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A proposal to regulate the international contract of logistics services door-to-door including a sea leg

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A PROPOSAL TO REGULATE THE INTERNATIONAL CONTRACT OF LOGISTICS SERVICES DOOR-TO-DOOR INCLUDING A SEA LEG

By

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Colombia

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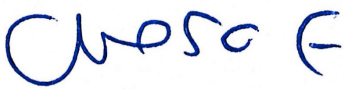
DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred to me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.



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First of all I would like to give a special acknowledgment to my parents for making this dream a reality. It was a Project we all envisioned years ago, since I started law school, and now we reach the goal! It was your constant support; daily encouragement and endless patience that help me achieve this important tittle in my professional career. I love you both will all my heart and you mean the world to me. Thank you!

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Abstract

Title of Dissertation: **A PROPOSAL TO REGULATE THE CONTRACT OF LOGISTICS SERVICES INVOLVING INTERNATIONAL OPERATIONS DOOR-TO-DOOR INCLUDING A SEA LEG**

Degree: **MSc**

The dissertation is a study of the role of intermediaries in the logistics services and the involvement of the freight forwarders in the transportation field. Due to the fact that there is no regulation in Colombia on the contract entered into with a logistics operator or a freight forwarder as an agent, it is necessary to fulfill the legal void by using international principles on the subject matter and clarify the scope of the Terms of the Contract, the regime of liability and the relation between logistics services and the contract of carriage of goods by sea and land.

A brief look is taken at different regulations around the world on freight forwarders. Various legal regimes have the same problem we have in Colombia; there is no international common regulation on the contract of the intermediaries providing logistics services door-to-door. The lack of uniformity in the standard terms established by organizations such as The International Federation of Forwarding Agents and the British International Freight Association constitute a problem for the parties involved in an international transaction for logistics services made by a freight forwarder.

The main issue of the dissertation is regarding the liability of the intermediaries. A freight forwarder can act as a broker, an agent, a carrier and a logistics operator. Each of these services has particularities that differentiate from one another. The regime of liability varies is the freight forwarder is an agent or if he also undertakes the carriage of the goods from one place to another.

The regime of liability of a carrier in any mode of transportation is a special regime only applicable for the contract of carriage of goods or passengers. The regime also varies if the carrier undertakes the carriage of goods by land or by sea. If the logistics operator undertakes the obligation with a client to provide services door-to-door in an international

scenario, the question is, whether the logistics operator should be liable as a carrier when the goods suffer loss or damage during the operation, when the operator himself did not perform the transportation of the goods.

Moreover, because of the multiple ancillary services offered by a logistics operator or a freight forwarder, what should be the regime of liability when the contract is breached? The international factors of these types of contracts raise questions about jurisdiction and applicable law to the agreement whenever the parties have a dispute.

The concluding chapters examine the possibility of proposing a legal framework for the contract of logistics services on an international scale. The services provided have to include inland transportation and a sea leg during the operation for it to be applicable. For this purpose, the United Nations Convention on multimodal transport, 1980 was a guideline and a starting point. Even though the Convention is not yet in force, it served as a valuable source of information. A number of recommendations are made concerning the need for further investigation in the subject.

KEYWORDS: Freight Forwarders, Agent, Broker, Multimodal Transport Operator, Maritime Agent, Logistics Services, Liability, Contract of Carriage of goods by sea, Contract of carriage of goods by land, Terms of Contract.

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Comm. Co.	Commercial Code
Ibid.	Citation as above, same page
Op. Cit.	Author, same book cited in the previous page, different page number

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List of abbreviations

FOB	Free on board
CIF	Cost, Insurance and Freight
B/L	Bill of lading
MTO	Multimodal Transport Operator
FIATA	International Federation of Forwarding Agents
BIFA	British International Freight Association
FITAC	Colombian Federation of Logistics Agents for International Trade
U.N.	United Nations
P.J.	Presiding Judge
Col.	Colombia
Cas. Civ.	Sala de Casacion Civil

Introduction

Freight forwarders are a key element of the shipping industry. The services they provide help the constant flow of the market and enhance the right equilibrium between shippers and carriers.

With the growth of containerization, consolidating of cargo has turned into a common practice in the maritime industry. For shippers and carriers, the help of the intermediaries has become a necessity. They have the knowledge of the market, making possible the carriage of small quantities of goods at a low rate. For the shippers, the advantage is the power the intermediaries have to bargain freight with the carriers. For the carriers, the benefit is to negotiate with one person the condition of the voyage plus the cargo. It is a win- win situation for everyone.

Therefore, traditionally the services provided by the intermediaries were limited and linked to the need of transporting goods from one port to another in an international transaction, or from place A to place B, involving different modes of transport, e.g., from a warehouse to a port and then to another country by sea. The main duty of the intermediaries was to coordinate the carriage of goods.

Hence, the shipper entered into a contract with the intermediary, delivered the goods to him, provided the necessary information about the nature of the cargo and expected the intermediary to arrange carriage of the goods with the best carrier. The intermediary would enter into an agreement with the carrier on behalf of the shipper and ensure the cargo was properly placed on board a vessel. If the parties agreed on such, the obligation of the intermediary could extend until the arrival of the goods to the port of destination was accomplished successfully.

The intermediaries may act in different capacities, i.e. freight forwarder, forwarding agent, broker, and so forth. However, the services provided by each one of them have slight differences that will impact the scope of the contract entered into with the client. For now, they will be referred to indistinctively. As for the client, depending on the agreement, will be differentiated: if this party is the shipper and the owner of the cargo; if the shipper is acting on behalf of the owner of the goods; if a buyer or a seller is under a commercial contract; or if a *strategic partner* is acting within a logistics scheme.

In this context, the intermediaries are professionals on the transportation market and offer services to carry goods by land, by sea and, only on some occasions (due to the high price of this particular service), by air.

The question behind the theme proposed in this dissertation came from several cases I had the opportunity to study while I worked in a law firm a few years ago. The main issue regarding the liability of the freight forwarders in Colombia was the lack of domestic normativity on the subject matter. Therefore, the purpose of this proposal is to study the true nature of the services provided by freight forwarders, the legal scheme of the contract entered into with the client and the regime of liability available for the party who suffer loss or damage to the goods or delay on the delivery, while the performance of the agreement.

It is imperative to clarify that this dissertation will focus on the carriage of goods by sea in an international framework that may include other modes of transport. This means, all references to the carriage of passengers by any mode of transportation will be excluded.

Due to the fact that one of the aims of this dissertation is to propose a regime of liability for logistics operators who offer services of international carriage of goods with a sea leg, I used international instruments as guidance. I study the provisions of The Hague Rules, The Hague –Visby Rules, The Hamburg Rules and the United Nations

Conference on a Convention on International Multimodal Transport of Goods (1980) even though this instrument has not yet entered into force. I also took into account the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also known as the Rotterdam Rules.

The provisions inserted in the Rotterdam Rules were a valuable source of information because they regulate many of the issues presented by the author. However, Colombia has not ratified the instrument and it is not going to ratified in the near future.[1] That is why the method chosen was limited to make all comparisons with The Hague, The Hague Visby Rules and Hamburg Rules.

The reference towards the U.N Convention on International Multimodal Transport of Goods is based on the fact that Colombia has ratified the Decision 331/1993 and Decision 393/1996 of the Andean Community of Nations that regulates the Multimodal Transport of Goods between Peru, Ecuador, Bolivia and Colombia. These instruments follow the provisions stated in the U.N. Convention on International Multimodal Transport of Goods. That is the reason why this Convention was part of the study as well.

With the elements extracted from the conventions mentioned above, I made a comparison with Colombian Law in order to determine if it is possible to propose a legal frame work for the contract of logistics operator, which I now believe a possible task to be pursued and encourage.

[1] The statement is a personal remark of the author based on the fact that one of Colombia main partners in international trade is The United States of America, and it is commonly known within the maritime industry the refusal of the mentioned country to sign the Rotterdam Rules, at least in the near future.

CHAPTER ONE. GENERAL SCOPE. RELATED CONTRACTS. REGIME OF LIABILITY OF THE INLAND CARRIER AND SEA CARRIER.

1.1 General scope

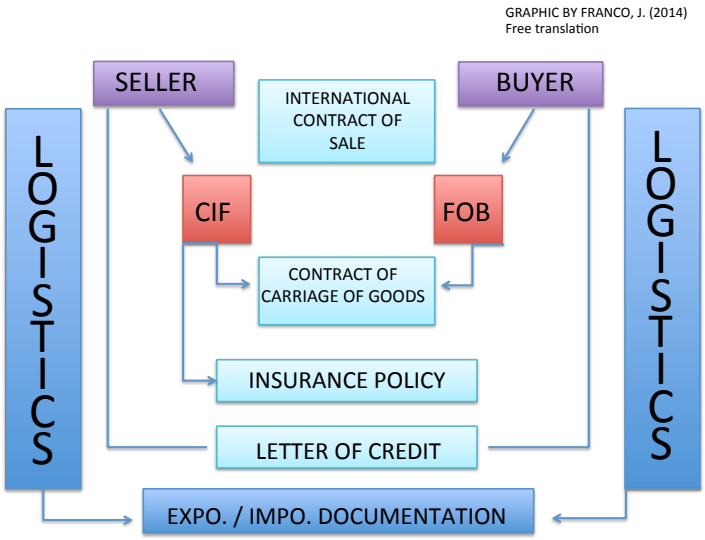
The complexity of the shipping industry demands the participation of multiple parties for each voyage. As international trade grows, the transactions turn more complicated and the proper information is the wheel that keeps the machinery working. When a seller from state A enters into an international contract of sale with a buyer from state B, adequate information is as imperative as the agreement itself.

Freight forwarders have the knowledge required to make an international transaction plausible. The familiarity they have with the shipping industry allows them to negotiate freight with the carrier, select the proper vessel for the cargo, supervise the operation and give confidence to the parties involved in the international contract of sale entered into overseas.

However, it is important to highlight that during an international transaction, as described above, many legal relationships arise between the different parties involved. Freight forwarders do not have a direct contractual relationship with most of the parties involved. Generally they render the services to the shipper that can be the seller, as well, but not necessarily so.

To clarify the multiple relations in an international transaction, the following chart is presented.

Chart 1 Various legal relationships[2]



Graphic by Franco, J. (2014). Free translation

Therefore, a seller enters into an international commercial contract of sale of goods with a buyer. Generally they use Incoterms[3] to allocate the risks and obligations each party will assume. It is common to use free on board (FOB) or cost, insurance and freight (CIF) in a contract that involves a carriage of goods by sea. Depending on the type of Incoterm used, the seller or the buyer will enter into different agreements, such as an insurance policy or an arrangement of transport. They will probably ask for a letter of credit from a bank in order to give security to the transaction. And finally, they will decide about the documentation process for the whole transaction.

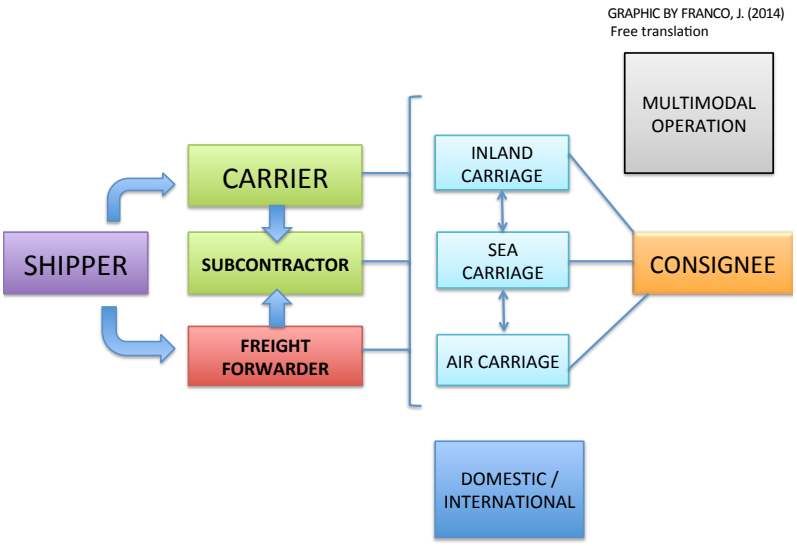
[2] Franco Zarate, J. A. (2014). *Aspectos legales de la logística comercial y los contratos de servicios logísticos*. Bogota, Colombia: Universidad Externado de Colombia P. 57

[3] Any mention to Incoterms will be in reference to the 2010 version.

Logistics services are on both sides because they are able to handle the whole transaction on behalf of the parties, as it shall be presented later on.

In the present dissertation the focus will be on the legal relationship between the intermediaries as logistics operators, the shippers and the carriers. For this purpose, it is necessary to look deeper into the contract of carriage of goods. The next chart is a magnified view of that specific square.

Chart 2 Contract of carriage of goods[4]



Graphic by Franco, J. (2014). Free translation

Traditionally it is understood that two contractual parties compose the contract of carriage of goods; this is the shipper and the carrier. On this chart it can be observed that other parties can be involved as well. On the one hand, the shipper can be the owner of the cargo or can act on behalf of the owner; and the carrier may undertake to carry the goods either himself or by another carrier (performing carrier). On the other hand, the consignee, a subcontractor and a freight forwarder.

[4] Franco, J. (2014). Op. Cit. P. 136

Under Colombian commercial law the consignee is the person charged to receive the cargo sent by the shipper. He will only be part of the agreement as a contractual party if he accepts the goods in the port or place of destination from the carrier. It is important to highlight that "acceptance" in this context is a legal act; this means the consignee has to accept delivery of the goods presenting the adequate transport document and without reservations.

The subcontractor can be an inland transport company who receives the goods in a factory or a warehouse and delivers them to a port. The freight forwarder is the person that enters into an agreement with the shipper to arrange the transport of the goods by one mode of transportation or various, depending on the contract and the merchandise. This scheme can be modified depending on the contract.

