit is N200 per kg (an amount that has lost value due to Nigeria's declining economy and inflation), the Ghanian provision was cleverly drafted: the Act states that 'Rule 5 of article 4 of

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641 1986) All N.L.R. 33

642 How Much Is 200 Naira ₦ (NGN) To $ (USD) According To The Foreign Exchange Rate For Today' (*Ex-rate.com*, 2021) <https://ex-rate.com/convert/ngn/200-to-usd.html> accessed 14 April 2021

the Rules shall be read as though for the reference to "£100" there were substituted the equivalent amount in cedis at the current rate of exchange'.

The domestic regimes in Ghana and Nigeria both adopt the provision of Art III (6) of the Hague Rules, which states that any claim in respect of the goods carried must be commenced within one year of the delivery of the cargo, or the date when they should have been delivered. Failure to bring such action will mean the action is time-barred. A notice of loss or damage must also be issued in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody or, where the loss or damage is not apparent, the notice must be issued within three days,

In *Côte d'Ivoire*, Act No. 2017-442 of June 30, 2017 of the Ivorian Maritime Code governs the international carriage of goods by sea in Côte d'Ivoire. This Act was drafted based on the Hague Rules and applies to both inbound and outbound carriage of goods by sea. Accordingly, where a loss or damage occurs during carriage of goods by sea, the Ivorian Maritime Code will apply.

Article 709 states that the carrier is liable for damage arising from loss, damage or delay to the goods in delivery if such loss, damage or delay occurs while the goods were in its custody.[643] Article 710 also stipulates that delay in delivery occurs when the goods have not been delivered to the port of unloading provided for in the contract of carriage within the time expressly agreed or within the time that it would be reasonable to require from a diligent carrier taking into account the factual circumstances.

The Ivorian Code adopts a presumed fault and neglect approach. Pursuant to Article 711 of the Ivorian Maritime Code, a carrier is responsible for loss and damage suffered by the goods unless he proves that these losses and damages come from one of the following causes:

- unseaworthiness of the vessel, provided that the carrier provides proof that he has fulfilled his obligation

[643] Article 708 of the Ivorian Maritime Code stipulates that the liability of the carrier with regard to the goods covers the period during which the goods are in his custody at the port of loading, during transport and at the port of unloading. The goods are deemed to be in the custody of the carrier from when the latter takes charge of them either from the shipper or a person acting on his behalf, or from an authority or other third party to whom the goods are to be delivered for shipment, in accordance with applicable laws and regulations at the port of loading. Similarly, the goods are deemed to be in the custody of the carrier until the moment he makes delivery either by handing over the goods to the consignee, or in cases where the consignee does not receive the goods from the carrier.

- fact constituting an event not attributable to the carrier, unforeseeable and for which the carrier, his agents or employees have taken all reasonable measures to avoid the consequences
- acts of war
- acts of public enemies
- arrest or constraint of prince
- restriction of quarantine
- fire
- faults on the part of the shipper, in particular in the packaging, conditioning or marking of the goods
- strikes, lock-outs or obstruction of work.

The above provision of the Ivorian Code appears to pick and choose from both the Hamburg Rule and the Hague Rules, thus creating a truly hybrid system. Interestingly, the Ivorian Code does not include navigational fault and management as one of the events which a carrier could use in exoneration of his fault, as in Article 4 of the Hague Rules.

The limits of liability of the Ivorian Code adopts the wordings of the Hamburg Rules but retains the monetary units of the Hague Rules. A look at Article 713 of the Ivorian Code states that a carrier's liability for damage arising from loss or damage to the goods is limited to an amount, fixed by the regulations, calculated either per package or other loading unit, or per kilogram of weight gross of lost or damaged goods, the higher limit being applicable. The use of the word 'fixed' by regulation appears to refer to international conventions in force in Ivory Coast since the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), and Protocol of Signature, which was ratified by Côte d'Ivoire by the law n ° 61-211 of 12 June 1961[644] and which has not been repealed by the new Maritime Code. Accordingly, the Hague Rules is the regulation in force. As earlier stated, the commercial court of Abidjan and appeal court have upheld the Hague Rules in the case of *La Société Saham Assurances Vs La Société Bolloré Transport Et Logistics Côte D'ivoire*.[645]

Also, in line with the wordings of the Hamburg Rules, Article 713 further states that the limit is waived when that fixed by the agreement of the parties is more advantageous for the entitled person to the goods. The responsibility of the carrier in the event of delay in the delivery is limited to a sum corresponding to two and a

[644] JORCI du 22 juin 1961, 902

[645] Supra

half times the freight payable for the goods which have suffered the delay. This sum may not exceed the total amount of freight payable under the contract for the carriage of goods.

Article 730 of the *Code Maritime* provides that actions relating to carriages of goods by sea must be brought within two years, failing which the rights of the claimant will be extinguished. The delay of the limitation period begins to count from the day which the carrier has delivered the goods or part of the goods or, when the goods have not been delivered, from the last day on which they should be delivered. It is important to note that although Côte d'Ivoire is yet to ratify the United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg rules), through the new Maritime Code, the Côte d'Ivoire internalised the two-year prescription provided for in Article 20 of said convention.

The two-year limitation period has the advantage of extending the time within which parties may resolve their disputes on loss of goods amicably. This further promotes legal certainty and better management of losses arising from damage of goods at sea.

The Togolese liability regime is clearly different from the other three jurisdictions because it domesticates the Rotterdam Rules pursuant to Article 396 of the Loi n° 2016-028 portant code de la marine marchande. The Loi n° 2016-028 portant code de la marine marchande stipulates that even if no bill of lading, other transport document or electronic record has been issued, the laws apply to the carriage of goods in the liner trade. The law does not apply to charter parties or other similar contracts for the use of space on a ship. However, if a bill of lading is issued in accordance with a charter, the parties are bound by the Rotterdam Rule.

If the claimant can show that the loss, damage or delay occurred during the carrier's duty period, or that the event or situation that caused or contributed to the loss occured during the period of the carrier's responsibility, the carrier is liable for the loss, damage or delay.[646] The carrier is absolved of all or part of its liability if he demonstrates that the cause or one of the causes of the loss, damage or delay was not attributable to its fault or to the fault of (a) a performing party; (b) master or crew of the ship; (c) employees of the carrier or a performing party; or (d) any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.[647]

Pursuant to the Maritime Code, the carrier's obligation for the goods commences when the carrier or a performing party accepts the goods for carriage and ends when

[646] See Article 17 of the Rotterdam Rules

[647] Article 17(2) and Article 18 of the Rotterdam Rules

the goods are delivered. Article 23 of the Rotterdam Rules additionally states that the carrier shall be notified within twenty-one days of the goods being delivered

Unless the shipper declares a higher value and the carrier agrees to a higher limitation, the carrier's liability is restricted to 875 'units of account'[648] per package or 'shipping unit', or 3 units of account per kilogram. The limitation of liability provided under Article 59 is more difficult to break. According to Article 61, the carrier may only rely on the package limitation if the loss was caused by a personal act or omission committed with the intent to cause such loss or negligently with knowledge that such loss would almost certainly occur.

Article 17(6) stipulates that in the event of multiple causes of a loss or damage, 'the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article'.[649]

Togolese law, pursuant to Article 395 stipulates that the limitation period for all actions against the shipper or the recipient is one year. This is different from the provision of Article 62 of the Rotterdam Rules, which provides for two years.

4.3.1.2 The Liability of the Contracting Carrier in Carriage of Goods by Air

As stated above, the domestic legal regime of aviation liability in Nigeria consists of international conventions, particularly the Montreal Convention, the Civil Aviation Act, and regulations on liability put in place by authorised agencies.[650]

According to the National Civil Aviation Policy, the Civil Aviation Act and regulations promulgated by the Nigerian Civil Aviation Authorities (NCAA)[651] constitutes the primary law governing civil aviation in Nigeria.[652] Pursuant to Article 18, the carrier is liable for damage sustained in the event of the destruction, loss of or damage to goods upon condition only that the event which caused the damage took place during the carriage by air. The law also provides that the carrier is not liable if he can prove that the destruction, loss of or damage to the cargo is as a result of (a) inherent defect, quality or vice of that cargo; (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents; (c)

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[648] The unit of account is the Special Drawing Right as defined by the International Monetary Fund

[649] Article 17(6) of the Rotterdam Rules

[650] Adejoke O. Adediran. 'Current regulation of air carrier's liability and compensation issues in domestic air carriage in Nigeria' (2016) 81(1) The Journal of air law and commerce 3

[651] Regulations concerning liability of air carriers are the Consumer Protection Regulations contained in Part 19 of Nige-ria Civil Aviation Regulations 2015

[652] These regulations are crucial to the issue of liability because they fill the gaps which the Montreal Convention and Civil Aviation Act do not provide for. Examples of this issues include denied boarding and cancellation of flight.

an act of war or an armed conflict; or (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.[653]

Under Nigerian law, a carrier's liability in the event of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made a special declaration of interest and has paid a supplementary sum if the case so required at the time the package was handed over to the carrier. In such circumstances, the carrier will be liable to pay a sum not exceeding the declared sum, unless he can demonstrate that the declared value exceeds the consignor's actual interest in delivery at destinatio.[654]

Article 35 of Schedule 2 of the Civil Aviation Act also stipulates that if an action is not brought within two years from the date of arrival at the destination or the date the aircraft ought to have arrived, the right to damages shall be extinguished.

In Ghana, the position is also similar to the Nigerian position in all ramifications, more particularly because Section 28 of the Ghana Civil Aviation (Amendment) Act, 2016 adopts the provisions and limit of the liability as contained in the Montreal Convention. Accordingly, the limit of liability in the case of damage, delay and loss of cargo is the same as stated above. The time within which a person who has suffered damages may bring an action is also the same.[655] With respect to the law governing carriage of goods by air, it is noteworthy to mention that, like other African nations, Ghana has not incorporated the revised limits of liability established under Articles 21 and 22 of the said Convention, in Special Drawing Rights (SDRs). The revisions to the limits were done on 30 December 2009 and 28 December 2019. However, the Court, in the case of *Dr. R.S. D Tei & Evelyn Jumbo v. CEIBA Intercontinental*,[656] used the revised limits of 2009 as the basis for calculation of damages, despite not expressly stating that the limits of the principal Act had been amended. It is, however, unclear whether the court will extend the same position to Article 22 of the Montreal Convention, which deals with limits for carriage of goods by air. Notwithstanding the above, the limit according to the plain text of the law remains 17 SDR.

In Togo, also, the applicable law is the Montreal Convention and, as such, the liability regime is the same as the Nigerian situation.

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[653] Article 18 of the Montreal Convention which is annexed as schedule 2 of the Civil Aviation Act

[654] Schedule 2 Article 22 of the Civil Aviation Act which domesticates Convention for the Unification of Certain rules Relating to International carriage By Air.

[655] See Schedule 2 Article 22 of the Ghana Civil Aviation (Amendment) Act, 2016 which domesticates the Convention for the Unification of Certain Rules Relating to International Carriage by Air.

[656] Supra

In *Côte d'Ivoire*, by virtue of Decree No. 2014-716 of November 17, 2014, the Montreal Convention applies to the international carriage of goods by air. The Montreal Convention is also applicable in the determination of loss and liability which occurred during international carriage of goods by air. The liability regime in the Montreal Convention, which is applicable in Nigeria and Ghana, is accordingly applicable in Côte d'Ivoire.

The commercial court of Abidjan has applied the Montreal Convention in the case of *Specimen And Sogescom V. Air France And National Aviation Services Ivoire*.[657]

The Commercial Court, in its decision, noted that the Warsaw Convention has been repealed by the Montreal Convention. It stated that the Montreal Convention has been ratified by Côte d'Ivoire and entered into force on 5 April 2015. The Court held that the principle of the liability of the air carrier for loss of goods, article 18 and 22 paragraph 3 of the Montreal Convention on 28 May 1999 applies. Accordingly, the Court held that Air France was able to limit their liability.

4.3.1.3 The Liability of the Contracting Carrier in Carriage of Goods by Road and Rail.

In the case of carriage of goods by road and rail, both Nigeria and Ghana do not have specific legislation which details out the liability of a contracting carrier where loss occurs during these modes of transportation. The courts determine the liability of contracting carriers by virtue of the agreement of parties and where parties do not have any agreement, the simple law of bailment will be applicable.

In the case of Togo and *Côte d'Ivoire*, carriage of goods by road is governed by the OHADA Uniform Act on Transport. The carrier, by virtue of article 16 of the Uniform Act on Transport, is responsible for damage, total or partial loss that occurs during transport, as well as delay in delivery. The beneficiary may consider the goods lost in whole or in part, as the case may be, if they have not been delivered or have only been partially delivered thirty days after the agreed delivery period has expired or, if no delivery period has been agreed, sixty days after the carrier has taken possession of the goods.

The carrier under the treaty is liable, as for its own acts or omissions, for the acts or omissions of its employees or agents acting in the exercise of their functions and those of any other person whose services it uses for the performance of the contract when these persons are acting for the purposes of performing the contract.

It's worth noting that Article 17 of the treaty states that the carrier may be exempted from liability if he can show that the loss, damage, or delay was caused by the

[657] Supra

beneficiary's fault or beneficiary's order, an inherent defect in the goods, or circumstances that the carrier could not avoid and could not remedy. The carrier is also exempted from liability when the loss or damage results from the particular risks inherent in one or more of the following facts:

- use of open and unshielded vehicles, when this use has been expressly agreed and mentioned in the consignment note
- absence or defective packaging for goods exposed by their nature to packaged or unpackaged
- handling, loading, stowing or unloading of the goods by the shipper or recipient or persons acting on behalf of the shipper or recipient
- nature of certain goods exhibited, by causes inherent to this very nature, either total or partial loss, or damage, in particular by breakage, spontaneous deterioration, desiccation, leakage or normal waste
- insufficiency or imperfection of marks or package numbers
- transport of live animals.

If the carrier is liable for a loss during carriage, the carrier may limit his liability. The Uniform Act on Transport specifies that compensation for damage or loss of the goods is calculated according to the value of the goods but cannot exceed 5,000 CFA francs per kilogram of gross weight of the goods. However, when the sender has made a declaration of value or a declaration of special interest in the delivery on the consignment note, compensation for the damage suffered will not exceed the amount indicated in the declaration.[658]

It is pertinent to note that with regards to delay, in addition to the ceiling set in paragraph 18(1), if the beneficiary proves that additional damage has resulted from the delay, the carrier is required to pay compensation for this damage, which may not exceed the cost of transport.[659] These limitations and compensation are binding on the parties. Accordingly, any clause providing for a lower limit of compensation than that provided for by the Uniform Code is null and void.[660]

There are two cases where the limitation of liability ceases to apply: either there has been a declaration of value or interest in the delivery, or there is fault on the part of

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[658] Article 18 of Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

[659] Article 18(3) of the Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

[660] Article 28(1) of the Acte uniforme relatif aux contrats de transport de marchandises par route, 22 March 2003, http://www.droit-afrique.com/upload/doc/ohada/Ohada-Acte-Uniforme-2003-Transport.pdf

the carrier. It follows from the provisions of Article 21 para. 1 of the Uniform Act, a carrier cannot rely on the limitation of liability when loss, damage or delay in delivery results from an act or omission he has committed (or from his agents or agents) either with the intention of causing this loss, damage or delay (intentional, willful or gross fault), or recklessly and knowing that this loss, damage or delay would probably result (inexcusable fault). In either case, there is therefore a forfeiture of the right to limitation of liability. In other words, the carrier loses the right to invoke the benefit of the cause of exemption.[661]

Article 19 states that the value of the goods is determined on the basis of the current market price for goods of the same type and quality at the place and at the time of collection. For the purpose of calculating compensation, the value of the cargo includes the price of transportation, customs charges, and other costs incurred during the carriage of goods, in full in the event of total loss, and pro rata in the event of partial loss or damage.

The exemptions and limits of liability provided for in the treaty are applicable in any action against the carrier for damage arising from loss or damage suffered by the goods or for delay in delivery, whether an action is based on contractual or non-contractual liability. When a claim for loss, damage, or delay is brought against a person whose carrier satisfies the requirements of Article 16 paragraph 4 above, a person may avail himself of the exemptions and limits of liability provided for in the Uniform Act on Transport.

In relation to the carrier's liability in the event of several successive carriers, Article 23 provides that the action can only be brought against:

- the first carrier
- the carrier who performed the part of the transport during which the event causing the damage occurred
- the last carrier.

The action can be brought against several of these carriers, their liability being joint and several. In addition, as soon as an intermediate carrier becomes aware of apparent damage to the goods, he is obliged to enter a reservation on the consignment note and immediately notify the sender as well as the carrier issuing the consignment note.

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[661] Paul Gerard Pougue. 'Encyclopédie du droit OHADA' (2011) Lamy <http://bibliotheque.pssfp.net/livres/ENCYCLOPEDIE_DU_DROIT_OHADA.pdf>Paul Gerard Pougue.
'Encyclopédie du droit OHADA' (2011) Lamy <http://bibliotheque.pssfp.net/livres/Encyclopedie_Du_Droit_Ohada.pdf>

Pursuant to Article 25, actions arising from transport governed by the Uniform Act on Transport must be brought within one year from delivery or, failing that, from the date on which the goods should have been delivered. However, in the case of fraud or fault equivalent to fraud, this limitation period is three years.

As a condition to instituting an action, the consignee must make a written complaint to the first or last carrier no later than sixty (60) days after the date of delivery of the goods, or at the latest six (6) months after taking charge of the goods. as a condition prior to instituting the action.

4.3.2 Unlocalised Loss

Losses are said to be unlocalised when the specific stage of transportation where losses or damages to goods cannot be determined. Unlocalised losses are prevalent in multimodal transport. Studies show that circa 80 per cent of claims in multimodal transport result from unlocalised loss.[662]

There is no gainsaying the one prominent feature of multimodal transport is the use of more than one mode of transportation. Many multimodal transport carriages are done with the use of containers. The reason for this is straightforward – it makes handling and transfer of cargo from one mode to the other easier.[663] These containers are mostly used by carriers and are usually sealed. The seal is not broken until the container reaches its final destination. As such, when there is a loss, it is difficult or almost impossible to ascertain the stage or time of such loss.[664] The implication is that when the loss cannot be easily ascertained, it will be difficult to ascertain the damages and compensation due to the carrier, the time limitation of the suit, and the limitation applicable to the carrier.

The use of containers appears to be one of the reasons why negotiating a single multimodal contract is preferable to concluding numerous unimodal contracts. In the case of multimodal transport, the claimant can still hold the MTO responsible for losses that occurred even though they are unsure of where the loss occurred. However, in cases where several unimodal transport contracts are concluded, the

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[662] MG Graham. 'The economic and commercial implications of the multimodal conventions' (Multimodal Transport-The 1980 UN Convention seminar at Southampton University 1980 12 September 1980)

[663] Daniel Dąbrowski. 'The multimodal carrier's liability for non-localized loss' (2016) 36 Zeszyty Naukowe Uniwersytetu Szczecińskiego Problemy Transportu i Logistyki 203

[664] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

claimant might be left without any compensation in a scenario of unlocalised loss.[665] This is because they have to prove that the loss had occurred in a particular stage and can only hold accountable the contracting carrier of such a unimodal stage of transport. Where they are unable to prove this, the claimant will be left with no possibility of seeking compensation.

It is mainly because of the issues surrounding unlocalised loss that there has been a clamour for international regulation of multimodal transport laws. A uniform liability system allows for the same set of rules irrespective of the stage of transport in which the damage loss or delay occurs. Even where the liability system is not truly uniform, a modified uniform liability regime, such as the MT Convention, is preferable. A modified uniform liability system allows the carrier to rely on the liability limits provided for in the unimodal convention as applicable to the stage of transport during which loss, damage or delays occur. However, when it is impossible to ascertain which segment of transportation the loss, damage or delay occurs, the Convention's limitation of liability will apply. The limits of the carrier's liability may vary where the carriage contract provides for carriage by sea or inland waterway.[666]

However, in the four countries we have used as a case study for the ECOWAS scenario (like most West African countries), there is no national legislation on multimodal transport or regional regime on multimodal transport**.** Accordingly, where an unlocalised loss occurs in the ECOWAS region, it may be difficult to ascertain liability.

The only recourse available is where the MT contract adopts the UNCTAD/ICC Rules. Rule 5.1 stipulates that the MTO is accountable for loss or damage to the products, as well as for delays in delivery, if the occurrence that caused the loss, damage or delay in delivery occurred when the goods were in custody of the MTO.[667]

If the contract is in accordance with the UNCTAD/ICC Rules, then the provision of Rule 6 will apply where the loss cannot be localised. The provision states that the MTO shall in no event be liable for any loss of or damage to the goods in an amount exceeding the equivalent of 66.67 SDR per package or unit or 2 SDR per kilogram

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[665] Zbigniew Kwaśniewski, *Umowa multimodalnego przewozu towarów w obrocie międzynarodowym* (Univ. Mikołaja Kopernika 1989)Zbigniew Kwaśniewski, Umowa multimodalnego przewozu towarów w obrocie międzynarodowym (Univ. Mikołaja Kopernika 1989)

[666] Dąbrowski. 'The multimodal carrier's liability for non-localized loss' (2016) 36 Zeszyty Naukowe Uniwersytetu Szczecińskiego Problemy Transportu i Logistyki 203

[667] The Rules in Rule 4.1 states that the responsibility of the MTO for the goods under the Rules covers the period from the time the MTO has taken the goods in charge until the time of their delivery.

of the gross weight of the goods lost or damaged. However, in the event that the carriage where the loss occurred does not include carriage of goods by sea, then the liability shall not exceed 8.33. SDR per kilogram of the gross weight of the goods lost or damaged.

However, where the contract does not incorporate the UNCTAD/ICC rules, all four countries will resort to simple contract determination under their local law and, in some instances, tort laws.

4.4 Applicable Theory of Multimodal Transport Contract in ECOWAS Region – A Mixed Contract

An assessment of the countries' approaches in this study reveals that in the ECOWAS, a multimodal carriage of goods contract is seen as a of mixed nature, combining elements of two or more subtypes of the carriage contract.[668] While some scholars believe that the multimodal carriage contract is a one-of-a-kind contract,[669] Selected West African countries recognise the multimodal contract's mixed nature.

A mixed contract is one in which more than one purpose is incorporated in a contract in such a way that it totally fits the conditions of two or more contracts. Mixed contracts are frequent in the transportation industry. For example, a through transport contract is a mixed contract: it is partially a carriage contract and partially a forwarding contract.[670]

This theoretical approach can avoid differences in liability with respect to cargo that is being transported in the same way. For the cargo interests, it's possible to see the strange scenario where different liability regimes are applied to the damage of goods that were damaged in the same way on the same part of the journey. Although the damage was caused by the same event, the liability would vary; for instance, a unimodal transport convention would apply to one portion of the cargo, while a multimodal transport convention would apply to the other portion. The mixed contract approach avoids this type of difference.[671]

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[668] Ridley, J., & Whitehead, G. (1982). *The law of the carriage of goods by land, sea and air* (6. ed. ed.). London: Shaw.

[669] See distinction of sui generis contract and mixed contract in chapter 3 supra

[670] Marian Hoeks. (2010). *Multimodal transport law: The law applicable to the multimodal contract for the carriage of goods* Kluwer Law International. doi://doi.org/10.1093/ulr/15.1.288

[671] Jeon, H. (2013). *Coping with muddles and uncertainty in the field of multimodal transport liability* Available from Dissertations & Theses Europe Full Text: Literature & Language. Retrieved from https://search.proquest.com/docview/1775429723

This mixed contract approach is essentially the same as the network liability scheme that is already used in multimodal transportation contracts. A multimodal contract for the carriage of goods in West Africa is often considered to be a mixed contract because the existing legal system of multimodal regimes employs a network liability system. The lack of a distinct liability system for multimodal transportation triggered the recognition of multimodal transport as a mixed contract.

From a holistic perspective, it makes sense to think of it as a mixed contract because as it fits into the existing unimodal legal framework, it leaves a number of issues to the discretion of the court and the judge, consequently leading to uncertainty and increased legal costs.

4.5 Challenges and Conflict Enabled by Unimodal Transport Laws Governing Carriage in the Selected Countries

From the preceding sections, it is clear that the current regime in West Africa is fragmented. We will now examine the challenges that may arise due to the different regimes applicable in these jurisdictions.

Given the growing importance of multimodal transport, the issue of the multimodal transport liability system is very important. Due to different legal systems and treatment in the different jurisdictions in this study, multimodal transport liability tends to change '… like the colour of a chameleon as the transport progresses by various means of conveyance'.[672] This constant change limits the ease with which the outcome of any claim may be predicted before the loss or damage.[673] Therefore, the constant change leads to the application of one of the international unimodal transport conventions, either because they are mandatory or because they are the 'choice of law' of the contract.

The current international transport convention governing multimodal transport carriers' liability in West Africa involves a series of unimodal transport conventions and treaties including the Hague (Visby) Rules, Rotterdam Rules, Montreal Convention and Warsaw Convention, and the OHADA Uniform Act on road transport. These conventions have different liabilities, definitions, and carrier responsibilities. However, there are no guides as to how two conventions may relate

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[672] J. Ramberg. 'Harmonisation of the Law of Carriage of Goods' (1973) Scandinavian Law Review 245

[673] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

to each other in the event of a conflict.[674] There are several fathomable situations in which either more than one unimodal convention or no unimodal convention applies. Combining different modes of transportation continued to cause a lot of undesirable effects. There are different rules of liability and different time bars for bringing an action.

The following sections analyse some of the challenges that may arise from combining different modes of transportation. With the establishment of the African Continental Free Trade Area, many shipments will be from one state to another, particularly between regional economic communities. There is no more natural place for conflict of law questions to arise. The possibilities are as numerous as the combinations permit.

Conflicts are exacerbated by the various methods used by jurisdictions to give internal effect to unimodal conventions. Some states have treated the Conventions as self-executing or have implemented the relevant international text directly by giving it the force of law; for example, Nigeria's adoption of the Hamburg Rules. Some others have rewritten the international text.[675]

4.5.1 Togo's Maritime Code and other Unimodal Transport Rules

The Rotterdam Rules are the mandatory governing regime for carriage of goods by sea in Togo. The Rotterdam Rules will generate conflicts with other international rules on unimodal transport with respect to the applicable regime to 'wet' multimodal transport operations. These conflicts will definitely lead to undesirable litigation, which will consequently increase legal cost in transportation. Due to the 'unimodal plus' approach of the Rotterdam Rules, there may be a possible conflict with the existing unimodal regime. For example, when a carrier agree to carry by road and sea whereby the goods remain on the vehicle during the carriage by sea, a conflict with the OHADA Uniform Act on transport may arise, since both the OHADA Uniform Act on Road Transport (pursuant to Articles 2 and 22) and the Rotterdam Rules will then require application. This work will detail below how the maritime code domesticating the Rotterdam Rules will conflict with other unimodal transport rules applicable in ECOWAS.

