

**The Suitability of the Rotterdam Rules in Modern Multimodal
Transport: The Possibility of Harmony for Liability under
Multimodal Carriage Contracts**

by

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I, Linda Innocent Matshinga declare that

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Linda Innocent Matshinga

DEDICATION

To my late beloved grandmother, Nomalizo Mildred Matshinga, whose care and warmth I dearly miss and to my mother, Busisiwe Nomxolisi Ngcobo, without whom I would have never gotten this far.

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ABSTRACT

With the advent of containerisation in the 1960s, there was a significant need to alter the traditional legal approach to the long-distance haulage of goods. The use of containers made it possible for goods to be transported by different modes of transport from their point of origin to their destination without there being a need for unpacking in order to sort or verify them during the process of being moved from one mode of transport to another. This led to an increase, internationally, in the use of multimodal transport contracts for long-distance haulage. In the event of loss, damage or delay to the goods involved in multimodal transport, shippers and consignees desired to deal with a single operator who would bear responsibility for the entire transport in lieu of pursuing several unimodal carriers. Multimodal transport, however, is being operated in circumstances where the current international cargo liability regime for the carriage of goods is not harmonised i.e. the law of carriage is substantially influenced by unimodal transport conventions. The current carriage regimes are out-dated and unsuitable to deal with multimodal carriage. A cargo claimant whose goods are lost, delayed or damaged during international multimodal transportation is confronted with numerous difficulties in establishing liability under a multimodal carriage contract as he may find himself dealing with a number of different liability regimes. This becomes even worse when the stage during which the damage occurred cannot be localised and therefore it is not clear which unimodal liability regime is pertinent. There have been several calls from different authors for a true multimodal convention, covering all aspects of “door-to-door” multimodal carriage to be developed. The question that arises is whether the recently formed United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) has what it takes to meet the demands of modern multimodal transport and if it does, why then are states reluctant to ratify it. This study aims at examining the scope of application of the Rotterdam Rules in multimodal transport and its implications for the liability problems associated with multimodal transport. It will however not focus on the basis of liability, limits and other matters offered by the Convention.

CHAPTER 1

THE INTRODUCTION TO INTERNATIONAL TRANSPORT

BACKGROUND

Historically, the international carriage of goods by sea was governed by common law.¹ At common law, the parties to a contract of affreightment covered by a bill of lading or similar documents of title were completely free to negotiate the terms of their contract.² The lack of competition in sea transport improved the carrier's bargaining powers in relation to cargo owners and this led to an increase in the inclusion of exemption clauses by ship owners in contracts of carriage to the point that by 1921, there were fifty five commonly excluded risks.³ Moreover, ship owners were even able to escape liability for their own negligence.⁴ The carriers were further exempted from liability for, *inter alia*, loss or damage done from perils of the sea, decay, strikes, and unseaworthy ships.⁵ The exclusion clauses were completely in the carriers favour and goods were carried at the risk of the merchants.⁶

As a countermeasure to the British monopoly over ships, American traders passed the Harter Act of 1893.⁷ This was the first legislative effort to demarcate the liability boundaries of ocean carriers.⁸ The Harter Act defined the minimum liability of carriers. However, it did not bring about uniformity with regard to carrier liability and as a result, ship owners persisted with the practice of inserting clauses that minimised liability in bills of lading because such clauses continued to be enforceable in other countries.⁹

¹ Michael E Crowley 'The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem' (2004-2005) 79 *Tulane Law Review* 1463.

² JF Wilson. *Carriage of goods by sea*. 7 ed. (2010) 174.

³ M.Lourens 'An overview of the regimes governing the carriage of goods by sea' (1999) 10 *Stellenbosch Law Review* 245.

⁴ Ibid.

⁵ I Carr. *International trade law*. 4 ed. (2010) 229.

⁶ Ibid.

⁷ Lourens op cit note 3 at 245.

⁸ Ibid.

⁹ Yancey "The Carriage of Goods: Hague, COGSA, Visby and Hamburg" 1983 *Tulane LR* 1238 1241.