Different authors have proposed various definitions of freight forwarders. For example, Simon Baughen state that a freight forwarder is

> A party acting as agent for shippers for the purpose of arranging carriage of goods for them. Sometimes, this party will contract with a shipper to carry the goods, as principal and not merely to arrange carriage.[5]

For D.J Hill, freight forwarders are

> Traditionally, freight forwarders are professional intermediaries between consignors or consignee and the carrier. The name "freight forwarder" generally refers to any person which holds itself out to the general public to provide and arrange transportation of property, for compensation, and which may assemble and consolidate shipments of such property, and performs or provides for the performance of break-bulk and distributing operation with respect to such

[5] Baughen, S. (4th Ed). (2009). *Shipping Law*. London: Routledge. P.XXII (Glosary)

> consolidated shipments and assumes responsibility for the transportation of such property from point of receipt to point of destination and utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers, by sea, land or air, or any combination thereof.[6]

Finally, Peter Brody gives the following meaning in the Dictionary of Shipping Terms:

> A person or a company who arranges the carriage of goods and the associated formalities on behalf of a shipper. The duties of freight forwarders include booking space on a ship, providing all the necessary documentation and arranging customs clearance. Also referred to as a forwarder or forwarding agent.[7]

From the definitions mentioned above, it is clear that the freight forwarder is a person or a company who undertakes the coordination of the carriage of goods.

> As described in Jones v General Express (1920) 4 Ll.L.Rep.127, forwarders are willing to forward goods for you … to the uttermost ends of the earth. They do not undertake to carry for you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.[8]

The difficulty begins when the role of the freight forwarder exceeds the traditional services they are supposed to provide in order to comply with the main objective of the contract, in other words, to arrange the transport of the goods.

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[6] Hill, D.J. *Freight Forwarders*. London: Stevens & Sons, (1972), P. 16 (Cited by Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002). *Shipping and Logistics Law: Principles and Practice in Hong Kong*. *Hong Kong*: Hong Kong University Press. P 456)

[7] Brody, P. (5th Ed.).(2007) *Dictionary of shipping terms*. London: Informa. P. 113

[8] Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002). Op. Cit. P. 456

The issue became more visible with the door-to-door services. In fact, this situation leads for intermediaries to expand their business and offer ancillary services such as handling of shipping documents, arranging for storage, warehousing, local transportation, insurance, customs, packing and unpacking, among others.[9]

As can be observed, the needs of the market have transformed the traditional role of the freight forwarders into another figure. The original functions are no longer enough to stay competitive within the industry. Clients nowadays are demanding not a single service but a package of different services to make the international transactions easier and lower in cost.

The phenomenon described above is the reason why the intermediaries are turning into logistics operators. It is a natural development of an industry as dynamic as shipping. Generally the impact on this mutation of roles is positive and it does help the transactions worldwide. As long as there is a clear contract governing the duties and obligations of the parties, there should be no problem on the performance of the agreement. The issue arises when the distinction between freight forwarder/ logistic operator and carrier is blurred.

> In fact, many disputes between forwarders and their customers are concerned with the status of the forwarder in issue: whether he is an agent or a carrier. In other words, the point in dispute is whether he as a principal, formed a carriage of goods contract with the customer. This is particularly important in the context of international carriage of goods. Several international conventions regulate the rights and obligations of sea and air carriers. [10]

[9] Ibid. p. 465

[10] Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002), Op. Cit. p. 456

As an example, in the traditional understanding of a freight forwarder the customer enters into a contract with the intermediary for the coordination of the carriage of goods from port A in State Z to port B in State Y. The freight forwarder receives the goods from the customer in the loading port A and arranges the transport with the carrier C on board the vessel D. The first thing the freight forwarder and the carrier would discuss is the freight to pay for the transport.

After that is settled, the vessel has to be proper for the transportation of the specific goods. The document of transport would be issued by the carrier with the information delivered by the freight forwarder. Then the freight forwarder communicates to the customer the detail of the shipment and collects a percentage of the total freight for his services. A professional freight forwarder will follow the voyage until the merchandise is delivered safely in the port of destination.

In recent days, the equation has become more complex. Client E enters into a contract for logistics services with Logistics Company F on a door-to-door basis. The contract only specifies that the goods are supposed to be picked-up in the factory of client E in State G and delivered in the factory of client P located in State H. The time and the nature of the goods are also stated in the contract. F subcontracts inland transport to pick-up the goods in the factory of E, then stores the goods in the loading port while he arranges with the sea carrier: the freight, the vessel, the document of transport and the voyage.

The goods arrive to the port of discharge and are loaded on a truck to be delivered in the factory of P in State H. All documents are cleared and customs, as well. The merchandise arrives to the factory and the receiver notices the goods suffered substantial damage during the transport. The question raised in this scenario is who is liable for damage of the goods?

The first thing to do is to review the Terms of the Contract. If the contract is not clear or incomplete, the question would be if the logistic operator acted as a carrier or not. For this purpose the documents of transport can clarify the real identity of F. However, F had the goods in storage, as well; what if the damage occurred during this period?

Therefore, some of the dangers that emerge from an ambiguous agreement are:

> For the shippers: in the event of a dispute, they do not always know if they should sue the transport operators or the intermediaries, nor which is the legal framework governing the liability of the intermediaries;
>
> For the Intermediaries: if the principal and the intermediary are settled in two different countries, then which law is applicable;
>
> For the transport operators: they could be directly liable for damage without being aware of it, and who should they file a legal action against for payment? [11]

Many inquires can be made from these cases and, in the following lines, the author will try to address the issue step by step.

For the moment, here are some preliminary responses:

Hong Kong authors Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y., addressed the issue by stating:

[11] Bon-Garcin, I. (2014). Transport and logistics chain intermediaries. *International Road Transport Unit (IRU)*. FIATA World Congress. Istanbul. P. 15.
http://fiata.com/fileadmin/user_upload/documents/recent_views/ABLM/FIATA_World_Congress_2014_-_Transport_and_Logistics_Chain_Intermediaries__Isabelle_Bon-Garcin.pdf

> Often, a forwarder acts as an agent of his customer for the arrangement of the carriage. Usually, there is a contract between the forwarder and his customer. The rights and obligations of the parties are basically determined by the terms of the contract. If the forwarder performs the carriage himself, he has all the rights and liabilities of a carrier. If it is an international carriage, he is also subject to the international convention governing the particular mode of transport issue. In any case, the forwarder at fault is liable in the law of negligence to parties who have no contract with him further, if the forwarder is in possession of the goods, he is liable as a bailee if the goods are damaged or lost.[12]

By parity of reasoning, Vincent S.W. Cheng from Taiwan explains that the freight forwarders may be deemed as carriers and responsible for cargo claims as carriers if the freight/ price for the whole voyage of transportation of goods has been negotiated and agreed upon by and between the freight forwarder and the assigner/shipper; or the bill of lading or waybill for the shipment has been issued by the freight forwarders.[13]

The legal matter exposed is only relevant if the carriage of goods has an international component. If the goods suffer damage or losses during inland transportation, domestic regulation will govern the dispute regardless of the type of intermediary.

In Colombia, the situation is more complicated. On the one hand, Colombia is under the continental law system so there is a Constitution and different codes that regulate specific matters, e.g. civil code and commercial code. On the other hand, the jurisprudence has been gaining more importance through the years and even though the decisions do not yet possess the force of a precedent like in the common law

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[12] Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002), Op. Cit. p. 453

[13] Cheng, V. (n.d.) The legal matters relating to the freight forwarder´s liability for the cargo claims in Taiwan. *Pan Asia International Law Offices*. P. 2. Published by FIATA web page: http://fiata.com/fileadmin/user_upload/documents/recent_views/ABLM/FIATA_World_Congress_2015_-_The_Legal_Matters_relating_to_the_Freight_Forwarders__Liability_by_Vincent_S.W._Cheng__Pan_Asia_International_Law_Offices.pdf

system, the Supreme Court of Justice decisions are highly respected and followed by the lower judges and lawyers.

It is important to mention that Colombia has not ratified or acceded to any convention pertaining to private maritime law. Nevertheless, the Constitution mandates to respect the international instruments as long as they do not contradict domestic laws. The Commercial Code also has an Article that allows the application of international conventions or treaties to the particular case as one of the sources of law if no other source is feasible. In addition, the freedom of contract shall be respected in all cases and the clauses governing the contract are binding law to the parties involved according the ancient principle *Pacta Sunt Servanta*.[14] (Emphasis added)

Due to the purpose of this dissertation, it is important to understand the basic principles of contract law in order to elaborate a possible solution regarding the legal nature of the contract of logistics services offered by freight forwarders.

In this sense, Colombia recognizes two types of agreements: those, which are strictly regulated within the national law and those, which are not.

1.2. Typical contracts

Typical contracts are agreements entered into that have all the elements stipulated in a specific law. In other words, the essential, natural and accidental elements of a contract are described by the legislator in a descriptive way.

By essential elements is understood those elements required in the agreement to be valid in that particular form. This means that without these characteristics the agreement would be understood as something else or simply be void. For example, in

[14] Art. 7, 9 Comm. Cod (Free translation)

a seller-buyer contract the consensual agreement on the price and the object of sale is an essential element required in the civil or commercial law, depending on the nature of the transaction. If the price or the object of sale is not described in the agreement, then it may be another type of contract or it will not be valid and binding for that matter.

The natural elements are those, which are within the agreement but can be excluded by the parties without affecting the essence of that particular contract. And the accidental elements are those agreed to by the parties in additional clauses to the contract. These clauses are valid as long as they are not against a domestic rule, customs or public order.

1.3 Non-typical contracts

On the contrary, the non-typical contracts are agreements not regulated or described in a particular provision of law. As mentioned before, the freedom of contract allows the parties to agree on their own terms as long as they do not violate a domestic law, customs or public order.

Within the scope of non-typical contracts, parties can take elements from various typical contracts and create a new agreement. They can also take elements from international instruments or use an international standard form to rule their duties and obligations. What is important in this type of contract is the real intention of the parties to enter into a particular valid contract that will govern their legal relationship.

Various issues can emerge from non-typical contracts, especially if the agreement is ambiguous or vague. In those cases, the judge will determine the real intention of the parties and rule according to the relevant circumstances of the case. Another problem can be the *litis forum,* when the parties use international instruments, as it shall be presented in chapter three. (Emphasis added)

The carriage of goods by any mode of transport in Colombia is a typical contract. The Commercial Code regulates all the essential elements of the agreement. It defines the legal relationship between the parties, their duties and obligations and gives an overall scope of possible circumstances in which the affected contractor can pursue liability.

1.4 Main related contracts

1.4.1 Contract of carriage of goods – General provisions

To understand the complexity of the legal regime of liability for the carriers in Colombia, it will be explain the general provisions regarding the carriage of goods by land because they set the main characteristics of the contract, then it will be explain the carriage of goods by sea and the regime of liability applicable to these carriers.

1.4.1.1 Carriage of goods by land

The Commercial Code in Colombia[15] regulates the general conditions of the carriage of goods by land from Article 981 until Article 999. Then Chapter II and Chapter III set the rules for the carriage of passengers and goods.

Article 981 of the Com. Co. defines the contract as follows:

> A contract in which a carrier, against payment of freight, undertakes to carry on a certain route and in the agreed time, goods from one place to another and deliver them to the consignee. The agreement is consensual and may be proved using the legal mechanisms for the effect.[16]

[15] Decret 410 of 1971 (Commercial Code)

[16] Art. 981 Comm. Co. (Free translation)

1.4.1.1.1 Parties of the contract

In Article 1008 the parties of the contract are defined as the carrier and the cargo owner.

- ***Carrier***

The carrier is defined as the person obliged to receive the goods, undertake the carriage and deliver them to the consignee.[17]

To be a carrier for inland transportation the person or company has to be resident and authorized by the Ministry of Transport; the Maritime Authority in carriage of goods by sea; and the Aviation Authority if transport is by air. Administrative sanctions are imposed if an unauthorized person or company provides the service.[18] However, there is a loophole regarding the effects of the contract of carriage by land and its validity as a binding agreement when the carrier has not been authorized by the Ministry of Transport to execute the transport of goods.

In recent years, many companies started to offer "*logistics services door-to-door*" which included inland transportation of cargo but were not recognized as a legal carrier by the Ministry of Transport. They are identified by the transport sector as informal carriers and the Ministry of Transport is making all efforts to eliminate this illegal practice by enforcing the sanctions established in the Law 336 of 1996 and special Decrees on the matter.

[17] Art. 1008 Comm. Co. (Free translation)

[18] Law No. 336 de 1996 (National Statute of Transport)

The reason for this practice was based on the difficulty to get the authorization from the Ministry, the long time it took, the total cost for the documents and the many taxes they had to pay to maintain the permission.

Hence, under the name of "*logistics operator*" an enterprise offers a package of services, including the carriage of goods. Nonetheless, if the cargo suffered damage, loss or delay during the transport, the company cannot be held liable as a carrier because they are not legally recognized as one, so the regime of liability applicable in Court is under the general provisions, which are less severe than the regime of liability established for the carrier. This situation opened the door to a lot of trouble between the legal carriers and the informal ones.

Regarding the carriage of goods by sea or by air, this scenario is probable unlikely; generally the requirements to offer these types of services are strictly observed by the Maritime or Aviation Authority. However, the question raised in this matter is relevant because in many cases the freight forwarder or logistics operator provide services as a carrier by land as part of a multimodal contract with the client, without having been authorized by the national Authority to do so or subcontracts the carriage by land with informal carriers.

The issue is significant when the goods suffer loss or damage during an international multimodal transport and it is not clear in which stage of the transport the loss or damage occurred. It is important to highlight that the question is raised only regarding the liability of a freight forwarder, not a multimodal operator. The author will explain in more detail this issue in chapter two.

- ***Cargo owner***

Any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a carrier. It can be a person or a company. It has the obligation to deliver the goods in the condition, place and time agreed upon in the contract.[19]

- ***Consignee or receiver***

The consignee will only be part of the contract if he accepts the terms and conditions of the agreement by receiving the goods from the carrier in the place of delivery or by holding a document of transport that entitles him to receive the cargo in the conditions described in the document. Regardless of the distinction made, a person can be at the same time a cargo owner and a consignee.[20]

In the last paragraph of Article 1008 of the Comm. Co., it is mentioned that the carriage of goods by sea under a B/L will be regulated under special provisions. This means that by exception, if the special rules for this contract were insufficient to determine a specific situation, the general provisions would fill the legal void and could be used by a judge if they applicably suit that particular case.

[19] Art. 1008 Comm. Co. (Free translation)

[20] Art. 1008 Comm. Co. (Free translation)

1.4.1.1.2 Main obligations of the parties

- ***Carrier***

From the definitions described above it is clear that the core of the contract is the agreement to carry goods from place A to place B. This is the main obligation of the carrier. He undertakes to receive the goods, carry them to the final destination and deliver them to the consignee in the same condition the goods were delivered to him by the cargo owner or the person authorized to act on his behalf.[21]

- ***Cargo owner***

On the other hand, the cargo owner has the duty to pay the freight, deliver the goods to the carrier and disclose all the relevant information about the goods, such as the nature of the merchandise, special measures to be taken, if needed, weight, volume, so on and so forth. It also has to pack the goods, unless the parties have agreed on something else.