In instances where damage occurs within the carrier's period of responsibility but solely before or after the sea leg, the Togo Maritime Code – which domesticates the Rotterdam Rules – will apply. However, it will not prevail over another

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[674] Bevan Marten (ed), *Multimodal Transport Reform and the European Union: A Minimalist Approach*, vol 3 (Victoria University of Wellington 2013)

[675] The Ivory coast maritime code is a mixture of both the Hague Rules and Hamburg Rules although the rules are primarily based on the Hague Rules.

compulsorily applicable Convention, as stipulated in Art. 26 and 82. Where the carriage before or after the sea segment is a road carriage, the OHADA Uniform Rules on Transport will apply.

Conflict of the conventions can emerge in situations where both the OHADA Uniform Treaty on transport and the Rotterdam Rules may be applicable. An example is where bottles are produced in Nigeria, and put in a container and loaded unto a road vehicle in the factory, then brought to Togo, from where the loaded vehicle is carried by sea to Côte d'Ivoire. In this instance, the OHADA Uniform Treaty on transport is applicable based on Articles 2 and 22, and Article 5 of the Rotterdam Rules makes the Rotterdam Rules applicable.

In the event of a road accident before sea segment of a carriage, the road carrier liable for the entire carriage, and such liability will be governed by the provisions of the OHADA Uniform Treaty on transport. Suppose, on the other hand, the damage was caused by an event that could only occur in the course and by reason of the transport by sea (e.g. sinking of the ship); in other words, when the damage was localised to the sea leg. In that case, the road carrier will be liable according to the maritime convention in force. That means the maritime convention provisions concerning the carrier's liability will apply to the road carrier.

If the damage to the containerised cargo in the above-mentioned example is not localised, both the OHADA Uniform Treaty on transport and the Rotterdam Rules will apply compulsorily. This is a conflict between two laws. To have questions like this determined by a court will certainly increase the legal cost, which is broadly referred to as a friction cost and thus an obstacle to an efficient transport chain.

Although the Rotterdam Rules made efforts to avoid conflicts with other unimodal conventions, it is still not without conflicts. The Rotterdam Rules liability system includes step back clauses in Articles 26 and 82. Article 26 tries to regulate instances wherein the liability regime of the Rotterdam Rules has extended its scope of application to multimodal carriage beyond the carriage of goods by sea.[676]

Article 82 only seeks to clarify issues of precedence relating to 'international conventions governing the carriage of goods by other modes of transport. it does not provide that mandatory regional or national law should prevail over the provisions in the Rotterdam Rules. In any event, Article 82 only seeks to clarify issues of precedence relating to 'international conventions governing the carriage of goods by other modes of transport'. it does not provide that mandatory regional or national law should prevail over the provisions in the Rotterdam Rule. It is arguable that Article 82 will not be applicable to OHADA Uniform Rules on Road Transport

[676] Ellen Eftestol Wilhelmson, 'The Rotterdam Rules in a European multimodal context' (University of Helsinki, Faculty of Law 2010)

since OHADA is a regional agreement and not essentially an international Convention – which Article 82 seeks to deal with. A look at Article 26 of the Rotterdam Rules shows it uses the phrase 'international instrument', as against Article 82, which uses the phrase 'International Convention'. Accordingly, it appears that Article 82 does not affect amendments on regional instruments, such as the OHADA Uniform rules on Road Transport.

This position may be slightly different as it relates to carriage by rail because there are no national or regional liability systems for this mode of carriage. Accordingly, a reliance on the Rotterdam Rules may even provide some legal certainty as it relates to carriage of goods by rail. Conversely, the Rotterdam Rules apply to only Togo; therefore, the regional uniformity cannot be achieved as regards the rail segment of multimodal transport within the ECOWAS.

As regards carriage of goods by air, theoretically, there is a possibility of conflict. Article 18(4) falls under the liability of the carrier. However, despite falling under this chapter, it is uncertain whether it relates to the three subjects which the Rotterdam Rules provides a step back on. Therefore, if the carrier performs a carriage by sea while also performing the terms of a contract for air carriage for the purpose of loading, delivery, or transhipment, a conflict may arise. Any damage is presumed to be the result of an event that occurred during air transportation, unless proven otherwise. The possibility of seeing a carriage by sea in performance of carriage by air is almost zero. Also, the Rotterdam Rules require the transport to be international for the Rules to apply. it is not likely that the ancillary carriage will be international in this hypothetical case.

Clearly, Article 26 does not resolve the potential conflict between unimodal transport conventions and the Rotterdam Rules. For example, where there is a conflict on transport documents, delivery of goods, rights of controlling parties and transfer of right, Article 26 of the Rotterdam Rules cannot be said to provide the certainty which the law seeks to provide.[677] Also, Article 26 is not designed to address overlaps with unimodal transport conventions in cases where the cargo loss, damage or delay was progressive. Instead, Article 26 deals only with cases where the loss of, damage to or delay in delivery of the goods occurred in a particular stage of carriage.[678]

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[677] Nikaki Theodora and Soyer Baris. 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just another one for the Shelves?' (2012) 30(2) Berkeley Journal of International Law 303 <https://search.proquest.com/docview/1082410303>Nikaki Theodora and Soyer Baris. 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just another one for the Shelves?' (2012) 30(2) Berkeley Journal of International Law 303 <https://search.proquest.com/docview/1082410303>

[678] ibid

Articles 26 and 82 are incapable of resolving all conflicts that arise from the application of two international conventions. The measures in Articles 82 and 26 only partially remedy the problem of conflict of conventions. These measures fall short of what the drafters intended – Article 82 is prone to misunderstanding and falls short of resolving the conflict. The inadequacy of these two provisions was discussed in Chapter 3 of this work.

Conclusively, there is potential for conflict as regards the coexistence of the Rotterdam Rules and other unimodal instruments in the region.

4.5.2 Conflict between OHADA's Uniform Rules on Road Transportation and Mode on Mode Carriage

'Give the customer what he wants' has always been a lucrative credo in any trade, and the transport business is no different. In a world where door-to-door transport is becoming important, it will most likely play a huge role in African Continental Free Trade. There is no denying that because AfCFTA promotes intra-African trade, many ancillary carriages will be by road transportation. As earlier stated, Ten OHADA member are members of the ECOWAS. The OHADA Uniform Act on transport is the applicable law for the determination of carriage by road. Article 1 of the treaty states that:

> This Uniform Act applies to any contract for the transport of goods by road when the place of taking charge of the goods and the place provided for delivery, as indicated in the contract, are located either in the territory of a member state of OHADA, or on the territory of two different states, at least one of which is a member of OHADA. The Uniform Act applies regardless of the domicile and nationality of the parties to the contract of carriage. (Translated).

From the scope of application of the law, it is clear that the law applies when at least one of the territories for loading or discharge is a member of OHADA. Accordingly, the law may be applicable between carriage from one of the five (5) non-OHADA member states and an OHADA state.

It is worrisome that the OHADA treaty on road transport, which should be a unimodal transport treaty, annexes other transport modes into its scope of transportation. A combined reading of Articles 2 and 22 of the OHADA Uniform Rules stipulates that when the vehicle is carried over (mode on mode) and the goods are not unloaded from the vehicle, the Uniform Act applies to the whole of the carriage. However, when, through no fault of the road carrier, a loss, damage or delay occurs during the non-road part of the transport, the liability of the road carrier is determined in accordance with the mandatory rules of law governing this other

mode of transport. However, in instances where there are not mandatory rules, the OHADA uniform rules on transportation will remain applicable.

While it is almost impossible to have a vehicle and its goods carried by air, it is not impossible for carriage of goods by sea and by rail. Therefore, for this work, we will only discuss the conflict as it relates to carriage of goods by sea and rail.

In Africa, there is no convention or treaty that determines the liability for losses occurred during the carriage of goods by rail. Therefore, it means that where there is a loss on the rail portion of mode-on-mode carriage and this loss occurred due to no fault of the road carrier, the OHADA uniform rules will apply. The question, then, is what if there is a contract for carriage of goods by rail? It appears from the construction of the rules that if there is a contract and a loss occurs during the mode-on-mode carriage, the OHADA rules will prevail because their application is mandatory to carriage of goods by road, whether mode-on-mode or just a carriage by road. Therefore, even on issues such as limitation of time and compensation, the OHADA uniform rules on road transportation will prevail.

In relation to carriage of goods by sea, it is unlikely that OHADA uniform rules on road transportation will conflict with the Hague Rules since the Hague Rules does not have a multimodal provision. The possible conflict with the Rotterdam Rules are discussed in 4.5.1. above

4.5.3 Hague (Visby) Rules and Multimodal Contracts

Container revolutions has aided the use of multimodal transport for carriage of goods. However, it appears that the law is strained, particularly as it relates to limitation per package.

It has been said that a container is one of the clearest definitions of a package. A container is specially designed to protect its contents against theft or physical damage for the purpose of transportation.[679]

The is no doubt that the Hague (Visby) Rules are by far the most applicable regime for the carriage of goods by sea. Therefore, it is important to consider the potential challenges of the Hague Rules and multimodal transport. Whilst some of the issues have been considered in the previous chapter, the following section will consider the appropriateness of monetary limits in the Hague (Visby) Rules.

By virtue of Article 9 of the Hague Rules, the monetary units used in the Convention are said to be gold. Article 9 states: ‘The monetary units mentioned in this Convention are to be taken to be gold value’. it further states: ‘those contracting

[679] William Tetley. 'Package & kilo limitations and The Hague, Hague/Visby and Hamburg Rules & Gold' (1995) 26(1) Journal of maritime law and commerce 133

States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures.'[680]

There is a challenge here as to determining whether the container is a package for the purpose of limitation or whether it is the package inside the container that is subject to limitation. In *Northeast Marine Term, Co. v. Caputo*, the Court held that, 'The container is a modern substitute for the hold of the vessel'.[681] Also, Scruton, on charterparties and bills of lading described, the container as '… no more than a sophisticated form of package'.[682]

However, the United States Coast Guard proposes a more detailed definition of container:

> An article of transport equipment (lift van, portable tank, or other similar structure including normal accessories and equipment when imported with the equipment), other than a vehicle or conventional packaging [which is] … strong enough to be suitable for repeated use; … specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading … fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; [and] … so designed as to be easy to fill and empty.[683]

The problem with containers and the Hague Rules is that the limitation of liability is very meagre. The limitation, prescribed in Article 4(5) of the Hague Rules, is put at 100 pounds sterling per package or unit, or the equivalent of that sum in other currency depending on what the nations codify.

Of course, this is too small and is not in tandem with contemporary reality. In Nigeria, the Carriage of Goods by Sea Act puts it at N200 per package, which is less than US$0.5 as of June 2021. In Ghana, 100 pounds is read as 'two hundred Ghanaian currency' which is also less than US$35. So as not to be caught by this ridiculous sum as a limit to a claimant liability, it appears that the only option for the shipper is to ensure that the number of packages being shipped are stated on the bill of lading according to art 3(3) (b), or they may declare the value of the goods shipped if such value is more than the value stated in Art. 4(5) of the Hague Rules.

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[680] See Article 9 of the Hague Rules

[681] 432 U.S. 249 (1977)

[682] Stewart Crauford Boyd and others, *Scrutton on charterparties and bills of lading* (20. ed. edn, Sweet & Maxwell 1996)Stewart Crauford Boyd and others, Scrutton on charterparties and bills of lading (20. ed. edn, Sweet & Maxwell 1996)

[683] Edward Schmeltzer and Robert A. Peavy. 'Prospects and problems of the container revolution' (1970) 1(2) Journal of maritime law and commerce 203 <http://www.econis.eu/PPNSET?PPN=485225336>Edward Schmeltzer and Robert A. Peavy. 'Prospects and problems of the container revolution' (1970) 1(2) Journal of maritime law and commerce 203 <http://www.econis.eu/PPNSET?PPN=485225336>

However, if the bill of lading only mentions the container, then the container will be treated as the package for limitation purposes.[684] Accordingly, a shipper entering a multimodal carriage contract must ensure that goods are properly declared on the multimodal transport document (which will serve as a bill of lading[685]).

Whilst the law appears to have been changed by the Visby Rules (The Brussels Protocol of 1968 amending the Hague Rules) – the Visby Rules amended article 4(5), increased the limit[686] and fixed in Gold Francs Poincaré, which in 1968 had a stable value, but still does not solve the universal issue of inflation. The Visby Rules also clarify the case of goods shipped in a container or on a pallet. They state that if the packages are listed on the bill of lading, each object so listed is a package. However, more countries in West Africa use the Hague Rules rather than the Hague (Visby) Rules as their mandatory law for carriage of goods by sea.

The Original purpose of the Limitation per package rule in the Hague Rules, as stated in *Pannell v. SS. American Flyer*,[687] is to prevent excessive claims in respect of small packages of great value, but not to permit carriers to escape liability for just claims.[688]

Accordingly, it is safe to say that, as a result of the advent of containers (which came several years after the drafting of the Hague Rules) coupled with the growing inflation all over the world particularly Africa – which has hovered between 7 and 10 per cent in the last 10 years[689] the current limit is not in line with reality of multimodal transport, especially since multimodal is viewed as a chain of various unimodal transport conventions.

In Africa, the local currency value that replaces the £100 sterling has a fraction of the value it used to have. Of course, it may be argued that each country can create

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[684] See the American Case of Royal Typewriter Co. v. M/V Kulmerland 1973] A.M.C. 1784: [1973] E.T.L. 705 (U.S.C.A.) affg. [1972] A.M.C.1995; [1973] 1 Lloyd's Rep. 318 (N.Y. Dist. Ct.)

[685] Discussion on this have been made in Chapter 3.

[686] The increase provides an alternative of "10,000Gold Poincare Francs per package or unit or 30 such francs per kilo whichever is the greater". The use of KGs as an alternative is commendable particularly for heavy single packages or bulk cargoes.

[687] 1958 A.M.C. 1428 at 1433 (N.Y. Dist. C

[688] William Tetley. 'Per Package Limitation and Containers under the Hague Rules, Visby & UNCITRAL Visby & UNCITRAL' (1978) 4(3) Dalhousie Law Journal

<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1248&context=dlj>William Tetley. 'Per Package Limitation and Containers under the Hague Rules, Visby & UNCITRAL Visby & UNCITRAL' (1978) 4(3) Dalhousie Law Journal

<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1248&context=dlj>

[689] Sub-Saharan Africa: Inflation Rate From 2016 To 2026 (Compared To Previous Years)' (*Statista*, 2020) <https://www.statista.com/statistics/805570/inflation-rate-in-sub-saharan-africa/> accessed 25 June 2021.

formulae for determining the value of limitation; however, doing that further poses the challenge that they will not provide uniformity under international law.

Another challenge is the interaction between multimodal contracts and the dominant unimodal convention in the carriage of goods by sea – in West Africa, the Hague (Visby) Rules. The Hague (Visby) Rules apply to every bill of lading relating to the carriage of goods. These Rules define 'contract of carriage' as applying 'only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea'.[690] The Hague Rules apply to operations from tackle to tackle and not door to door, as is customary in multimodal transport. Multimodal transport sometimes warrants the storage of goods.

According to the Hague Rules, the Rules apply to tackle-to-tackle operation. The final function for which the carrier is responsible by force of the Hague Rules is the discharge of the goods from the ship. That operation is complete when the goods cross the ship's rail or are delivered from the ship's tackle.[691] From the moment of delivery, any operations undertaken are not subject to the Hague Rules, and the carrier's obligation in respect of the goods must be found elsewhere. Accordingly, within the meaning of the expression 'carriage of goods' and Article 2, Article 3, rule 2, and Article 7, once the goods have been discharged from the ship, the Hague Rules will no longer apply. However, case law in different regions has shown clearly that the carrier is responsible for damages during loading and discharge of cargo.

The implication of this to multimodal transport in the four countries which this work studies is that there are no laws to determine the liability from the period of discharge to the period when the goods are placed on another mode of transportation. A loss that occurs in this instance would accordingly be determined by the principles of simple contract in that jurisdiction, subject to the judges' view and discretion -–a breeding ground for non-uniformity.

4.5.4 Potential Conflict between the Montreal Convention and OHADA Uniform Rules on Road Transport

The greatest potential conflict that may arise in the multimodal carriage of goods arises from Article 18 of the Montreal Convention.

Ordinarily, looking at Article 18(4) of the Montreal Convention, carriage of goods by air should not extend to a carriage outside the airport. However, where 'such

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[690] Bevan Marten. 'Multimodal transport reform and the European Union: a treaty change approach' (2012) 36(2) Tulane Maritime Law Journal 741

[691] Tetley, W. (1988). *Marine cargo claims* (3. ed. ed.). Montreal: Blais.

carriage takes place, in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary'. If the event leading to the damage happened during the carriage by air, the Montreal Convention will be applicable.

With AfCFTA, it is expected that there will be free movement of persons and goods within the region. Sometimes, air carriers may have their warehouses in another country close to the border. In these cases, goods are stored temporarily in the warehouse of an air carrier and the goods are carried from the warehouse to the airport. Where damage occurs, it appears that the road carriage law and Montreal Convention are applicable. Considering the provision of Article 18(3) of the Montreal Convention, the Montreal Convention is applicable.

However, equally, in OHADA regions, two possibilities may arise. Article 3 of the Uniform Act stipulates that a contract for the transport of goods exists as soon as the principal and the transporter agree to the movement of goods for an agreed price. Article 2 defines a transporter as a natural or legal person who takes responsibility for transporting the goods from the place of departure to the place of destination using a road vehicle. Whilst it is clear that when an air carrier contracts another vehicle for an agreed fee to carry the goods from the warehouse to the airport. By doing so, a contract of carriage exists and as such, the road carriage law may be applicable.

In an instance where an air carrier owns the vehicle which carries the goods from the warehouse to the airport, then he may not be able to rely on the OHADA Uniform act because a contract of carriage by road does not exist considering the provision of Article 3. It is also arguable that the air freight be seen as the agreed price, since the air carrier has taken responsibility for the carriage of goods. Whether it is by road or air, the carriage would have fulfilled the provisions of both Articles 2 and 3 of the OHADA Uniform act.

One may wonder why the Montreal Convention is applicable. This is because the physical parameter of an airport is not solely what constitutes an airport. There have been arguments that it is the functional interpretation of an airport that is important in deciding the scope and extent of an airport.[692] In the American case of *Victoria Sales Corp* v *Emery Air Freight Inc*,[693] per Judge Van Graafeiland, and the English decision of *Rolls-Royce Plc* v *Heavylift-Volga DNEPR Ltd.* per Morrisson J,[694] the judges took a functional approach and concluded that loss, delay and damages

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[692] George Leloudas. 'Door to door application of the international air law conventions - commercially convenient, but doctrinally dubious' (2015) 3 Lloyd's Maritime and Commercial Law Quarterly 368

[693] (1990) 917 F.2d 705 (2nd Cir).

[694] [2000] 1 Lloyd's Rep 653

occurring in a warehouse outside the perimeter fence, but within the operating airport area, fell under the Warsaw Convention system. The effect is that an airport is decided on a functional approach rather than with geographical limitations. Whilst the functional approach is sensible, it creates room for uncertainty because the determination of the applicability of air convention is determined on an 'airport-by-airport' basis. Some scholars agree that land transport to and from a warehouse should always be subject to the Montreal Convention, and that the argument of functional interpretation is not plausible. It is argued that the land carriage be treated as an ancillary carriage to the air carriage and thus should be subject to Montreal Convention 1999. This interpretation is buttressed by the 'absorption doctrine' of multimodal transport.[695]

On the contrary, it may also be argued that land movement of the goods by an air carrier from the airport to a warehouse outside is not subject to the Montreal Convention 1999 because there was a specific proposal at Montreal International Conference for the barrier to cover off-airport warehouses be removed, but the said proposal was turned down.[696] This argument posits that land movement to the warehouse should not be covered and only the actual storage of the goods by the air carrier in the warehouse should be subject to Montreal Convention. Despite the different theories, the most convenient theory, which will create a seamless liability system between the aircraft and the warehouse of the air carrier, appears to be the theory that determines an airport in relation to its functional area.

Concerning the earlier illustration, a situation where road carriage law and air carriage law are both applicable is not desirable for several reasons. First, the limits of liability differ. Under the air conventions, a carrier may limit his liability to 17 SDR under the Warsaw and 17–19 SDR per kilogram (depending on whether the country has taken the necessary steps in accordance with their domestic legal requirements to give full effect to the December 2009 increase)[697] under the Montreal Conventions – in the case of the Montreal Convention this limit is unbreakable when it comes to the carriage of goods. In the OHADA Uniform Act on Rad Transport, the limit of liability per kg is 5.000 FCFA. The difference in the limit is huge and, as such, an air carrier will happily seek to rely on the provision of

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[695]Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[696] See ICAO, *International Conference on Air Law. Convention for the Unifi cation of Certain Rules for International Carriage by Air. Montreal, 10–28 May 1999, Vol.2, Documents* (Doc 9775-DC/2, 1999), 76–77, *per* IATA

[697] In 2009, the limit was revised to 19 SDR. Pursuant to the 2019 review of the limits of liability conducted by ICAO under Article 24 of the *Convention for the Unification of Certain Rules for International Carriage by Air*, done at Montréal on 28 May 1999 (Doc 9740) (Montreal Convention of 1999), the revised limits of liability established under Articles 21 and 22 of the said Convention, in Special Drawing Rights (SDRs) has been increased to 22 SDR and has become effective as of 28 December 2019

OHADA rather than the provision of the air conventions. In the case of non-OHADA regions in ECOWAS where there is no international treaty on road carriage, the shipper is at the court's discretion to determine whether the Montreal Convention is applicable, or the shipper can only recover damages on the principle of torts and bailment under domestic law.

Furthermore, Article 35 of the Montreal Convention stipulates that the 'right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped', while OHADA prescribes one year from the date of delivery or, in the absence of delivery, from the date on which the goods should have been delivered. However, in the case of fraud or fault equivalent to fraud, this limitation period is three years. Non-OHADA jurisdictions may be subject to their domestic limitation laws where road carriage applies.

Challenges could also arise from different limits of liability. Montreal provides the highest limits of liability, at 17 to 22 SDR. The Hamburg Rules provide for limits of 835 SDR per package or unit, or 2.5 SDR per kilogram, whilst the Hague (Visby) rules provide for limitation of 2 SDR per kilogram, or 666.67 SDR per package or other shipping unit. Even in the event of using a contractual solution, the UNCTAD/ICC Rules, pursuant to Rule 6.1, state that the liability of the multimodal carrier is limited to 666.67 SDR per package or unit, or 2 SDR per kilogram, whichever is the higher, and if the multimodal transport does not include carriage by sea or by inland waterways, the liability of the multimodal carrier is limited to 8.33 SDR per kilogram of gross weight of the goods lost or damaged.

The Rules on time within which a suit may be brought also differ greatly. Whilst the Montreal Convention,[698] Hamburg Rules[699] and Rotterdam Rules[700] provide that proceedings should be instituted within two years, the Hague Rules[701] provide for one year and the period stipulated in the UNCTAD/ICC Rules is 9 months.[702]

For important issues such as the basis of liability, time bar, delay and limitation of liability, the diverse approach employed under these conventions mean that the applicable law will be different in each case, depending on the applicable regime, localised loss, unlocalised loss and the cause of loss or damage. If the loss occurs

[698] Article 35 of the Montreal Convention

[699] Article 20.1 of the Hamburg Rules

[700] Article 62.1 of the Rotterdam Rules.

[701] Article III, rule 6 of the Hague Rules and Hague-Visby Rules.

[702] Rule 10 of the UNCTAD/ICC Rules

gradually through several modes of transportation this consequently brings different liability regimes into play.[703]

4.5.5 Difficulty in Determining Liability for Unlocalised Loss

Losses are said to be unlocalised when the specific stage of transportation where losses or damages to goods cannot be determined. Unlocalised loss is prevalent in multimodal transport. Studies show that circa 80 per cent of claims in multimodal transport result from unlocalised loss.[704]

As stated earlier, the current legal system in ECOWAS utilises a system of liability wherein every stage of multimodal transport is governed by the applicable law. The applicable law may be a convention by air, a convention by sea, OHADA Uniform Act, or domestic law. it is therefore important to determine which segment of transport in which the loss, damage, or delay occurred.

The question then arises, when the place of loss is unascertainable, of which rules will apply. In multimodal transport, containers are used mainly by carriers and are usually sealed. Such a seal is not broken until the container reaches its final destination. As such, when there is a loss, it is difficult or almost impossible to ascertain the stage or time of such loss.[705] The implication is that when the loss cannot be easily ascertained, it will be difficult to determine the damages and compensation due to the carrier, the time limitation of the suit, and the limitation applicable to the carrier.

More particularly, the issue of unlocalised loss is paramount to ascertaining whether limitations could be broken or not. For example, Article 25 of the Warsaw Convention stipulates that a carrier is not entitled to exclude or limit his liability if the damage is caused by his wilful misconduct or by such fault of his agents. However, Article 22(5) of the Montreal Convention also stipulates that the provisions for the limitation of liability will not apply where the damage resulted from an act or omission of the carrier or agents, done with intent to cause damage or recklessly. Accordingly, a carrier can break the limitation of liability. The provision only relates to the carriage of passengers and their baggage, and does not relate to the carriage of goods by air. Therefore, where damage to cargo arises in the

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[703] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

[704] MG Graham. 'The economic and commercial implications of the multimodal conventions' (Multimodal Transport-The 1980 UN Convention seminar at Southampton University 1980 12 September 1980)

[705] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

course of carriage by unimodal or multimodal air carriers, the limits are unbreakable.[706]

Article 21 of the OHADA Uniform Act for the carriage of goods by road also provides that the carrier cannot benefit from the provision of limitation of liability where there is wilful misconduct.

For carriage of goods by sea, Article 4.5(a) of the Hague (Visby) Rules and Article 6 of the Hamburg Rules provide that the carrier will be deprived of the right to enjoy the limitation of liability if the loss or damage to the goods resulted from 'an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that such loss, damage or delay would probably result'.[707] Article 4(5) of the Hague Rules provides that:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

The use of the phrase 'in any event' has been said to mean that the limit of liability cannot be broken in the case of the Hague Rules, even where there is wilful misconduct.[708] Although this is subject to several dissenting opinions,[709] what is pertinent is that it is very important to determine the place of loss to ascertain the measure of compensation.