Consequently, the growing discontentment with the abuse by carriers of their strong bargaining position culminated in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, August 25, 1924 (the Hague Rules). The Hague Rules were adopted on 3 September 1921 at a meeting of the Maritime Law Committee of the International Law Association at The Hague.¹⁰ The Rules were intended for voluntary incorporation by carriers into bills of lading. Not surprisingly, the carriers were however not keen to accept the invitation to self-regulation and therefore a diplomatic conference held at Brussels in 1924 converted the Rules into an international convention.¹¹ The Hague Rules were amended in 1968 by the Brussels Protocol, the Rules together with this Protocol became known as the Hague-Visby Rules.¹²

The international carriage of goods by sea is governed for the most part by the 1924 Hague Rules, either in its original form or as amended by the 1968 Visby Amendments (Hague-Visby Rules).¹³ These Rules embodied a compromise between the interests of ship owner and those of the cargo owner and the buyer. The Rules define the responsibilities and liabilities of the carrier where goods are transported using bills of lading or similar documents of title.¹⁴ The use of multimodal transport contracts has restricted the scope of application of the Hague-Visby Rules. This is because the Rules apply only to contracts covered by bills of lading or similar documents of title for the period of “tackle to tackle.”¹⁵ The law pertaining to international carriage of goods by rail is regulated by the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999.¹⁶ Attached to it as appendix B is the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (CIM).¹⁷ The Convention on the Contract for the International Carriage of Goods by Road (CMR) of May 1956,¹⁸ fundamentally modelled

¹⁰ Lourens op cit note 3 at 245- 246.

¹¹ Ibid.

¹² Carr op cit note 5 at 230.

¹³ Michael E Crowley op cit note 1 at 1467.

¹⁴ Carr op cit note 5 at 159.

¹⁵ S Hashmi ‘The Rotterdam Rules: A Blessing?’ (2011-2012) 10 *Loyola Maritime Law Journal* 228. Tackle to tackle means “from the time when the ship’s tackle is hooked on at the loading port until the moment when the ship’s tackle is unhooked at discharge and if shore tackle is used, the moment is when the goods cross the ship’s rail.” R Force, AN Yiannopoulos & M Davies. *Admiralty and maritime law*. (2006) Vol 2: 213.

¹⁶ Convention Concerning International Carriage by Rail (COTIF) 1980 Modification Protocol 1999.

¹⁷ The CIM Rules apply to over 240, 000 km of railway lines and to contemporary carriage of goods on shipping lines and inland waterways. See Carr op cit note 5 at 361.

¹⁸ Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

after the CIM Convention, is the foremost international liability regime for the carriage of goods by road. It is a product of the United Nations Economic Commission for Europe and its use is limited to the transportation of goods in Europe with as few as three contracting member countries outside the Europe Union.¹⁹

Air transport is governed by the Convention for the Unification of Certain Rules for the International Carriage by Air (the Montreal Convention)²⁰ and the Warsaw system which consists of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention).²¹ The Warsaw Convention as amended by the Hague Protocol 1955, Montreal Protocol No. 4, 1975 and the Montreal Convention, 1999. Because multimodal transport was not a consideration in the early 1900s, there was never a need to establish uniform rules to govern all modes or combined modes of transports and therefore, each regime developed separately,²² more so with the land and air conventions not being prevalent enough to require international conventions governing and regulating such carriage in the early 1900s.

With the advent of containerisation in the 1960s however, there was a significant need to alter the traditional legal approach to the long-distance haulage of goods.²³ The use of containers has made it possible for goods to be carried by different modes of transport from their point of origin to their destination without there being a need for unpacking in order to sort or verify them during the process.²⁴ This has led to an increase, internationally, in the use of multimodal transport contracts for long-distance haulage.²⁵ In the event of loss or damage in the delivery of goods involved in multimodal transport, shippers and consignees desire to

¹⁹ See Carr op cit note 5 at 377.

²⁰ Adopted in Montreal in 28 May 1999.