Article 1010 Comm. Co. highlights the duty of the cargo owner or the person who acts on his behalf to disclose the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the transport document. False information regarding this matter makes the cargo owner or the person acting on his behalf liable for the loss, damage or delays the carrier suffers due to the inaccuracy of the characteristics of the goods. This is a very important article because it describes the disclosure of relevant and relievable information as a major obligation of the cargo owner towards the carrier.

[21] Art. 982 Comm. Co. (Free translation)

As shall be explained further in this dissertation, this article has a clear resemblance with the Article 3 of The Hague and The Hague-Visby Rules regarding the obligation of information of the cargo owner and the correlative right of the carrier to insert reservation in the document of transport when he suspects the information is not accurate or may be false and he has had no reasonable means of checking. This provision allows the carrier to qualify the description of the goods with clauses such as *said to weight*. (Emphasis added)

The controversy of having an unclear document of transport has many repercussions for the parties involved in the contract. At this time I will only highlight the issue arising from descriptions made by the carrier on the document of transport with the phrase *said to* when, the information of the cargo is delivered by a logistics operator. The question is if the inaccuracy of the information delivered by this operator to multiple carriers under the same contract makes the cargo owner liable for the damage as instructed in article 1010 of the Comm. Code; or, should the logistics operator be responsible for his actions during the performance of the contract? (Emphasis added)

Furthermore, when the descriptions of the goods differ in the document of transport issued by an inland carrier from the ones inserted in a B/L by a sea carrier, which document would prevail in Court?

For example, Logistics Operator A received the goods from the Client B. The agreement between the operator and the client establishes that the goods are going to be packed, handled and delivered by the operator. He then subcontracts with an inland carrier to transport the goods from the operators warehouse to the port of loading. In the document of transport the carrier inserts the description of the goods as said to weight X. When the cargo is delivered in the port, the operator arranges the sea carriage of the goods to State C. The sea carrier is not entirely convinced of the weight of the cargo and cannot demand an inspection of the goods for any given reason. The

B/L is issued with a reservation as to the weight of the cargo different from the one inserted in the inland document.

The goods are delivered to State C with substantial damage. To determine the stage of the transport in which the goods may have suffered damage, the documents of transport are presented. Both of the documents have different reservations on the same matter. Should the operator be liable before the cargo owner and the carriers?

In other words, does the logistics operator have the same responsibility as the cargo owner or the shipper regarding the disclosure of relevant information about the cargo to the carriers?

A preliminary answer to these questions is that the logistics operator shall be liable for damage occurring during the period when he, his servants, agents or subcontractors have the custody of the cargo or are in possession of it. The obligation of disclosure of relevant information to the carriers is undertaken by the logistics operator, among others, due to the fact that he will be the contractual party on the contracts of carriage of goods entered into with the carriers during the performance of the contract of logistics services entered into with the client.

- ***Consignee***

Finally, the consignee has to be entitled by the cargo owner to receive the goods, and he has the right to inspect the cargo to ensure the condition of the goods is the same as the one described in the document of transport.

1.4.1.1.3 Period of responsibility

According to Article 1030 of Comm. Co., the period of responsibility of the carrier by land for the total or partial loss of the goods and for the damage thereto is when it

occurs between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery, to the person entitled to receive the goods in the time and place agreed upon in the contract of carriage of goods.

Having notice of the arrival of the cargo to the place of destination to the consignee or the person entitled to receive the goods, the carrier would not be liable if nobody entitled to claims the cargo appears within five consecutive days after arrival. In this case, the carrier has the right to be compensated for the extra cost of storage during this period.[22]

1.4.1.1.4 Regime of liability

Art. 992 of the Comm. Co., establishes the general regime of liability for the carriage of goods by land. As said before, the main obligation of the carrier is to undertake the carriage of the goods from one place to another and deliver them to the consignee according to the terms of the contract. It is an obligation of result. Therefore, the carrier is liable for loss or damage to the goods, as well as for delay in delivery, unless the carrier proves the occurrence which caused the loss, damage or delay was due to an unknown cause, and that he took all measures that could reasonably be required to avoid the occurrence and its consequences. The clauses of the contract that implied the total or partial exoneration from liability of the carrier for the breach of his duties and/or obligations are void and will not produce any legal effect.[23]

In fact, regarding the nature of the regime of liability of the carrier of goods by land, the Supreme Court of Justice has established on several occasions that the obligation undertaken by the carrier is one of result.

[22] Art. 1030 Comm. Co. (Free Translation)

[23] Art. 992 Comm. Co. (Free translation)

> In particular, regarding the contract of carriage of goods, this Court has said that the carrier enters into an obligation of result in the sense that to fulfill his duties he has to prove due diligence in the carriage of the goods in the same condition another professional carrier would execute the same delivery. The carrier is not liable where loss, damage or delay in delivery was caused by an unknown cause, and he proves he took all reasonable measures to prevent the damage or its consequences. In other words, in those events where the causal nexus has been broken, liability cannot be established, i.e. force majeure. [24]

In any case, to pursue the liability of the carrier, the following elements have to be fulfilled by the entitled person to claim compensation:

1. The contract of carriage of goods is valid and binding for the parties. As said before, the contract is a consensual agreement; therefore, by using any of the legal methods described in the National Procedure Code[25] the parties can prove the existence and validity of the contract.

2. The breach of the contract has to be demonstrated. It has to be proven that the loss, damage of the cargo or delay in its delivery occurred during the period of responsibility of the carrier according to the terms of the agreement or the document of transport. This means that, normally, it should be proved that the damage occurred during the performance of the obligation to move the goods.[26]

3. Economic damage. To have the right of compensation, the claimant has to demonstrate the economic damage suffered by him due to the breach of the contract.

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[24] Supreme Court of Justice. Cas. Civ., P. J. Arturo Solarte Rodríguez. 16 of December, 2010. Docket No. 05001-3103-010-2000-00012-01. Col. (Free translation)

[25] Law No. 1564 of 2012, Colombian General Code of Procedure

[26] Pandele, A. (2013). The Transport of goods. The carrier´s liability under the new provisions of the Civil Code. *Contemporary Readings in Law and Social Justice*, *5* (2), Pp. 716-722

4. *Nexus causalis*. This is a civil liability claim. The claimant must convince the judge of the fact that the economic loss or damage suffered by the entitled person to be compensated was caused by or has a direct connection with the conduct of the carrier that lead to the breach of the contract. (Emphasis added)

5. Fault. In general, domestic regulation[27] presumes the fault on the conduct of the party in breach of a contract. Thus, the claimant does not have to prove in Court the fault of the carrier during the performance of the transport of the goods. On the contrary, the carrier has to prove due diligence if he wants to exonerate himself from liability as well as the fact that the occurrence of the damage or loss of the cargo or delay in its delivery was due to an unknown cause.

6. Causes of exoneration of liability. The carrier has the right to invoke a cause to exonerate himself from liability. Art. 992 of the Comm. Co. establishes that the carrier can be exonerated from liability if he proves that the loss, damage of the goods or delay in the delivery occurred due to an undetermined cause and that he took all the diligent measures another professional in his situation would have taken to prevent the damage or reduce its occurrence.

7. Limit of liability.[28] Article 1031 of the Comm. Co. regulates the limit of liability of the carrier who undertakes the transport of goods by land. On this matter, the rule differentiates if the value of the merchandise has been declared or not, if the loss is total or partial and if the breach of the contract was due to delay on the delivery of the goods.

[27] Article 1604 Civil Code

[28] Art. 1031 Comm. Co. (free translation)

Total loss/declared value: In case the cargo owner declared the value of the goods to the carrier at the moment of delivery, the carrier limits its liability to the amount of the value declared.

Partial loss/ declared value: in this case, the amount will be determined in proportion to the value the loss of cargo represents to the total value of the goods.

Total-Partial loss / Declared value: Nevertheless, the parties can agree in a contractual clause a different limit of the liability of the carrier to an amount *as low* as 75% of the value declared of the cargo and an additional 25% for lost profits. (Emphasis added)

If the cargo owner has not declared the value of the goods, or the value declared is higher, taking into account the value of the goods have in the place the carrier is supposed to receive the merchandise (plus the packing, taxes, freight, insurance policies), the carrier is obliged to pay 80% of the proven value the cargo have in the place and date agreed upon for the delivery of the goods to the consignee. The carrier is exonerated to pay any amount for loss of profit in this scenario.

If the party entitled to compensation proves the cause of the damage or loss of the cargo was due to gross negligence in the conduct of the carrier during the performance of the transport of the goods, the limit of liability will not apply and the carrier will have to pay full compensation to the cargo owner or the entitled person for that matter.

In case the breach of the contract was due to delay in the delivery of the merchandise to the consignee, the parties are entitled to agree on a different

limit. If the parties do not agree on a value to limit the carrier liability, the judge can establish the fair amount in Court.

Now, even though it seems like article 1031 of the Comm. Co., gives the parties freedom to negotiate the limit of liability of the carrier, it is imperative to mention that the provisions set in article 1031 of the Comm. Co., are mandatory to the parties, in the sense that any contractual clause against this rule of law will have no legal effect on the contract.

The problem of article 1031 of the Comm. Co., is that for many years The Supreme Court of Justice and several Courts applied the limits established in this provision to the carriage of goods by sea. The contract of carriage of goods by sea has its own rules and regarding the limit of liability of the carrier of goods by sea it is permitted that the parties agree on a different limit, higher or lower than the value of the cargo in the port of loading. In other words, the limit of liability of carriage of goods by sea is not bound by the limit of 75% of the value of the cargo as it is in the carriage of goods by land.[29]

8. Time bar. The time bar to pursue legal actions (direct or indirect) against the carrier is two years after the goods were supposed to be delivered to the consignee or the person entitled to receive the goods.[30]

[29] Supreme Court of Justice. Cas. Civ. P.J. William Namen Vargas. 8 of September 2011. Docket No. 11001-3103-026-2000-04366-01. P. 27 (Free translation)

[30] Article 993 Comm. Cod. (Free translation)

1.4.1.2 Carriage of goods by sea

The contract of carriage of goods by sea has a long history in Colombian Codes. Data on this matter can be found since the XIX century when the United States of Colombia issued The Maritime Commercial Code in 1870, as an exact copy of the Chilean Code issued in 1867.[31]

The Constitution of 1886, rearranged Colombia as an independent Republic. A National Commercial Code adopted the Maritime Commercial Code in a chapter. Finally, this Code was transformed into the New Commercial Code in 1970. The aim of the new code was to modernize the rules governing commercial transactions. The Commission in charge of the elaboration of the Code created a book for two special contracts: carriage of goods by sea and by air. The Commissioners wanted to incorporate international instruments in relation with the maritime field and the transport of goods/persons by air due to the old nature of the articles inserted in the National Commercial Code.[32]

For this purpose, the commissioners followed the provisions set in international instruments available at the time. Regarding the carriage of goods/passengers by air, Colombia has ratified almost every convention on the subject matter. In contrast, even though the Commercial Code has various similarities with The Hague Rules and The Hague – Visby rules, the Country has not ratified any of the international conventions in private international maritime law.

The reason behind the reluctance of the Colombian government to enter into international treaties or conventions on this matter is not clear for the author. The

[31] Bernal, R. (n.d.) Colombian Comercial Code (History and Proyections) Pp. 86. Retrieved 23 July 2016 from http://bibliohistorico.juridicas.unam.mx/libros/2/640/6.pdf (Free translation)

[32] Ibid. P. 90 (Free translation)

growth of ports located in cities such as Cartagena, Santa Marta and Buenaventura, and the increasing importance many of them are achieving with the development of technology and efficient facilities, indicate the need to regulate the field according to international principles, such as the ones inserted in The Hague –Visby Rules. It is imperative for the country to be competitive in the market and engage in international trade as a real maritime potency. Unfortunately, the path to accomplish this goal is uncertain and obscured due to social, economical and political circumstances the country is facing nowadays.

Regarding the regulation established in the Commercial Code towards the carriage of goods by sea, the code divided all maritime affairs into several chapters depending on the subject matter. Arrest of vessels, salvage, mortgages and liens are some of the topics regulated in the general provisions.

1.4.1.2.1 Contract of carriage of goods by sea

The contract of carriage by sea is regulated by articles 1578 to 1687 of the Comm. Co. These provisions include the transportation of goods and passengers, the contract of carriage of goods by sea under a B/L and the contract of affreighment.

As can be observed, the normativity of this contract is extensive. Nevertheless the Comm. Co. does not provide a definition of the contract as such, thus, the meaning can be elaborated using the general definition of the contract of carriage provided in the general rules for the transportation of carriage by land.

Colombian Professor Guzmán, J.V., proposes the following definition:

> The carriage of goods by sea is a contract in which one of the parties, identified as carrier, undertakes to transport the goods of the other party, identified as shipper, against payment of freight from one port to another, in a specific vessel

> or a vessel to be determined, in the agreed time, using the route agreed upon; and deliver the cargo in the port of destination to the consignee or the person entitled to receive the goods, in the same condition the cargo was delivered by the shipper to the carrier.[33]

Comparing this definition with the one established in Article I (b) of The Hague-Visby Rules, it can be noted that neither the B/L nor any other document of transport is mentioned. The reason behind it, is because one of the obligations of the carrier is to issue the document of transport, generally the parties will use the B/L, but the parties have the liberty to use another kind of document as long as they do not violate any domestic law.

1.4.1.2.1.1 Parties to the contract

The fact that the Commercial Code did not provide a definition of the contract, the parties involved in the agreement can be established using the general provisions of the carriage of goods, with some particularities.

- ***Shipper***

The shipper can be defined as the person who enters into a contract of carriage of goods by sea with the carrier. The shipper can be the owner of the cargo or a person acting on behalf of the owner of the cargo, such as a maritime agent, freight forwarder or a logistics operator.

[33] Guzman, J.V. (2007). *The carriage of goods by sea under B/L*. Bogotá, Colombia: Externado de Colombia University. Pp. 46. (Free translation.)