Where the place of a loss or damage is not ascertainable, there may be a liability gap altogether, leaving the matter wholly to be determined by the applicable national law and the standard contract forms. Eventually, the decision of a court in a case of unlocalised loss cannot be predicted, because there is no certainty as to which

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[706] Ingrid Koning. 'Liability in Air Carriage. Carriage of Cargo Under The Warsaw and Montreal Conventions' (2008) 33(4) Air and Space Law 318 <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=AILA2008025>

[707] Hani M. S. Abdulrahim. 'Maritime carriers' liability for loss of, or damage to, goods under the Hague Rules, Visby Rules and the Hamburg Rules, compared with his liability as an operator under the relevant rules of the International Multimodal Transport Convention' (University of Glasgow 1994)

[708] Katsivela Marel. 'Loss of the Carrier's Limitation of Liability under the Hague Visby Rules and the Warsaw Convention : Common Law and Civil Law Views
' (2012) 26 Australian and New Zealand Maritime Law Journal <https://poseidon01.ssrn.com/delivery.php?ID=559124089121125009072082100101094124063062077093054032068075011087091104106120000093033098026038045017119075008075067084069121025059009008018098067080098078065094106023000046124097096001098100025124065025091070013002008118112094081093126125075091092026&EXT=pdf>

[709] Sir Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading
* (24th edn, Sweet & Maxwell 2019)

unimodal convention should be applied. This may consequently lead to an increased litigation cost affecting a cost-efficient transport chain.

4.6 Assessment of Status Quo and the Desirability of Harmonised Regulation

There have been several attempts at regulating multimodal transport around the globe. These range from creating an international instrument to incorporating different means to fit in with the existing fragmented international and national legal framework. Three main approaches that may be utilised in regulating multimodal transport are:

- uniform system
- network system
- modified system.

The three theoretical approaches have been discussed in 3.1.6 of this work. To narrow down the approach to the scope of this work, it is important to consider which system the countries in this study use.

Interestingly, all the countries chosen in this study use the Network Approach. This is basically an approach that creates a fusion of different liability regimes together.[710] In this system the liability regime applicable on a multimodal transport agreement is comparable to a chain that is composed of the regimes that normally apply on each trajectory of the total voyage using a different mode of transport. In other words, different regimes apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them.

In this system, the different liability regimes governing unimodal stages of transportation coexist accordingly, allowing the different regimes to be applicable in separate stages of the journey as if a unimodal transport contract was entered for each of their stages. The network liability approach allows the conventions to be incorporated into the multimodal transport contract. This approach depends on the localisation of the unimodal segment where the loss occurs.

[710] Erasmus University Rotterdam, Faculty of Law, *Competitive and Sustainable Growth Programme - Intermodal Liability
* (WG3 Intermodality & Interoperability August 4, 1, 2004)

As there are no international instruments applicable for multimodal transport in West Africa, the current legal framework for multimodal transport contracts can be described as a network system[711].

A network system is not a structure that provides substantive regimes – it merely connects the substantive regimes. A practical way in which the network regime works is that the multimodal transport is divided into different parts, and one regime per transport mode is incorporated into the contract, accordingly becoming a chain of contracts. The consequence of this is that the claimant cannot claim for any amount from the MTO more than what he would have been able to claim from the subcontracting carrier.

The Network system has its benefits. One benefit is that once there is a new convention in any mode of transportation, there no need to deliberate extensively or take steps to achieve consensus.[712] The same argument also relates to the amendment of existing unimodal regimes. As long as the new convention is declared as the regime governing the transport segment, it will suffice. Another advantage is that areas that enjoy the freedom of contract will continue to enjoy the freedom of contract rather than been regulated by a mandatory regime.[713]

One major challenge of this system is the proliferation of liability rules in the realm of multimodal transport.[714] Another challenge is the proliferation in the use of containers.

One of the system's weaknesses is that because of its structure, which depends on unimodal conventions and regulations, it becomes essential to determine where the loss occurred. Particularly if one considers that each unimodal regime has substantial differences about time bars for litigation and compensation. As noted above, modern international trade has led to a proliferation of the use of containers. The containers are usually sealed all through the whole transport period. As a consequence of this, most of the losses that occur during multimodal transportation are unlocalised. Therefore, it may be laborious to determine where exactly the loss occurred; also, to determine which law will apply in the event that loss or damages cannot be localised. The transition point also poses complexity in the network approach. Other issues that may arise include, when does the sea stage end? Is storage in the port area accessory to the carriage? Is it, in other words, absorbed by

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[711] United Nations Conference on Trade and Development, *Multimodal Transport: the Feasibility of an International legal Instrument* (United Nations Conference on Trade and Development January 13, , 2003)

[712] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[713] ibid

[714] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

the carriage contract, or is it perhaps a part of the contract that is not covered by transport law at all?[715] There is also a defect in the application of network system as it relates to gradual loss. In a situation where the loss or damage on the goods is gradual, or the goods are perishable, there will be difficulty in ascertaining the portion of the loss that occurred at every stage and during what stage of transport,[716] causing legal acrobatics as to the applicability of unimodal conventions.

One effect of not determining where the loss occurred is that the MTO will lose his rights to bring an action against the subcontracting carrier or recover what he paid out to the consignee from the subcontracting carrier. However, the MTO may be subject to the rules (where rules such as UNCTAD/ICC rules are incorporated into the contract) of the contract agreed upon in the event of unlocalised loss.[717]

The pure network system of liability poses several challenges that it is sometimes impracticable to apply without any friction or disputes.[718] The disadvantage of the network approach, particularly for transport users, is the unpredictability of the liability rules and the extent of a carrier's liability. This will vary from case to case – a situation that places an extra burden on cargo claimants. This unpredictability leads to increased insurance premiums and, ultimately, higher legal proceedings and administration costs.[719] It may be safe to say that predictability and harmonisation cannot be achieved with the network system used in determining the liability of multimodal transport liability.[720]

Like Professor Jan Ramberg asked, is the law of transport and freight forwarding lagging in the modern development of commercial law?[721] The perfect answer is the phrase of Dr Ellen Eftestøl-Wilhelmsson: yes – the law is lagging behind.[722]

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[715] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[716] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

[717] C. Besong. 'Towards a modern role for liability in multimodal transport law' (ProQuest Dissertations Publishing 2007) <https://search.proquest.com/docview/899715990>

[718] Ralph DeWit, *Multimodal transport : carrier liability and documentation* (Lloyd's of London Press 1995) 583

[719] United Nations Conference on Trade and Development, *Multimodal Transport: the Feasibility of an International legal Instrument* (United Nations Conference on Trade and Development January 13, , 2003)

[720] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

[721] Simone Lamont-Black, & D. Rhidian Thomas (Eds.). (2017). *Current issues in freight forwarding: Law and logistics
* (Is the Law of Transport and Freight Forwarding Lagging behind in the Modern Development Of Commercial Law ed.). Oxford: Law Text Publishing Limited. Retrieved from https://search.proquest.com/docview/2299160894

[722] Ellen Eftestøl-Wilhelmsson. (2019). Yes, jan – the law is lagging behind. *Legal Studies Research Paper Series,* Retrieved from

4.7 Impact of the Status Quo on Trade Facilitation and Regional Integration

The network principle, which is currently employed in the determination of multimodal transport in ECOWAS, requires reference to standard terms, such as the UNCTAD/ICC, in multimodal transport contracts. This clearly does not create predictability and uniformity. In any event, if the contract does not refer to this standard contract, there is no uniform contract which is predictable and reliable that can create a result which all parties can trust.[723] Even when the standard terms are referred to, there is still uncertainty as to the interpretation and the real effect of the standard terms, particularly as they relate to unimodal conventions and national laws. Where the standard terms are in conflict with the national legislation or unimodal convention, the national law or unimodal convention will prevail, and the terms of the standard terms will bow to the mandatory law.[724]

Parties to a multimodal contract can agree on the forum and law that will guide the terms of their contract; however, it is unpredictable whether the judge will apply the forum or law agreed by parties. The absence of an international framework creates a vacuum that has been filled with complex and fragmented legal frameworks. The variety that the network system currently provides is complicated and far from ideal.[725]

The current regime creates unpredictability and legal uncertainty by, inter alia, making the identification of the applicable liability regime into a fact-specific inquiry for each and every case, leading to the application of the various liability schemes prescribed in the unimodal transport conventions.[726] Indisputably, the current situation is not desirable. One of the benefits of shifting away from the status quo and creating a new regime is that a new regime will promote predictability, which consequently reduces legal risk and transportation cost.[727] Predictability

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https://deliverypdf.ssrn.com/delivery.php?ID=588125096113082096106013107108098121035031077054017013065115020077027109102084030081118107106002104019004114025077029096098122006086087059083002011081067013064081118054058062121065119109109067012028069019093001093126124030073066074113011006081066093068&EXT=pdf&INDEX=TRUE

[723] Outi Toivonen. 'A regional regime - as a step towards an international regime in multimodal transport?' (2015) 5(4) World Review of Intermodal Transportation Research 387

[724] ibid

[725] Theodora Nikaki. 'Bringing multimodal transport law into the new century: is the uniform liability system the way forward?' (2013) 78(1) Journal of Air Law and Commerce 69

[726] ibid

[727] Paul B. Stephan. 'The futility of unification and harmonisation in international commercial law' (1999) 39(3) Virginia journal of international law 743

allows the parties to multimodal contracts to have a sense of the predictable consequences stemming from their legal commitments.

Transport is crucial to the development of a country. It is significant to countries' economic integration and trade patterns of. Undoubtedly, there can be no market access without a quality and cost-effective means of transportation. Research has shown that the cost of international transport alone is about three times the cost of custom duties.[728]

In Africa, international transportation is plagued with high cost, excessive delay and a disjointed application of different unimodal transport modes.[729] The World Bank noted that a reduction in transportation costs allowed greater economic concentration in the countries, making trade with neighbouring countries even more important. This is what AfCFTA seeks to do – ensure neighbouring trade within the African continent.[730] As the demand for transportation increases, stakeholders and consumers are paying attention to the quality of transportation, such as efficiency, safety and reduced cost. Hence the reason why several policies, including the African Maritime Charter, have increasingly tried to address the issue of sustainable transport development. Multimodal transport is seen as a key element to effectively counterbalance risk and reduce cost, and plays an important role in regional integration and trade facilitation.

There are several bottlenecks that affect the shift to multimodal transport. Friction cost is one of the challenges that have created a shift to multimodal transport. Dr. Ellen Eftestøl defines 'friction costs' as a 'measurement of the inefficiency of a transport operation', stating:

> [t]hey were expressed in the form of higher prices, longer journeys, more delays, less punctuality, lower availability of quality services, limitations on the types of goods available, higher risk of damage to cargo and more complex administrative procedures.[731]

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[728] UNTCAD secretariat, *Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade* (8-12 December, , 2003)

[729] Economic Commission for Africa, 'An overview of multimodal transport development in Africa' (2003)

[730] Ben Shepherd and others. 'The Trade Impact of Enhanced Multimodal Connectivity in the Asia-Pacific Region' (2011) 26(4) Journal of economic integration 624 <https://www.jstor.org/stable/41330830>

[731] Dr. Ellen Eftestøl, 'The European Project on Sustainable Multimodal Transport: Is a Harmonized Liability System the Right Tool?' in Baris Soyer and Andrew Tottenborn (eds), *Carriage of Goods by Sea, Land and Air* (Informa Law from Routledge 2013) 278
<https://www.taylorfrancis.com/books/9780203798065/chapters/10.4324/9780203798065-27>

To strengthen the multimodal transport chain, it is crucial for these friction costs to be identified and removed or reduced.

Research has shown that friction costs can be incurred at several levels. Friction cost can be linked to infrastructural development. There is no gainsaying that effective implementation of multimodal transport requires an efficient and reliable transport infrastructure network. This ranges from modern ports and lack of connectivity to inadequate security of land transport.[732] However, these are beyond the scope of this work.

The friction cost that is important to this research is the cost linked to the existing mode-based information transmission system and other administrative bottlenecks. This friction cost includes the legal cost that arises from the difficulty of identifying the liability for damage, loss, or delay of cargo. Therefore, the uncertainty in relation to the issue of carrier liability is a hindrance to efficient multimodal transport.[733] This unpredictable liability situation in multimodal transport is a bottleneck that deters parties from choosing the multimodal transport alternative.

The unpredictability of the current regime becomes a transaction cost because it gives rise to both legal and evidentiary enquiries, expensive litigation processes, and a rising insurance cost. In a regional economic community like West Africa, this is a critical concern for small and medium-sized transport users.[734] While it is possible for a big shipper to negotiate the terms of contract with the carrier, this might not be possible for a small or medium-sized transport user. They do not usually have the opportunity to negotiate the terms of their contract – they always have to accept standard term contracts of the MTO/carrier. At the moment, unlike unimodal transport modes, which have standard terms, multimodal transport does not have such international minimum standards.[735]

In international multimodal transport, the shipper insures the risk of cargo damage or loss. The reason for the prevalence of shipper's insurance is the uncertainties and lacunae related to the recovery options. In an instance where a carrier can be held liable, the shipper's insurance company compensates the shipper and goes after the

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[732] See UNTCAD secretariat, *Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade* (8-12 December, , 2003) for further discussion.

[733] Dr. Ellen Eftestøl, 'The European Project on Sustainable Multimodal Transport: Is a Harmonized Liability System the Right Tool?' in Baris Soyer and Andrew Tottenborn (eds), *Carriage of Goods by Sea, Land and Air* (Informa Law from Routledge 2013) 278 <https://www.taylorfrancis.com/books/9780203798065/chapters/10.4324/9780203798065-27>

[734] The AfCFTA agreement was created to help SMEs. Th agreement is expected to favour small and medium-size businesses, usually known by the acronym SMEs. SMEs amount for the creation of more than 80% of Africa's employment and 50% of its GDP.

[735] United Nations Conference on Trade and Development, *Multimodal Transport: the Feasibility of an International legal Instrument* (United Nations Conference on Trade and Development January 13, , 2003)

MTO for compensation. Where the liability of the carrier/MTO is in dispute or uncertain, the quantum of financial responsibility for damage or loss will become a matter for negotiation between the underwriters of both contracting parties.[736] This uncertainty of recovery then leads to increased premiums, all forming friction cost associated with the use of multimodal transport.

While there is no research specifically into how much this friction cost racks up in a year within the ECOWAS, similar research conducted by the European Commission shows that the harmonisation of conditions such as a uniform liability limit for all modes could yield savings in friction costs of up to 50 million Euros per annum.[737]

A questionnaire by UNCTAD[738] revealed that 76 per cent of the respondents believe that the current legal framework is not cost-effective, mainly because of additional costs in relation to insurance, claims and legal advice as relevant factors increasing overall costs associated with claims settling and requiring the involvement of numerous parties.

Although some scholars are of the opinion that the friction costs related to a change of transport mode are low and will have only minor impact on the choices made by the transport integrators and their customers, in a continent like Africa and regional economic community like ECOWAS, the elimination of every cost is important to trade facilitation and ensuring regional integration in the continent.

As has been noted many times in this work, trade facilitation is a concerted effort to reduce costs associated with international trade. Reducing trade costs is vital to promoting trade. Trade facilitation seeks to reduce trade costs for developing countries by building efficient hard and soft trade-related infrastructure. Hard infrastructure means tangible infrastructure, such as roads and ports, whilst soft infrastructure refers to the intangible regulatory framework. As noted by UNCTAD,[739] one of the activities to ensure trade facilitation is improving multimodal transport liability. By tackling all obstacles affecting trade, including the ancillary cost associated with trade (such as transport cost) with the aid of building soft infrastructure, trade facilitation can deepen regional integration.

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[736] Marian Hoeks, 'Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods' (Kluwer Law International 2010)

[737] European Commission, *The economic impact of carrier liability on intermodal freight transport* (IM Technologies , 2001)

[738] UNCTAD Questionnaire on Multimodal Transport Regulation; UNTCAD secretariat, *Efficient Transport and Trade Facilitation To Improve Participation by Developing Countries In International Trade* (8-12 December, , 2003)

[739] UNCTAD, *Trade Facilitation and Multimodal Transport Newsletter* (United Nations December, , 2000)

Regional implementation of trade facilitation reforms can bring significant benefits to regional economic communities (REC) and their member states, rather than the application of an uncoordinated measure which might include each state taking efforts to improve the liability regime governing multimodal transport in ECOWAS. Regional approaches can ensure uniformity on several approaches, and coordinated results, to remove the challenges that the current frameworks give.[740] This consequently leads to deepening regional integration.

4.8 Functional Gains of Legal Certainty and Predictability to Trade and Trade Facilitation

The law is the essential instrument of all global economic integration. The different legal systems within an integration area increase the transaction costs of cross-border activities, on the one hand due to information and adaptation to national regulations, and on the other hand, to the large number of rules, regimes and processes adding to the problem of uncertainty in cross-border transactions.[741]

While it is agreed that there must be a level of legal indeterminacy in our legal system. it is not acceptable that our legal system must be ridden with legal indeterminacy rather than legal certainty. Legal certainty or legal predictability requires that all law [must] be sufficiently precise to allow the person, if need be, with appropriate advice-to foresee, to a certain degree that is reasonable in the circumstances, the consequences which a given action may entail.[742]

It has been noted that the efficiency of international business transactions is fundamentally dependent on legal certainty.[743] Indeed, legal certainty is crucial for any market, especially within the context of economic integration.[744] Legal rules are

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[740] Victoria Tuomisto. 'Regional integration through joint trade facilitation reforms' (2018) <https://www.tradeforum.org/news/Regional-integration-through-joint-trade-facilitation-reforms/> accessed July 10, 2021

[741] Helmut Wagner, *Economic analysis of cross-border legal uncertainty* (Diskussionsbeiträge, Fernuniv 2004)

[742] James R. Maxeiner. 'Legal certainty: a European alternative to American legal indeterminacy?' (2007) 15(2) Tulane journal of international and comparative law 541

[743] Jan Kleinheisterkamp, 'Legal certainty, proportionality and pragmatism: overriding mandatory laws in international arbitration' (Cambridge University Press for the British Institute of International and Comparative Law 2018)

[744] Scherk v Alberto-CulverCo, 417 U.S. 506, 516 (1974): 'Choice-of-law and choice-of-forum provisions in international commercial contracts are"an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction,"and should be enforced absent strong reasons to set them aside.'

the premise of certainty, since the decisions of courts are based on legislative provisions.

Legal certainty, especially as it relates to written legal norms, is part of the law. The law cannot be a code of conduct for everyone if it lacks some value of certainty.[745] Accordingly, legal certainty is a fundamental principle, recognised by most jurisdictions around the world. This feature is a prerequisite for the operational needs of economic actors operating in a given market[746].

Research has shown that foreign investment supports economic growth and, for an economy to develop, in the field of law there should be predictability, certainty, and fairness.[747]

Regions and countries with low legal certainty generally have uncompetitive economies. In an uncompetitive economy, prices tend to rise. The 'pursuit of higher returns' and low levels of competition threaten consumers in the country with low legal certainty.[748] Employers (including transport companies) adapt to the economic environment of the unpredictability of judicial decisions and court decisions by increasing prices to compensate for the occurrence of unpredictability in these countries. Legal uncertainty has been said to be able to restrict the growth of an economy.[749] It is one of the most essential tools underpinning competitive market. Therefore, countries wishing to improve their position in the world economy should be interested in strategies to increase legal certainty.[750] The sacrosanct point here is that legal uncertainty is investment risk. It may be caused by imperfect national legal systems or by the different natures of legal systems in the international spectrum.[751]

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[745] Ahmad Muliadi. 'Applying Principles of Legal Certainty and Equal in the Implementation of Investment in Indonesia' (2017) XX(Issue 4A) European Research Studies Journal 133

[746] UNCTAD, *Enhancing legal certainty in the relationship between competition authorities and judiciaries* (UNCTAD , 2016)

[747] Erman Rajagukguk, 'Globalisasi Hukum Dan Kemajuan Teknologi: Implikasinya Bagi Pendidikan Hukum Dan Pembangunan Hukum Indonesia' (2009)

[748] Fábio Ulhoa Coelho. 'Legal certainty and Commercial Law: a comparative perspective (common law x civil law)' (2015) 2(2) IALS student law review 3
<https://explore.openaire.eu/search/publication?articleId=doajarticles::e603af4387bffe84ad130cc1acef86b9>

[749] A. Chong and C. Calderón. 'Causality and Feedback Between Institutional Measures and Economic Growth' (2000) 12(1) Economics and politics 69 <https://api.istex.fr/ark:/67375/WNG-2RVGJGRJ-F/fulltext.pdf>

[750] Coelho. 'Legal certainty and Commercial Law: a comparative perspective (common law x civil law)' (2015) 2(2) IALS student law review 3
<https://explore.openaire.eu/search/publication?articleId=doajarticles::e603af4387bffe84ad130cc1acef86b9>

[751] Helmut Wagner, *Economic analysis of cross-border legal uncertainty* (Diskussionsbeiträge, Fernuniv 2004)

It may also be caused by the absence of law, legal instability,[752] diversity in judicial administration across the different member countries[753] and denial of justice.[754]

As noted above, legal uncertainty leads to transaction costs. This increased cost is generated by (i) costs of collecting information, (ii) costs of legal disputes, (iii) costs of setting incentives for pushing through legal claims, (iv) diversity in judicial administration across the different member countries and (v) other transaction costs.[755] As can be imagined, this cost will be even higher when the transaction is an international transaction, such as international carriage of goods by sea.

Coelho[756] notes that a well drafted legislation or law can help increase legal certainty because it reduces interpretation doubts. However, the proper drafting of rules is not enough to provide or increase legal certainty. Accordingly, unpredictability will cause an increase in legal cost ancillary to transport which will eventually lead to an increase in the cost of goods. Legal uncertainty is a non-tariff trade barrier, and accordingly generates a lower level in trade and in income

Indisputably, it appears to be beneficial to shift away from the status quo and create a new regime that promotes predictability, consequently reducing legal risk and transportation costs.[757] It is agreed that predictability allows the parties to multimodal contracts to have a sense of the predictable consequence from their legal commitments. The demand for harmonisation of laws in certain areas stems from the assumption that legal unpredictability and diversity causes an increase in transaction costs and economic trade, particularly by creating legal uncertainty.[758] However, as a second thought, it is important to bear in mind that it does not follow that complete harmonisation is necessary because of the price that arises from legal uncertainty. Harmonisation itself generates substantial costs.

This chapter will end with a quote:

> ... in commercial matters, it usually matters very little what law or form is adopted as long as it is adopted by everyone concerned. There are many antique documentary

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[752] This is a type of legal uncertainty which occurs where regulations are unstable as a result of several amendments to statutes o that even experts are not clear about the current legal position

[753] Gerhard Wagner. 'The Economics of Harmonisation: the Case of Contract Law' (2002) 39(5) Common market law review 995 <http://www.kluwerlawonline.com/abstract.php?area=Journals&id=5103046>

[754] This arises by the obstruction or prevention of the enforcement of legal rights.

[755] Helmut Wagner, *Economic analysis of cross-border legal uncertainty* (Diskussionsbeiträge, Fernuniv 2004)

[756] ibid

[757] Paul B. Stephan. 'The futility of unification and harmonisation in international commercial law' (1999) 39(3) Virginia journal of international law 743

[758] Helmut Wagner, *Economic analysis of cross-border legal uncertainty* (Diskussionsbeiträge, Fernuniv 2004)

> forms in circulation and many old rules, but they serve a purpose because there are accepted if documents and followed if rules. From this viewpoint, there is no one best rule for liability, and arguments about the best rule, while capable of being on the level of rational debate, are just not weighty. Commerce will flow if the limit of carrier responsibility is lowered to ten pence a ton or if it is raised to ten thousand gold franc of millesimal fineness of 999 parts. If the liability is low, shippers will buy insurance, if the limit is high, then in a sense, the shippers of valued goods are being subsidised. The argument can be good, bad or indifferent, but all the merchant wants to know is, **WHAT IS THE RULE?**[759] [Emphasis mine]

The next chapter will consider the appropriate solution for legal uncertainty within the ECOWAS.

[759] Robert Khurash. (1971). *Legal impediments to international intermodal transportation*. Washington, D.C: National Academy of Sciences.

5 Appropriate resolution to the fragmented regime governing multimodal transport in the economic community of West African states

5.1 Is the Need for Regulation Evident or Wishful?

It is not always cast in stone that an instrument is a proper response to a liability gap. It is essential to consider different options that may resolve the issue of a liability gap. For there to be a new instrument, there must be underlying reasons that are camouflaged with beautiful arguments regarding the need to jettison other possible solutions that seek to strengthen the status quo. Unification and harmonisation come with a heavy price, ranging from ratification issues to political will and other ancillary challenges. Therefore, it should not be resorted to if the current framework cannot be adapted or cannot optimally function. If it is evident, then we will agree that there is a need for regulation; however, where the need is doubtful, it may not be necessary to have new regulation.

In the succeeding paragraphs, we will consider the other options available before considering harmonisation or unification.

5.2 Freedom of Contract as a Panacea to Fragmentation

From a commercial lawyer's and scholar's perspective, it may appear that freedom of contract can be a solution to the challenges caused by the current legal framework. What will happen if parties are allowed freedom of contract without any international multimodal transport regulation? The challenge with freedom of contract is that it does not obliterate the complexity and fragmentation caused by the use of unimodal transport conventions and domestic transport laws, which will

apply mandatorily to a unimodal segment.[760] The only way to avoid the possible complexity certain to ensue from the use of laws governing a unimodal transport segment is to totally avoid the applicability of unimodal conventions, leaving it sticto sensu to freedom of contract. This, however, seems highly impractical. The fact that the contract of carriage must also be adapted to a scenario where no mandatory rules, uniform or national, apply to achieve freedom of contract, is one of the key factors affecting its impracticability. A prospective transport customer is unlikely to fully comprehend such wide terms and conditions.[761]

As examined in previous chapters, the current legal framework governing multimodal transport in ECOWAS consists of different unimodal transport conventions, regional instruments and, in some cases, case laws that regulate the unimodal carriage of goods. There are also national laws and standard form transport contracts.

The freedom of contract approach means that the MTO–consignee relationship is contractual in nature. Given that unimodal transport is subject to mandatory laws, such complete contract freedom may make it difficult to justify multimodal transport contracts. It is key to note that, regardless of the parties' intentions, the contract will be governed by any mandatory applicable international or national laws. If a contract's terms conflict with any mandatory laws, the mandatory international conventions or national laws will take precedence, and the provisions of existing unimodal conventions will be enforced. Even if there are no international conventions, there are almost certainly mandatory national legislation that apply to the unimodal segment of such transport.

One of the main benefits of a mandatory regime against the freedom of contract approach is that it reduces the potential for abuse and unfair terms of contract. It is not new that some parties have unequal bargaining power to a contract. A powerful MTO may have a standard form of contract, with no opportunity for negotiation. Certainly, the potential for anti-competitive practices and abuse arising from the unequal bargaining power of the parties is obvious. Having a minimum standard regulating carrier liability (whether by a chain of unimodal conventions or by a uniform multimodal regime) that cannot be contractually modified protects the consignee from unfair standard contract terms unilaterally imposed by the MTO.[762]

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[760] Jeon, H. (2013). *Coping with muddles and uncertainty in the field of multimodal transport liability* Available from Dissertations & Theses Europe Full Text: Literature & Language. Retrieved from https://search.proquest.com/docview/1775429723

[761] Backden, P. (2019). *The contract of carriage* (1st ed.). Milton: Routledge. doi:10.4324/9780429401442 Retrieved from https://www.taylorfrancis.com/books/9780429401442

[762] Asariotis, R. (2009). Uncitral (draft) convention on contracts for the international carriage of goods wholly or partly by sea: Mandatory rules and freedom of contract. *Competition and*

Therefore, so long as there are mandatory international unimodal conventions and national laws that apply to multimodal transport, the application of a freedom of contract approach will be hampered. A complete freedom of contract (contractual solution) may appear as one of the solutions; however, it is unlikely to provide the predictability and certainty that shippers seek when entering a multimodal transport contract.