²¹ Signed at Warsaw on 12 October 1929.

²² Stephen Zamora 'Carrier liability for damage or loss to cargo in intermodal transport' (1975) 23 (3) *The American Journal of Comparative Law* 391. See also Michael E Crowley op cit note 1 at 1463.

²³ J Hare. *Shipping law and admiralty jurisdiction in South Africa*. 2 ed. (2009) 599.

²⁴ UNCTAD report *Implementation of Multimodal Transport Rules* and the accompanying comparative table, which presents in overview the content of existing regional, subregional and national multimodal liability regimes, UNCTAD/SDTE/TLB/2.

²⁵ S Lamont-Black 'Claiming Damages in Multimodal Transport: A need for Harmonisation' (2011-2012) 36 *Tulane Maritime Law Journal* 707.

deal with a single operator who would bear responsibility for the entire transport in lieu of pursuing several unimodal carriers.²⁶

Multimodal transport, however, is being operated in circumstances where the current international cargo liability regime for the carriage of goods is not harmonised, that is, the law of carriage is substantially influenced by unimodal transport conventions.²⁷ It is out-dated and unsuitable to deal with multimodal carriage.²⁸ Cargo claimants whose goods are lost or damaged during international multimodal transportation are confronted with numerous difficulties in establishing liability under multimodal carriage contracts as they may find themselves dealing with a number of different liability regimes.²⁹ This becomes even worse where the stage during which the damage occurred cannot be localised and therefore it is not clear which unimodal liability regime is pertinent.³⁰

OBJECTIVES

There have been several calls from different authors for a true multimodal transport convention that covers all aspects of “door-to-door” multimodal carriage to be developed.³¹ The question that arises is whether the recently formed United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) has what it takes to meet the demands of modern multimodal transport and if it does, why then states are reluctant to ratify it. The significance of this is to find out whether there can be a solution to the legal problems experienced in multimodal transport contracts and if there is, whether it is capable of implementation. Thus, the dissertation will investigate why the unimodal carriage regimes such as the Hague-Visby Rules do not meet the demands of international multimodal transport and whether the Rotterdam Rules are capable of harmonising the process of claiming damages under a multimodal transport contract. It will

²⁶ UNCTAD report op cit note 24 at 6.

²⁷ Lamont-Black op cit note 25 at 707.

²⁸ Michael E Crowley ‘The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem’ (2004-2005) 79 *Tulane Law Review* 1462.

²⁹ S Mankabady ‘The Multimodal Transport of goods Convention: A challenge to Unimodal Transport Conventions’ (1983) 32 *International and Comparative Law Quarterly* 120-121.

³⁰ Lamont-Black op cit note 25 at 711.

³¹ Michael E Crowley op cit note 28 at 1461. See also Indira Carr. *International trade law*. 4 ed. (2010) 415. See also Diana Faber ‘The Problems arising from multimodal transport’ (1996) *Lloyd’s Maritime and Commercial Law Quarterly* 503.

further investigate the various attempts that have been made to establish a uniform legal framework governing multimodal transport, such as the United Nations Convention on International Multimodal Transport of Goods 1980, and why such attempts have not succeeded.

A further issue or problem that the dissertation will explore is the continuous lack of unanimity with regard to the adoption of an international transport liability regime to govern multimodal transport. The dissertation will also analyse the various international efforts that have been made with a view to simplifying the problems of liability associated with multimodal transport, the so called industry solutions, and why their usefulness is limited and makes harmony and uniformity practically impossible. Moreover, the dissertation will also investigate the practical consequences of having a multimodal carriage liability regime (if the international community ever adopts such a regime), such as the anomaly of having different systems, that is, a multimodal system if the carriage was conducted under a multimodal transport document and a different system where carriage has been conducted under a single mode of transport. These scenarios raise clashes between such desired multimodal regime and the national laws of different States.