In this sense, the shipper means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier. However, it must be clarified that under Colombian Commercial law the person who delivers the cargo to the sea carrier is not necessarily a part of the contract of carriage of goods by sea, as it is understood in English Law.[34]

The importance of distinguishing the difference between a shipper and a cargo owner under domestic regulation relies on the fact that only the shipper is entitled to pursue a civil claim against the sea carrier for the breach of the contract. The cargo owner may have the possibility to sue the carrier but only under tort law procedure.[35]

As stated before, the carriage of goods by sea involves a diverse legal relationship governing various types of agreements. To have the condition of shipper under a contract of carriage of goods by sea is enough to enter into the contract with the carrier under the condition of "shipper". Therefore, it is irrelevant if the person who actually delivers the goods is not the cargo owner, nor the shipper, but someone else. In general terms, the delivery guy will not be considered part of the agreement just because he delivered the goods to the carrier.

English law has another theory on this matter. Under English Law it is understood that the person who delivers the goods to the carrier enters into a contract of carriage of goods with the sea carrier. He is considered a shipper and acquires all the duties and obligations of a shipper. Hence, in one contract there can be two different shippers, the one who agreed the terms of the voyage with the carrier and the one who delivers the goods in the port of loading.[36]

[34] Ibid. P. 130 (Free translation)

[35] Ibid. P. 128. (Free translation)

[36] Ibid. P. 131. (Free translation)

This presumption was stated in the English Case Pyrene Company Ltd. v. Scindia Steam Navigation Company, Ltd.[37] The dispute dealt with the interpretation of The Hague Rules and their applicability to an F.O.B. seller.

The facts are as follows:

The plaintiffs sold a piece of machinery, a fire tender, -among other cargo- to the Government of India (which acted in this matter through a department known for short as "I.S.D.") for delivery f.o.b. London. I.S.D., nominated the Jal-Azad, one of the defendant´s vessels, as the ship to be loaded under the contract of sale, and through their agents, (…) made all the arrangements for the carriage of the goods." During the loading operation, and before one fire tender crossed the rail of the ship, the tender was dropped and damaged due to a fault of the ship. The plaintiffs sued the defendants for the total amount of the repair of the tender. The defendant admitted liability but alleged that the amount was limited under Art. IV, Rule 5, of The Hague Rules.

Thus, to limit liability under The Hague Rules, the defendants had to prove privity of the contract between themselves and the plaintiffs, that the contract incorporated the Rules, and that the Rules are effective to limit their liability. The plaintiffs, on the other hand, disagreed on the applicability of the Rules for the case and decided to claim in tort for the damage done to the fire tender.

A bill of lading was issued in due course to I.S.D., to cover the shipment of the cargo, except the fire tender that was damaged prior to the shipment, which was deleted from the document. The bill of lading incorporated The Hague Rules and The Carriage of Goods by Sea Act, 1924, Sect. 3.

In the judgment, Mr. Justice Devlin explained the period of responsibility of the carrier under the provisions of The Hague Rules, he elaborated on the definition of "contract of

[37] *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] I Lloyd´s Rep. 321.

carriage of goods by sea", "loading" and "discharging" as an operation in relation to the agreement, and finally, he elucidated on the parties of the contract.

Regarding the parties, he concluded:

> Under present conditions, when space often has to be booked well in advance, the contract of carriage comes into existence at an earlier point of time. Sometimes the seller is asked to make the necessary arrangements; and the contract may then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract.
>
> Sometimes the buyer engages his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight has to be paid in advance this method may be the most convenient. In such a case the seller discharges his duty by putting the goods on board, getting the mate´s receipt and handing it to the forwarding agent to enable him to obtain the bill of lading. The present case belongs to this third type; and it is only in this type, I think, that any doubt can arise about the seller being a party to the contract.[38]

Furthermore,

> By delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created must incorporate the shipowners usual terms; none other could have been contemplated; the shipowner would not contract for the loading of the goods on terms different from those, which he offered, for the voyage as a whole.[39]

[38] Ibid. P. 332

[39] Ibid. P. 333

In other words, depending on the Incoterm used by the parties on an international contract of sale of goods, the shipper or the buyer can be considered a party to the contract of carriage of goods by sea, even when one of them had not engaged in the negotiation of the contract or had no previous knowledge of the overall terms of the agreement.

Under a free on board type of contract, it is clear that one of the buyer's obligations is to designate the vessel and arrange the contract of carriage of the goods. The seller, on the other hand, has the duty to deliver the goods to be loaded on the ship selected by the buyer. If the seller does not disclose his condition as acting on behalf of the buyer as the shipper, he can be described in the document of transport as such and, thus, be part of the contract as a shipper with all the rights and obligations provided in the contract of carriage of goods by sea.

The Hamburg Rules follow this principle as can be observed in Article 1 (3) when it states that a shipper is also "any person by whom or in whose name or *on whose behalf the goods are actually delivered* to the carrier in relation to the contract of carriage by sea". (Emphasis added). Neither The Hague Rules nor the The Hague-Visby Rules define the shipper.

Colombian Comm. Co., does not recognize this situation. According to Article 1008 of the Comm. Co., the shipper is the person who enters into a contract of carriage of goods by sea whether he is the cargo owner or has the authority to act on behalf of the cargo owner. The problem arises not with the actual delivery of the goods alongside the vessel, but when the agent, freight forwarder or logistic operator does not disclose his condition as agent to the carrier and his overall involvement in the agreement becomes ambiguous.

- ***Carrier***

As explained in the carriage of goods by land, the carrier has to be an authorized carrier by the National Maritime Authority to execute the carriage of goods within the territory or, if applicable, for international trade.

For the definition of this party, The Hague Visby Rules state in Article I (a) “Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper”.

The Hamburg Rules define the carrier as

> Any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper, and adds: actual carrier means any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.[40]

Colombian commercial law defines the carrier as the authorized person or company who enters into a contract of carriage of goods by sea with a shipper[41]. The carrier may undertake the transport of the goods by himself or it can entrust total or partial transport of the goods to another carrier. In this case, the contractual carrier remains liable of the total of the carriage before the shipper regardless if the goods suffer damage under the care of the entrusted carrier, also known as the performing carrier.

The terms of the contract entered into with the shipper will not be modified if the contractual carrier entrusts part of the transport to the performing carrier. The

[40] Article 1 (a), (b) of The Hamburg Rules

[41] Article 1008 Comm. Cod. (Free translation)

contractual carrier and the performing carrier are severally liable for the transport of the goods[42].

In this sense, the commercial code, even though inspired by The Hague-Visby Rules, in terms of liability of the performing carrier, has more similarities with the provisions of The Hamburg rules. Article 10 of the Hamburg Rules is almost the same as article 984 of the Comm. Co., when it states that

> Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents within the scope of their employment.

The identification of this party in the contract of carriage of goods by sea can be difficult when logistics operators offer packages of services including the transport of goods by various modes of transport. Logistics operators should not be confused with Multimodal Transport Operators (hereinafter MTO). The MTO is a typical contract under domestic law, and the liability of this operator is regulated by Decision 331/1993 and Decision 393/1996 ratified by Colombia as a contractual party of the Andean Community of Nations along with Bolivia, Ecuador and Peru.

[42] Article 991 Comm. Cod. (Free translation)

- ***Consignee***

The person entitled to receive the goods in the port of destination or in the place agreed upon by the terms of the contract entered into between the carrier and the shipper. The consignee has to be authorized by the shipper or be a legitimate holder of a B/L.

The consignee is not a party to the contract of carriage of goods by sea, in the sense that he is not involved in the negotiation of the agreement. He can be considered a party to the contract if the shipper provides for the inclusion of his name in the bill of lading as the person entitled to receive the goods from the carrier. However, it has to be highlighted that, because the bill of lading is a document of title[43], the legitimate holder of the document has the authority to receive and claim delivery of the goods. Hence, regardless of his absence during the negotiation of the contract, he still has the right to claim against the carrier for loss or damage.[44]

1.4.1.2.1.2 Period of responsibility

Article 1606 of the Comm. Co. establishes the period of responsibility of the sea carrier. It is a complex rule because it encompasses two different situations.

On the one hand, the article says the period of responsibility of the sea carrier for the goods covers the period during which the carrier is in charge of the goods at the port of loading, from the time the shipper or a person acting on his behalf has delivered them to him; or when the goods have been handed over by an Authority by virtue of national regulations. The obligation ends when the carrier has delivered the goods in the port of destination to the consignee or a person entitled to receive the cargo; or by handing

[43] Articles 1636 and 1637 Comm. Co. (Free translation)

[44] Donner, P. (2016). *Maritime Commercial Law*. Unpublished lecture notes in bills of lading. World Maritime University, Malmö.

over the goods to an Authority or a third party in the case where the carrier is obliged to do so by national regulations.

On the other hand, the next paragraph of article 1606 of the Comm. Cod., states that the carriage of goods covers the period from the time when the goods are loaded until the time they are discharged from the ship. And adds, the period of responsibility begins when the tackle of the vessel takes the goods to upload them on the ship until they are discharged in the port of destination. If the discharge is supposed to be done on another vessel, then the period of responsibility will cease when the goods have crossed the ship´s rail.

As can be observed, the first paragraph is very similar to Article 4 of The Hamburg Rules this is a period of responsibility from *port to port*; while the second paragraph follows the principle *tackle to tackle* stated in Article I (e) and Article VII of The Hague-Visby Rules. The bill of lading often extends the carrier´s responsibility to the periods when it has custody of the goods before loading onto the ship and/or after discharge from it, which extension is expressly permitted by article 7 of the Rules.[45]

Regardless of the fact the Hamburg Rules were adopted after the Commercial Code entered into force (Comm. Co. 1971 – HR 1978), the point to highlight is the intricacy of the rules governing the transportation of carriage by sea.

1.4.1.2.1.3 Regime of liability

As mentioned before, the Commercial Code of Colombia was elaborated upon under a civil law regime structure. However, the chapter of carriage of goods by sea is modeled primarily on The Hague-Visby Rules. This means that many of the special provisions set forth for this specific contract are structured on a common law basis.

[45] Guzman, J.V. (2007). Op.Cit. P. 316 (Free translation)

> The basic tenet of the civil law style of drafting (le style français) is concision. The aim of the style is to be concise; to present a principle of law in a single, general, harmonious phrase that by its broad terms encompasses all particular details […][46]
>
> The common law style of drafting (le style anglais) emphasizes precision rather than concision. The aim of the style is to include every possible detail in order to fully inform the citizen of the law and his rights. The practice in common law drafting is to list all the particulars preceded by a catch-all phrase, which is followed by a demurrer such as "notwithstanding the generality of the foregoing.[47]
>
> Neither The Hague nor The Hague-Visby Rules is a code in the civil law drafting style. Rather each is a Hybrid civil law-common law (mostly common law) style statute"[48]

The disparity described is palpable in Colombian Commercial Law, specifically in the type of regime of liability of the carrier: if contractual or under tort law, strict liability or based on presumed/proven fault.

It is clear that the main obligation of any carrier of goods is to deliver the cargo. From the general provisions of the contract of carriage, the Supreme Court of Justice has understood the obligation undertaken by the inland carrier as one of result, due to the fact that he is obliged to deliver the goods to the person entitled to receive them in the same condition in which he got them from the consignor. The liability is based on the principle that the carriage of goods is a dangerous activity; thus, the carrier is presumed

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[46] Tetley W., (1994) International Conflicts of Law: Commercial, Civil and Maritime. Montreal, Canada: Blais International Shipping Publication. P. 46 (Cited by Guzman, J.V. (2007). Op. cit. Pp. 291)

[47] Ibid. P. 46

[48] Ibid. P. 50

liable in all cases for the breach of a contract unless he proves due diligence and that the cause of the occurrence of the damage, loss or delay in delivery is uncertain.

On the other hand, the regime for the sea carrier in this matter is not that clear. Under this contract the parties allocate the risk of the voyage according to the various perils of the sea. In other words, the sea carrier is presumed liable unless the occurrence of the damage/loss of the goods or delay in the delivery is due to one of the risks that allow the carrier to be exempt from liability.

Accordingly to professor Schoenbaum, The Hague-Visby Rules, under common law principles, state

> The liability of carriers for loss or damage to cargo is characterized by a complex system of shifting burdens of proof and accompanying presumptions of liability. The concept of shifting burdens of proof predates the statutory schemes of liability and was a feature of the common law […]. Under the common law, after the amount of damage to the goods is established, the carrier has the burden to show that it was caused by one of the perils for which he is not responsible.[49]
>
> The use of presumptions and shifting burdens of proof is thus rooted in strong policy considerations. The common law rule that the plaintiff has both the burden of persuasion and of producing evidence to prove his case was thought to be unduly onerous in cases where the facts surrounding the loss or damage to goods are accessible primarily to the defendant-carrier. The use of a presumption of liability after a prima facie case of damage is made by the plaintiff shipper, modifies this rule and alleviates its unfairness.[50]

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[49] Schoenbaum, T. (1994). *Admiralty and Maritime Law*. (2nd Ed) USA: Hornbook Series, West Publishing Group. P. 565 (cited by Guzman, J.V. (2007) Op. Cit. Pp. 289)

[50] Ibid. P. 565

Therefore, when the goods suffer damage or loss during the period of responsibility of the sea carrier, the cargo owner (or the shipper) can sue the carrier by proving in a *prima facie* case (without the burden of proving fault of the carrier or the cause that produced the breach of the contract), that he, the cargo owner, delivered the goods in good conditions to the carrier and the goods where delivered damaged to the consignee. The carrier then will have to prove that the damage occurred under one of the circumstances described as an exonerated risk and, thus, he is not liable for that particular loss or damage.

If the cargo owner/shipper/claimant proves that such loss or damage had been occasioned by fault, the carrier will be unable to be released from liability.

The explanation set above is a general overview of the complex maritime claims procedural law. It is not the aim of this dissertation to study the regime of liability of the sea carrier, but just to compare the regime established in The Hague Visby Rules with the one provided in Colombian Commercial Law.

The Commercial Code does not have a specific provision regarding the regime of liability for the sea carrier, hence, the applicable disposition is the one established in the general chapter for the carriage of goods. This first scenario raises most of the problems concerning the interpretation of the contract of carriage of goods by sea. As said before, the general provisions set forth for the carriage of goods were constructed under a civil law regime structure; whilst the contract of carriage of goods by sea followed the principles stated in The Hague-Visby Rules under a Common Law regime.

In order to determine if the regime provides for strict liability, fault based, presumed fault or proven fault, it is imperative to analyze the general regime of liability stated in article 992 of the Comm. Co., with the special provisions of the carriage of goods by sea, as follows:

The general regime under contractual law for the breach of the contract presumes the fault of the carrier.