Conclusively, beyond the merits of the contractual terms and standard rules, the fear of change and uncertainty regarding the interpretation of the terms of contract make freedom of contract less attractive. Accordingly, a contractual solution is not appropriate to resolve the quandary currently affecting multimodal transport law in the ECOWAS.[763]

5.3 Improving the Current Network System – A Remedy?

For proponents of retaining the status quo, a sensible proposal for the resolution of the current fragmented framework of the legal regime governing multimodal transport in ECOWAS might be to consolidate on the current regime and see a possibility of improving the network system. This can be done by altering the convention scope and introducing a conflict of regime provision.[764]

The first effort in doing this may be to extend the application of the OHADA Uniform Act on Road Transport to every country within the ECOWAS. Currently, the OHADA regime is only applicable to the French-speaking countries of the region, which amounts to 10 out of the 15 ECOWAS Countries.[765] A review of Article 53 of the OHADA Treaty provides that any member state of the African Union may become a member of OHADA. All English-speaking countries of the ECOWAS are members of the African Union and are at liberty to join OHADA.

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regulation in shipping and shipping related industries (pp. 347-365) doi:10.1163/ej.9789004173958.i-404.122 Retrieved from http://dx.doi.org/10.1163/ej.9789004173958.i-404.122

[763] Jeon, H. (2013). *Coping with muddles and uncertainty in the field of multimodal transport liability* Available from Dissertations & Theses Europe Full Text: Literature & Language. Retrieved from https://search.proquest.com/docview/1775429723

[764] Bevan Marten (Ed.). (2013). *Multimodal transport reform and the european union: A minimalist approach* Victoria University of Wellington.

[765] Although, Guniea Bissau is a Lusophone Country, it is also a part of OHADA. Benin, Burkina Faso, Cote d'Ivoire, The Gambia, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo

Therefore, extending application to ensure uniform mandatory laws on road transport is important to improving the current network system.

Furthermore, Article 1(1) of the OHADA Uniform Act on Road Transport states that the law applies to a 'contract for the carriage of goods by road'. Article 2 of the Uniform Act on Road Transport also stipulates that a 'contract for the carriage of goods' is a contract in which a natural person or legal person, known as the carrier, agrees to transport goods entrusted to him by another person, known as the sender, by road from one location to another in exchange for remuneration. It is therefore arguable that a multimodal contract must expressly provide for a road segment before the OHADA Uniform Act on Road Transport will be applicable. There is no doubt that there are many multimodal contracts in which the modes are unspecified; in such instances, the OHADA Uniform Act on Road Transport may not be applicable.

Another issue arising from the OHADA Uniform Act on Road Transport is whether mode-on-mode carriage can apply. The OHADA Uniform Act on Road Transport can apply to mode-on-mode carriage. A combined reading of Articles 2 and 22 of the OHADA Uniform Act on Road Transport stipulates that when the vehicle is carried over (mode on mode) and the goods are not unloaded from the vehicle, the Uniform Act applies to the whole of the carriage. However, when, through no fault of the road carrier, a loss, damage or delay occurs during the non-road part of the transport, the road carrier's liability is determined in accordance with the mandatory rules of law governing this other mode of transportation.

The first issue with this is that the provision may be seen as conflicting with Article 1 of the OHADA Uniform Act on Road Transport, which states that the instrument applies to any contract for the carriage of goods by road when 'the place of taking over the goods and the place designated for delivery', as specified in the contract, are both located within the territory of an OHADA State. Some academics[766] opine that the cargo must be taken over before the OHADA Uniform Act on Road Transport can be applied.[767] Since the goods were not taken over by the new carriage, the OHADA Uniform Act on Road Transport should not apply to the mode-on-mode carriage.

It is opined in this work that the provision of Article 22 only seeks to extend the provision of the carriage from the initial carriage of goods by road to the second segment. However, what may be perturbing is that in the OHADA Uniform Act on

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[766] E. Orrui. (2014). *The regime of multimodal carrier's liability for the transport of goods, passengers and their baggage, with particular regard to the Italian legal system, within international and comparative perspectives* Libreria Bonomo Editrice.

[767] This argument has been made for CMR, which is similar to the OHADA Uniform Act on Road Transport

Road Transport, the instrument ascertains how liability will be determined when the loss occurs during other modes of transportation. The OHADA Uniform Act on Road Transport is an instrument for unimodal transport and should not extend to determination of losses in the event of combined transport. To achieve a pure network system, it is important that unimodal transport instruments are strictly unimodal. The practice of incorporating other transport modes in unimodal law is risky since it does so at the expense of other unimodal conventions.[768] Annexation of other modes of carriage into a unimodal regime always leads to conflict.

There are two options to avoid conflicts in this situation. One is that the OHADA Uniform Act on Road Transport may be amended to clearly state that it is applicable to any carriage of goods by road. The second option is in favour of the proponents who believe that the mention of combined transport is good for the current reality. It is suggested that the provision of Article 22 should clearly state that mandatory laws/conventions of the mode which the vehicle was carried on will be applicable for any loss that occurs during the period of mode on mode. For example, if a vehicle moves from Togo to Burkina Faso, and the vehicle is loaded on a ferry or rail to Niger Republic, it is suggested that the applicable law for the carriage from Burkina Faso to Niger Republic should be the legal framework governing the carriage of goods by sea

It is also important to note that the current legal framework in West Africa does not have a legal structure for rail. This may not be unconnected to the fact that the government or its designated agencies provide most rail services. There is a need to create a legal framework for the carriage of goods by rail. The framework must, in its application, recognise the existence of multimodal transport and must be drafted to conform with the existence of multimodal transport. The regime will spell out the carrier's liability from when the goods are loaded to when they are unloaded for the next mode of carriage.

To address the issue of unlocalised loss, there will be a standard 'fall-back' clause[769] to deal with circumstances which relevant unimodal instrument nor domestic laws do not address, particularly as they relate to unlocalised loss. For a well-strengthened network system, it is also necessary to supplement the unimodal rules with fall-back rules for non-localised damage. As a consequence, where none of the unimodal conventions can be applied due to difficulty in determining the stage, time and location of loss or damages, the basis of obligation must be determined using

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[768] Haak, K., & Hoeks, M. (2004). Arrangements of intermodal transport in the field of conflicting conventions. *The Journal of International Maritime Law,* Retrieved from https://www.narcis.nl/publication/RecordID/oai:repub.eur.nl:12907

[769] A fall-back clause is a clause that would apply where nothing is agreed to by parties. So where a loss occurs during a stage and there is no contractually unimodal convention that is applicable, the standard fall-back clause will be applicable.

additional criteria. In circumstances when the loss or damage cannot be identified, the fall-back provisions will apply 'by default'. These fall-back clauses are either decided contractually or by legislation (needless to say, statutory regulations provide for a better degree of uniformity between the parties because they do not require any negotiating, and of certainty because they are mandatory.

Let us assume that ECOWAS agrees to draft a very short instrument that will deal with multimodal transport only when the place and time of loss cannot be ascertainable. This will be a fall-back liability clause. This same result can also be achieved by drafting rules which will contractually be incorporated into a transport document. However, to achieve uniformity, there would be a need to develop a single (electronic) West African transport document that can be used for multimodal carriage.[770] The liability of the MTO will be determined by the unimodal liability regime where the loss can be ascertained, and this will include the fall-back liability rules for circumstances where the loss cannot be ascertained. This fall-back liability may be modelled around the UNCTAD/ICC Rules, which would garner industry acceptance quicker or may just utilise the unimodal conventions applicable to the mode of transportation which took the goods furthest as the fall-back regulation.

5.3.1 Benefits of Perfecting the Current Framework

One main benefit of perfecting the system is that it automatically adapts to the existing framework, consisting of several unimodal regimes. Another reason is that it allows some sort of telepathic link on the right of recourse because the consignee or consignor cannot bring a claim more than which the MTO will have a right of recourse against the actual carrier. The chances of the same rules applying to a multimodal carrier recourse action against a unimodal carrier are higher.

Finally, another benefit is that perfecting the system allows flexibility. When a unimodal convention is reviewed, the current system adapts easily. The amended

[770] This document can be modelled after standard contracts such as the FIATA Bill of Lading (FBL) 1992 and the BIMCO's MULTIDOC 95. For example, the FIATA Bill of Lading (FBL) 1992 and the BIMCO's MULTIDOC 95 incorporate the UNCTAD/ICC Rules 1992. The limits stated in Rule 6 of the UNCTAD/ICC Rules are based on the limitation and defences provisions of the Hague (Visby) Rules. This means that if the claimant has expressly mentioned the units inside the container on the bill of lading, they can use the units for limitation reasons. For example, if there are 50 units in a container, the limits of liability will be 2 SDR multiplied by 50 SDR. The UNCTAD/ICC Rules also employ the CMR limit of liability of 8.33 SDR per kilogram if the loss does not include sea transport since the UNCTAD/ICC Rules cover the entire spectrum of multimodal transport, including contracts that do not include sea transport. Rule 6.4 states that the limit of an applicable international convention or mandatory national law (i.e where the loss may be ascertained to a particular segment) may apply, if it is higher than what is stated in Rules 6.1 and Rules 6.3 of the UNCTAD Rules.

law applies in its entirety as long as the forms are amended to include the new regime[771].

5.3.2 The Disadvantages of Perfecting the Current Framework

Despite these benefits, there are still challenges surrounding the use of an 'improved current system'. The extent of the MTO's liability is not predictable and may vary from case to case.[772] Therefore, there is an extra cost in the form of insurance premiums and higher cost of proceedings. The terms of a standard contract may be interpreted differently from region to region. Accordingly, it does not offer the desired predictability and foreseeability of liability. Furthermore, the lack of foreseeability and certainty has an impact on the speed and cost of claims handling, as well as the likelihood of litigation. The inability to foresee liability of carrier will lead to an extra cost in the form of insurance premiums and consequently cascade to higher legal costs. Furthermore, the lack of foreseeability and certainty has an impact on the speed and cost of claims handling, as well as the likelihood of litigation.

The mandatory unimodal laws will be determined not only by the stage of transport where a loss occurs, but also by the courts in the nation where the actions are brought – a factor that cannot be foreseen at the time of entering into the MTC.

Furthermore, whether a certain regime covers a loss in a specific instance is frequently susceptible to differing national courts' perspectives. The complexity of contractual as well as mandatory national and international responsibility standards makes it difficult to understand issues, such as different liability systems, different onus of proof, and different conditions for the successful institution of legal proceedings.[773]

Furthermore, the fact-finding mission of precisely where and when a loss occurred is not desirable, particularly from a commercial perspective. As it has been explained several times, the current framework can only work perfectly when the damage or loss is localised. When this is impossible, there will be liability gaps. An example is where the loss occurred during storage before the next mode of

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[771] Erasmus University Rotterdam, Faculty of Law. (2004). *Competitive and sustainable growth programme - intermodal liability
*. (No. 1).WG3 Intermodality & Interoperability. Retrieved from https://www.factline.com/download/229119.1

[772] Jeon, H. (2013). *Coping with muddles and uncertainty in the field of multimodal transport liability* Available from Dissertations & Theses Europe Full Text: Literature & Language. Retrieved from https://search.proquest.com/docview/1775429723

[773] Asariotis, R., H.-J. Bull, M. A. Clarke, R. Herber, A. Kiantou-Pampouki, J. Ramberg, . D. Morán-Bovio. (1999). *Intermodal transportation and carrier liability*. Luxembourg: Office for Official Publ. of the Europ. Communities.

transportation or where loss cannot even be localised. The option will be to rely on a fallback clause, which is strictly contractual and usually inserted in a standard form, created without detailed negotiation and skewed in favour of the carrier.

The current abundance of potentially applicable regimes encourages 'forum shopping' and numerous expensive proceedings. Uncertainty about the contract and the carrier's identification, particularly the role and obligation of the MTO with which the consignor deals, causes a slew of issues.

If the network system is to continue to be used, pursuing an action against the MTO may be difficult if it is not the carrier itself. There is also the issue of when to bring an action, particularly if the actual carrier's liability is governed by local legislation with a short limitation period, the content of which is unknown to the consignor.

Overall, the content and interpretation of different applicable unimodal regimes are often uncertain and potential liability cannot be determined ahead of time. Standard term contracts are based on systems that are complex for operational efficiency. This is not just undesirable, it could also add a multilayer of legal advisory service consequently leading to additional cost.

Finally, 'perfection' does not cure other issues, such as forum shopping, as explained in the preceding chapter. It is unlikely that changes will be made to the OHADA regime, creating a legal regime for rail or a standard form with a fall-back clause, to ensure legal predictability in multimodal transport.

5.4 Is a Harmonised Liability System the Best Tool?

'More than ever before, clarity and uniformity are essential attributes of the law,'[774]

Dating back to the 19th and 20th centuries, the importance of a uniform or harmonised system in transnational law was a recurrent leitmotif. For more than a century, industry groups, law reform agencies, governments, regional organisations, and international organisations worldwide have signed treaties supporting these lofty ideals.[775]

A considerable and ever-increasing literature has accompanied this growth in harmonisation and unification projects on transnational law. Except for a few

[774] Boutros Boutros-Ghali, former Secretary General of the United Nations (UN); Uniform Commercial Law in the Twenty-First Century', Proceedings of the Congress of the UNCITRAL, New York, 18–22 May 1992

[775] Myburgh, P. (2000). Uniformity or unilateralism in the law of carriage of goods by sea? *Law Review (Wellington), 31*(2), 355-382. doi:10.26686/vuwlr.v31i2.5953

contrary positions,[776] it appears from a review of the literature that there is continuous praise for harmonisation and unification of transnational law, that it increases stability and predictability of processes and results, avoids of conflicts of laws and litigation, and finally, brings a reduction of legal risks and costs.[777]

A harmonised and balanced legal system has always been justified in the carriage of goods. The Comite Maritime International was established with the sole aim of achieving uniformity. The European Commission has also discussed the possibility of creating a legal system for multimodal transport within the EU to create some uniformity.[778]

It has been said that different methods for implementing international conventions might hamper the goal of uniformity.[779] In one United Nations Commission on International Trade Law (UNCITRAL)[780] Congress in Vienna in 2007, one commentator observed:

> The uncertainties that arise from the application of different legal rules to an international trading transaction constitute obstacles to that transaction, retarding its further expansion. Harmonising or unifying the legal rules that apply to the same trade transaction as it crosses national borders makes for certainty of outcomes, reduces cost and removes obstacles to the further development of trade in that area.[781]

As such, it is generally desirable that there is a level of uniformity of law in certain areas of commercial law (which transport law is a part of).[782]

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[776] Boodman, M. (1991). The myth of harmonisation of laws. *The American Journal of Comparative Law, 39*(4), 699-724. doi:10.2307/840738

[777] Clarke, M. (1999). The transport of goods in europe: Patterns and problems of uniform law. *Lloyd's Maritime and Commercial Law Quarterly, 160*(1), 36, Sturley, M. F. (1995). Uniformity in the law governing the carriage of goods by sea. *Journal of Maritime Law and Commerce, 26*(4), 553.

[778] Dr. Ellen Eftestøl. (2013). The european project on sustainable multimodal transport: Is a harmonized liability system the right tool? In Baris Soyer, & Andrew Tottenborn (Eds.), *Carriage of goods by sea, land and air* (pp. 278-296) Informa Law from Routledge. doi:10.4324/9780203798065-27 Retrieved from https://www.taylorfrancis.com/books/9780203798065/chapters/10.4324/9780203798065-27

[779] Berlingieri, F. (1987). Uniformity in maritime law and implementation of international conventions. *Journal of Maritime Law and Commerce, 18*(3), 317.

[780] The UNCITRAL was established by the UN with the purpose of promoting the progressive harmonisation and unification of the law of international trade

[781] J.C. Wah-Teck. (2007). Modern law for global commerce - congress to celebrate the 40th annual session of the united nations commission on international trade law (uncitral) - vienna, 9-12 july 2007. *Revue De Droit Uniforme, 12*(1), 187-191. doi:10.1093/ulr/12.1.187

[782] Bonell, M. J. (1990). International uniform law in practice - or where the real trouble begins. *The American Journal of Comparative Law, 38*(4), 865-888. doi:10.2307/840615

It is not uncommon to see authors or scholars use harmonisation and uniformity interchangeably. In fact, some have noted that uniformity is a subcategory of harmonisation[783]. On the other hand, UNCITRAL considers uniformity to be different from harmonisation. UNICTRAL defines harmonisation as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions, while unification may be seen as the adoption of a common legal standard governing particular aspects of international commercial law or transactions by several states.[784] The effect of this will mean that, unlike uniformity, harmonisation does not always lead to a new set of agreed rules. It sets a change in process, standards and regulations to avoid conflict.

Professor Rene David[785] perceives the unification of rules as the final step in a more extensive process and believes that unification can include the harmonisation of the different laws. Accordingly, it means that unification is a subsect of harmonisation. On the contrary, another author asserts that 'unification does not always produce harmonisation'.[786] Leebron believes that harmonisation is a means of achieving goals pertaining to greater efficiency or fairness, allowing participants or systems from different jurisdictions to interact or communicate.[787]

One thing is sure from all the above perspectives – the words 'harmonisation' and 'unification' are kind of a chicken and egg situation. Harmonisation is broader in perspective than unification. You cannot achieve unification without harmonisation. This work will accordingly treat unification as step towards harmonisation.

The Role of harmonisation is critical to the legal system[788]. Harmonisation may lead to uniformisation if properly executed.[789] Harmonisation can be achieved by implementing instruments such as conventions, model laws and other instruments designed to facilitate uniformity in transnational law. Proponents of harmonisation

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783 Andersen, C. B. (2007). Defining uniformity in law. *Revue De Droit Uniforme, 12*(1), 5-54. doi:10.1093/ulr/12.1.5

784 UNCITRAL.What does UNCITRAL mean by the "harmonisation" and "unification" of the law of international trade? Retrieved from https://uncitral.un.org/en/about/faq/mandate_composition/history

785 Rene David. (1968). The methods of unification. *American Journal of Comparative Law, 16*, 15.

786 Rosett, A. (1992). Unification, harmonisation, restatement, codification, and reform in international commercial law. *The American Journal of Comparative Law, 40*(3), 683-697. doi:10.2307/840594

787 Leebron, D. W. (1996). Claims for harmonisation: A theoretical framework. *Canadian Business Law Journal, 27*(1), 63. Retrieved from https://search.proquest.com/docview/231904376

788 Andenæs, M. T. (2011). *Theory and practice of harmonisation*. Cheltenham [u.a.]: Elgar. Retrieved from http://bvbr.bib-bvb.de:8991/F?func=service&doc_library=BVB01&local_base=BVB01&doc_number=022647859&sequence=000001&line_number=0001&func_code=DB_RECORDS&service_type=MEDIA

789 Uniformitization is a method of achieving consistency. It starts with unification and goes further to achieve a system where judges give a uniform interpretation of the unified text.

opine that domestic legal frameworks are inadequate in governing transnational laws. Therefore, harmonisation helps to create a legal framework tailor-made for international transactions. Mistellis[790] notes that harmonisation produces 'neutral law', agreeable to both common law and civil law systems, making trade between commercial parties from different systems more straightforward. The justification for legal harmonisation is that it removes obstacles to trade and allows economic growth.[791]

There has always been fragmentation of the legal regime governing multimodal transport, whether it is being considered from a global perspective or regional perspective. Since the possibility of a global solution to this fragmentation is slim, there is a need to harmonise the laws governing multimodal transport law to regulate matters of common interest at least on a regional basis. The strive for harmonisation is not a new phenomenon!

Harmonisation has been linked to fair trade. It has been noted that harmonisation can help eliminate unfair differences in the legal regime and system, accordingly creating a level playing field and fairness for stakeholders.[792]

The benefits of the harmonisation cannot be overstated. It is important to note that the drafting of a regional treaty or global instrument is not the only form of harmonization. Other forms of harmonisation, such as model laws offer far more flexibility, which can increase use, but the lack of certainty is a negative effect of these forms of harmonisation.

In achieving harmonisation, some questions require attention before a unanimous decision can be made to harmonise the law as it concerns multimodal transport in West Africa. Since the 'whether or not we should harmonise multimodal' question on harmonisation has been answered in preceding paragraphs and is no longer the relevant question here, the question is 'how?': How do we harmonise? What kind of harmonisation is required, and to what degree must the laws be harmonised? What should the harmonisation effort's scope be to realise any goals without unnecessary costs or distortions? Is there an alternative option to achieve my intended purpose that harmonisation seeks to bring forth?

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[790] Loukas Mistelis. (2001). *Is harmonisation a necessary evil? - the future of harmonisation andNew sources of international trade law*. London: Sweet and Maxwell. doi:10.4337/9780857933454 Retrieved from http://cisgw3.law.pace.edu/

[791] Basedow, J. (2003). Worldwide harmonisation of private law and regional economic integration - general report. *Revue De Droit Uniforme, 8*(1-2), 31-49. doi:10.1093/ulr/8.1-2.31

[792] Leebron, D. W. (1996). Claims for harmonisation: A theoretical framework. *Canadian Business Law Journal, 27*(1), 63. Retrieved from https://search.proquest.com/docview/231904376

Therefore, it is vital to remember that harmonisation is not an end in itself. Instead, it is a way to achieve goals such as uniformity, efficiency and fairness.[793] One thing is certain, the medium-term objective should be able to provide its customers with clear conditions and procedures for liability for cargo damaged or lost during the journey. From an end-user perspective, liability rules should not be determined by the mode of transport and should not distinguish between national and international transport. In addition to covering the actual carriage of goods, the rules should cover losses or damages that may arise from other logistics activities, such as warehousing.

Now, the question to be answered is, what kind of harmonisation tool offers the best possible solution to resolve the fragmentation imbroglio surrounding multimodal transport in West Africa? There is no doubt that a global solution is most preferable. However, it appears that legal harmonisation seems to have transitioned from universalism to regionalism. This transition is necessary because achieving global harmonisation is slow and there are numerous competing interests to cope with. Regional harmonisation, on the other hand, is quicker and easier to achieve.

In a variety of areas, including transportation, international legal unification is highly desirable. It is critical to establish a common understanding of the legal principles that will apply to multimodal transportation. A technique of offering the same solution to all states is the most preferable. In multimodal transportation, there are currently no regional or international legal frameworks for carrier liability and transport documentation. A unified legal framework for multimodal carriage contracts is viewed as a critical component of developing a uniform transport policy that is critical to regional integration.

Having a regional liability framework for multimodal transportation would eliminate legal uncertainty in multimodal transportation, which is a barrier to the expansion of the usage of multimodal transport.

Regional integration necessitates the strengthening of the multimodal transportation industry. The goal is to create a framework for optimal integration of multiple modes of transportation, allowing for efficient and cost-effective usage of the system through seamless, customer-oriented, door-to-door services while encouraging competition among transportation providers.

[793] Leebron, D. W. (1996). Claims for harmonisation: A theoretical framework. *Canadian Business Law Journal, 27*(1), 63. Retrieved from https://search.proquest.com/docview/231904376

5.5 Unification by a Regional Multimodal Transport Instrument

Uniform international or regional laws have been used to achieve a transnational unification in other sectors.[794] Unification has usually been achieved by the codification of a written set of rules. Unification in the current context stipulates that just one liability system will be applicable to a multimodal carriage. With this type of liability system, there will be no concern in cases where the loss or damage cannot be localised or where the loss was progressive through the journey.

This unification would eliminate the application challenges that come with the application of the existing unimodal transport to multimodal carriage. Furthermore, the liability system would reduce the cost of fact-finding regarding in which mode of transportation the loss occurred because the carrier's liability against cargo interest will be uniform.[795]

Unification can either be by an international convention or regional convention. Theoretically, many scholars agree that an international convention would be the best means of ensuring the unification of multimodal transport.[796] However, the failure of the 1980 UN Multimodal Convention shows that success might be a long road to achieve if any attempt is made to create a globally accepted legal framework for multimodal transport liability. Many reasons are attributed to the failure of a global regime. Some of these reasons are:

- The tedious and lengthy process required for negotiating a globally acceptable regime
- The larger the forum, the more difficult it is to achieve a consensus during negotiation
- There is no guarantee that a convention will enter into force

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[794] Marc Ancel. (1977). From the unification of law to its harmonisation. *Tulane Law Review, 51*, 108-118. Retrieved from Hein online

[795] Erasmus University Rotterdam, Faculty of Law. (2004). *Competitive and sustainable growth programme - intermodal liability
*. (No. 1).WG3 Intermodality & Interoperability. Retrieved from https://www.factline.com/download/229119.1

[796] Toivonen, O. (2015). A regional regime - as a step towards an international regime in multimodal transport? *World Review of Intermodal Transportation Research, 5*(4), 387. doi:10.1504/WRITR.2015.076917

- A new convention that is ratified in some states and not ratified in some other states may further add to the already murky waters of multimodal transport liability regimes.[797]

Since an international regime is not feasible, and the goal is to improve the quality, effectiveness, and transparency of multimodal transport chains in the African Continental Free Trade Area era, a regional regime seems to be the next best option. A regional regime can increase predictability and may even function as a step towards achieving an international regime.

For there to be a set of rules on a regional level, detached from a national context, these rules can only become effective through various instruments which contain 'hard' law. To unify regional laws, the cooperation of the national governments is crucial. National legislatures must ratify this instrument. Whether the regional instrument will be incorporated into national substantive law depends upon national legislatures; as such, it is important to have all members of ECOWAS align with the project of unification when embarking on this project to ensure that the instrument acquires a binding effect. To be effective and successful, the regional regime must be cost-effective, acceptable by transport industry stakeholders, uniform and compatible with existing unimodal regimes.

While it appears easy to suggest a uniform text for multimodal transport law in West Africa through codification or creation of a single instrument to unify the law related to multimodal transport, focusing on the unification of text may mean we fail to consider the discrepancies that may result from the application of the unified text in different systems. Some have argued that a unifying instrument through international conventions and regional law might have made sense fifty years ago but it does not make sense in the current reality.[798] This argument cannot be sustained; however, a particular trend is visible. The number of conventions adopted in the various periods indicates that the attempt to unify substantive law through multilateral agreements reached its peak in the last 20 years of the previous century. However, at the regional level, such as ECOWAS, the unification of substantive law does not have a past; if anything, it must have a future.

For mandatory unification, the rules of the instrument will be applicable mandatorily. Accordingly, parties cannot contract out of it. They will have no choice but to be bound by the provisions of the instrument.