PROBLEM STATEMENT OF THE RESEARCH PROJECT

In the event of damage to or loss of goods transported under a multimodal transport document such as, for instance a through bill of lading, a cargo claimant needs to claim damages from the carrier responsible for such loss or damage.³² This may be problematic particularly where a container is used.³³ The documentation issued by the carrier would merely show the condition of the container when it was received and not the condition of the goods inside the container.³⁴ One of the initial problems for a claimant in establishing liability is to determine when and where the cargo was damaged and accordingly whether a particular transport convention for road, rail, sea or inland waterways mandatorily applies.³⁵ Expert opinion can show where the damage occurred, for instance if the damage was caused by an infiltration of sea water, this would show that the damage must have occurred during

³² Lamont-Black op cit note 25 at 708.

³³ I Carr. *International trade law*. 4 ed. (2010) 405.

³⁴ Ibid.

³⁵ Lamont-Black op cit note 25 at 711.

the sea leg of the multimodal carriage.³⁶ However, in most circumstances it is not “possible to localise the cause of damage.”³⁷ If, therefore, the place of loss or damage cannot be localised, or where damage has developed gradually throughout different legs of the journey, none of the unimodal convention regimes pertinently apply.³⁸ Moreover, the different unimodal liability regimes have different time limitations for bringing a claim for damages.³⁹ The cargo claimant is thus faced with the problem of ensuring that he brings his suit within the time limits set by the liability regime that is applicable to his claim.⁴⁰ This becomes even more difficult where the stage during which the damage occurred cannot be localised and therefore it is not clear which unimodal liability regime is pertinent.

STRUCTURE OF THE DISSERTATION

Chapter two of this dissertation will deal with the development of and what constitutes multimodal transport. It will also serve as introduction to some of the problems experienced in the course of multimodal transport contracts. Chapter three will review the cargo liability regimes currently in place covering the carriage of goods by Rail and Road; the carriage of goods by Air; and the carriage of goods by Sea. It will outline the problems caused by the limited scope of the Hague-Visby Rules, which is a sea carriage liability regime incorporated by our Carriage of Goods by Sea Act.⁴¹ Chapter four will explore the United Nations Convention on International Multimodal Transport of Goods 1980 and the reasons this convention did not find favour with various States and accordingly never came into force. This chapter will also discuss the UNCTAD/ICC Rules for Multimodal Documents 1992 and the industry solutions that are currently being used to govern multimodal carriage. Chapter five will comprise of an extensive look at the provisions of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (Rotterdam Rules). Finally, the author will conclude as to whether the Rotterdam Rules are capable of providing a mandatory liability regime for multimodal cargo carriage and give recommendations where necessary.

³⁶ Carr op cit note 33 at 405.

³⁷ Ibid.

³⁸ Lamont-Black op cit note 25 at 711.

³⁹ Ibid at 722.

⁴⁰ Carr op cit note 33 at 405.

⁴¹ Act 1 of 1986.

CHAPTER 2

THE DEVELOPMENT OF MULTIMODAL TRANSPORT

2.1 The container revolution

The 1960s saw the development of new transportation techniques that had significant implications for the long-distance haulage of goods. Containerisation and other means of unitisation of goods were established as well as technological developments designed to improve the systems for transferring cargo between different modes.⁴² The unitisation of goods occurs in three different forms.⁴³ These include roll on, roll off cargo, palletised cargo and containerised cargo.⁴⁴ For the purposes of multimodal transport, however, the most significant system of unitisation is the use of containers.⁴⁵

Since the 1960s, goods are increasingly carried in containers, making it possible for goods to be transported by different modes of transport from their point of origin to their destination without there being a need for unpacking in order to sort or verify them during the process of being moved from one mode of transport to another.⁴⁶ Containerised goods can move through different types of transport and speedily progress from the point of collection to their intended destination without the inconvenience of being discharged in order to be sorted or verified.⁴⁷

⁴² See the Report of the United Nations Conference on Trade and Development (UNCTAD). UNCTAD/SDTE/TLB/2 at 6.