> By the principle of *causa proxima non remota spectator*, in order to escape liability, the carrier has to prove the proximate causal relation between the loss and exempted incident.[51] (Emphasis added)

Article 1609 of the Comm. Co. describes the events in which a carrier can be released from liability. This article has a similar structure to Article IV (1) and (2) of the Hague-Visby Rules.

According to the opinion of Professor Karan, Article IV (1) and (2) of The Hague-Visby Rules provide:

> That the carrier is not liable for loss or damage arising or resulting from one of the excepted occurrences therein. (…) For liability to be excluded the carrier has to first show that the loss stemmed from one of the exempted events effectively. Otherwise, the loss is presumed to have resulted from an occurrence for which the carrier is liable.[52]

Article 1609 of the Comm. Co., however, has a shorter list of events than the one described in Art. IV (2) of The Hague Visby Rules and has a mixed regime of liability depending on the event that causes the damage or loss of the cargo. For instance, it states that the claimant has to prove fault of the carrier when the claim is based on fire on board; if the cause relates to the seaworthiness of the vessel, the carrier has to prove due diligence; in other words, he has to prove he was not at fault regarding the specific cause that made the ship unseaworthy.

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[51] Karan, H. (2005) *The carrier´s liability under international maritime conventions: The Hague, Hague-Visby, and Hamburg Rules*. United States of America: The Edwin Mellen Press, Ltd. Pp. 335

[52] Karan, H. (2005) Op. Cit. Pp. 326

Another example is the event of latent defects not discoverable by due diligence. In this case, the carrier also has to prove he was not at fault in relation to that particular circumstance.

Consequently, in order to elaborate upon a principle that describes the regime of liability of the sea carrier, it is important to consider the national rules on the matter as a whole, taking into account the influence of The Hague-Visby Rules in the chapter of carriage of goods by sea. It is imperative to have clarity on the particular terms of the contract, the obligations undertaken by the parties, the circumstances that led to the breach of the contract, the international factor of the agreement, and, the interpretation given of the Rules by foreign judges and authors on the subject matter of dispute.

CHAPTER TWO. FREIGHT FORWARDERS. MARITIME AGENT. MULTIMODAL TRANSPORT OPERATOR. BROKER. AGENT.

2.1 Intermediaries – special provisions

Given the overall scope of the contract of carriage of goods, it is possible to understand the difficulties of the regulation of freight forwarders in Colombia. From now on it is imperative to differentiate the various types of intermediaries because the legal regime varies depending on the nature of the services provided.

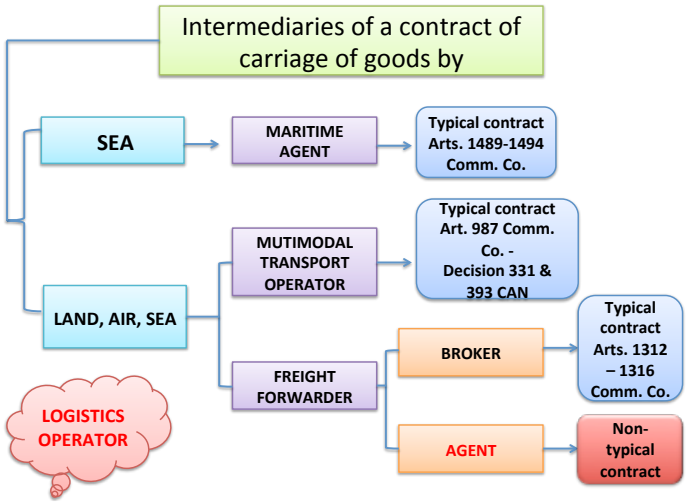
As mentioned before, many participants are involved in a contract of carriage of goods by any mode of transport. Each one of them has a role and specific tasks to perform during the performance of the agreement. Most of them are regulated under national law or an international instrument. In Colombia, the Commercial Code acknowledges the existence of freight forwarders as those in charge of arranging the carriage of goods from one place to another and, depending on the terms of the contract, the services provided to be distributed in different categories.

Freight forwarders can provide services within the national territory or between different countries. The scope of services provided by intermediaries can go from being a simple intermediary between the cargo owner/ shipper and the carrier; as far as to arranging a full operation door-to-door with a client. It all depends on the freedom of contract of the parties involved.

However, to fit into the categories provided by the Commercial Code, the contract has to meet the elements described in the articles elaborated upon by the rule for those specific services and, therefore, the parties will be bound by the national regime on the subject matter. These services vary depending on the scope of the task to be performed by a qualified professional or company, and the mode of transport needed by the cargo owner/shipper or consignor.

In light of this, the commercial law recognizes the following intermediaries:

Chart 3 Intermediaries of a contract of carriage of goods by different modes of transport[53]



[53] Chart elaborated by the author

On the one hand, all these intermediaries, except the freight forwarder as an agent, have specific regulation by legal provisions. The agent has been described by the Courts, but this is still a non-typical contract. On the other hand, the logistics operator, as such, has not been examined yet by a Court, it is a non-typical contract, but is of common use in practice within the transport sector, nationally and internationally.

In the next paragraph, the main features of two particular intermediaries that have a regime of their own and cannot be confused with freight forwarders will be analyzed. These are the maritime agent and the multimodal transport operator.

2.1.1 Maritime Agent

It is important to make a distinction between the maritime agent, the freight forwarder and the logistics operator.

The maritime agent is a person who represents the shipowner inland for all aspects involving the shipowner vessel.[54] Among the requisites to be a maritime agent, Article 1491 of the Comm. Co., specifically prohibits the maritime agent to be at the same time a carrier or an entrepreneur in the transport field. In practice, the agent's most important duty is to deal with the Customs Authorities on behalf of the shipowner in the national territory or in duty free zones, which by legal fiction are recognized as international territory for the effect of customs and nationalization of the goods unloaded from a vessel in a Colombian Port.[55]

In other words, the maritime agent generally acts under an agreement similar to the contract of mandate in duty free zones to nationalize the goods and clear them from the national customs procedures required in an import or export operation.

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[54] Article 1489 Comm. Co. (Free translation)

[55] Supreme Court of Justice. Cas. Civ. P.J. Eduardo Garcia Sarmiento. 25 August 1994. Docket No. 1498. Pp. 5 (Free translation).

In terms of liability, the maritime agent is directly liable, and in solidarity with the Captain and the shipowner of the vessel he represents for all obligations the vessel contract in Colombia. He may also be liable for the negligent performance of the Captain during the performance of a contract of carriage of goods by sea to receive or deliver the goods as stated in the agreement.[56] Therefore, the liability for this intermediary is clear, determined in the commercial law and severe due to the similarity it has with the contract of mandate and the due diligence expected in the performance of his duties.

It is also stipulated that if the maritime agent arranges a carriage of goods by sea without disclosing his capacity as maritime agent, he will be liable for all the damage suffered by the parties involved in a direct action.

As an example of the severe regime of liability of the maritime agent, the Supreme Court of Justice[57] had the opportunity to examine the following case in 1994:

A shipping company from Croatia and their maritime agent in Colombia -among other parties- were sued in solidarity by a civilian before a Civil Judge because a vessel from their property had unloaded to a free duty zone dangerous and toxic cargo that threatened human rights (life, health and environmental rights) of the people living in a community next to the area where the cargo was unloaded from the ship. After all the evidence was reviewed, the Judge issued an order to the shipping company for the immediate upload of the cargo on the first vessel that arrived to the port involved in the operation and take it out of Colombia, escorted by a vessel from the National Maritime Authority. All the expenses had to be covered by the shipping company and their maritime agent.

[56] Article 1492 Comm. Co. (Free translation)

[57] Supreme Court of Justice. Cas. Civ. P. J. Eduardo Garcia Sarmiento. 25 August, 1994. Docket No. 1498. Pp. 5. (Free translation)

The questions raised in the present case dealt with the rules regarding the import of toxic merchandize to the territory and the role of the Customs Authority in the matter. Regardless of this aspect, the relevance of the case is on the ruling regarding the liability of the maritime agent and the shipping company for introducing into the country substances that are prohibited by national law.

The maritime agent, acting on behalf of the shipping company entered an appeal against the civil judge ruling before the Supreme Court of Justice. They argued that the sea carrier is not obliged to verify the nature of the cargo when he receives the cargo sealed or inside a container. They claimed that the shipper has the obligation to disclose all the relevant information of the cargo to the carrier and that the import/export permits were the responsibility of the shipper and the consignee, not the carrier or the maritime agent.

The Supreme Court of Justice found the civil judge ruling to be according to law. Hence, the shipping company and the maritime agent were held liable for unloading toxic cargo within the national territory. The reasons provided by the Supreme Court of Justice relied on the fact that the carrier has the obligation to inspect the cargo if the nature of the goods is dangerous or toxic. The action of not verifying the cargo was negligent and, therefore, they cannot be exempt from liability under national law. The maritime agent is liable as well due to the solidarity he shares with the captain and because they represent the vessel for all the obligations it contracts in Colombia.

This case of law can lead to the conclusion that, even though the maritime agent may not be present during the interchange of information between the shipper and the carrier, when he enters into a contract of carriage of goods by sea, he is still liable under contractual law if there is a breach of the contract, or under tort if the vessel causes damage to the national territory. As stated before, it is a highly severe regime.

That being said, the maritime agent cannot be confused with a freight forwarder because, even though they share similarities in the performance of duties with reference to a contract of carriage of goods by sea, the freight forwarder is allowed to be a carrier, except if he acts like a broker, and he can also arrange other modes of transport within the agreement with the client. Furthermore, the freight forwarder does not represent the shipowner inland for any matter regarding the vessel, as it will be presented in the next chapter.

The difference from the logistics operator is the object of the business they have with the client. The scope of the agreement with a logistics operator is wider, in most cases multimodal and involves an international segment most of the time. The maritime agent deals only with contracts of carriage of goods by sea in domestic ports and /or in duty free zones.

2.1.2 Multimodal Transport Operator

The Commercial Code defines the multimodal transport in article 987 of the Comm. Co. as

> The carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery to the person entitled to receive the goods.

Regarding the multimodal transport operator, the definition is structured the same way as Article I (2) of the United Nations Convention of International Multimodal Transport of Goods, 1980 (not in force). Therefore,

> 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.[58]"

The MTO has to be authorized to offer these kind of services by the Ministry of Transport.

Article 987 of the Comm. Co., also states that when the carriage of goods involves two or more countries, it would be understood to be an international agreement and that the law applicable will be those of national regulations or customs, depending on the terms of the contract.

The Commercial Code does not regulate any specific aspect of the agreement. However, as a contracting State of the Andean Community of Nations, Colombia is bound by Decision 331 of 1993 modified by Decision 393 of 1996 that regulates the Multimodal Transport of Goods between Peru, Bolivia, Ecuador and Colombia. The mentioned Decisions follow the same principles stated in the U.N. Convention of International Multimodal Transport of Goods, 1980 (not in force).

Thus, it can be established that this is a typical contract. Regarding the contract, as such,

> There would appear to exist several essential elements:

1. A contract to carry from place to place – the multimodal transport contract,
2. At least two different modes of transport involved in the performance of the contract,

[58] Article I (2) of the United Nations Convention of International Multimodal Transport of Goods, 1980

3. The multimodal transport contract´s coverage of the entire performance of the carriage from place of receipt to place of delivery;
4. The issuance of a multimodal transport document by the contractual carrier (multimodal transport operator) to the shipper, which evidences, inter alia, the contractual obligations of the carrier with respect to the entire carriage*;*
5. The contractual carrier´s benefit of an express or implied liberty to subcontract the whole or any part of his contractual obligations; and
6. The contractual carrier´s assumption of responsibility for the entire carriage, even when actually performed in whole or part by another carrier, the actual carrier. [59]

Regarding the regime of liability, the period in which the MTO is responsible for the goods covers the period from the time he takes the goods under his custody until the time of their delivery[60].

It is important to underline that under the provisions of Decision 331 and 393, the MTO has the duty to undertake all the necessary measures to ensure the delivery of the cargo to the person entitled to receive it. He is liable for any 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 during the period of responsibility of the operator, unless the multimodal transport operator proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[61]

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[59] Rhidian, T., (2012). Multimodalism and Trough Transport – Language, Concepts and Categories. *Tulane Maritime Law Journal* [Vol.36:76] Pp. 761 – 780
http://www.heinonline.org/HOL/Page?handle=hein.journals/tulmar36&div=34&?&collection=journals#

[60] Article 6 Decision 331, 1993 of the Andean Community of Nations. (Free translation)

[61] Article 5 Decision 393, 1996 of the Andean Community of Nations. (Free translation)

One of the main features of the MTO responsibility is that, even though he is liable for the whole period during the performance of the contract, Article 7 of Decision 393 states that when the loss 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 established by the parties, that limit shall prevail over the freedom of contract of the parties.[62]

Regarding this particular, Colombia has not ratified any convention on commercial maritime law. For the contract of carriage of goods by sea, the parties are allowed to establish the limit of liability they consider suitable for the terms of the agreement. Some judges have applied the general rule of Article 1031 of the Comm. Co. that establishes a boundary to the freedom of contract in respect of the limit of liability.

The issue with all of these rules is the uncertainty of the risk assumed by the carrier or the MTO due to all the normativity on the matter. If the claim is brought to a Colombian judge, he may apply national legislation over the Decision 331 and 393 on this particular topic; or he can allow the freedom of contract. Anyhow, in a contract of carriage of goods by sea or for an MTO it is vital to know the limit of his liability as part of the negotiations of the contract.

Due to the circumstance that the national regime is so complex for the multimodal transport operator, the industry has shifted to facilitate commercial transactions and encourage the creation of the logistics operator, for which the legal regime has not yet been determined. Many MTOs are now logistics operators with the advantage of not having to be authorized by the Ministry of Transport, the full knowledge of the market and the possibility to offer as many ancillary services as they can provide.

[62] Art. 7 Decision 393/1996. (Free translation)

The author emphasize the fact that, as long as the terms of the contract are clear, there should be no problem with an MTO offering logistics services; the problem begins when the clauses are obscure and the agreement does not reach it purpose.

After mentioning some features of the maritime agent and the MTO, it is time to analyze the legal regime of freight forwarders in order to be able to highlight the principal difficulties of these types of intermediaries for national regulation and propose possible solutions to the various issues.

2.1.3 Freight forwarder as a broker

This type of agreement is a typical contract. The rules are stipulated in the Commercial Code from Article 1312 to Article 1316.