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[797] Asariotis, R., H.-J. Bull, M. A. Clarke, R. Herber, A. Kiantou-Pampouki, J. Ramberg, D. Morán-Bovio. (1999). *Intermodal transportation and carrier liability*. Luxembourg: Office for Official Publ. of the Europ. Communities.

[798] Rosett, A. (1992). Unification, harmonisation, restatement, codification, and reform in international commercial law. *The American Journal of Comparative Law, 40*(3), 683-697. doi:10.2307/840594

A mandatory regional regime that applies by force of law indeed creates long-sought uniformity. It is, however, expected to be rejected by industry stakeholders who will lobby the government of member states during the negotiations and drafting of the instrument. Accordingly, it may fail to attract sufficient support, thus leading to uncertainty and further complication of the already fragmented regime of multimodal transport. The fear of change is innate to everyone, which may further lead to some stakeholders insisting on the current situation. There is no doubt that any solution that must be adopted must be acceptable to all transport industries.[799]

It is also important to state that for effective interpretation of uniform laws, where there are no supranational organs capable of ensuring its uniform interpretation, there is a risk that the laws will be interpreted differently in each state.[800] However, a discussion as to whether the ECOWAS has an effectively functional supranational organ to ensure uniform interpretation is beyond the scope of this work.

5.6 A Modified Uniform System – A Default System

Experience has shown that voluntary solutions may not lead to widespread application of a regime or give the type of certainty that a regional instrument requires to provide legal certainty. This is because contracting parties may fail to opt for the voluntary solution. The reason may be connected to ignorance or uncertainty of the legal consequences. In addition, model rules, such as UNCTAD/ICC, lack the force of law when compared to mandatory international, regional or domestic legislation. If there is a conflict between model rules and mandatory laws, mandatory laws will take precedence.

This study suggest that ECOWAS can achieve widespread uniformity by adopting and implementing a new regime that would adopt a system which would create a balance between the challenges of a mandatory uniform legal system and model rules. The proposed uniform regime would establish required mandatory uniform regulations for all areas of multimodal transport. However, parties can contract out of the liability limits. The liability limits would be based on a default system. The implication is that the liability limits automatically apply unless the parties agree to opt out. Where parties do not expressly opt out of the regime, the regime is applicable in its entirety and parties are bound by it. It is believed that an optional

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[799] Asariotis, R., H.-J. Bull, M. A. Clarke, R. Herber, A. Kiantou-Pampouki, J. Ramberg, . . . D. Morán-Bovio. (1999). *Intermodal transportation and carrier liability*. Luxembourg: Office for Official Publ. of the Europ. Communities.

[800] Bonell, M. J. (1990). International uniform law in practice - or where the real trouble begins. *The American Journal of Comparative Law, 38*(4), 865-888. doi:10.2307/840615

regime is easily acceptable by industry stakeholders and may have more coherency than the opt-in solution we already have.

The fact that the regime applies automatically when parties have not entered an agreement on liability limits provides some legal certainty and uniformity to multimodal transport legal framework within the ECOWAS. It is important to note that the regional instrument will in itself have a liability limit that will be applicable irrespective of where a loss, delay or damage occurred.

One reason for excluding mandatoriness for liability limits is that one of the most complex issues facing uniformity of multimodal transport regime, on both a global and regional scale, is the issue of limits of liability. The stakeholders in maritime transport are used to very low limits of liability; the users of air carriage will not accept a liability as low as the limits in maritime conventions because it does not reflect their reality. It is therefore preferable that parties are allowed to contract out of the liability regime.

It is believed that a set of uniform rules that apply to all other aspects of multimodal transportation, such as time limits, jurisdiction and documentation, provides certainty, and that the flexible, non-mandatory nature of liability when parties expressly opt out makes it easier to persuade member states to reach an agreement and adopt the uniform rules. Accordingly, the new regime would apply by default to a multimodal transport contract.

This modified regime has been employed in the Andean Community[801] Latin American Integration Association (ALADI), Mercosur, and have also been suggested as the regime for the European Union Draft. It is important to know that this structure is taken from the failed 1980 UN convention. Whilst it is reasonable to raise suspicion about its success considering that the 1980 UN convention failed, the failure of the convention is not attributable to this structure.[802]

The renowned Professor Jan Ramberg gave approval to the modified liability system when he said:

> an easily understandable, transparent, uniform, cost-effective and all-embracing system on a global rather than national, sub-regional or regional level is otherwise unattainable, since any mandatory convention with extended carrier liability, if at all possible to achieve would share the unfortunate fate of the 1978 Hamburg Rules and

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[801] The trade bloc comprising the South-American countries of Bolivia, Colombia, Ecuador and Peru (created in 1969, based on the 1969 Cartagena Agreement and named 'Andean Pact' until 1996)

[802] 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. *Tren/Cc/01-2005/Lot1/Legal Assistance Activities,*

> the 1980 Multimodal Transport Convention. The solution to establish an overriding regime with opting-in or opting-out possibilities is for this reason recommended in the EU study Asariotis, Bull, Clarke, Kiantou- Pampouki, Morán-Bovio, Ramberg, de Wit and Zunarelli, 'Intermodal transportation and Carrier Liability', June 1999.[803]

The modified uniform rules will allow parties the contractual freedom to determine the liability limits that will apply to the multimodal carriage contract. The determination of whether the issue of liability limit will be contracted out will depend on the bargaining power and economic interplay of parties to the contract.

An example of the type of clause that will apply automatically for limitation of liability except parties contract out is:

> The multimodal transport operator of a multimodal transport contract is not liable for any loss of or damage to the goods that are the subject of the contract, in an amount exceeding the higher of the following:

a) The equivalent of 666.67 SDR per package or shipping unit of the goods lost or damaged;

b) 2SDR per kilogram of gross weight of the goods lost or damaged

If the multimodal transport contract does not include carriage of goods by sea or inland waterways, the multimodal transport operator's liability for loss or damage to the goods is limited to 8.33 SDR per kilogram of gross weight of the goods lost or damaged.[804]

It is important to consider the economic implications of the limits when drafting the liability limit of the regional regime. Limiting the liability of a multimodal transport carriage with an air carriage for 2SDR, for example, may not be appealing. Consequently, it might be more practical to set a distinct limit for a contract that includes sea carriage and another for a multimodal3 contract that does not include sea carriage. This will increase competition, make multimodal carriage more appealing to transport consumers, and allow viable carriers to enter the multimodal carriage sector.

It is essential to state that the regional regime will only be applicable to the contractual relationship between the consignor and the multimodal transport

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[803] Jan Ramberg. (2016). The Future of International Unification of Transport Law. *Transport - Wirtschaft - Recht* (pp. 317) Duncker & Humblot. doi:10.2307/j.ctv1q6b72x.25 Retrieved from https://www.jstor.org/stable/10.2307/j.ctv1q6b72x.25

[804] Adapted from the Singapore Multimodal Transport Act 2021 published in Acts Supplement on 19 Feb 2021

operator. The relationship between the MTO and the subcontractors will continue to be determined by unimodal transport operators.

The new regional liability regime would need to be carefully analysed and drafted to address all of the potential consequences and conflicts that currently plague multimodal transport. Any new regime that is poorly constructed or otherwise fails will exacerbate the current fragmented situation. As a result, it is critical that the liability regime can play a significant role in shaping the future of multimodal transportation and consequently be a step to achieving uniformity

5.6.1 Presumed Fault or Strict Liability

Is the regime to be adopted going to be presumed fault or strict? Both alternatives seem to be acceptable to achieve the objectives of reducing friction cost arising from the fragmented regime. In the past, both liability based on fault and presumed liability has been used in transport law.

5.6.2 Presumed Fault Liability

Presumed liability simply means that the carrier or MTO will be presumed to be liable for a loss that occurs when the goods are in his custody. However, the burden of proof shifts to the defendant; the carrier is to prove the facts leading to the cause of loss or damage.[805] Accordingly, the carrier is prima facie liable for the loss unless he can prove that the loss occurred as a result of one of the excepted perils laid down in the contract[806] to overturn the claimant's proof of loss and discharge himself of the liability.

It is a trite principle of law that he who alleges must prove. Accordingly, since the carrier alleges that the loss is not caused by him or his fault and seeks a rebuttal of the presumption, the carrier must prove it.[807] It also follows that he who seeks to rely upon an exception in his contract must first bring himself within it.[808] Therefore, if the carrier claims that the loss happened based on an excepted peril, he must bring himself within the excepted peril.

For example, when the loss is latent, the carrier cannot rebut this presumption by showing that he took reasonable care of the goods. The onus is on the carrier to

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[805] This principle is considered to be a matter of public policy which prevents the parties to derogate from. See The Hong kong Producer, [1969] 2 Lloyd's Rep. 536

[806] Article 4(2) (a)-(q) of the Hague Visby Rules. See also The Theodegmon [1990] 1 L lloyd's Rep.52,

[807] The Torenia (1983] 1 Lloyd's Rep.

[808] Per Staughton L.J. (C A) in The Antigoni [1991] 1 Lloyd's Rep. 209 at p. 212

explain the cause of the loss. This principle was reiterated in *Quaker Oats Co.* v. *M /V Tovanger*[809], that:

> to rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than his negligence. Once the shipper establishes a prima facie case, under the 'policy of the law' the carrier must explain what took place or suffer the consequences. ... [T]he law casts upon [the carrier] the burden of loss which it cannot explain or, explaining bring within the exception.

5.6.3 Strict Liability

However, it is possible for the law to impose liability without fault in which the carrier is liable irrespective of fault. Strict liability has been proposed in the past as regards different transport modes[810] and by academic scholars.[811] As a matter of fact, there was a proposal for an absolute system of liability away from the presumed fault in the Warsaw Convention.[812] In addition, in 1933, strict liability was an option in the Rome Convention and its amendment in 1952 for damage caused by aircrafts to third persons on the surface.[813]

Strict liability has been proposed in multimodal transport but has been discarded in the past. However, it appears that a strict liability might be the proper basis of liability in multimodal transport.[814]

The meaning of strict liability is simple and straightforward. The carrier is liable for any loss, damage and delay without fault. The MTO will be responsible for any loss, delay or damage from the moment he takes over the goods until delivery. The only exception is if he can prove that the loss or damage was caused by a situation beyond his control. These exceptions generally include the exception of force majeure.

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[809] 743 F 2d. 238 at p. 243, 1984 AMC at p. 2943 (5th Cir. 19cert. denied 469 U.S. 1189, 1985 AM

[810] Maritime administration; is it time for a change? Paper presented at the ,UNCTAD. International intermodal transport operation. *U N Doc. TD/B/A C .15/7,* , 17.

[811] Asariotis, R., H.-J. Bull, M. A. Clarke, R. Herber, A. Kiantou-Pampouki, J. Ramberg, . . . D. Morán-Bovio. (1999). *Intermodal transportation and carrier liability*. Luxembourg: Office for Official Publ. of the Europ. Communities.

[812] Martin, P. (1979). 50 years of the Warsaw convention and the practical man's guide. *Annals of Air and Space Law, 4*, 233. Retrieved from https://search.proquest.com/docview/1303865413

[813] Cheng, B. (1981). A reply to charges of having inter alia misused the term absolute liability in relation to the 1966 Montreal inter-carrier agreement in my plea for an integrated system of aviation liability. *Annals of Air and Space Law, 6*, 3. Retrieved from https://search.proquest.com/docview/1303861511

[814] Besong, C. (2007). *Towards a modern role for liability in multimodal transport law* Retrieved from https://search.proquest.com/docview/899715990

Other possible exceptions are a wrongful act or neglect on the claimant's part, the inherent vice of the goods, or the perils of the sea, as used in maritime regimes.

It is preferable in the new regional regime that the MTO be strictly liable rather than the presumed fault under which his liability is based in multimodal transport. This is because the MTO subcontracts part of the carriage to different subcontractors. The MTO is like a guarantor for the safe arrival of the goods. Where the loss is unlocalised, it is only reasonable that the MTO is held strictly liable for the loss.[815] This is similar to the contractual obligations under common law, in which the carrier is liable for loss of goods under his care without fault.[816] Accordingly, the MTO will not be allowed to prove his innocence from presumed fault and may only be excused when the loss is beyond his control.[817]

In the 1960s, strict liability became more sought-after. During this period, tort liability in tort entered a new phase, replacing the existing liability system in some areas of law with a system of liability and insurance. Fault liability was no longer suitable for the less expensive, insurance-based liability. Strict liability was seen as equitable and practical to all legal systems, mainly because some were based on unequal bargaining powers.[818]

The switch to strict liability was further encouraged by three reasons – a downside of the fault liability:

- a tort system based on fault was thought to be too expensive to administer
- litigation was fraught with delay
- the outcome was unpredictable on cases based on fault.[819]

This economic theory stems from the fact that liability should be allocated to the party that can minimise the loss at the lowest cost.[820] In transportation law, the

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[815] M A Clarke, Prof R Herber, Dr F Lorenzon, & Prof J Ramberg. (2005). *Fina report task B - liability and documentation
*. (). Southampton:

[816] Graham McBain. (2005). Time to Abolish common carrier liability. *Jbl,* , 553.

[817] Dr Ellen Eftestøl-Wilhelmsson. (2013). The European project on sustainable multimodal transport: Is a harmonised liability system the right tool? *Carriage of goods by sea, land and air* (pp. 278-296) Informa Law from Routledge. doi:10.4324/9780203798065-27 Retrieved from https://www.taylorfrancis.com/books/9780203798065/chapters/10.4324/9780203798065-27

[818] Besong, C. (2007). *Towards a modern role for liability in multimodal transport law* Retrieved from https://search.proquest.com/docview/899715990

[819] Besong, C. (2007). *Towards a modern role for liability in multimodal transport law* Retrieved from https://search.proquest.com/docview/899715990

[820] Peck, D. S. (1998). Economic analysis of the allocation of liability for cargo damage: The case for the carrier, or is it? *The Transportation Law Journal, 26*(1), 73.

person who can do this is the person with the 'deepest pockets', who can pass it on as freight, so that in the end, all share the loss.

In the case of multimodal transport where either none of the parties is at fault or the loss or damage cannot be localised, leading to inquiries as to who is liable, it appears logical that the MTO is held liable despite there being no proof of fault. Accordingly, strict liability of the carrier would be based on the fact that they will be in a better position to manage the risk.

Freezer also held that:

> if there is any guiding principle as to who can best bear loss, it seems to be that it is the party who can absorb it with the least injury to himself and in such a way as will produce a minimum of consequential problems of social adjustment for himself.[821]

Flowing from the above, it is clear that loss should be born by the superior risk bearer. Also, the MTO is better positioned to take precautions as to the risk they are aware of and cheaply avoid losses because they have more substantial control over goods during the carriage.

It is also suggested that the liability regime of the new regional regime should be 2SDR per kilogram of gross weight of the goods lost or damaged when the multimodal contract involves carriage of goods by sea, and 17 SDR per kg of gross weight when it does not involve the carriage of goods by sea, which is the highest monetary limit in unimodal regimes. While this may sound a bit harsh and difficult, it is softened by the fact that the limit is unbreakable, and the regional liability regime is based on an opt-out solution where the parties could agree otherwise.

The strict liability regime is expected to facilitate quick settlements compared to presumed liability, wherein parties need to take steps to rebut presumptions. Strict liability will also reduce cost associated with inquires as to who is at fault and how the loss occurred.

Finally, strict liability is likely to impact on the business of the cargo interest as it relates to insurance. The cargo owner will reduce his cost of insurance in the form of a no-claims bonus. It is also noteworthy that one of the cargo owners (including shipper, consignee, seller, consignor or cargo owner), the cargo insurance, the carrier and the liability insurance will be liable for loss or damage. Ultimately, in most cases, because of the uncertainty regarding allocation of loss between the parties, there will be double insurance, consequently leading to more costs to the parties. The choice of strict liability will reduce costs and eliminate uncertainty. It

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[821] Feezer, L. W. (1931). Capacity to bear loss as a factor in the decision of certain types of tort cases. *University of Pennsylvania Law Review and American Law Register, 79*(6), 742-767. doi:10.2307/3307778

is also suggested that the strict liability regime monetary limit should be unbreakable.

Some scholars[822] have criticised strict liability on the basis that it defies the rule of morality. As earlier noted, the concept of strict liability is holding a carrier liable even when it cannot be proved that he is negligent. These scholars believe loss should lie where it falls and that it is certainly not morally right to hold someone responsible for a loss they had no fault in. These scholars opine that the only sustainable liability is one based on fault and, as such, a person should be liable for their fault. Accordingly, extinguishing liability altogether will offend the morality of the advocates of a fault-based liability system, who believe that to absolve one even for the faults of his servants would be immoral.[823] It has also been argued that strict liability may lead to the negligence of the plaintiff, knowing full well that he will be compensated in terms of loss.

For the sake of certainty in determining the liability of multimodal transport, it is suggested that the new regime should be based on strict liability.

5.7 Dealing with the Collision of Unimodal Conventions, Regional Laws and Mandatory National Laws

As earlier retorted, there are potential clashes with unimodal conventions, regional laws and mandatory national laws. One way to deal with this to ensure uniformity and achieve the legal certainty sought is to make the new regime treat multimodal transport as sui generis. Parties must not be allowed to invoke the liability limits in unimodal transport regulations. Even when the loss can be localised to a unimodal segment of transportation, the proposed regime must be applicable.

The argument is that, assuming the OHADA regime is even extended ECOWAS-wide, it is only applicable to a contract of carriage by road and, as such, courts of member states must uphold that a multimodal contract of carriage is uniquely different from a unimodal contract of carriage by road even if one of the modes in the multimodal carriage is by road. The courts must interpret the combined reading of Articles 1 and 3 of the OHADA Uniform Act on Carriage of Goods by Road stipulates to the effect that the regime will be applicable to any contract for the

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[822] Epstein, R. A. (1980). *A theory of strict liability*. San Francisco, Cal: Cato Inst. Retrieved from http://www.econis.eu/PPNSET?PPN=439536197

[823] Besong, C. (2007). *Towards a modern role for liability in multimodal transport law* Retrieved from https://search.proquest.com/docview/899715990

carriage of goods by road once the shipper and the carrier agree to the movement of the goods for an agreed price. The implication is that for OHADA to be applicable, the carrier must enter an agreement with the shipper and pay the carrier for the carriage of goods by road.[824] The court must also hold that a multimodal transport document will not qualify as a consignment note.[825]

Furthermore, where the loss is localised to carriage of goods by sea, an argument that Hague or Hague (Visby) Rules are only applicable to a bill of lading can be made. Most ECOWAS countries use either the Hague or Hague (Visby) Rules as the basis of their national law governing carriage of goods by sea. Article 1 of the Hague (Visby) Rules states that the Hague Rules

> [applies] only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the **carriage of goods by sea**, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

Therefore, it is tenable to make the case that the Hague Rules apply to a contract of carriage of goods by sea. Since the multimodal document is not a contract of carriage by sea, it would not be applicable.

There are no regional or national laws on the liability of carriage via rail. Interestingly, no ECOWAS nation is a signatory to the Convention concerning International Carriage by Rail (COTIF)[826] or has domesticated a similar document.

Similarly, for carriage of goods by air, Article 38 of the Montreal Convention (which appears to be the dominant air carriage regime globally), which deals with Combined Transport, states that:

> In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article

[824] See Article 1 and 3 of "OHADA Acte uniforme relatif aux contrats de transport de marchandises par route"

[825] See Article 2 and 4 of "OHADA Acte uniforme relatif aux contrats de transport de marchandises par route"

[826] As at 2020, there are 50 Member States and 1 Associate Member of OTIF plus the European Union: Afghanistan, Albania, Algeria, Austria, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Jordan, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Morocco, Netherlands, North Macedonia, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine and United Kingdom.

18, apply only to the carriage by air, provided that the carriage by air falls **within the terms of Article 1**[Emphasis mine]

Article 1 of the Montreal Convention states that the Convention applies to all international carriage of persons, baggage, or cargo performed by aircraft for reward. Arguably, a multimodal transport contract, being sui generis, is not a carriage performed by an aircraft for reward. The carriage which was performed for reward is the contract between the MTO and the sub-contractor. The court must hold that a multimodal transport contract should only be subject to the proposed regime rather than the Montreal Convention, even when the loss is localised to the air carriage.

Accordingly, the only precaution to be taken is to ensure that where there is a regional regime, the scope of application is strictly applicable to multimodal transport without any recourse to a unimodal convention.

5.8 Weaknesses of the Proposed Uniform Regime

The first flaw that should be brought to fore is that the proposed regional regime cannot be implemented without sufficient political will. Whether or not a regional regime is ever established depends entirely on the policies of the various West African governments. Political stakeholders must be persuaded that a regional regime is a necessary step forward.

In addition, there is a possibility that stakeholders who are accustomed to the "current pattern" of contractual solutions involving unimodal transport will object. Therefore, a concerted effort is required to educate the various stakeholders about the new regime's potential and its ability to assist in reducing multimodal transportation costs in the West African region.

Even though the opt out system was chosen, in a bid to facilitate the gradual implementation of the new regional regime, it would not be desirable for “opting out” to become the norm and desirable in MT contracts governed by the regime. When more stakeholders opt out of the regime, there is no assurance that achieving the desired certainty, which the proposed regime appears to address and deal with, will always be challenging. Cost appears to be a major concern that this proposed regime intends to address. Consequently, appropriate consultation with stakeholders from various modes of transportation is necessary to eliminate any uncertainty regarding inventiveness and reduce the number of divergent views regarding the proposed legal regime.

5.9 Key Element of a Possible Regional Liability Regime

5.9.1 Multimodal Transportation Documents and the Proposed Regime

On the basis that one of the important reasons for a proposed regime is to reduce ancillary cost associated with transportation, a total overhaul of the current multimodal transport document is not desirous. It is suggested that the current documentation is retained but a stamp on the multimodal bill stating that the bill is subject to the proposed regime suffices. The transport document will meet the requirement of Article 19 of the UCP 600 and credits will be able to banking institutions. It will therefore be acceptable for Letter of Credits without ruffling the current banking system.

5.9.2 Notice of Loss and Time Bar

The problem of notice of loss and time bar is one of the most important areas of uncertainty with regard to the carriage of goods. Every legal claim is subject to a statute of limitations, which may be set forth in the governing law or the relevant contract provisions. Time limitations and restriction periods are thus among the first and most crucial factors to take into account whenever a dispute or potential conflict arises. When a claim is brought to a court, the court checks if a claim is made within the applicable time limit.

In all transport conventions, there are provisions governing notice of loss and time bar. Even where the proposed regime comes into force in multimodal transport within ECOWAS, the unimodal conventions will continue to be in force, and will remain applicable particularly in the context of recourse actions against unimodal carriers.

Considering that the MTO will still be able to bring an action against the sub-contractors, the notice of loss and time bar must be shorter than those in unimodal conventions. The shortest time bar is contained in the Hague Rules, which is one year. Any time bar that the proposed regime must have must be shorter than one year. It is suggested that the notification of loss be the same as the Hague Rules,[827]which allows for notice of loss or damage to be given in at the port (place) of discharge before or at the time of the removal of the goods into the custody of the

[827] Artice 3(6) of the Hague (Visby) Rules

person entitled to delivery and, where the loss or damage be not apparent, within three days.

5.9.3 Jurisdiction Under a Non-Mandatory Overriding Regime

It is suggested that, to allow effective claims handling and reduce the possibility of forum shopping, claims by the claimants should only be permitted to bring an action against the MTO at his principal place of business. It is also suggested that an arbitration clause should be included in the provision of the proposed regime. The Alternative Dispute Resolution system will stipulate that a sole arbitrator should determine the case within a short period of time at a fixed cost. It is only if such a system is not available at the operator's principal place of business that claims should be made before the courts of law at that place.[828] As earlier noted, some West African Courts may not respect the provisions of choice of law or forum; it is, therefore, necessary to find a mechanism where only one court will have jurisdiction. Where the action is brought in derogation of the provision which stipulates that the action should be brought at the operators place of business, the national courts my resist temptation to retain jurisdiction in actions filed in these instances.

5.9.4 Calculation and Monetary Unit of the New Regime

It is proposed that the new regime should stick to Special Drawing Rights as defined by the International Monetary Fund, since that is already a generally acceptable monetary unit. As earlier stated, the limit of liability must provide for two limits. First, for when the carriage includes the carriage of goods by sea and second, when the carriage does not include a carriage of goods by sea. Also, damages should not exceed the total loss or exceed the amount foreseen (or that ought to have foreseen) at the time of the conclusion of the contract as a possible consequence of the loss or delay.

5.9.5 Competence of ECOWAS to Introduce the Proposed Liability Regime

It is important to consider whether ECOWAS is competent to regulate a certain multimodal transport or not.

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[828] Asariotis, R., H.-J. Bull, M. A. Clarke, R. Herber, A. Kiantou-Pampouki, J. Ramberg, … D. Morán-Bovio. (1999). *Intermodal transportation and carrier liability*. Luxembourg: Office for Official Publ. of the Europ. Communities.

The Economic Community of West African States is currently governed by the Revised Treaty Establishing the Economic Community of West African States (ECOWAS Treaty).[829] The Economic Community of West African States (ECOWAS) Treaty is a multilateral agreement signed by the Economic Community of West African States' member states. The goals of ECOWAS are to encourage cooperation and integration, leading to the formation of an economic union in West Africa, in order to improve the living conditions of its peoples, preserve and increase economic stability, foster ties among member states, and contribute to the advancement and development of the African continent.[830]

To this end, members have agreed to ensure, in stages, the harmonisation and coordination of national policies, as well as the promotion of integration programmes, projects, and activities, particularly in the following areas: food, agriculture, and natural resources; industry, transportation and communications; energy; trade, money and finance; taxation; economic reform policies; human resources; education; information; culture; science and technology; services; health; tourism; legal matters; the establishment of a common market; and the establishment of an economic union.[831]

Flowing from the fact that ECOWAS was established by a treaty, there is no denying that ECOWAS can only act within the limits of the competences conferred to it by the Member States.

Regarding the competence of ECOWAS to make laws, a combined reading of Article 3(a, b, h,I,j) of the Revised Treaty makes it clear that the treaty recognises a legal system within the ECOWAS. Article 88 stipulates that ECOWAS shall have international legal personality. Furthermore, the objectives of ECOWAS reflect the fact that the ECOWAS treaty allows for the creation of norms.

Specifically, a look at Article 57(1) of the Revised Treaty establishing the Economic Community of West African States (ECOWAS)[2] states that: 'Member States undertake to co-operate in judicial and legal matters with a view to harmonising their judicial and legal systems'.

Article 37 of the ECOWAS treaty also shows that transport falls under shared competences of ECOWAS. The article states that:

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[829] The original founding treaty was the Treaty establishing the Economic Community of West African States, 28 May 1975, 1010 U.N.T.S. 18 but was revised in 1993

[830] Ibid 3(1)

[831] ibid. art. 3(2)(a).