⁴³ Jeb Anthony Clulow *Multimodal Transport in South Africa* (Unpublished LLM thesis, University of Cape Town, 1998). Available on <http://web.uct.ac.za/depts/shiplaw/theses.clulow.htm>.

⁴⁴ *Ibid.*

⁴⁵ C Proctor. *The legal role of the bill of lading, sea waybill and multimodal transport document*. (1997) xi. See also J Hare. *Shipping Law and Admiralty Jurisdiction in South Africa*. 2 ed. (2009) 599. See also Clulow op cit note 43. See also UNCTAD report UNCTAD/SDTE/TLB/2 op cit note 42 at 6. See also Stephen Zamora. 'Carrier liability for damage or loss to cargo in intermodal transport.' (1975) 23 (3) *The American Journal of Comparative Law* 391.

⁴⁶ UNCTAD report op cit note 42 at 6. See also Malcolm A. Clarke. 'Multimodal Transport in the new millennium.' (2002) 1 *WMU Journal of Maritime Affairs* 71.

⁴⁷ Hans Carl. *Future developments in the regulatory aspects of the international multimodal transport of goods*. Presentation Liability Committee Monday 13 September 1999 at 1. <http://www.aimu.org/IUMI%20PAPERS/LIABILITY/Future%20Developments%20in%20the%20Regulatory%20Aspects.pdf> (Accessed: 26 June 2013). See also UNCTAD report *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2 at 5- 6.

Containerisation has been described as the “consolidation of cargo in a standard size box.”⁴⁸ The United Nations Conference on Trade and Development (UNCTAD) offers a more in-depth background behind containerisation as follows:

“Cargo unitization, using containers, developed first in the domestic trades of the United States of America, and was then employed in the trades from the United States to the east coast of Latin America. The first sea-container was employed in 1956. The extension of the use of containers to international deep-sea trades began in the middle of the 1960s in the North Atlantic trades between North America and Western Europe. In the containerization of cargo, containerization refers to a system that unitizes cargo in a container for transport through various modes and phases of transport without the intermediate handling of the cargo carried.”⁴⁹

The motive behind containerisation was, and still is, purely financial as carriers desired to increase the cargo carrying capacity of their ships while reducing the amount of time it took to load and discharge the cargo.⁵⁰ Shippers on the other hand looked to “achieve economies of scale in distribution.”⁵¹ With regard to the increase of cargo carrying capacity, the magnitude of cargo ships in general was forced by the speed of loading and discharge.⁵² Through the significant reduction of the time taken to load and discharge cargo, ship owners took “advantage of economies of scale by ordering even larger container ships.”⁵³ As a result, during the late 1960s, the majority of container ships had a capacity of not less than 1000 Twenty-Foot Equivalent Unit Containers (TEU), whilst the largest vessels carried 1600 TEU and when containerisation had fully developed in the early 1980s the majority of container ships had capacities exceeding 1600 TEU, with the largest vessels carrying 2800-3000 TEU.⁵⁴ The capacity of containerships has kept on increasing with new ships that are being

⁴⁸ Jeb Anthony Clulow op cit note 43.

⁴⁹ UNCTAD Report. *Unitization of Cargo*. UNCTAD, TD/B/C.4/75. (1970).

⁵⁰ Jeb Anthony Clulow op cit note 43.

⁵¹ MJ Shah ‘International developments in multimodal transport and shipping’ in *Containerisation and the developing world: the full verbatim report of the international conference the growth of containerisation and the impact on the economies of developing countries held in London- October 6th and 7th 1980* (1980) 17.

⁵² Jeb Anthony Clulow op cit note 43.

⁵³ Ibid. Economies of scale characterises a point in production where there is an increase in the scale of output which while the cost of producing one more unit decrease. This definition and example was taken from the Council of Supply Chain Management Professionals (CSCMP), USA. (2007). *Supply Chain and Logistics: Terms and Glossary* (Updated October 2006).

<http://www.cscmp.org/Downloads/Public/Resources/glossary03.pdf> (Accessed: 17 July 2013).