It is defined as a contract whereby the broker undertakes under his name, but on behalf of a principal, to hire and arrange the performance of a contract of carriage of goods from one place to another, by any mode of transport or various modes and the ancillary operations required in the carriage[63]. The agreement between the parties is understood as a mandate in which the broker, on behalf of the cargo owner, arranges the transport of the goods with the carrier, or vice versa.

This contract has its origins in French law. The main characteristic of the agreement is that the broker provides a service for the cargo owner or the carrier to facilitate the performance of a contract of carriage of goods. He knows the market, the carriers and the cargo owners. Traditionally, these contracts emerged due to the fact that cargo owners did not necessarily know the carriers, or were located in a different place from which the goods were supposed to be transported.[64]

[63] Article1312 Comm. Co. (Free translation)

[64] Franco. (2014). Op. Cit. Pp.193. (Free translation)

For example, Company A, located in Chile has some cargo in Colombia to be delivered in Miami Port, USA. They contact a Colombian broker. The broker searches for the best carrier and starts the negotiation of the contract of carriage of goods by sea from a Colombian Port to Miami Port. He arranges the agreement under his name but with the intention to transfer the effect of the contract to his principal afterwards, this is Company A. He does not act as a carrier by undertaking to perform the carriage himself. His task is to provide guidance as to the best carrier for the specific cargo, arrange the transportation of the goods, give advise about the vessel, negotiate the freight with the carrier, and supervise the operation as a whole, until the goods are delivered successfully.

> If he works as a shipbroker, due to his good technical awareness of all types of vessels, he will promote the owners vessel in the market, locate another owner´s vessel in the market, seek charterers for the voyage charter or for time charter employment, etc.[65]

Now, regarding the broker´s liability, Colombian commercial law, known as the *Code de Commerce* in France, makes the brokers responsible for the performance of the carriage of goods until they are delivered according to the terms of the contract. Their obligation is of result and their rights and liability are the same as the carrier.[66] Regarding the period of responsibility, the broker is liable from the time he receives the goods under his custody until the cargo is delivered to the person entitled to claim it in the place of delivery. (Emphasis added)

At this point it is imperative to clarify that even though the broker has some similarities to a bailee, as understood by English Law, they are not the same concept. The basis of

[65] Blum, J. (2016). *Maritime Commercial Law*. Unpublished lecture notes on the role of shipbrokers. World Maritime University. Malmö, Sweden

[66] Franco, J. 2014. Op. Cit. Pp. 137. (Free translation)

liability differs mainly because the concept of the broker under Colombian Commercial law is structured under the Continental Law structure, while the bailee is a typical Common Law figure.

Therefore, even if the broker does not undertake the carriage of the goods himself, the regime of liability follows the same principles as if he was a carrier. The reason behind this legal fiction is because the obligation undertaken by the broker falls under the scope of the contract of mandate.

In this sense, there are a few similarities to the liability of a bailee. In the case law *Coggs v. Bernard*[67], Chief Justice Holt categorized the types of bailment into six kinds: *depositum, commodatum*, *location and conduction*, pawn and the last two that caught as follows: (emphasis added)

> The fifth sort is when goods or chattels 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 sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage[68].

The case then states that the sixth type is understood as a mandate, because "the owner trusting him with the goods is a sufficient consideration to oblige him to a careful management"[69].

It is a matter of trust. The same principle governs the Colombian commercial regime on the broker. In other words, the broker undertakes an obligation of result due to the fact that he is obliged to deliver the goods to the satisfaction on behalf of the cargo owner to

[67] *Coggs v. Bernard* [1909], Lloyd´s Rep. 1703.

[68] Ibid. P. 109

[69] Ibid. P. 113

the consignee; or procure that the transport of the goods will not represent a hazard to the vessel if he is acting on behalf of the ship owner.

In the event of loss or damage of the goods during the performance of a contract of carriage of goods, the principal can directly sue the broker. As stated before, the contract of carriage of goods is arranged under the broker's name but on behalf of a third party. If the broker does not disclose the principal name, the contractual parties are the carrier and the broker; being the reason why the principal can directly sue the broker as if he was the carrier. The principal can also sue the carrier directly if he chooses to.

On the other hand, the consignee gains the right to claim against the carrier or the broker if he accepts the agreement entered into and becomes a party to the contract. The act of reception of the goods in the place of delivery is understood as a judicial act of acceptance[70].

The broker can claim all the exemptions the carrier has and limit his liability but he has to prove that the occurrence, which caused the loss, damage or delay of the cargo, was due to an unknown cause and that he took all measures that could reasonably be required to avoid the occurrence and its consequences.

It is not possible to be a broker and a carrier at the same time. Article 1316 of the Comm. Co., expressly prohibits this situation.

Finally, reading more literally the article that defines the contract, there is mention of ancillary services, but not a specific description of what to understand by that terminology. The vague allusion to this matter opens the door for brokers to offer more services than just facilitating the contract of carriage of goods between the principal and the carrier. Some of them actually provide logistics services to their clients, which can

[70] Article 1314 Comm. Cod. (Free translation)

be a problem when something goes wrong during the transport of the cargo due to the severe regime of liability the brokers have under domestic law.[71]

The next case ruled in Colombia a few years ago, will illustrate the difficulties that emerge from the contract of freight forwarders as a broker with an international client. For this purpose the author will refer to *freight forwarders (broker)* because that was the way the judge understood the dispute and it is important for the conclusions reached after the reading of the ruling. (Emphasis added)

In January 1993, company A (defendant) entered into a contract as a freight forwarder (broker) to coordinate the carriage of goods on a door-to-door basis from a storehouse located in Medellin, Colombia to the factory of the client (claimant) in Colon, Panama. According to the claimant, the agreement covered the coordination of the inland / sea transportation, and, as ancillary services, among others, the picking up and packing of the cargo, handling of the goods, clearance, customs, arrangement of the documents of transport and the delivery of the merchandise to the final destination selected by the client.

The claimant appealed the goods never reached the final destination; thus, there was a breach of the contract. Due to the fact that the freight forwarder (broker) has the same regime of liability as the carrier, the claimant asked for full compensation for the loss of the cargo. The defendant denied the allegations and challenged the nature of the contract stating that he was not a freight forwarder (broker) of the client and that the goods were, in fact, delivered to the place of final destination.

In 1997, at the end of the first instance of the plea, the judge declared that company A was held liable as freight forwarders (broker) and were found responsible under the regime of liability as carrier (Art. 1313 Comm. Co).

[71] Franco, J. (2014) Op. Cit. P. 140. (Free translation)

Both parties challenged the decision. Later that year, at the end of the second instance, the judge confirmed the decision of the first instance judge but changed the motivation of the ruling in the following sense:

1. He used as a framework to explain the legal relationship of the parties the general provisions stated in the Civil Code regarding obligations and principles of contractual law.

2. He dismissed the breach of the contract of carriage of goods and disregarded the quality of company A as freight forwarder (broker). The decision relied on the fact that the duty to deliver goods and nationalize them falls under a fault-based obligation, not under a strict liability obligation that the carrier regime established.

3. When the second instance judge explained the circumstances of the case, he admitted company A was authorized to arrange carriage of goods operations and ancillary services required by the client. That company A received the goods from the client coordinated the inland and sea transportation from Colombia to Panama and was supposed to deliver the goods according to the instructions given by the client.

4. For the Judge, the issue of the non-delivery of the goods in Panama emerged due to the fact that the case was studied under the lens of a fault-base obligation instead of an obligation of result, Company A had to prove the actual delivery of the goods and that he acted with due diligence during the performance of the contract.

5. Company A failed to prove due diligence. The judge then stated:

> Because the loss of the merchandise occurred under the custody of a subcontractor of the defendant, who was in charge of the nationalization of the merchandise and delivery of the goods to the client, it is not relevant to use the rule stated on article 1313 of the Comm. Co., because the contract entered into was not with a freight forwarder (broker) but just a with a regular broker.[72] Therefore, the regime applicable follows the general regime of liability instead of the special regime applicable to the carrier.
>
> It says that the essential elements of the contract were reached. The parties consent on the task to nationalize the goods and the delivery of them in Panama. For this purpose it is irrelevant to determine if the defendant was a freight forwarder (broker) or a simple consignee. The fact is that the goods were not delivered and Company A acted with negligence during the performance of the agreement. [73]

Hence, the judge concluded that there was a breach of duty in the performance of the contract between the regular broker and the client due to the non-delivery of the goods in Panama. Company A was held liable and condemned to pay a sum of money to the client.

The judgment given by the second instance judge was challenged and brought to the Supreme Court of Justice. Unfortunately, procedural errors in the claim compelled the Court to disregard the issue matter. This is a very common situation in Colombia, especially in cases involving carriage of goods by sea or air.

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[72] Regular broker is defined in article 1287 Comm. Co. as a kind of mandate by which a professional on the particular market undertakes the performance of one or more business as in his name but on behalf of a principal. (Free translation.)

[73] Supreme Court of Justice. Cas. Civ. P. J. Cesar Julio Valencia Copete. 14 of February, 2005. Docket No. 7095 (Free translation.)

In my opinion, the scenario described above is one of the reasons why Colombia needs more specialized judges on the issues regarding carriage of goods. I consider, the main problems with the ruling are:

- The facts of the case clearly demonstrate the commercial nature of the agreement. Therefore, the adequate regulations governing the contract are in the Commercial Code, not in the Civil Code as in the second instance judge's ruling.

- It was clear that the principal aim of the contract was to coordinate the transport of the goods from place A to place B and, as ancillary services, the nationalization of the goods, handling of, picking up of, packing of, and so on, so forth.

- Company A was indeed freight forwarders (broker) for the client. Hence, the articles applicable to the case are the ones established in the chapter regarding the regime for freight forwarder as a broker. In other words, the liability should be based on an obligation of result, not a fault based obligation. In this event, Company A would have had the possibility to benefit from the rights of a carrier, i.e. exemptions from liability, limit of liability and time bar.

- When the nature of the contract is obscure, the safe path to take is analyzing the conduct of the parties and the real intention behind the agreement. It is unacceptable to confuse a special commercial contract with specific provisions such as a freight forwarder broker with another contract with different effects and scope of application. In this case, the confusion on the elements of the contract was evident.

  For instance, the relevant circumstance of the agreement for the judge was the nationalization of the goods and the final delivery in Panama. But the receipt,

custody, coordination of the transport, arrangement of delivery and the handling of the cargo was not taken into consideration for not having relevance to the case.

- If the case had been judged according to the proper rules, maybe Company A could have limited their liability as a carrier; or exonerated themselves by proving that the occurrence of the loss, damage or delay was unknown to them because they did deliver the goods in Panama, as they claimed. They executed the contract with due diligence and took reasonable measures to assure the delivery of the cargo in the place instructed by the client. Therefore, there is a possibility the decision could have been completely different.

This, among other arguments to be expressed later on, are the basis of the question raised in this dissertation. It is imperative to understand the type of contract entered into with a freight forwarder, because, even in this scenario in which the contract is nominated and fully described in the Commercial Code, confusion remains in the minds of our judges. Imagine a more complex agreement, with no regulation whatsoever, no limits and with an international component. It is time to analyze the freight forwarder as an agent.

2.1.4 Freight forwarder as an agent

This is a non-typical contract in Colombia. There is no specific legal provision that describes the elements of the agreement concluded between the freight forwarder, as an agent, and the client[74].

As mentioned before, the main difficulty with the regulation of the intermediaries in Colombian national law is the scope of the ancillary services. Globalization and the

[74] Guzman, J.V., (2005). El agente de carga. *Revista e-mercatoria*, 4 (1), 1-21. P. 1 (Free translation)

expansion worldwide of door-to-door services have created a loophole in the market regarding the liability of these freight forwarders.

In the exercise of their duties, services offered by agents often mix with other parties involved in the carriage of goods, such as carriers, customs intermediaries, non-vessel operating common carriers, multimodal transport operators and the personnel working at sea and air terminals. They have multiple denominations depending on the kind of services provided. This situation has generated various legal issues, the most relevant being the regime of liability. Within the national judicial system there have been completely opposite rulings in similar cases. [75]

During the author practice as a lawyer, various Court decisions where reached under the scope of strict liability following the provisions of the contract of carriage of goods and as fault based liability which only demands due diligence of the agent in the performance of the contract entered into. From the commercial point of view the difficulties relied on the fact that sometimes the distinction between a freight forwarder acting as a broker, as an agent, as a carrier or as a logistic operator is blurred and hard to ascertain.

As a definition of freight forwarders, the Supreme Court of Justice has used the following description:

> Freight forwarders play a role as an intermediary for international trade. It is not regulated in the national law. Even though it is slightly mentioned in the Customs Code, the legal framework, nature and regime has not been codified by the legislator.[76]

[75] Ibid. P. 2 (Free translation)

[76] Supreme Court of Justice. Cas. Civ. P.J. Arturo Solarte Rodriguez. 16 of December 2010. Docket No. 05001-3103-010-2000-00012-01 (Free translation).

> Freight forwarders in essence are professionals specialized in the handling of international cargo on behalf of the cargo owner to arrange the carriage of the goods. For that purpose, he is an intermediary between the parties involved in the chain of transport to facilitate the transactions among various cargo owners and the carrier. He provides guidance regarding the best route to take, the permits required in the operation, etc.
>
> The services offered by freight forwarders are wide because they cover all aspects concerning international trade – import and export of cargo- including the carriage of the goods. Either way, the important aspect to highlight is that their main task is to arrange the transport of the goods on behalf of the cargo owner and in the cargo owners name.[77]

According to this definition, the main difference between the freight forwarder as a broker and as an agent is that the first enters into a contract with a cargo owner or a carrier to supervise the carriage of goods from one place to another. He agrees to the terms of the contract of carriage in his name, but with the intention to transfer the effects later on to his principal. He does not undertake the carriage of the goods himself.

On the other side, the agent works only on behalf of the cargo owner, not on behalf of the carrier. He enters into a contract of carriage of goods on behalf of the principal, not in his own name, and he can undertake to carry of goods for the whole voyage or a leg of it.

The wide range of services provided by the freight forwarder as an agent includes:

> Arranging for or providing transportation via all four modes, warehousing, distribution and consolidation, import and export documentation, customs

[77] Ibid.

clearance, packing and containerizing the product, pre- or post-auditing, freight payment services, claims filing and recovery, site selections and design and /or operation of electronic data information systems, etc.[78]

Regarding the liability, it has to be determined first if the agent arranges the carriage of goods or if he acts as a carrier by undertaking to perform the carriage himself. This situation should be determined by the contract entered into with the client, the shipper. If this fact is not clear, the regime of liability will depend on the legislation applicable to the contract and the jurisdiction in which the claim is brought.