> For the purpose of ensuring the harmonious integration of the physical infrastructures of Member States and the promotion and facilitation of the movement of persons, goods and services within the Community, Member States undertake to:
>
> a) evolve common transport and communications policies, laws and regulations.

It is therefore clear that ECOWAS have the competence to draft norms in relation to transportation.

However, despite the many discussions of economic integration in Africa, none of the regional communities seem to have or have had a regional treaty governing an area of private law, neither is it on their agenda. At the moment, there is no African Regional Economic Community including ECOWAS with an initiative or any subject matter on private law. Prof. Richard Oppong[832] states that the reason for this is because of the low level of intra-regional trade and movement of persons.

Private law does not appear to be a top priority for African governments, experts, or the international community. It is argued that private law does not immediately benefit the continent's inhabitants, despite some academics, governments, and international organisations arguing that reforming private law can drive economic progress and so improve everyone's situation.[833] Even at that, private law scholarships are few. Some academics[834] have suggested that legal codification operations are unrelated to widespread food hunger, environmental destruction, social dislocation, low pay, or the heinous labour conditions that exist in most African countries, hence the need to pay attention to private law is not pressing. The gap between private law and the lived reality of the bulk of Africans may explain why regional economic communities do not engage in much private law discussion.[835]

There is also the challenge of the lack of political will. With the new AfCFTA, it is expected that intra-regional trade will be boosted. The AfCFTA regional market is

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[832] Oppong, R. F. (2014). Globalization and private international law in commonwealth africa. *University of Arkansas at Little Rock Law Review, 36*(2), 153.

[833] Ngugi, J. M. (2005). Policing neo-liberal reforms: The rule of law as enabling and restrictive discourse. *University of Pennsylvania Journal of International Economic Law, 26*(3), 513.

[834] Kang'ara, S. W. (2011). Why take private law seriously in Africa? *American University International Law Review, 26*(4), 1125. Retrieved from https://search.proquest.com/docview/1223911262

[835] Kang'ara, S. W. (2011). Why take private law seriously in Africa? *American University International Law Review, 26*(4), 1125. Retrieved from https://search.proquest.com/docview/1223911262

an opportunity to help African countries diversify their exports, accelerate growth, and attract foreign direct investment.[836]

However, it cannot be said that harmonisation of private law areas has occurred within the African regional economic organisations. There is a glimmer of hope with the important initiative OHADA. The OHADA Agreement was established to harmonise the trade laws of the Contracting States by developing and adopting simple, modern and common rules to suit their economies. The willingness of the seventeen member countries to abandon their different national laws in favor of harmonised rules shows that there is a possibility for cooperation in Africa (including the ECOWAS) in private law areas.

In conclusion, ECOWAS has the competence to create the harmonisation sought in the area of multimodal transport. Notwithstanding this fact, it appears that Africa has so far remained mainly impervious to how harmonisation of private law can help in achieving globalisation and economic growth, and additionally to shape the development of the private law, as has been done in other regions of the world. As a matter of fact, academic works on the subject remain scanty. Therefore, African academics must continue to play a role in clamoring for harmonisation and development private law in Africa.[837]

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[836] World Bank. (2021). The African continental free trade area. Retrieved from https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area

[837] For instance, the Hague Conference on Private International Law has not been significant in Africa. See generally Richard Frimpong Oppong, The Hague Conference and the Development of Private International Law in Africa: A Plea for Cooperation, 8 Y.B. PRIVATE INTL. 189 (2006). Furthermore, there are currently 26 African countries that are parties to Hague Conventions (*Botswana; Burkina Faso; Burundi; Cape Verde; Egypt; Gabon; Guinea; Kenya; Lesotho; Liberia; Madagascar; Malawi; Mali; Mauritius; Morocco; Namibia; Niger; Rwanda; Sao Tome and Principe; Senegal; Seychelles; South Africa; Swaziland; Togo; Zambia; and Zimbabwe*) and four (Egypt; Morocco; South Africa and Zambia) that are member states of the Conference. Private international law is still very underdeveloped in Africa. For instance, in Nigeria, the courts have held in Eagle Super Pack (Nigeria) Ltd. v. African Continental Bank Plc. [2006] 19 NWLR that for the Uniform Customs Practice for Documentary Credits to be applicable, it must be incorporated in a contract. However, in Kenya, it has been held in Nedermar Technology BV Ltd v. Kenya Anti-corruption Commission [2008] eKLR
476 at 499 that the parties may choose Transnational law Including general principles of law, development law; the lex mercatoria; codified terms and practices; and trade Usages

6 Conclusion and recommendations

6.1 Conclusion

The AfCFTA was signed with the goal of increasing commerce, economic growth, and integration amongst African countries. This thesis concludes that trade requires smooth transportation and market access. According to this thesis, multimodal transportation is less expensive and a viable choice for door-to-door trade in ECOWAS. To add to the cost issue, using containers to transport goods reduces handling; as a result, costs associated with labour, packaging, and damage during transhipment are reduced.

The lack of trade facilitation is one of the main reasons behind Africa's low trade integration. Research shows that Africa is claimed to have the highest trade expenses in the world, so every solution that can lower or eliminate trade costs is worth investigating. Given that multimodal transportation is more cost-effective than unimodal transportation, it is essential to emphasise that several challenges in West Africa prevent the adoption of multimodal transportation as a preferred contract of transport, ranging from infrastructure flaws to the lack of a legal framework.

This thesis demonstrates that the legal regulation of multimodal transport in West Africa is currently unacceptable because it did not arise from any clear policy but rather from the standpoint of social convenience and rough justice. multimodal transport is viewed as a chain contract.

In the absence of a governing convention, contradictions have arisen as various contractual rules attempt to achieve the intended effect of having a governing convention – particularly in the case of unlocalised loss or where none of the essential conventions apply to localised loss.

The current approach, according to this study, causes ambiguity, which leads to increased legal cost as a result of having to sue or seek legal counsel and, in some instances, litigate. All of these factors have an impact on transportation costs.

The only way out of this 'quagmire' is to establish a regional uniform liability regime that recognises the realities of multimodal transportation and is capable of institutionally regulating all the modes with a uniform liability.

As a result, in Chapter 1, the thesis poses the following significant questions.

- Is the legal framework adequate for multimodal transport in the ECOWAS region?
- Does the legal framework create legal certainty with regard to the applicable liability regime?
- Is legal certainty important to regional integration and trade facilitation?
- What is the suitable approach to achieving legal certainty regarding multimodal transport liability in the Economic Community of West African States?

6.2 The Research Questions Revisited

The idea of this research is to investigate the ambiguity in the legal framework that governs multimodal transportation in West Africa and how such uncertainty can affect regional integration and trade facilitation. To do this, four research questions were developed.

Is the current legal framework adequate for multimodal transport in the ECOWAS region?

To the extent that there are no regional regimes for certain unimodal segments, such as rail, there is a challenge arising from the fact that the OHADA Uniform treaty on Road Transport does not apply to all ECOWAS member states. Given the inability to determine liability in the event of unlocalised losses, and also some unimodal applicable regimes extend beyond their unimodal carriage, it is safe to conclude that the legal framework for multimodal transport in ECOWAS is inadequate.

Does the current legal framework create legal certainty with regards to the applicable liability regime?

As a result of the above inadequacy, the liability of parties can sometime be difficult to predict. Furthermore, there are liability gaps not addressed under the current legal framework, consequently leaving them to the discretion of the judges of different jurisdictions.

Is legal certainty important to regional integration and trade facilitation?

According to the main economic stakeholders, one of the main weaknesses of integration schemes is the legal uncertainty. The lack of clarity as to which law is applicable and how much liability a MTO will incure as a result of a possible loss is not desirable. Due to the lack of clear norms, parties are forced to incur higher

legal fees and make preparations to defend themselves. Increasing costs and uncertainty discourage investment, which slows economic progress.

What is the suitable approach to achieving legal certainty regarding multimodal transport liability in the Economic Community of West African States?

This work suggests that the best way to resolve the uncertainty plaguing multimodal transport is by unification. Chapter 5 of this thesis proposes an instrument which adopts a modified uniform default system with a strict liability approach. The reason why this system is proposed is to allow stakeholders to gradually embrace it and and the strict responsibility approach prevents the MTO from attempting to rebut his liability except in cases of force majeure.

6.3 The Consequence of Maintaining the Status Quo

Due to the unimodal drafting style of the mandatory unimodal transport laws, the network system inherently includes some legal challenges, such as non-regulation of non-localised damage, possible applicability overlaps, and difficulty in application. These legal concerns have been extensively discussed in previous chapters. In the end, the network system is neither seamless nor perfect.[838]

Complete contract flexibility without the introduction of any mandatory law problems is not without its drawbacks. As previously stated, the current legal framework is comprised of a complex web of international unimodal transport conventions, regional treaties, and standard form contracts designed to govern carriage by sea, air, and road. Multimodal transportation may be subject to mandatory unimodal rules. The freedom of contract method, on the other hand, is contractual in character and does not have legal force. Any applicable international or national legislation applicable to the multimodal transport contract governs the approach. If this method contradicts with any mandatory legislation that has legal force, it must give way to such international conventions or state laws. Unimodal transport treaties applying mandatorily to the multimodal transport contract consequently leads to fragmentation and complexity.

Whilst it may appear to be desirable to leave everything to contract flexibility, it would actually be extremely impractical. The freedom of contract method could be one of the solutions, especially in instances when the market is pushing for more

[838] Paula Backden, *The Contract of Carriage* (Contemporary commercial law, 1st edn, Routledge 2019)

freedom of contract rather than more regulation.[839] However, those contractual arrangements do not appear to be suitable for multimodal transportation.

6.4 The Consequence of a New Instrument

The new instrument will view multimodal transport as sui generis, clearly stating that the conventions and treaties regulating unimodal contracts of carriage are not applicable to carriage under multimodal contracts. The result of this is that issues of potential conflicts would be resolved. In addition, the new instrument would also have just one liability dealing with localised and unlocalised loss. In general, the liabilities of stakeholders will be clearly defined through a new instrument. Achieving certainty is a major goal of the new instrument. Therefore, the new instrument would improve foreseeability of liability and increase certainty. The new instrument will address many legal issues that cause conflicts between unimodal mandatory laws and multimodal transport contracts.

However, having a new instrument necessitates political will and shared beliefs among stakeholders. As a result, member states must take harmonised steps to ensure that the new instrument does not become another failed attempt to regulate multimodal transportation.

6.5 Recommendations for Future Research

The outline provided in the previous chapters demonstrates that the road to multimodal transportation assurance is paved with bumps and potholes. There are various gaps and conflicts affecting the current 'multimodal carriage law' governing West African countries that were not discussed in this thesis. This is because this thesis focuses mostly on substantive law and avoids questions of private international law.

To achieve certainty, it is necessary to consider the mechanism for enforcing these 'substantive rights', which will be governed by the forum law or choice of law.

In multinational transactions, determining which set of rules to apply in the event of a dispute is critical, because the substantive laws that apply may differ. It is widely

[839] Haedong Jeon. 'Coping with muddles and uncertainty in the field of multimodal transport liability' (University of Southampton 2013) <https://search.proquest.com/docview/1775429723>

accepted that courts may need to resort to private international law. It is suggested that to determine the applicable domestic substantive norms that apply to an international transaction, the rules of private international law would be important. The lack of a unified private international regime may make it difficult to achieve the desired predictability. As a result, questions of jurisdiction, choice of law, execution of foreign judgements, and forum shopping leave potential room for confusion and litigation. As a result, further research as to what may be a lasting solution to possible issues that may arise from these issues is recommended.

Another issue that requires further discussion is the political will of ECOWAS to venture into making laws that deals with private laws. There is no doubt that the viability of a Regional Economic Community (REC) is contingent on the successful development of community laws and their subsequent effective implementation and/or adoption by member states. Whilst the Economic Community of West African States (ECOWAS) has changed its founding treaty to allow its legislative branch to make legislation with immediate effect and direct applicability in order to benefit from the new legal order, the political will seems to be lacking. It is therefore suggested that further research should be done to consider the possible reasons for a lack of laws in the area of private laws and private international laws.

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8 Appendices

OHADA Acte Uniforme Relatif Aux Contrats de Transport de Marchandises Par Route. (*The OHADA Uniform Rules on Road Transport)*

1980 United Nations Conference on a Convention on International Multimodal Transport

UNCTAD/ICC Rules· for Multimodal Transport Documents

OHADA

Acte uniforme relatif aux contrats de transport de marchandises par route

Acte adopté le 22 mars 2003

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[*NB - les chiffres renvoient aux numéros des articles*]

Chapitre 1 - Champ d'application et définitions

Champ d'application

Art.1.- 1) Le présent Acte uniforme s'applique à tout contrat de transport de marchandises par route lorsque le lieu de prise en charge de la marchandise et le lieu prévu pour la livraison, tels qu'ils sont indiqués au contrat, sont situés soit sur le territoire d'un État membre de l'OHADA, soit sur le territoire de deux États différents dont l'un au moins est membre de l'OHADA. L'Acte uniforme s'applique quels que soient le domicile et la nationalité des parties au contrat de transport.

2) L'Acte uniforme ne s'applique pas aux transports de marchandises dangereuses, aux transports funéraires, aux transports de déménagement ou aux transports effectués en vertu de conventions postales internationales.

Définitions

Art.2.- Pour l'application du présent Acte uniforme, on entend par :

- a) « avis » : un avis oral ou écrit, à moins qu'une disposition du présent Acte uniforme n'exige l'écrit ou que les personnes concernées n'en disposent autrement ;
- b) « contrat de transport de marchandises » : tout contrat par lequel une personne physique ou morale, le transporteur, s'engage principalement et moyennant rémunération, à déplacer par route, d'un lieu à un autre et par le moyen d'un véhicule, la marchandise qui lui est remise par une autre personne appelée l'expéditeur ;
- c) « écrit » : une suite de lettres, de caractères, de chiffres ou de tous autres signes ou symboles dotés d'une signification intelligible et mis sur papier ou sur un support faisant appel aux technologies de l'information.
  À moins que les personnes concernées n'en disposent autrement, l'exigence d'un écrit est satisfaite quels que soient le support et les modalités de transmission, pour autant que l'intégrité, la stabilité et la pérennité de l'écrit soient assurées ;
- d) la lettre de voiture est l'écrit qui constate le contrat de transport de marchandises.
- e) « marchandise » : tout bien mobilier ;
- f) « marchandise dangereuse » : une marchandise qui, de façon générale, par sa composition ou son état, présente un risque pour l'environnement, la sécurité ou l'intégrité des personnes ou des biens ;
- g) « transport de déménagement » : le transport de biens mobiliers usagés en provenance et à destination d'un local d'habitation ou d'un local à usages professionnel, commercial, industriel, artisanal ou administratif, lorsque le conditionnement est assuré par le transporteur et que le déplacement ne constitue pas la prestation principale ;
- h) « transport funéraire » : le transport du corps d'une personne décédée ;
- i) « transport successif » : le transport dans lequel plusieurs transporteurs routiers se succèdent pour exécuter un unique contrat de transport par route ;
- j) « transport superposé » : le transport dans lequel, en vue de l'exécution d'un unique contrat de transport routier, un véhicule routier contenant des marchandises est transporté, sans rupture de charge, sur ou dans un véhicule non routier sur une partie du parcours ;
- k) « transporteur » : une personne physique ou morale qui prend la responsabilité d'acheminer la marchandise du lieu de départ au lieu de destination au moyen d'un véhicule routier ;
- l) « véhicule » : tout véhicule routier à moteur ou toute remorque ou semi-remorque sur essieu arrière dont l'avant repose sur le véhicule tracteur, conçue pour être attelée à un tel véhicule.

Chapitre 2 -Contrat et documents de transport

Formation du contrat de transport

Art.3.- Le contrat de transport de marchandise existe dès que le donneur d'ordre et le transporteur sont d'accord pour le déplacement d'une marchandise moyennant un prix convenu.

Lettre de voiture

Art.4.- 1) La lettre de voiture doit contenir :

- a) les lieu et date de son établissement ;
- b) le nom et l'adresse du transporteur ;
- c) les noms et adresses de l'expéditeur et du destinataire ;

- d) les lieu et date de la prise en charge de la marchandise et le lieu prévu pour la livraison ;
- e) la dénomination courante de la nature de la marchandise et le mode d'emballage et, pour les marchandises dangereuses, leur dénomination généralement reconnue ;
- f) le nombre de colis, leurs marques particulières et leurs numéros ;
- g) le poids brut ou la quantité autrement exprimée de la marchandise ;
- h) les instructions requises pour les formalités de douane et autres ;
- i) les frais afférents au transport (prix de transport, frais accessoires, droits de douane et autres frais survenant à partir de la conclusion du contrat jusqu'à la livraison) ;

2) Le cas échéant, la lettre de voiture peut contenir :

- a) l'interdiction de transbordement ;
- b) les frais que l'expéditeur prend à sa charge ;
- c) le montant du remboursement à percevoir lors de la livraison de la marchandise ;
- d) la déclaration par l'expéditeur, contre paiement d'un supplément de prix convenu, de la valeur de la marchandise ou d'un montant représentant un intérêt spécial à la livraison ;
- e) les instructions de l'expéditeur au transporteur en ce qui concerne l'assurance de la marchandise ;
- f) le délai convenu dans lequel le transport doit être effectué.
- g) le délai de franchise pour le paiement des frais d'immobilisation du véhicule ;
- h) la liste des documents remis au transporteur.

3) Les contractants peuvent porter sur la lettre de voiture tout autre mention qu'ils jugent utile.

4) L'absence ou l'irrégularité de la lettre de voiture ou des mentions prévues aux alinéas 1 ou 2 du présent article, de même que la perte de la lettre de voiture n'affecte ni l'existence, ni la validité du contrat de transport qui reste soumis aux dispositions du présent Acte uniforme.

Force probante de la lettre de voiture

Art.5.- 1) La lettre de voiture fait foi, jusqu'à preuve du contraire, des conditions du contrat de transport et de la prise en charge de la marchandise par le transporteur.

2) La lettre de voiture est établie en un original et au moins en deux copies, le nombre de copies devant être spécifié. L'original est remis à l'expéditeur, une copie est conservée par le transporteur et une autre accompagne la marchandise à destination.

Documents de douane

Art.6.- 1) Dans les transports inter-États, en vue de l'accomplissement des formalités de douane et autres formalités à remplir avant la livraison de la marchandise, l'expéditeur doit joindre à la lettre de voiture ou mettre à la disposition du transporteur les documents nécessaires et lui fournir tous renseignements utiles.

2) Le transporteur n'est pas tenu d'examiner si les documents visés à l'alinéa précédent sont exacts ou suffisants. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces documents et renseignements, sauf en cas de faute du transporteur.

3) Le transporteur est responsable, au même titre qu'un mandataire, des conséquences de la perte ou de l'utilisation inexacte des documents mentionnés sur la lettre de voiture et qui accompagnent celle-ci ou qui sont déposés entre ses mains ; dans ce cas, l'indemnité à sa charge ne dépassera pas celle qui serait due en cas de perte de la marchandise.

Chapitre 3 -Exécution du contrat de transport

Emballage des marchandises

Art.7.- 1) À moins que le contrat ou les usages ne prévoient le contraire, l'expéditeur doit emballer la marchandise de manière adéquate. Il est responsable envers le transporteur et toute autre personne aux services de laquelle ce dernier recourt pour l'exécution du contrat de transport, des dommages aux personnes, au matériel ou à d'autres marchandises, ainsi que des frais encourus en raison de la défectuosité de l'emballage de la marchandise, à moins que, la défectuosité étant apparente ou connue du transporteur au moment de la prise en charge, celui-ci n'ait pas fait de réserves à son sujet.

2) Lorsque qu'au moment de la prise en charge, un défaut d'emballage apparent ou connu du transporteur présente un risque évident pour la sécurité ou

l'intégrité des personnes ou des marchandises, le transporteur doit en aviser la personne responsable de l'emballage et l'inviter à y remedier. Le transporteur n'est pas tenu de transporter la marchandise si, après l'avis, il n'est pas remédié à ce défaut d'emballage dans un délai raisonnable compte tenu des circonstances de fait.

3) S'il y a bris d'emballage en cours du transport, le transporteur prend les mesures qui lui paraissent les meilleures dans l'intérêt de l'ayant droit à la marchandise et en avise ce dernier. Si l'emballage brisé ou la marchandise qu'il contient présente un risque pour la sécurité ou l'intégrité des personnes ou des marchandises, le transporteur peut, de manière adéquate, décharger immédiatement la marchandise pour le compte de l'ayant droit et en aviser ce dernier. Après ce déchargement, le transport est réputé terminé. Dans ce cas, le transporteur assume la garde de la marchandise ; toutefois il peut la confier à un tiers et n'est alors responsable que du choix de ce tiers. La marchandise reste alors grevée des créances résultant de la lettre de voiture et de tous autres frais.

Déclarations et responsabilité de l'expéditeur

Art.8.- 1) L'expéditeur fournit au transporteur les informations et les instructions prévues à l'article 4 alinéa 1 de c) à h) ci-dessus et, le cas échéant, celles prévues à l'alinéa 2 du même article.

2) L'expéditeur est tenu de réparer le préjudice subi par le transporteur ou toute autre personne aux services de laquelle ce dernier recourt pour l'exécution du contrat de transport, lorsque ce préjudice a pour origine soit le vice propre de la marchandise, soit l'omission, l'insuffisance ou l'inexactitude de ses déclarations ou instructions relativement à la marchandise transportée.

3) L'expéditeur qui remet au transporteur une marchandise dangereuse, sans en avoir fait connaître au préalable la nature exacte, est responsable de tout préjudice subi en raison du transport de cette marchandise. Il doit notamment acquitter les frais d'entreposage et les dépenses occasionnées par cette marchandise et en assumer les risques. Le transporteur peut, de manière adéquate, décharger, détruire ou rendre inoffensives les marchandises dangereuses qu'il n'aurait pas consenti à prendre en charge s'il avait connu leur nature ou leur caractère, et ce sans aucune indemnité.

4) L'expéditeur qui remet au transporteur des documents, des espèces ou des marchandises de grande valeur, sans en avoir fait connaître au préalable la nature ou la valeur, est responsable de tout préjudice subi en raison de leur transport. Le transporteur n'est pas tenu de transporter des documents, des espèces ou des marchandises de grande valeur. S'il transporte ce type de marchandises, il n'est responsable de la perte que dans le cas où la nature ou la valeur du bien lui a été déclarée. La déclaration mensongère qui trompe sur la nature ou la valeur du bien exonère le transporteur de toute responsabilité.

Période de transport

Art.9.- Le transport de marchandise couvre la période qui s'étend de la prise en charge de la marchandise par le transporteur en vue de son déplacement, jusqu'à la livraison de ladite marchandise.

Prise en charge de la marchandise

Art.10.- 1) Lors de la prise en charge de la marchandise, le transporteur est tenu de vérifier :

- a) l'exactitude des mentions de la lettre de voiture relatives au nombre de colis, à leurs marques ainsi qu'à leurs numéros ;
- b) l'état apparent de la marchandise et de son emballage.

2) Si le transporteur n'a pas les moyens raisonnables de vérifier l'exactitude des mentions visées à l'alinéa 1a) du présent article, il inscrit sur la lettre de voiture des réserves qui doivent être motivées. Il doit de même motiver toutes les réserves qu'il fait au sujet de l'état apparent de la marchandise et de son emballage. Ces réserves n'engagent l'expéditeur que si celui-ci les a expressément acceptées sur la lettre de voiture.

3) L'expéditeur a le droit d'exiger la vérification par le transporteur du poids brut ou de la quantité autrement exprimée de la marchandise. Il peut aussi exiger la vérification du contenu du colis. Le transporteur peut réclamer à l'expéditeur le paiement des frais de vérification. Le résultat des vérifications est consigné sur la lettre de voiture.

4) En l'absence de réserves motivées du transporteur inscrites sur la lettre de voiture, il y a présomption que la marchandise et son emballage étaient en bon état apparent au moment de la prise en charge et que le nombre de colis, à leurs marques et à leurs

numéros, étaient conformes aux mentions de la lettre de voiture.

Droit de disposer de la marchandise en cours de route

Art.11.- 1) L'expéditeur a le droit de disposer de la marchandise en cours de route, notamment en demandant au transporteur d'arrêter le transport, de modifier le lieu prévu pour la livraison ou de livrer la marchandise à un destinataire différent de celui indiqué sur la lettre de voiture.

2) Le droit de disposition appartient toutefois au destinataire dès l'établissement de la lettre de voiture si une mention dans ce sens y est faite par l'expéditeur.

3) L'exercice du droit de disposition est subordonné aux conditions suivantes :

- a) l'expéditeur ou, dans le cas visé à l'alinéa 2 du présent article, le destinataire qui veut exercer ce droit, doit présenter l'original de la lettre de voiture sur lequel doivent être inscrites les nouvelles instructions données au transporteur et dédommager le transporteur des frais et du préjudice qu'entraîne l'exécution de ces instructions ;
- b) cette exécution doit être possible au moment où les instructions parviennent à la personne qui doit les exécuter et ne doit ni entraver l'exploitation normale de l'entreprise du transporteur, ni porter préjudice aux expéditeurs ou destinataires d'autres envois ;
- c) les instructions ne doivent jamais avoir pour effet de diviser l'envoi.

4) Lorsque, en raison des dispositions prévues à l'alinéa 3 b) ci-dessus du présent article, le transporteur ne peut exécuter les instructions qu'il reçoit, il doit en aviser immédiatement la personne dont émanent ces instructions.

5) Le transporteur qui n'aura pas exécuté les instructions données dans les conditions prévues au présent article ou qui se sera conformé à de telles instructions sans avoir exigé la présentation de l'original de la lettre de voiture sera responsable envers l'ayant droit du préjudice causé par ce fait.

Empêchement au transport et à la livraison

Art.12.- 1) Le transporteur doit sans délai aviser et demander des instructions :

- a) à l'ayant droit à la marchandise si, avant l'arrivée de la marchandise au lieu prévu pour la livraison, l'exécution du contrat dans les conditions prévues à la lettre de voiture est ou devient impossible ;
- b) à l'expéditeur si, après l'arrivée de la marchandise au lieu de destination, pour un motif quelconque et sans qu'il y ait faute de la part du transporteur, il ne peut effectuer la livraison.

2) Dans le cas prévu à l'alinéa 1 a) ci-dessus, lorsque les circonstances permettent l'exécution du contrat dans des conditions différentes de celles prévues à la lettre de voiture et que le transporteur n'a pu obtenir en temps utile des instructions de l'ayant droit à la marchandise, il prend les mesures qui lui paraissent les meilleures dans l'intérêt de cette personne.

3) Lorsque la livraison n'a pu être effectuée parce que le destinataire a négligé ou refusé de prendre livraison de la marchandise, celui-ci peut toujours en prendre livraison tant que le transporteur n'a pas reçu d'instructions contraires.