⁵⁴ Jeb Anthony Clulow op cit note 43.

built and today the largest container vessel is the Triple-E Class, belonging to the Maersk Line shipping company with a capacity of 18000 TEU.⁵⁵ Thus, containerisation ensured that ship owners continued making ships with increasing carrying capacities in order to take advantage of the continuous growth experienced by international traders and to effect improvements to their ships at lower unit costs.⁵⁶

With regard to the increase of speed, during the early 1960s, ship designers were designing ships capable of reaching the speeds that are more or less the same as the speed of modern ships.⁵⁷ The main difference from the modern carriage of goods by sea was the time it took to load or discharge goods on vessels.⁵⁸ By combining cargo into a container, which otherwise would have been carried as break bulk, into 10-25 ton loads, container ships were capable of being loaded and discharged in the least amount of time, compared to the time required for a loading and discharging goods on general cargo ship. Consequently, the less time spent in a port of shipment or a port of discharge meant that a container ship is able to save a number of days on each voyage without the need to speed up or burn more fuel and save costs for being berthed longer in the port of discharge.

In addition, although pure financial interests drove the shipping industry towards containerisation, there were also advantages that made containerisation more desirable. Limiting the extent to which goods are exposed to risks of loss and damage caused by congestion, delay and pilferage of the products at ports, as well as prompting a speedy collection, transit and delivery of the goods from one inland point to another with minimum intermediate handling of the goods, were all further advantages in favour of containerisation.⁵⁹ Because containers proved to be a more efficient means by which to transport cargo by all modes of transport, the development of the container paved the way for

⁵⁵<http://www.maersk.com/innovation/leadingthroughinnovation/pages/buildingtheworldsbiggestship.aspx> (accessed: 15 July 2013)

⁵⁶Adolf Koi Yu Ng and Jeremy K. Y. Kee 'The optimal ship sizes of container liner feeder services in Southeast Asia: a ship operator's perspective' (2008) 35(4) *Maritime Policy and Management: The Flagship Journal of International Shipping and Port Research* 373. <http://dx.doi.org/10.1080/03088830802198167> (Accessed: 17 July 2013).

⁵⁷ Jeb Anthony Clulow op cit note 43.

⁵⁸ Ibid.

⁵⁹ MJ Shah op cit note 51. See also Indira Carr. *International trade law*. 4 ed. (2010) 401.

the advent of operators that provide the service of ‘door-to-door’ transport.⁶⁰ Today, the container plays a significant role in the industry of carriage of goods, such that there is now an international framework for the use of containers under the name International Convention for Safe Containers of 1977⁶¹ that deals with the safety of containerisation in maritime transport. This Convention has been recently given effect to in South Africa by the Merchant Shipping (Safe Containers Convention) Act 10 of 2011.

2.2 Trade patterns and legal shortcomings

The advent of containerisation further introduced a major need to alter the commercial and traditional legal approach to the long-distance haulage of goods.⁶² In the world over, trade in goods is ever more being performed by way of multimodal transportation.⁶³ Cargo interest prefers to delegate the process of deciding which modes of transport, routes, and carriers to use for the carriage of goods to a transport specialist capable of making informed decisions on these matters.⁶⁴ This specialist is known as the multimodal transport operator (MTO) and is responsible for ensuring that the consignor goods arrive undamaged and on time.⁶⁵ The purpose behind MTOs is to service consignors that no longer desire to have a series of unimodal contracts representing each of the modes of transport involved in moving the goods, and having contracts such with a number of carriers.⁶⁶ Such practises are out-of-date and no in line with the “reasonable expectation of the market”.⁶⁷

The author Stephen Zamora⁶⁸ recognised such a need during the early stages of containerisation when he pointed out that combined transport operations were transforming into more sophisticated levels that saw fast and efficient methods being established for moving cargo from one mode to another whilst the law and commercial operations pertaining

⁶⁰ M Hoeks. *Multimodal transport law: the law applicable to the multimodal contract for the carriage of goods*. (2010) 3.

⁶¹ Adoption: 2 December 1972; Entry into force: 6 September 1977.