Usually the contract is agreed upon on the forwarder´s standard terms. Standard conditions drafted by leading organizations of the trade are often adopted. Examples are the Model Rules for Freight Forwarding Services of the International Federation of Forwarding Agents Association (FIATA). Meanwhile, forwarders in the United Kingdom generally adopt the Standard Trading Conditions of the British International Freight Association (BIFA).[79]

In this sense, Colombian Commercial Law has similar standard conditions for international freight forwarders that offer services in the country. They can be incorporated into a contract if the parties have agreed upon them. There has to be an explicit reference to this circumstance or else the conditions will not apply to the contract. These rules are known as Colombian Federation of Logistics Agents for International Trade (FITAC).

However, the scope of application of the "FITAC" Rules is restricted to arrange the carriage of the goods and the consolidation and deconsolidation of the cargo, without

[78] Augello, W. (2004). *Transportation, Logistics and the Law*. NY: Transportation Consumer protection Council Inc., P. 231 (Cited by Franco, J. Op. Cit. Pp. 151)

[79] Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002). Op. Cit. P. 456

making any reference to other services, such as handling, packing, and so on and so forth. Thus, these rules are less inclusive than the FIATA Model Rules.

The problem with the inclusion of standard conditions into an international contract of carriage of goods to be executed in Colombia is that national legislation is controversial regarding the validity of the inclusion clause. The general principle in commercial law is that the applicable law and the *litis forum* for a dispute emerging from a contract to be executed in Colombia is governed by domestic law.

Whether the article that states the principle is mandatory, or not, is unclear. Freedom of contract allows the parties to use international instruments in their contract. However, due to the fact that freight forwarders are not included in a typical contract, the Judge can interpret the agreement using national source of law and disregard the validity of the clauses inserted that incorporate foreign law or a different *litis forum*.

The consequence of the situation described above is that if the parties choose a forum and an applicable law that hold liable the freight forwarder as a carrier, when he acts like one, then the regime of liability is a known factor for the parties involved. But, if they use their freedom of contract in this regard, performance the agreement in Colombia, there is a possibility that the Judge may disregard the validity of the international clauses and take knowledge of the case in national territory. For the agent, it may be an advantage due to the fact that there is no legal regime for the subject matter; so, he can avoid being liable as a carrier even when he acted as one during the performance of the contract.

Now, it is important to highlight that in Court, the judge will take into consideration all the relevant circumstances of the case. In absence of a written contract or if the contract is ambiguous, the conduct of the freight forwarder can be taken into consideration as a factor to determine his liability for the breach of the agreement.

Colombian procedural law does not contemplate the concept of *estoppel* as the English Courts, but a similar concept known as the "Theory of Error". (Emphasis added). Therefore, the agent can be held liable in the subsequent cases:

1. Acts in public like a carrier by reason of his conduct.

   For example, a forwarder agrees to act as the agent of his customer. After the agency agreement is formed, the forwarder tells his customers that there is no need to take up certain insurance policies because he would be liable as a carrier if there is anything wrong. Relying on the forwarder´s statement, the customer does not take up any insurance policies. Although the forwarder is in fact not a carrier in this case, the doctrine of estoppel by representation may operate. The forwarder is not allowed to deny his liability as a carrier if the goods are later damaged in transit.[80]

2. Where the parties have acted upon a common mistaken assumption that even a diligent professional in the field would have believed it was a real and binding situation. This has to be proven in Court.

3. A party is not allowed to go back on his own word.

   For the doctrine to apply, an unequivocal promise must have been made by the promisor to the promisee. In making the promise, the promisor intended the promise would act upon the promisee. Relying on the promise, the promisee acted to his detriment by not enforcing certain legal rights. [81]

Therefore, the freight forwarder can be held liable as a carrier under Colombian law but it is a complicated case law and a long and expensive procedure. Thus, it is considered

[80] Chan, F.W.H., Ng, J.J.M., Wong, B.K.Y. (2002). Op. Cit. Pp. 462

[81] Ibid. P. 463

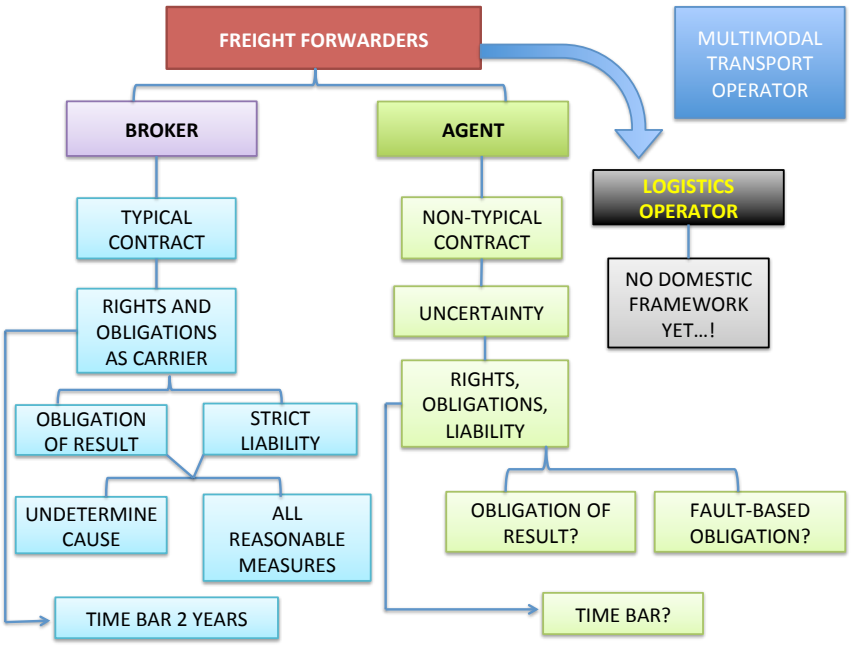
pertinent to create a legal framework for these kinds of intermediaries by a national or international instrument. Nowadays, due to the market demands, agents are continuously evolving and transforming into logistics operators, offering more services worldwide and absorbing a big portion of the international trade.

Stakeholders of the shipping industry should have certainty on the allocation of the risk of an eventual claim for a breach of an international contract of carriage of goods by various modes of transport entered into with a freight forwarder, not only as a safety measure, but to give transparency to the transaction and avoid long and expensive disputes in Court.

2.2 Freight forwarders in Colombia – current situation

Just to show a recap of the lines above, the following chart is illustrative:

Chart 4 Freight forwarders in Colombia[82]



[82] Chart elaborated by the author

CHAPTER THREE. RELATED ISSUES. CLAUSE OF CHOICE OF LAW AND JURISDICTION. TIME BAR

3.1 Validity of the clauses of choice of law and jurisdiction inserted in B/L

Regarding the applicable law for a contract of carriage of goods by sea, the commercial code has an ambiguous approach to the matter. In the first place, the general principle state that the freedom of contract will prevail over a special rule as long as it does not violate the domestic law, public order or custom. It also states that international conventions, even if they are not ratified by Colombia, can be used in the interpretation of a contract if there is no other source of law applicable to the particular case.

However, commercial law also respects the principle of *lex loci solutionis,* in the sense that any contract entered into in a foreign territory but to be executed in national land is governed by Colombian law. Article 869 has been a source of controversy on the subject. In other words, if the parties agree to the terms of the contract in Sweden but the final destination of the goods is a port in Colombia, the law applicable to the contract shall be domestic law, regardless of whether the parties agreed to something else. (Emphasis added)

In the contract of carriage of goods by sea this is a recurrent problem when the dispute involves the breach of an international agreement. Recognized authors believe that when the port of discharge is located in Colombia, the applicable law is Colombian law, even when the parties express a different opinion on the matter and choose to insert into the document of transport a different legislation applicable to their dispute.[83]

It is a common practice within the shipping industry to insert in the B/L clauses of jurisdiction and applicable law different to that which may be the applicable law under the *lex loci solutionis* principle. (Emphasis added)

[83] Guzman, J.V. (2007). Op. Cit. Pp. 114

The reason for this is that some countries have specialized courts in the maritime field, which are more competent than in other countries. Thus, it is for the parties a safe bet to allocate the risk of an eventual dispute in a safe and known *forum. The* United Kingdom, the United States of America and Canada are typical examples of this choice.

As for the applicable law, many carriers choose to be bound by international conventions, mostly by The Hague-Visby Rules due to the number of ratifications this instrument has worldwide.

The freedom of contract in an agreement as complex as an international carriage of goods by sea is a major component of the negotiations. Regardless of the clause printed in the B/L, if the parties choose to be obliged by it, the judicial system shall support this decision and respect the will of the parties stipulated in the document, so long as the clause is not intended to violate any law or constitute fraud on behalf of one of the contractors.

The question in Colombia with the jurisdiction clause and choice of law clause is if Article 869 is a mandatory rule or if freedom of contract shall prevail. It is the author opinion that the parties can agree on this subject matter within limits of reason. In other words, so long as the clause is not intended to cause harm to one of the parties or commit fraud, it should be considered valid to insert a different jurisdiction and a different law applicable to the international agreement. This idea may be supported by the fact that the article does not mention expressly that it is a mandatory rule, and, under Colombian principles of law, if a rule is mandatory, there should be an explicit wording that: any agreement contrary to this rule shall be void and have no legal effect whatsoever.

The author bring this aspect to the present dissertation because when the freight forwarder or the logistics operator issues the B/L or negotiates the terms on behalf of the shipper or cargo owner, a jurisdiction clause and choice of law clause can constitute

a serious obstacle for the parties involved if the terms are not clear and the contract is brought to a Court. Moreover, some may think of the situation, for example, of a shipper located in Japan, a consignee located in Colombia and a Freight Forwarder with several companies around the world, who enter into a contract of carriage of goods by sea on behalf of the shipper with a carrier who owns a vessel with its flag in Nigeria.

Many difficulties can emerge from a dispute that involves a strong international component and as complex as the shipping industry and procedural maritime law.

As an example of the situation described above, the following case reflects reality[84]:

Company S, entered into a contract of carriage of goods by sea with carrier L, to undertake the transport of steel from Venezuela to Colombia. Three independent but original bills of ladings were issued by the carrier in English describing the same cargo, covering different amounts of steel (bill of lading one: 700 pieces; bill of lading two: 600 pieces, B/L three: 400 pieces).

The three bill of ladings stated:

Shipper: Company S
Ship: Ciudad G
Loading port: Matanzas, Venezuela
Destination of goods: Barranquilla, Colombia
Consignee to shipper´s order: Company C.

Clause 24 was printed under the Captain's signature of the B/L in clear letters and stated:

[84] The identities of the parties and real amount of the cargo have been changed by the author.

> And finally in accepting this bill of lading the shipper, owner and consignee of the goods and holder of this bill of lading agree to be bound by all its provisions, on this page and overleaf, whether written, printed, pasted or stamped, the freight having been paid in consideration of same, as fully as if signed by all of them.

The cargo was loaded 03 of June 2001 in the Loading Port. The cargo arrived in Colombia damaged by water. The consignee sued the sea carrier and their maritime agent in Colombia. Due to the fact that three original bill of ladings were issued, the consignee used each bill of lading as proof of independent contracts of carriage of goods by sea in Colombia in the same city. One claim went to Judge 1 and the other two went to Judge 2.

The argument of the claimant in the three claims was that he suffered damage because the carrier was negligent during the performance of the contract; therefore, the carrier should be held liable as well as the maritime agent severally for a percentage of the loss of the goods. The defendant challenged the claim arguing lack of jurisdiction because of the following two clauses inserted into the bill of lading:

> Clause 20: “This bill of lading shall be construed and the rights of the parties thereunder determined according to the law of the United States.
> Clause 21: “All actions under the present contract shall be brought before the court of New York at carriers convenience.

Judge 1, at first instance, acknowledged the fact that the courts in Colombia lack jurisdiction due to these clauses and that the case should be heard by a New York Court. The reasoning of the ruling relied on the fact that it was an international contract of carriage of goods by sea and the freedom of contract was binding to both parties.

The claimant filed an appeal against the ruling of Judge 1. The next judge in hierarchy found the ruling of Judge 1 according to law and declared lack of jurisdiction on the subject matter. The issue was raised to a Tribunal and the Tribunal confirmed both decisions. The unhappy claimant entered a claim before the Supreme Court of Justice. The decision remained the same. Colombia had no jurisdiction to pursue the claim. This final ruling on this particular matter was delivered in 2008[85].

On the other hand, Judge 2 analyzed the other bill of lading. He also found lack of jurisdiction on the matter and declined the claim. The claimant challenged the decision and the second judge in hierarchy, surprisingly, ruled in favor of the claimant. In the understanding of the Judge, Colombian Courts had jurisdiction to rule the case based on national legislation.

As explained before, article 869 of the Comm. Co. states that any contract entered into on international grounds, but to be executed within the territory opens the door for national jurisdiction to pursue the claim. Therefore, the jurisdiction clause and choice of law clause under Colombian law were held void and had no effect. The defendant challenged the decision but lost the case[86].

Furthermore, if the document of transport is issued by a logistics operator, the situation for the shipper, the carrier and the consignee can be truly problematic in a Court, especially if it is added to that matter the issue of time bar restrictions on the claim.

[85] Supreme Court of Justice. Cas. Civ. P. J. Ruth Marina Diez Rueda. 21 of August 2008. Docket No. 11001-02-03-000-2008-01320-00. (Free translation)

[86] Tribunal Superior del Distrito Judicial de Barranquilla. P. J. Lilian Pajaro de De Silvestri. 27 of September 2010. Docket. 08-001-31-03-009-2002-00201-01 (Free translation)

3.2 Time bar

After explaining the main features of freight forwarders, the issue raised in this section is that, depending on the legal regime chosen by the parties to enter into a contract, the time bar can change substantially. If the freight forwarder is considered a broker, he will have the same time bar as the carrier.

If the freight forwarder is an agent, things can get complicated. In this case, the document of transport has to be study in order to determine the *litis forum*, the law applicable and the nature of the claim. Regardless of these aspects, the problem begins when the nature of the agreement is ambiguous and the framework binding the intermediary is not clear.

For example, the freight forwarder alleges he is not a freight forwarder (agent) but acted under a mandate of principal, or that he was an MTO, or that he was actually the performing carrier. In all of these cases the time bar varies and, in some cases, the claimant can even loose the right to sue the intermediary or the carrier due to the short terms established in the rules of law.