4) Le transporteur a droit au remboursement des frais que lui causent sa demande d'instructions et l'exécution des instructions, sauf si ces frais sont la conséquence de sa faute.

5) À compter de l'avis de l'alinéa 1 du présent article, le transporteur peut décharger la marchandise pour le compte de l'ayant droit. Après ce déchargement, le transport est réputé terminé. Le transporteur assume alors la garde de la marchandise et il a droit à une rémunération raisonnable pour la conservation ou l'entreposage de la marchandise. Le transporteur peut toutefois confier la marchandise à un tiers et il n'est alors responsable que du choix judicieux de ce tiers. La marchandise reste grevée des créances résultant de la lettre de voiture et de tous autres frais.

6) Le transporteur peut faire procéder à la vente de la marchandise sans attendre d'instructions si l'état ou la nature périssable de la marchandise le justifie ou si les frais de garde sont hors de proportion avec la valeur de la marchandise. Dans les autres cas, il peut faire procéder à la vente s'il n'a pas reçu d'instructions dans les quinze jours suivant l'avis. La façon de procéder en cas de vente est déterminée par la loi ou les usages du lieu où se trouve la marchandise. Le produit de la vente est mis à la disposition de l'ayant droit, déduction faite des frais grevant la marchandise. Si ces frais dépassent

le produit de la vente, le transporteur a le droit à la différence.

Livraison de la marchandise

Art.13.- 1) Le transporteur est tenu de livrer la marchandise au destinataire au lieu prévu pour la livraison et de lui remettre la copie de la lettre de voiture qui accompagne la marchandise, le tout contre décharge. La livraison doit être faite dans le délai convenu ou, à défaut de délai convenu, dans le délai qu'il est raisonnable d'accorder à un transporteur diligent, compte tenu des circonstances de fait.

2) Après l'arrivée de la marchandise au lieu prévu pour la livraison, le transporteur est tenu d'aviser le destinataire de l'arrivée de la marchandise et du délai imparti pour son enlèvement, à moins que la livraison de la marchandise ne s'effectue à la résidence ou à l'établissement du destinataire.

3) Avant de prendre livraison de la marchandise, le destinataire est tenu de payer le montant des créances résultant de la lettre de voiture. En cas de contestation à ce sujet, le transporteur n'est obligé de livrer la marchandise que si une caution lui est fournie par le destinataire.

4) Sous réserve des droits et obligations de l'expéditeur, le destinataire, par son acceptation expresse ou tacite de la marchandise ou du contrat de transport, acquiert les droits résultant du contrat de transport et peut les faire valoir en son propre nom vis-à-vis du transporteur. Le transporteur ne peut cependant pas être tenu à une double indemnisation vis-à-vis de l'expéditeur et du destinataire pour un même dommage.

État de la marchandise et retard à la livraison

Art.14.- 1) Lorsque le transporteur et le destinataire s'entendent sur l'état de la marchandise à la livraison, ils peuvent faire une constatation commune écrite. Dans ce cas, la preuve contraire au résultat de cette constatation ne peut être faite que s'il s'agit de pertes ou avaries non apparentes et si le destinataire a adressé au transporteur un avis écrit indiquant la nature des pertes ou avaries dans les sept jours suivant cette constatation commune, dimanche et jours fériés non compris.

2) Lorsqu'il n'y a pas de constatation commune écrite de l'état de la marchandise à la livraison, le destinataire doit adresser au transporteur un avis écrit indiquant la nature des pertes ou avaries :

- a) au plus tard le premier jour ouvrable qui suit la date de la livraison, en cas de pertes ou avaries apparentes ;
- b) dans les sept jours suivant la date de la livraison, dimanche et jours fériés non compris, en cas de pertes ou avaries non apparentes.

3) À défaut d'avis dans ces délais, la marchandise est présumée reçue dans l'état décrit à la lettre de voiture. Une mention écrite de la perte ou de l'avarie faite sur la lettre de voiture ou sur tout autre document de transport au moment de la livraison satisfait aux exigences d'avis de ce alinéa.

4) Un retard à la livraison ne peut donner lieu à une indemnité que si un avis écrit est adressé au transporteur dans les vingt et un jours suivant la date de l'avis d'arrivée de la marchandise au lieu prévu pour la livraison ou, le cas échéant, celle de l'arrivée de la marchandise à la résidence ou à l'établissement du destinataire lorsque la livraison doit y être effectuée.

Paiement des créances résultant de la lettre de voiture

Art.15.- 1) Les créances résultant de la lettre de voiture sont payables par le donneur d'ordre avant la livraison, sauf stipulation contraire sur la lettre de voiture.

2) Si la marchandise n'est pas de la même nature que celle décrite au contrat ou si sa valeur est supérieure au montant déclaré, le transporteur peut réclamer le prix qu'il aurait pu exiger pour ce transport.

3) Conformément à l'article 13 alinéa 3 ci-dessus, le transporteur a le droit de retenir la marchandise transportée jusqu'au paiement des créances résultant de la lettre de voiture. Si selon la lettre de voiture, ces sommes sont dues par le destinataire, le transporteur qui n'en exige pas l'exécution avant la livraison perd son droit de les réclamer au donneur d'ordre. En cas de refus de paiement par le destinataire, le transporteur doit en aviser le donneur d'ordre et lui demander des instructions.

4) Le transporteur a un privilège sur la marchandise transportée pour tout ce qui lui est dû à condition qu'il y ait un lien de connexité entre la marchandise transportée et la créance.

Chapitre 4 - Responsabilité du transporteur

Fondement de la responsabilité

Art.16.- 1) Le transporteur est tenu de livrer la marchandise à destination. Il est responsable de l'avarie, de la perte totale ou partielle qui se produit pendant la période de transport, ainsi que du retard à la livraison.

2) Il y a retard à la livraison lorsque la marchandise n'a pas été livrée dans le délai convenu ou, à défaut de délai convenu, dans le délai qu'il serait raisonnable d'accorder à un transporteur diligent, compte tenu des circonstances de fait.

3) L'ayant droit peut, sans avoir à fournir d'autres preuves, considérer la marchandise comme perdue en totalité ou en partie, suivant le cas, lorsqu'elle n'a pas été livrée ou n'a été que partiellement livrée trente jours après l'expiration du délai de livraison convenu ou, s'il n' a pas été convenu de délai de livraison, soixante jours après la prise en charge de la marchandise par le transporteur.

4) Le transporteur est responsable, comme de ses propres actes ou omissions, des actes ou omissions de ses préposés ou mandataires agissant dans l'exercice de leurs fonctions et de ceux de toute autre personne aux services desquels il recourt pour l'exécution du contrat de transport, lorsque cette personne agit aux fins de l'exécution du contrat.

Exonérations

Art.17.- 1) Le transporteur est exonéré de responsabilité s'il prouve que la perte, l'avarie ou le retard a eu pour cause une faute ou un ordre de l'ayant droit, un vice propre de la marchandise ou des circonstances que le transporteur ne pouvait pas éviter et aux conséquences desquelles il ne pouvait remédier.

2) Le transporteur est exonéré de responsabilité lorsque la perte ou l'avarie résulte des risques particuliers inhérents à l'un ou à plusieurs des faits suivants :

- a) emploi de véhicules ouverts et non bâchés, lorsque cet emploi a été convenu d'une manière expresse et mentionné à la lettre de voiture ;
- b) absence ou défectuosité de l'emballage pour les marchandises exposées par leur nature à des déchets ou avaries quand elles sont mal emballées ou pas emballées ;
- c) manutention, chargement, arrimage ou déchargement de la marchandise par l'expéditeur ou le destinataire ou des personnes agissant pour le compte de l'expéditeur ou du destinataire ;
- d) nature de certaines marchandises exposées, par des causes inhérentes à cette nature même, soit à la perte totale ou partielle, soit à l'avarie, notamment par bris, détérioration spontanée, dessiccation, coulage ou déchet normal ;
- e) insuffisance ou imperfection des marques ou des numéros de colis ;
- f) transport d'animaux vivants.

3) Le transporteur ne peut s'exonérer de sa responsabilité en invoquant les défectuosités du véhicule utilisé pour effectuer le transport.

4) Lorsque le transporteur prouve que, eu égard aux circonstances de fait, la perte ou l'avarie a pu résulter d'un ou de plusieurs de ces risques particuliers, il y a présomption qu'elle en résulte. L'ayant droit peut toutefois faire la preuve que le dommage n'a pas eu l'un de ces risques pour cause totale ou partielle. Dans le cas visé à l'alinéa 2 ci-dessus, la présomption ne s'applique pas s'il y a manquant d'une importance anormale ou perte de colis.

5) Si le transport est effectué au moyen d'un véhicule aménagé en vue de soustraire les marchandises à l'influence de la chaleur, du froid, des variations de température ou de l'humidité de l'air, le transporteur ne peut invoquer le bénéfice de l'exonération prévu à l'alinéa 3 d) que s'il prouve que toutes les mesures lui incombant, compte tenu des circonstances, ont été prises en ce qui concerne le choix, l'entretien et l'emploi de ces aménagements et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.

6) Le transporteur ne peut invoquer le bénéfice de l'alinéa 2 f) du présent article, que s'il prouve que toutes les mesures lui incombant normalement, compte tenu des circonstances, ont été prises et qu'il s'est conformé aux instructions spéciales qui ont pu lui être données.

7) Si le transporteur ne répond pas de certains des facteurs qui ont causé le dommage, sa responsabilité reste engagée dans la proportion où les facteurs dont il répond ont contribué au dommage.

Limites de responsabilité

Art.18.- 1) L'indemnité pour avarie ou pour perte totale ou partielle de la marchandise est calculée d'après la valeur de la marchandise et ne peut excéder 5.000 FCFA par kilogramme de poids brut de la marchandise. Toutefois, lorsque l'expéditeur a fait à la lettre de voiture une déclaration de valeur ou une déclaration d'intérêt spécial à la livraison, l'indemnité pour le préjudice subi ne peut excéder le montant indiqué dans la déclaration.

2) Dans le cas d'une déclaration d'intérêt spécial à la livraison, il peut être réclamé, indépendamment de l'indemnité prévue à l'alinéa 1, et à concurrence du montant de l'intérêt spécial, une indemnité égale au dommage supplémentaire dont la preuve est apportée.

3) En cas de retard, indépendamment de l'indemnité prévue à l'alinéa 1 du présent article pour l'avarie ou la perte de la marchandise, si l'ayant droit prouve qu'un dommage supplémentaire a résulté du retard, le transporteur est tenu de payer pour ce préjudice une indemnité qui ne peut dépasser le prix du transport.

Calcul de l'indemnité

Art.19.- 1) La valeur de la marchandise est déterminée d'après le prix courant sur le marché des marchandises de même nature et qualité au lieu et au moment de la prise en charge. Pour le calcul de l'indemnité, la valeur de la marchandise comprend également le prix du transport, les droits de douane et les autres frais encourus à l'occasion du transport de la marchandise, en totalité en cas de perte totale, et au prorata en cas de perte partielle ou d'avarie.

2) En cas d'avarie, le transporteur paie le montant de la dépréciation calculé d'après la valeur de la marchandise. Toutefois, l'indemnité pour avarie ne peut dépasser :

- a) le montant qu'elle aurait atteint en cas de perte totale, si la totalité de l'expédition est dépréciée par l'avarie ;
- b) le montant qu'elle aurait atteint en cas de perte de la partie dépréciée, si une partie seulement de l'expédition est dépréciée par l'avarie.

3) L'ayant droit peut demander les intérêts de l'indemnité. Ces intérêts, calculés à raison de cinq pour cent l'an, courent du jour de la réclamation adressée par écrit au transporteur ou, s'il n'y a pas eu de réclamation, du jour de la demande en justice ou de la demande d'arbitrage.

4) En cas de transport inter-États, lorsque les éléments qui servent de base au calcul de l'indemnité ne sont pas exprimés en francs CFA, la conversion est faite d'après le cours du jour et du lieu de paiement de l'indemnité ou, le cas échéant, à la date du jugement ou de la sentence.

Responsabilité extra-contractuelle

Art.20.- 1) Les exonérations et limites de responsabilité prévues par le présent Acte uniforme sont applicables dans toute action contre le transporteur pour préjudice résultant de pertes ou dommages subis par la marchandise ou pour retard à la livraison, que l'action soit fondée sur la responsabilité contractuelle ou extra-contractuelle.

2) Lorsqu'une action pour perte, avarie ou retard est intentée contre une personne dont le transporteur répond aux termes de l'article 16 alinéa 4 ci-dessus, cette personne peut se prévaloir des exonérations et des limites de responsabilité prévues pour le transporteur dans le présent Acte uniforme.

Déchéance du droit à l'exonération et à la limitation de responsabilité

Art.21.- 1) Le transporteur n'est pas admis au régime de l'exonération de la limitation de responsabilité prévue au présent Acte uniforme, ni à celui de la prescription prévu à l'article 25 ci-après, s'il est prouvé que la perte, l'avarie ou le retard à la livraison résulte d'un acte ou d'une omission qu'il a commis, soit avec l'intention de provoquer cette perte, cette avarie ou ce retard, soit témérairement et en sachant que cette perte, cette avarie ou ce retard en résulterait probablement.

2) Nonobstant les dispositions de l'alinéa 2 de l'article 20 ci-dessus, un préposé ou un mandataire du transporteur ou une autre personne aux services desquels il recourt pour l'exécution du contrat de transport, n'est pas admis au bénéfice de l'exonération de responsabilité et de la limitation de l'indemnisation prévue dans le présent Acte uniforme, ni à celui de la prescription prévue à l'article 25, s'il est prouvé que la perte, l'avarie ou le retard à la livraison résulte d'un acte ou d'une omission qu'il a commis dans l'exercice de ses fonctions, soit avec l'intention de provoquer cette perte, cette avarie ou ce retard, soit témérairement et en sachant que cette perte, cette avarie ou ce retard en résulterait probablement.

Responsabilité en cas de transport superposé

Art.22.- Le présent Acte uniforme s'applique à l'ensemble du transport superposé. Cependant, lorsque sans faute du transporteur routier, une perte, une avarie ou un retard se produit pendant la partie non routière du transport, la responsabilité du transporteur routier est déterminée conformément aux règles impératives de la loi qui régissent cet autre mode de transport. En l'absence de telles règles, la responsabilité du transporteur routier demeure régie par le présent Acte uniforme.

Responsabilité en cas de transport successif

Art.23.- 1) Dans un transport successif, en acceptant la marchandise et la lettre de voiture, chaque transporteur devient partie au contrat.

2) Dans un tel transport, l'action en responsabilité pour perte, avarie ou retard ne peut être exercée que contre le premier transporteur, le transporteur qui exécutait la partie du transport au cours de laquelle s'est produit le fait à l'origine du dommage ou le dernier transporteur. L'action peut être dirigée contre plusieurs de ces transporteurs, leur responsabilité étant solidaire.

3) Lorsqu'il y a perte ou avarie apparente, le transporteur intermédiaire doit inscrire sur la lettre de voiture présentée par l'autre transporteur une réserve analogue à celle prévue à l'article 10 alinéa 2 ci-dessus. Il doit aviser immédiatement l'expéditeur et le transporteur émetteur de la lettre de voiture de la réserve qu'il inscrit.

4) Les dispositions des articles 4, 5 alinéa 2 et 10 alinéa 4 ci-dessus s'appliquent entre transporteurs successifs.

Chapitre 5 -Contentieux

Recours entre transporteurs

Art.24.- 1) Le transporteur qui a payé une indemnité en vertu du présent Acte uniforme a le droit d'exercer un recours en principal, intérêts et frais contre les transporteurs qui ont participé à l'exécution du contrat de transport, conformément aux dispositions suivantes :

- a) le transporteur par le fait duquel le dommage a été causé doit seul supporter l'indemnité, qu'il l'ait payée lui-même ou qu'elle ait été payée par un autre transporteur ;
- b) lorsque le dommage a été causé par le fait de deux ou plusieurs transporteurs, chacun d'eux doit payer un montant proportionnel à sa part de responsabilité ; si l'évaluation des parts de responsabilité est impossible, chacun d'eux est responsable proportionnellement à la part de rémunération du transport qui lui revient ;
- c) lorsqu'il ne peut être établi à quel transporteur la responsabilité est imputable, la charge de l'indemnité est répartie entre tous les transporteurs dans la proportion fixée à l'alinéa 1b) du présent article ;

2) Si l'un des transporteurs est insolvable, la part lui incombant et qu'il n'a pas payée est répartie entre tous les autres transporteurs proportionnellement à leur rémunération.

3) Les transporteurs sont libres de convenir entre eux de clauses dérogeant au présent article.

Délai de réclamation et de prescription

Art.25.- 1) Toute action découlant d'un transport régi par le présent Acte uniforme se prescrit par un an à compter de la date de livraison ou, à défaut de livraison, de la date à laquelle la marchandise aurait dû être livrée. Toutefois, dans le cas de dol ou de faute équivalente au dol, cette prescription est de trois ans.

2) L'action n'est recevable que si une réclamation écrite a été préalablement faite au premier transporteur ou au dernier transporteur au plus tard soixante (60) jours après la date de la livraison de la marchandise ou, à défaut de livraison, au plus tard six (6) mois après la prise en charge de la marchandise.

Arbitrage

Art.26.- Tout litige résultant d'un contrat de transport soumis au présent Acte uniforme peut être réglé par voie d'arbitrage.

Juridiction compétente en matière de transport inter-États

Art.27.- 1) Pour tout litige auquel donne lieu un transport inter-États soumis au présent Acte uniforme, si les parties n'ont pas attribué compétence à une juridiction arbitrale ou étatique déterminée, le

demandeur peut saisir les juridictions du pays sur le territoire duquel :

- a) le défendeur a sa résidence habituelle, son siège principal ou la succursale ou l'agence par l'intermédiaire de laquelle le contrat de transport a été conclu ;
- b) la prise en charge de la marchandise a eu lieu ou les juridictions du pays sur le territoire duquel la livraison est prévue.

2) Lorsqu'une action est pendante devant une juridiction compétente ou lorsqu'un jugement a été prononcé par une telle juridiction, il ne peut être intenté aucune nouvelle action pour la même cause entre les mêmes parties à moins que la décision de la première juridiction saisie ne soit pas susceptible d'être exécutée dans le pays où la nouvelle action est intentée.

3) Lorsqu'un jugement rendu par une juridiction d'un Etat partie est devenu exécutoire dans cet Etat-partie, il devient également exécutoire dans chacun des autres pays membres aussitôt après accomplissement des formalités prescrites à cet effet dans l'Etat intéressé. Ces formalités ne peuvent comporter aucune révision de l'affaire.

4) Les dispositions de l'alinéa 3 du présent article s'appliquent aux jugements contradictoires, aux jugements par défaut et aux transactions judiciaires. Elles ne s'appliquent ni aux jugements qui ne sont exécutoires que par provision, ni aux condamnations en dommages et intérêts qui seraient prononcées en sus des dépens contre un demandeur en raison du rejet total ou partiel de sa demande.

Chapitre 6 - Dispositions diverses

Art.28.- 1) Sous réserve des dispositions des articles 2 c), 15 alinéa 1, 24 alinéa 3 et 27 ci-dessus, est nulle et de nul effet toute stipulation qui, directement ou indirectement, dérogerait aux dispositions du présent Acte uniforme. La nullité de telles stipulations n'entraîne pas la nullité des autres dispositions du contrat.

2) En particulier, sont nulles toute clause par laquelle le transporteur se fait céder le bénéfice de l'assurance de la marchandise ou toute autre clause analogue, ainsi que toute clause déplaçant la charge de la preuve.

Conversion monétaire

Art.29.- Pour les États hors zone CFA, les montants mentionnés à l'article 18 ci-dessus sont convertis dans la monnaie nationale suivant le taux de change à la date du jugement ou de la sentence arbitrale ou à une date convenue par les parties.

Chapitre 7 - Dispositions transitoires et finales

Art.30.- Les contrats de transport de marchandises par route conclus avant l'entrée en vigueur du présent Acte Uniforme demeurent régis par les législations applicables au moment de leur formation.

Art.31.- Le présent acte uniforme sera publié au Journal officiel de l'OHADA ; il sera également publié au Journal officiel des Etats Parties ou par tous procédés en tenant lieu.

Il entrera en vigueur le 1er janvier 2004

TD/MT/CONF/17

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

United Nations Conference on a Convention on International Multimodal Transport

Held at Geneva from 12 to 30 November 1979 (first part of the session)
and from 8 to 24 May 1980 (resumed session)

Volume I

Final Act
and
Convention on International Multimodal Transport of Goods

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NOTE

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VOLUME II

Part One

Part Two

FINAL ACT OF THE UNITED NATIONS CONFERENCE ON A CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS

1. The General Assembly of the United Nations, by resolution 33/160 of 20 December 1978, decided that a conference of plenipotentiaries should be convened to consider and adopt a convention on international multimodal transport, and requested the Trade and Development Board of UNCTAD to consider the appropriate date for the Conference.

2. The United Nations Conference on a Convention on International Multimodal Transport was convened, under the auspices of UNCTAD, at the United Nations Office at Geneva. The first part of the Conference was held from 12 to 30 November 1979 and the resumed session from 8 to 24 May 1980.

3. Representatives of the following 77 members of UNCTAD participated in both parts of the Conference, namely representatives of: Algeria; Argentina; Australia; Austria; Belgium; Brazil; Bulgaria; Burundi; Byelorussian Soviet Socialist Republic; Canada; Chile; Colombia; Cuba; Czechoslovakia; Denmark; Ecuador; Egypt; Ethiopia; Finland; France; Gabon; German Democratic Republic; Germany, Federal Republic of; Ghana; Greece; Hungary; India; Indonesia; Iraq; Ireland; Israel; Italy; Jamaica; Japan; Kenya; Lebanon; Madagascar; Malawi; Malaysia; Malta; Mexico; Morocco; Netherlands; New Zealand; Nigeria; Norway; Panama; Peru; Philippines; Poland; Portugal; Republic of Korea; Romania; Saudi Arabia; Senegal; Somalia; Spain; Sri Lanka; Sudan; Sweden; Switzerland; Syrian Arab Republic; Thailand; Trinidad and Tobago; Tunisia; Turkey; Ukrainian Soviet Socialist Republic; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United Republic of Cameroon; United Republic of Tanzania; United States of America; Uruguay; Venezuela; Yugoslavia; Zaire.

4. Representatives of the following 10 members of UNCTAD participated only at the first part of the Conference, namely representatives of: Bangladesh; Bolivia; Central African Republic; Dominican Republic; Guinea; Ivory Coast; Jordan; Liberia; Luxembourg; Rwanda.

5. Representatives of the following members of UNCTAD participated only in the resumed session of the Conference, namely representatives of: Cyprus; El Salvador; Honduras; Libyan Arab Jamahiriya; Pakistan; Uganda; Yemen.

6. The Economic Commission for Africa and the Economic Commission for Europe were represented at the Conference.

7. The United Nations Industrial Development Organization was represented at the Conference.

8. Representatives of the following specialized agencies and observers for the following intergovernmental and non-governmental organizations participated in both parts of the Conference in accordance with rules 54, 55 and 56 of the rules of procedure:[1]

Specialized agencies: International Civil Aviation Organization; Inter-Governmental Maritime Consultative Organization. The International Labour Organisation participated only in the first part of the Conference.

Intergovernmental organizations: Central Office for International Railway Transport; Customs Co-operation Council; European Economic Community; International Institute for the Unification of Private Law; Organisation for Economic Co-operation and Development; Organization of African Unity; Organization of American States.

Non-governmental organizations: Baltic and International Maritime Conference; International Air Transport Association; International Chamber of Commerce; International Chamber of Shipping; International Container Bureau; International Federation of Freight Forwarders Associations; International Road Transport Union; International Shipowners' Association; International Union of Marine Insurance; Latin American Shipowners' Association.

9. The following intergovernmental organizations participated only at the resumed session of the Conference: Arab Federation of Shipping; Council of Arab Economic Unity; League of Arab States.

10. The following non-governmental organization was represented by an observer only at the resumed session of the Conference: International Union of Railways.

11. An observer from the South West African People's Organization participated at both parts of the Conference.

12. An observer from the Patriotic Front participated only at the first part of the Conference.

13. The Conference elected Mr. E. Selvig (Norway) as President.

14. The Conference, at its first part, elected as Vice-Presidents representatives of: Algeria (Mrs. C. Sellami-Meslem); Argentina (Mr. G. Martinez); Canada (Mr. D.A.D. Saarty); China (Mr. Liang Yufan); Czechoslovakia (Mr. J. Růžička); Federal Republic of Germany (Mr. P. Bethkenhagen); India (Mr. R. Pradhan); Iraq (Mr. D. Al-Hilali); Italy (Mr. P. Janni); Japan (Mr. M. Sawaki); Sri Lanka (Mr. W.D. Soysa); Sweden (Mrs. B. Blom); Union of Soviet Socialist Republics (Mr. D. Zotov); United Republic of Cameroon (Mr. A. Ndam); Venezuela (Mr. O. Villegas).

[1] TD/MT/CONF/9.

15. The Conference, at its resumed session, elected Mr. F. Suzuki (Japan) to replace Mr. M. Sawaki (Japan) and Mr. M. Šikić (Yugoslavia) to replace Mr. R. Pradhan (India), who were unable to attend the resumed session of the Conference.

16. The Conference elected Mr. P. Romano Moreira (Brazil) as Rapporteur.

17. The Conference established the following Committees:

General Committee

Chairman: The President of the Conference

Members: The President, Vice-Presidents and Rapporteur of the Conference, and the Chairmen of the First and of the Second Committee

First Committee

Chairman: Mr. B. Mbakileki (United Republic of Tanzania)

Vice-Chairman: Mr. S. Suchorzewski (Poland)

Second Committee

Chairman: Mr. D. Popov (Bulgaria)

Vice-Chairman: Mr. D. Al-Hilali (Iraq)

Drafting Committee

Chairman: Mr. R. Cleton (Netherlands)

Vice-Chairman: Mr. Zhu Zengjie (China)

Members: Mrs. A.M. Donato (Argentina); Mr. I. Starec (Brazil); Mr. B. Christov (Bulgaria); Mr. Zhu Zengjie (China); Mr. I. León Montesino (Cuba); Mr. M. Pohúnek (Czechoslovakia); Mr. J.P. Beraudo (France); Mr. R.K. Dixit (India); Mr. Z.K. Abbas (Iraq); Mr. R. Cleton (Netherlands); Mrs. K. Bruzelius (Norway); Mrs. M. Guzman (Spain); Mr. B.G. Nilsson (Sweden); Mr. A. Abdeljaouad (Tunisia); Mr. O. Sadikov (Union of Soviet Socialist Republics); Sir Brian MacKenna, Mr. R.M.L. Duffy, Mr. D.J.L. Watkins, Mr. R. Wollman (United Kingdom of Great Britain and Northern Irleland); Mr. M. Ayissi (United Republic of Cameroon); Mr. L.T. Kalunga (United Republic of Tanzania); Mr. P.B. Larsen (United States of America); Mr. V. Borčić, Mr. D. Pavic, Mr. A. Vlaškalin (Yugoslavia).

Credentials Committee

Chairman: Mr. J. Poswick (Belgium)

Members: Belgium, China, Ecuador, Kenya, Pakistan, Panama, Senegal, Union of Soviet Socialist Republics, and United States of America.

18. The Secretary-General of the United Nations was represented by Mr. G. Corea, Secretary-General of UNCTAD. Mr. A. Al-Jadir, Director of the Shipping Division of the secretariat of UNCTAD, served as Director-in-Charge of the Conference, and Mrs. C. Sramek, Assistant Secretary of the Trade and Development Board of UNCTAD, served as secretary of the Conference.

19. The Conference had before it, as a basis for its work, the draft convention on international multimodal transport prepared and approved by the Intergovernmental Preparatory Group on a Convention on International Multimodal Transport at its sixth session and the draft provisions on the final clauses prepared by the UNCTAD secretariat, contained in the report of the Intergovernmental Preparatory Group on its sixth session.[2] The Conference had also before it the comments by Governments on the draft convention on international multimodal transport, and on the draft provisions of the final clauses.[3] At its resumed session, the Conference also had before it the report of the Conference on the first part of its session,[4] including the text of the draft convention on international multimodal transport as at the adjournment of the Conference, on 30 November 1979.[5]

20. At the request of the International Civil Aviation Organization, the Customs Co-operation Council and the Central Office for International Railway Transport, the UNCTAD secretariat circulated to the Conference documents prepared by each of these intergovernmental organizations.[6]

21. The Conference also had before it a note prepared by the UNCTAD secretariat on resolutions and decisions concerning the preparation of a draft convention and the convening of the Conference.[7]

22. On the basis of its deliberations as recorded in the reports of the Conference on the first part of its session and its resumed session,[8] the Conference prepared the UNITED NATIONS CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS, the text of which is annexed to this Final Act.

23. That Convention was adopted by the Conference on 24 May 1980. The Convention will be open for signature at the United Nations Headquarters in New York from 1 September 1980 until 31 August 1981, after which date it will be open for accession, in accordance with its provisions.

24. The Convention is deposited with the Secretary-General of the United Nations.

25. Articles I to VI on customs matters relating to international multimodal transport of goods are annexed to the Convention.

[2] The draft convention was circulated in document TD/MT/CONF/1; the report in document TD/MT/CONF/1/Add.1 (reproduced in *Official Records of the Trade and Development Board, Annexes*, agenda item 3).

[3] TD/MT/CONF/4 and Add.1–3.

[4] TD/MT/CONF/12/Add.1 (reproduced in volume II of the present document).

[5] TD/MT/CONF/12 (*ibid.*).

[6] TD/MT/CONF/6, TD/MT/CONF/7 and TD/MT/CONF/8 respectively.

[7] TD/MT/CONF/5.

[8] TD/MT/CONF/16/Add.1 (reproduced in volume II of the present volume).

IN WITNESS WHEREOF the undersigned representatives have signed this Final Act on behalf of their respective States.*

* The States whose representatives signed the Final Act are: Algeria; Argentina; Australia; Austria; Belgium; Brazil; Bulgaria; Burundi; Byelorussian Soviet Socialist Republic; Canada; Chile; China; Colombia; Cuba; Czechoslovakia; Denmark; Ecuador; Egypt; El Salvador; Ethiopia; Finland; France; Gabon; German Democratic Republic; Germany, Federal Republic of; Ghana; Greece; Honduras; Hungary; India; Indonesia; Iraq; Ireland; Israel; Italy; Ivory Coast; Japan; Kenya; Lebanon; Libyan Arab Jamahiriya; Madagascar; Mexico; Morocco; Netherlands; New Zealand; Nigeria; Norway; Panama; Peru; Poland; Portugal; Romania; Senegal; Spain; Sri Lanka; Sweden; Switzerland; Syrian Arab Republic; Thailand; Trinidad and Tobago; Tunisia; Turkey; Uganda; Ukrainian Soviet Socialist Republic; Union of Soviet Socialist Republics; United Kingdom of Great Britain and Northern Ireland; United Republic of Cameroon; United Republic of Tanzania; United States of America; Venezuela; Yugoslavia.

DONE AT Geneva, this twenty-fourth day of May, one thousand, nine hundred and eighty, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

President of the Conference
E. SELVIG

Director-in-charge of the Conference
A. AL-JADIR

Secretary of the Conference
C. SRAMEK

ANNEX

UNITED NATIONS CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS

CONTENTS

UNITED NATIONS CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS

The States parties to this Convention,

Recognizing:

(*a*) That international multimodal transport is one means of facilitating the orderly expansion of world trade;

(*b*) The need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned;

(*c*) The desirability of ensuring the orderly development of international multimodal transport in the interest of all countries and the need to consider the special problems of transit countries;

(*d*) The desirability of determining certain rules relating to the carriage of goods by international multimodal transport contracts, including equitable provisions concerning the liability of multimodal transport operators;

(*e*) The need that this Convention should not affect the application of any international convention or national law relating to the regulation and control of transport operations;

(*f*) The right of each State to regulate and control at the national level multimodal transport operators and operations;

(*g*) The need to have regard to the special interest and problems of developing countries, for example, as regards introduction of new technologies, participation in multimodal services of their national carriers and operators, cost efficiency thereof and maximum use of local labour and insurance;

(*h*) The need to ensure a balance of interests between suppliers and users of multimodal transport services;

(*i*) The need to facilitate customs procedures with due consideration to the problems of transit countries;

Agreeing to the following basic principles:

(*a*) That a fair balance of interests between developed and developing countries should be established and an equitable distribution of activities between these groups of countries should be attained in international multimodal transport;

(*b*) That consultation should take place on terms and conditions of service, both before and after the introduction of any new technology in the multimodal transport of goods, between the multimodal transport operator, shippers, shippers' organizations and appropriate national authorities;

(*c*) The freedom for shippers to choose between multimodal and segmented transport services;

(*d*) That the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect;

Have decided to conclude a Convention for this purpose and have thereto agreed as follows:

PART I

General provisions

Article 1

DEFINITIONS

For the purposes of this Convention:

1. "International multimodal transport" means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up 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.

2. "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.

3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.

4. "Multimodal transport document" means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.

5. "Consignor" means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.

6. "Consignee" means the person entitled to take delivery of the goods.

7. "Goods" includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.

8. "International convention" means an international agreement concluded among States in written form and governed by international law.

9. "Mandatory national law" means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.

10. "Writing" means, *inter alia*, telegram or telex.

Article 2

SCOPE OF APPLICATION

The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

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

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

Article 3

MANDATORY APPLICATION

1. When a multimodal transport contract has been concluded which according to article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract.

2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.

Article 4

REGULATION AND CONTROL OF MULTIMODAL TRANSPORT

1. This Convention shall not affect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations.

2. This Convention shall not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, between multimodal transport operators, shippers, shippers' organizations and appropriate national authorities on terms and conditions of service; licensing of multimodal transport operators; participation in transport; and all other steps in the national economic and commercial interest.

3. The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.

PART II

Documentation

Article 5

ISSUE OF MULTIMODAL TRANSPORT DOCUMENT

1. When the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form.

2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.

3. The signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued.

4. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document. In such a case the multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such document shall for the purposes of the provisions of this Convention be deemed to be a multimodal transport document.

Article 6

NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT

1. Where a multimodal transport document is issued in negotiable form:

(*a*) It shall be made out to order or to bearer;

(*b*) If made out to order it shall be transferable by endorsement;

(*c*) If made out to bearer it shall be transferable without endorsement;

(*d*) If issued in a set of more than one original it shall indicate the number of originals in the set;

(*e*) If any copies are issued each copy shall be marked "non-negotiable copy".

2. Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary.

3. The multimodal transport operator shall be discharged from his obligation to deliver the goods if, where a negotiable multimodal transport document has been issued in a set of more than one original, he or a person acting on his behalf has in good faith delivered the goods against surrender of one of such originals.

Article 7

NON-NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT

1. Where a multimodal transport document is issued in non-negotiable form it shall indicate a named consignee.

2. The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.

Article 8

CONTENTS OF THE MULTIMODAL TRANSPORT DOCUMENT

1. The multimodal transport document shall contain the following particulars:

(*a*) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;

(*b*) The apparent condition of the goods;

(*c*) The name and principal place of business of the multimodal transport operator;

(*d*) The name of the consignor;

(*e*) The consignee, if named by the consignor;

(*f*) The place and date of taking in charge of the goods by the multimodal transport operator;

(*g*) The place of delivery of the goods;

(*h*) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;

(*i*) A statement indicating whether the multimodal transport document is negotiable or non-negotiable;

(*j*) The place and date of issue of the multimodal transport document;

(*k*) The signature of the multimodal transport operator or of a person having authority from him;

(*l*) The freight for each mode of transport, if expressly agreed between the parties, or the freight, including its currency, to the extent payable by the consignee or other indication that freight is payable by him.

(*m*) The intended journey route, modes of transport and places of transhipment, if known at the time of issuance of the multimodal transport document;

(*n*) The statement referred to in paragraph 3 of article 28;

(*o*) Any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.

2. The absence from the multimodal document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.

Article 9

RESERVATIONS IN THE MULTIMODAL TRANSPORT DOCUMENT

1. If the multimodal transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the multimodal transport operator or a person acting on his behalf knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the multimodal transport operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the multimodal transport operator or a person acting on his behalf fails to note on the multimodal transport document the apparent condition of the goods, he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.

Article 10

EVIDENTIARY EFFECT OF THE MULTIMODAL TRANSPORT DOCUMENT

Except for particulars in respect of which and to the extent to which a reservation permitted under article 9 has been entered:

(*a*) The multimodal transport document shall be *prima facie* evidence of the taking in charge by the multimodal transport operator of the goods as described therein; and

(*b*) Proof to the contrary by the multimodal transport operator shall not be admissible if the multimodal transport document is issued in negotiable form and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.

Article 11

LIABILITY FOR INTENTIONAL MISSTATEMENTS OR OMISSIONS

When the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraph 1 (*a*) or (*b*) of article 8 or under article 9, he shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expenses incurred by a third party, including a consignee, who acted in reliance on the description of the goods in the multimodal transport document issued.

Article 12

GUARANTEE BY THE CONSIGNOR

1. The consignor shall be deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document.

2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

Article 13

OTHER DOCUMENTS

The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. However, the issue of such other documents shall not affect the legal character of the multimodal transport document.

PART III

Liability of the multimodal transport operator

Article 14

PERIOD OF RESPONSIBILITY

1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.

2. For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods:

(*a*) From the time he has taken over the goods from:

(i) The consignor or a person acting on his behalf; or

(ii) An authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;

(*b*) Until the time he has delivered the goods:

(i) By handing over the goods to the consignee; or

(ii) In cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or

(iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents.

Article 15

THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR FOR HIS SERVANTS, AGENTS AND OTHER PERSONS

Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.

Article 16

BASIS OF LIABILITY

1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as

well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent multimodal transport operator, having regard to the circumstances of the case.

3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2 of this article, the claimant may treat the goods as lost.

Article 17

CONCURRENT CAUSES

Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any other person referred to in article 15 combines with another cause to produce loss, damage or delay in delivery, the multimodal transport operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.

Article 18

LIMITATION OF LIABILITY

1. When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

(*a*) Where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit.

(*b*) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.

5. The aggregate liability of the multimodal transport operator, under paragraphs 1 and 4 or paragraphs 3 and 4 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 or 3 of this article.

6. By agreement between the multimodal transport operator and the consignor, limits of liability exceeding those provided for in paragraphs 1, 3 and 4 of this article may be fixed in the multimodal transport document.

7. "Unit of account" means the unit of account mentioned in article 31.

Article 19

LOCALIZED 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 transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Article 20

NON-CONTRACTUAL LIABILITY

1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal transport operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

2. If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent of such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention.

3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport

operator and from a servant or agent or any other person of whose services he makes use for the performance of the multimodal transport contract shall not exceed the limits of liability provided for in this Convention.

Article 21

LOSS OF THE RIGHT TO LIMIT LIABILITY

1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

PART IV

Liability of the consignor

Article 22

GENERAL RULE

The consignor shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part.

Article 23

SPECIAL RULES ON DANGEROUS GOODS

1. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the consignor hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the multimodal transport operator does not otherwise have knowledge of their dangerous character:

(*a*) The consignor shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and

(*b*) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2 (*b*) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the multimodal transport operator is liable in accordance with the provisions of article 16.

PART V

Claims and actions

Article 24

NOTICE OF LOSS, DAMAGE OR DELAY

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties or their authorized representatives at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the multimodal transport operator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2 (*b*) (ii) or (iii) of article 14.

6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 (*b*) of article 14, whichever is later, the failure to give such notice is *prima facie*

evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants of agents.

7. If any of the notice periods provided for in paragraphs 2, 5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, or to the consignor, respectively.

Article 25

LIMITATION OF ACTIONS

1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.

2. The limitation period commences on the day after the day on which the multimodal transport operator has delivered the goods or part thereof or, where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 26

JURISDICTION

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(*a*) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(*b*) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(*c*) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(*d*) Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

2. No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.

4. (*a*) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;

(*b*) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.

Article 27

ARBITRATION

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(*a*) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(*b*) Any other place designated for that purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration

clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

PART VI

Supplementary provisions

Article 28

CONTRACTUAL STIPULATIONS

1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the multimodal transport operator or any similar clause shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.

3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 29

GENERAL AVERAGE

1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.

2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 30

OTHER CONVENTIONS

1. This Convention does not modify the rights or duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels of 25 August 1924; in the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating to the limitation of liability of owners of sea-going ships and inland navigation vessels.

2. The provisions of articles 26 and 27 of this Convention do not prevent the application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention. However, this paragraph does not affect the application of paragraph 3 of article 27 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(*a*) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or

(*b*) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.

Article 31

UNIT OF ACCOUNT OR MONETARY UNIT AND CONVERSION

1. The unit of account referred to in article 18 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in article 18 shall be converted into the national currency of a State according to the value of such currency on the date of the judgement or award or the

date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund shall be calculated in a manner determined by that State.

2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows: with regard to the limits provided for in paragraph 1 of article 18, to 13,750 monetary units per package or other shipping unit or 41.25 monetary units per kilogram of gross weight of the goods, and with regard to the limit provided for in paragraph 3 of article 18, to 124 monetary units.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The conversion of the amount referred to in paragraph 2 of this article into national currency shall be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion referred to in paragraph 3 of this article shall be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 18 as is expressed there in units of account.

5. Contracting States shall communicate to the depositary the manner of calculation pursuant to the last sentence of paragraph 1 of this article, or the result of the conversion pursuant to paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII

Customs matters

Article 32

CUSTOMS TRANSIT

1. Contracting States shall authorize the use of the procedure of customs transit for international multimodal transport.

2. Subject to provisions of national law or regulations and intergovernmental agreements, the customs transit of goods in international multimodal transport shall be in accordance with the rules and principles contained in articles I to VI of the annex to this Convention.

3. When introducing laws or regulations in respect of customs transit procedures relating to multimodal transport of goods, Contracting States should take into consideration articles I to VI of the annex to this Convention.

PART VIII

Final clauses

Article 33

DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 34

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. All States are entitled to become Parties to this Convention by:

(*a*) Signature not subject to ratification, acceptance or approval; or

(*b*) Signature subject to and followed by ratification, acceptance or approval; or

(*c*) Accession.

2. This Convention shall be open for signature as from 1 September 1980 until and including 31 August 1981 at the Headquarters of the United Nations in New York.

3. After 31 August 1981, this Convention shall be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the depositary.

5. Organizations for regional economic integration, constituted by sovereign States members of UNCTAD, and which have competence to negotiate, conclude and apply international agreements in specific fields covered by this Convention, shall be similarly entitled to become Parties to this Convention in accordance with the provisions of paragraphs 1 to 4 of this article, thereby assuming in relation to other Parties to this Convention the rights and duties under this Convention in the specific fields referred to above.

Article 35

RESERVATIONS

No reservation may be made to this Convention.

Article 36

ENTRY INTO FORCE

1. This Convention shall enter into force 12 months after the Governments of 30 States have either signed it not subject to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the depositary.

2. For each State which ratifies, accepts, approves or accedes to this Convention after the requirements for entry into force given in paragraph 1 of this article have been met, the Convention shall enter into force 12 months after the deposit by such State of the appropriate instrument.

Article 37

DATE OF APPLICATION

Each Contracting State shall apply the provisions of this Convention to multimodal transport contracts concluded on or after the date of entry into force of this Convention in respect of that State.

Article 38

RIGHTS AND OBLIGATIONS UNDER EXISTING CONVENTIONS

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

Article 39

REVISION AND AMENDMENTS

1. At the request of not less than one third of the Contracting States, the Secretary-General of the United Nations shall, after the entry into force of this Convention, convene a conference of the Contracting States for revising or amending it. The Secretary-General of the United Nations shall circulate to all Contracting States the texts of any proposals for amendments at least three months before the opening date of the conference.

2. Any decision by the revision conference, including amendments, shall be taken by a two thirds majority of the States present and voting. Amendments adopted by the conference shall be communicated by the depositary to all the contracting States for acceptance and to all the States signatories of the Convention for information.

3. Subject to paragraph 4 below, any amendment adopted by the conference shall enter into force only for those Contracting States which have accepted it, on the first day of the month following one year after its acceptance by two thirds of the Contracting States. For any State accepting an amendment after it has been accepted by two thirds of the Contracting States, the amendment shall enter into force on the first day of the month following one year after its acceptance by that State.

4. Any amendment adopted by the conference altering the amounts specified in article 18 and paragraph 2 of article 31 or substituting either or both the units defined in paragraphs 1 and 3 of article 31 by other units shall enter into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Contracting States which have accepted the altered amounts or the substituted units shall apply them in their relationship with all Contracting States.

5. Acceptance of amendments shall be effected by the deposit of a formal instrument to that effect with the depositary.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of any amendment adopted by the conference shall be deemed to apply to the Convention as amended.

Article 40

DENUNCIATION

1. Each Contracting State may denounce this Convention at any time after the expiration of a period of two years from the date on which this Convention has entered into force by means of a notification in writing addressed to the depositary.

2. Such denunciation shall take effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have affixed their signatures hereunder on the dates indicated.

DONE AT Geneva, this twenty-fourth day of May, one thousand nine hundred and eighty, in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, all texts being equally authentic.

ANNEX

Provisions on customs matters relating to international multimodal transport of goods

Article I

For the purposes of this Convention:

"Customs transit procedure" means the customs procedure under which goods are transported under customs control from one customs office to another.

"Customs office of destination" means any customs office at which a customs transit operation is terminated.

"Import/export duties and taxes" means customs duties and all other duties, taxes, fees or other charges which are collected on or in connection with the import/export of goods, but not including fees and charges which are limited in amount to the approximate cost of services rendered.

"Customs transit document" means a form containing the record of data entries and information required for the customs transit operation.

Article II

1. Subject to the provisions of the law, regulations and international conventions in force in their territories, Contracting States shall grant freedom of transit to goods in international multimodal transport.

2. Provided that the conditions laid down in the customs transit procedure used for the transit operation are fulfilled to the satisfaction of the customs authorities, goods in international multimodal transport:

(*a*) Shall not, as a general rule, be subject to customs examination during the journey except to the extent deemed necessary to ensure compliance with rules and regulations which the customs are responsible for enforcing. Flowing from this, the customs authorities shall normally restrict themselves to the control of customs seals and other security measures at points of entry and exit;

(*b*) Without prejudice to the application of law and regulations concerning public or national security, public morality or public health, shall not be subject to any customs formalities or requirements additional to those of the customs transit regime used for the transit operation.

Article III

In order to facilitate the transit of the goods, each Contracting State shall:

(*a*) If it is the country of shipment, as far as practicable, take all measures to ensure the completeness and accuracy of the information required for the subsequent transit operations;

(*b*) If it is the country of destination;

(i) Take all necessary measures to ensure that goods in customs transit shall be cleared, as a rule, at the customs office of destination of the goods;

(ii) Endeavour to carry out the clearance of goods at a place as near as is possible to the place of final destination of the goods, provided that national law and regulations do not require otherwise.

Article IV

1. Provided that the conditions laid down in the customs transit procedure are fulfilled to the satisfaction of the customs authorities, the goods in international multimodal transport shall not be subject to the payment of import/export duties and taxes or deposit in lieu thereof in transit countries.

2. The provisions of the preceding paragraph shall not preclude:

(*a*) The levy of fees and charges by virtue of national regulations on grounds of public security or public health;

(*b*) The levy of fees and charges, which are limited in amount to the approximate cost of services rendered, provided they are imposed under conditions of equality.

Article V

1. Where a financial guarantee for the customs transit operation is required, it shall be furnished to the satisfaction of the customs authorities of the transit country concerned in conformity with its national law and regulations and international conventions.

2. With a view to facilitating customs transit, the system of customs guarantee shall be simple, efficient, moderately priced and shall cover import/export duties and taxes chargeable and, in countries where they are covered by guarantees, any penalties due.

Article VI

1. Without prejudice to any other documents which may be required by virtue of an international convention or national law and regulations, customs authorities of transit countries shall accept the multimodal transport document as a descriptive part of the customs transit document.

2. With a view to facilitating customs transit, customs transit documents shall be aligned, as far as possible, with the layout reproduced below.

GOODS DECLARATION (CUSTOMS TRANSIT)

Consignor (name and address)			Office of departure	Date No.
Consigneé (name and postal address) Delivery address			Declarant (name and address) Country whence consigned	Country of destination
Place of loading	Pier, warehouse, etc.		Documents attached	Official use
Via	Mode and means of transport			
Office of destination				Seals, etc. affixed by ☐ Customs ☐ Declarant

B/L No	Transport-unit (type, indentification No.); Marks & numbers of packages or items	Number & kind of packages; Description of goods	Commodity No.	Gross weight, kg.
		Total number of packages	Total gross weight, kg.	

(National administrative requirements)	(Guarantee details)
	I, the undersigned, declare that the particulars given in this Declaration are true and correct and accept responsibility for fulfilment of the obligations incurred under this Customs transit operation in accordance with the conditions prescribed by the competent authorities.
	Place, date and signature of declarant

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UNCTAD/ICC Rules for Multimodal Transport Documents

UNCTAD/ICC Rules for Multimodal Transport Documents

1. Applicability

1.1. These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the "UNCTAD/ICC Rules for multimodal transport documents", irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not.

1.2. Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator.

2. Definitions

2.1. Multimodal transport contract (multimodal transport contract) means a single contract for the carriage of goods by at least two different modes of transport.

2.2. Multimodal transport operator (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.

2.3. Carrier means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not.

2.4. Consignor means the person who concludes the multimodal transport contract with the multimodal transport operator.

2.5. Consignee means the person entitled to receive the goods from the multimodal transport operator.

2.6. Multimodal transport document (MT document) means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be,

(a) issued in a negotiable form or,

(b) issued in a non-negotiable form indicating a named consignee.

2.7. Taken in charge means that the goods have been handed over to and accepted for carriage by the MTO.

2.8. Delivery means

(a) the handing over of the goods to the consignee, or

(b) the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery, or

(c) the handing over of the goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.

2.9. Special Drawing Right (SDR) means the unit of account as defined by the International Monetary Fund.

2.10. Goods means any property including live animals as well as containers, pallets or similar articles

of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

3. *Evidentiary effect of the information contained in the multimodal transport document*

The information in the *MT document* shall be *prima facie* evidence of the taking in charge by the MTO of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, has been made in the printed text or superimposed on the document. Proof to the contrary shall not be admissible when the *MT document* has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon.

4. *Responsibilities of the multimodal transport operator*

4.1. Period of responsibility

The responsibility of the MTO for the goods under these Rules covers the period from the time the MTO has taken the goods in his charge to the time of their delivery.

4.2. The liability of the MTO for his servants, agents and other persons

The multimodal transport operator shall be responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own.

4.3. Delivery of the goods to the consignee

The MTO undertakes to perform or to procure the performance of all acts necessary to ensure delivery of the goods:

(a) when the *MT document* has been issued in a negotiable form "to bearer", to the person surrendering one original of the document, or

(b) when the *MT document* has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed, or

(c) when the *MT document* has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transfered "to order" or in blank the provisions of (b) above apply, or

(d) when the *MT document* has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity, or

(e) when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.

5. *Liability of the multimodal transport operator*

5.1. Basis of Liability

Subject to the defences set forth in Rule 5.4 and Rule 6, the MTO shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Rule 4.1., unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in Rule 4 has caused or contributed to the loss, damage or delay in delivery. However, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in

timely delivery which has been accepted by the MTO.

5.2. Delay in delivery

Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case.

5.3. Conversion of delay into final loss

If the goods have not been delivered within ninety consecutive days following the date of delivery determined according to Rule 5.2., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

5.4. Defences for carriage by sea or inland waterways

Notwithstanding the provisions of Rule 5.1. the MTO shall not be responsible for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

- 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,
- fire, unless caused by the actual fault or privity of the carrier,

however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

5.5. Assessment of compensation

5.5.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the multimodal transport contract, they should have been so delivered.

5.5.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

6. Limitation of liability of the multimodal transport operator

6.1. Unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the *MT document*, the MTO shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

6.2. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the *MT document* as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

6.3. Notwithstanding the above-mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

6.4. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be deter-

mined by reference to the provisions of such convention or mandatory national law.

6.5. If the MTO is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport.

6.6. The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the goods.

7. Loss of the right of the multimodal transport operator to limit liability

The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

8. Liability of the consignor

8.1. The consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the goods were taken in charge by the MTO, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion in the *MT document*.

8.2. The consignor shall indemnify the MTO against any loss resulting from inaccuracies in or inadequacies of the particulars referred to above.

8.3. The consignor shall remain liable even if the *MT document* has been transferred by him.

8.4. The right of the MTO to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

9. Notice of loss of or damage to the goods

9.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the MTO when the goods are handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the MTO of the goods as described in the *MT document*.

9.2. Where the loss or damage is not apparent, the same *prima facie* effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were handed over the consignee.

10. Time-bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with Rule 5.3, failure to deliver the goods would give the consignee the right to treat the goods as lost.

11. Applicability of the rules to actions in tort

These Rules apply to all claims against the MTO relating to the performance of the multimodal transport contract, whether the claim be founded in contract or in tort.

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12. Applicability of the rules to the multimodal transport operator's servants, agents and other persons employed by him

These Rules apply whenever claims relating to the performance of the multimodal transport contract are made against any servant, agent or other person whose services the MTO has used in order to perform the multimodal transport contract, whether such claims are founded in contract or in tort, and the aggregate liability of the MTO of such servants, agents or other persons shall not exceed the limits in Rule 6.

13. Mandatory law

These Rules shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract.

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