In this sense, freight forwarders can be obliged under the carrier regime of liability, the general rule established in our domestic law for all types of contracts or under the provisions of an international instrument. According to the general provisions of the contract of carriage of goods by land, the time bar is two years for all types of actions emerging from the contract of carriage of goods. There is no special provision for the contract of carriage of goods by sea. Therefore, the time bar applicable is also two years.[87]

However, in the chapter regarding the carriage of goods by sea, Article 1677 of Comm. Co., a different time bar of only one year is provided for the actions against a special

[87] Article 993 Comm. Co. (Free translation)

type of agreement; this is the contract of affreighment. This time bar is not applicable to the contract of carriage of goods by sea under a bill of lading.[88]

Now, The Hague Rules provide a different time bar period. Article III states:

> Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.

Under this Convention, the time bar is only of one year and the Convention allows the parties to extend the time bar period. Under the Colombian Commercial law, the time bar is a mandatory rule and cannot be modified by the parties in the agreement. If a clause changes the time bar provided for by law, it will be considered a void clause and the time bar will remain two years.

Furthermore, if the carriage of goods is entered into under the multimodal transport regime, the time bar is extremely short. Article 22 of Decision 331 states that

> Unless the parties agreed otherwise, the MTO is exempted of liability under this Decision, if judicial or arbitral proceedings have not yet been instituted within a period of nine months after the goods had been delivered or had to be delivered or the non delivery of the goods entitle the consignee to consider them lost."[89]

On the other hand, if the freight forwarder is considered to fall within the general regime of responsibility for all types of contracts, then the time bar is ten years after the breach of the contract or the right to enter a claim is viable.

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[88] Guzmán, J.V., (2007) Op. Cit. Pp. 369 (Free translation)

[89] Art. 22 Decision 331 (Free translation).

As can be observed, time can be a sensitive issue for the claimant when the agreement entered into with a freight forwarder is not clear. The international component of the contract can be an incentive for *forum shopping* due to the fact that legislations as complex as the one in Colombia may not be the best scenario to bring a claim of this nature before the Courts.

CHAPTER FOUR. CONCLUSION. PROPOSAL FOR A NOMINATED CONTRACT OF LOGISTICS SERVICES

After explaining all relevant circumstances, the author considers it adequate to propose a legal framework to the contract of logistics services using elements of the other nominated contracts explained above.

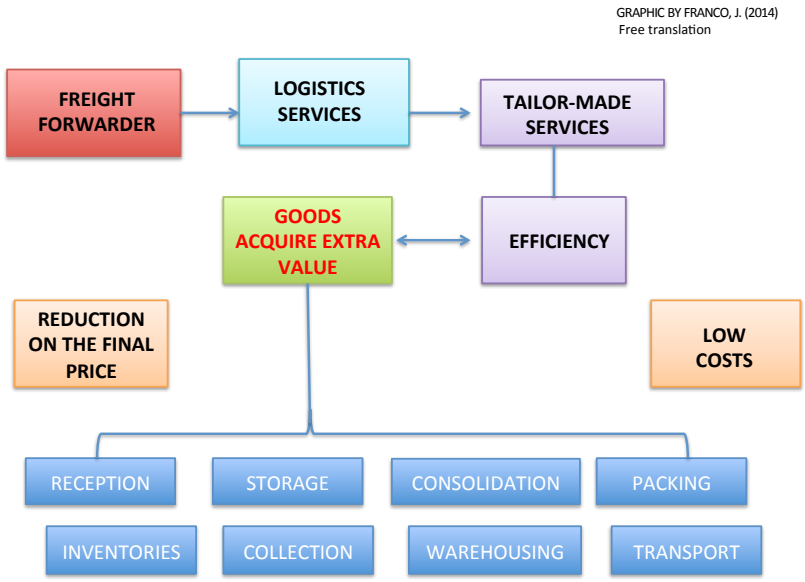
For this purpose, FIATA has adopted the following definition:

> Freight Forwarding and Logistic Services" means services of any kind relating to the carriage (performed by a single mode or multimodal transport means), consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods.
>
> Freight Forwarding Services also include logistical services with modern information and communication technology in connection with the carriage, handling or storage of the Goods, and de facto total supply chain management.

These services can be tailored to meet the flexible application of the services provided.[90]

The definition presented above can be explained in the next chart:

Chart 5 Logistics services



Graphic by Franco, J. (2014). Free translation

Colombia has a Council that studies Economic, Political and Social issues. The main task of the Council is to give recommendations for future regulation in a matter subject. Regarding logistics services, the Council has issued several documents about the importance of logistics services but they do not provide a definition, as such, of these services. The documents are guidelines, they are not mandatory and even though they

[90] FIATA (2004). Freight forwarders adopt an official description of "freight forwarding and logistics services". Retrieved 4th July 2016, from **http://fiata.com/uploads/media/CL0406_11.pdf**

have been elaborated upon years ago, the Government has not taken action towards the framework for these kinds of services.[91]

However, the documents in mention have helped authors define the contract of logistics services, highlight the benefits of the agreement and expose problematic issues emerging from the legal void in the matter.

The improvement of the transition between a freight forwarder and a logistics operator is that the logistics operator is considered a *strategic partner* of the client, in the sense that he helps to add value to the goods delivered by the client and can handle the operation following the specific necessities required by the company. The logistics operator can arrange all the stages needed to deliver the goods to the final consumer, thus, facilitating the operation, the benefit for the client will ultimately translate to more profits.[92] (Emphasis added)

The main component of the agreement is based on the economic function of the services provided by the logistics operator. It is submitted that the view of some authors on the fact that the logistics services contract is not a contract of carriage of goods, is correct.

> The deregulation of the motor carrier industry and the trend toward outsourcing certain business functions generated new entities known as "Third Party Logistics Providers" (hereinafter "3PLP). 3PLP are intermediaries between shippers and carriers, which fall into two categories: asset-based and non-asset based. Asset-based 3PLP are generally owned by carriers or are affiliated with a carrier in some manners. Non-asset based 3PLP do not own equipment, but generally operates a transportation consulting business. Both types of 3PLPs offer to take over the shipper´s partial or complete transportation and / or

[91] Documents CONPES No. 3439/2006; 3547/08, 3568/09

[92] Franco, J. (2014). Op. Cit. Pp. 218 (Free translation)

> logistical functions, on the representation that they will be able to reduce shipper´s transportation rates and / or total costs, and produce efficiencies in the shipper´s distribution system."[93]

Hence, the logistics services have a wider ambitious goal than to simply carry the goods from one place to another. When an agreement has been reached between a client and a logistics operator, a plan is elaborated for the whole operation; and the parties involved in the performance of the contract are bound by the plan, in the sense of timing, custody of the goods, the carriage of the goods, the storage, the handling, the packing, etc. The aim is to maximize the profit with the minimum intervention of third parties or risk factors that can jeopardize the task to be performed.

That is the reason why many logistics operators have their own transport fleet and storage units, to have full control of the production process. According to this, it is submitted that the period of responsibility shall be from the time they receive the goods from the client until they deliver them to the final costumer in the place of destination.

In this sense, the regime of liability proposed follows the general principles provided for the Multimodal Transport Operators and the international conventions on the subject matter. It has to be reminded that this method is only for logistics operators who offer services on an international scale using various modes of transport.

Even though the U.N Convention on Multimodal Transport of Goods is not in force, the regime of liability inserted in the convention is clear and adequate to regulate the responsibility of the MTO. It is desirable that the logistics operator is liable from the moment he receives the goods from the client until he delivers in the place of final destination to the customer. The obligation of custody covers all the period of responsibility, regardless if the goods are not in the possession of the logistics operator.

[93] Augello. Op. Cit. Pp. 230 y 231 (cited by Franco, J. Op. Cit. Pag. 247)

On the one hand, the logistics operator should be held liable for all the time he is in possession of the goods, or if his agents or subcontractors have custody. The operator shall be liable for loss resulting for loss 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; unless, the operator proves that he, his servants or agents or any other person involved in the operation, took all measures that could reasonably be required to avoid the occurrence and its consequences.

When loss of or damage to the goods occurred during the carriage of the goods, the operator shall determine in what particular stage of the multimodal transport the damage or loss occurred in order to benefit from the rights and obligations of the carrier stated in the applicable law, national or international instrument for the specific mode of transport. If the operator is unable to determine the particular stage, the regime of liability shall be the one stated in the contract. If the parties remained silent about the responsibility of the operator, and the particular stage cannot be determined, the general principles of international private law shall apply, due to international factor of these types of contracts.

It is important that the clauses inserted in the contract are binding for the parties, especially those who can variate from one country to another, such as the limit of liability of the carrier, the time bar and the clauses regarding the choice of law and *litis forum*. (Emphasis added).

The obligation undertaken by the operator is one of result. He has the duty to deliver the cargo with the added value as agreed in the contract with the client. In general, it can be stated that it follows a fault based liability regime, in the sense that he has to determine the cause of the damage to be able to be exonerated of responsibility and prove he took all measures to avoid the occurrence of damage or to minimize effects. However, this can vary depending on the stage of occurrence of the damage. The exemptions of liability, limit of liability and time bar will be the ones provided for the

transport mode in which the damage occurred or the legal regime determined by the judge of knowledge of the litis forum in the case that there is controversy on the matter.

This proposal is based on the study presented in this dissertation. Every day logistics services become more common and are being used on a daily basis all around the world. With globalization and the containerization phenomena, the carriage of goods by sea is still the most used transport of all, but with the increasing services of door-to-door including a sea leg, inland transportation has gained relevance as well.

In this sense, the terms of agreement entered into between the logistics operator and the client should be clear on the following aspects:

1. Definition of the contract. For this matter, the definition adopted by FIATA of freight forwarders and logistics services mentioned before is adequate. The main component of the agreement is the economical value added to the goods during the operation. The ancillary services should be described in order to delimit the scope of performance expected from the logistics operator.

2. International factor. The performance of the contract should involve two or more countries during the operation. If so, there should be no doubt regarding the validity of the jurisdiction clause and choice of law clause inserted into the agreement; unless the parties intend fraud. Thus, if the contract is to be executed in Colombia, the freedom of contract will prevail over the provision stated in Article 869 of the Comm. Co.

   In other words, if a claim involving a logistic operator is filed in Colombia, the judge of knowledge is not obliged to apply domestic law if the parties agreed on these clauses and the relevant circumstances of the case allows the plea to be heard by another jurisdiction under a different legal regime.

3. The contract is one for the whole operation. Even though the agreement involves multiple ancillary services, subcontractors and the carriage of goods by land and sea, the contract entered into between the logistics operator and the client is one. The logistics operator shall elaborate upon the document that evidences the contract according to the instructions of the client; unless the parties agreed otherwise.

4. The inclusion of standard conditions provided by the International Federation of Forwarding Agents Association (FIATA), The British International Freight Association (BIFA) or the Colombian Federation of Logistics Agents for International Trade (FITAC), to mention a few examples, shall be valid under the freedom of contract, but there must be an express reference to this fact in the document that evidences the contract.

5. If any clause is ambiguous, the interpretation of the contract shall be made in favor of the party not responsible for the elaboration of the document.

Regarding the liability of the logistics operator, the period of responsibility shall follow the general provision stated in the United Nations Convention on International Multimodal Transport, 1980[94], as stated before, with some particularities:

The responsibility of the logistics operator for the goods covers the period from the time he takes the goods in his charge to the time of their delivery.

For the purpose of the clause expressed above, the logistics operator is deemed to be in charge of the goods from the time he has taken over the goods from the client or a person acting on his behalf in the place and time agreed upon, until the time he has delivered the goods by handing over the goods to the person entitled to receive them according to the terms of the contract.

[94] Article 14 and following of the U.N. Convention on International Multimodal Transport, 1980

The logistics operator's liability shall include his servants or agents or any other person of whose services he makes use for the performance of the logistics services contract. In this sense, the logistics 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.

If the occurrence which caused the loss of or damage to the goods, or delay in delivery took place during the period of responsibility of the logistics operator, his servants, agents or subcontractors the logistics operator shall be liable unless he proves that he, his servants or agents or subcontractors took all measures that could reasonably be required to avoid the occurrence and its consequences.

Now, if the occurrence of the damage, loss or delay in delivery occurred during the period the goods where being transported by land under a contract of carriage of goods by land, the general provision for this type of contract shall apply. The logistics operator shall be entitled to benefit from the rights and obligations of the carrier by land. In this case, if the damage, loss or delay in the delivery occurred in Colombia, the applicable law will be Colombian Law, more specifically the provisions stated in the Commercial Code on this matter. Therefore, the mandatory rules of law, such as the limit of liability and the time bar would be governed by Colombian law.

If the occurrence of the damage, loss or delay in delivery occurred during the sea leg, then the applicable law shall follow international private law principles. The freedom of contract shall prevail over the domestic regulation of the contract of carriage of goods by sea. This means, that if the parties choose to apply the Hague-Visby Rules, for example, and be heard in a Court in London, the clauses shall be valid in principle, unless the parties intent is fraudulent.

According to this example, the limitation of liability can be established by the parties as provided in the mentioned Rules and the time bar would be one year, instead of two years as provided in Colombian law.

Due to the complexity of the contract of logistics services and the many legal relationships involved, it is not appropriate to classify the regime of liability as a strict one or a fault based one. It will depend on the relevant circumstances of the case and the particular occurrence of the loss of or damage to the goods or delay in the delivery.

However, it can be stated that if the occurrence of the loss or damage to the goods or delay in the delivery occurred during the transportation of the goods by land in Colombia, the logistics operator should be held responsible under a strict liability regime like the land carrier under Colombian law. On the other hand, if the occurrence happened during the sea leg, then it is probable than the regime of liability is a fault based one, in accordance with The Hague-Visby Rules, with the exemption of transportation of dangerous goods, which will follow the especial regime to this matter.

In any other stage of the contract, the liability of the logistics operator will depend on various factors, such as the place of occurrence of the damages, the ancillary services provided when the damage occurred, the terms of the contract, and so on and so forth.

Hence, due to the intricacy of an international contract of logistics services *door-to-door,* it is imperative to have a clear regime of liability of these multifaceted actors in the industry. For this matter, the importance of having an international instrument on the subject is a necessity. The road may be long and challenging, but it is a responsibility of the new generation of professionals in the field to start working on proposals to integrate the rules regarding intermediaries in the transport chain of supply and logistics services.

Colombia has the duty and responsibility to be part of the international community. It is hoped that private maritime conventions will be signed in the years to come and Colombia shall become a real maritime power within the shipping industry.

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