⁶² J Hare. *Shipping law and admiralty jurisdiction in South Africa*. 2 ed. (2009) 599. See also UNCTAD secretariat report. UNCTAD/SDTE/TLB/2 op cit note 47 at 5- 6.

⁶³ Malcolm A. Clarke op cit note 46 at 71. See also European Commission ‘International Transportation and Carrier Liability’ (1999) at 7.

⁶⁴ Diana Faber ‘The Problems arising from multimodal transport’ (1996) *Lloyd’s Maritime and Commercial Law Quarterly* 503. 504-5.

⁶⁵ Malcolm A. Clarke op cit note 46 at 71.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Stephen Zamora ‘Carrier liability for damage or loss to cargo in intermodal transport’ (1975) 23 (3) *The American Journal of Comparative Law* 392.

to combined transport remained undeveloped. He further pointed out that while engineers developed transport systems to suit the twenty-first century, lawyers were trying to cope with nineteenth century concepts of transport law. The result being that customers of combined transport services have to deal with an unclear web of rules which determine their rights and liabilities in relation to the carrier.⁶⁹

According to Carl,⁷⁰ the international transport and insurance communities in or about the 1930s had already foreseen the need for a regulatory framework to cover the multimodal carriage of goods.⁷¹ He states that the International Institute for the Unification of Private Law (UNIDROIT) began working on a regulatory regime around that time; however, such efforts were thought to be more theoretical than practical in commercial circles. He further states that it was the development of containerisation that prompted “sound commercial reasons for trying to solve the problems surrounding the regulation of multimodal transport.”⁷²

2.3 Defining multimodal transport

Since its inception three decades ago, the term multimodal transport has not been defined with clarity and has been used in many occasions interchangeably with terms such as “combined” transport, “intermodal” transport and “through” transport.⁷³ Even the UNCTAD secretariat had done research and found that some transport lawyers and the Through Transport Club had a difficulty with properly defining these terms.⁷⁴ This section will attempt to unravel the confusion that had formerly surrounded the use of these terms and outline the legal differences, if any, in the use of these terms.

For multimodal transport to be understood, an explanation of what constitutes unimodal transport has to be provided. Unimodal transport is “the transport of goods by one mode of

⁶⁹ Ibid.

⁷⁰ Hans Carl op cit note 47 at 1.

⁷¹ See also Stephan Zamora op cit note 68 at 392.

⁷² Ibid.

⁷³ Richard W. Palmer and Frank P. Degiulio ‘Terminal operations and multimodal carriage: history and prognosis’ (1989) 64(2 & 3) *Tulane Law Review* 283. See also Christopher John Green *A Comparative Analysis of the Law of Affreightment with regard to Multimodal Transport* (unpublished LLM thesis, University of Natal (Durban), 1993) 2. See also Diana Faber op cit note 64 at 503.

⁷⁴ Hans Carl op cit note 47 at 6.

transport by one or more carriers.”⁷⁵ Where one carrier is involved, that carrier issues a transport document that in the case of carriage of goods by sea, may either be a bill of lading or a sea waybill.⁷⁶ On the other hand, where more than one carrier is involved, such as where goods are carried from port-to-port and they are transhipped at an intermediate port between the port of loading and the port of discharge, one of the carriers may issue a transport document known as a through bill of lading for the entire haulage under which the carrier issuing the document either takes responsibility for the entire transport or for the part to which he performs.⁷⁷

At least two of the terms that are used interchangeably with multimodal transport are “legal terms of art” that describe the different legal responsibilities of persons contracting with cargo owners.⁷⁸ A combined transport contract is one in which the person contracting with the cargo owner assumes legal responsibility for the complete duration of the transportation of the goods by the different means of transport from the point of reception/ loading to the destination named in contract.⁷⁹ Under such type of contract, the cargo owner can claim for damage to their goods caused at any stage during the haulage against the person who undertook legal responsibility for the entire contract.⁸⁰ Under a through transport contract, the person contracting with the cargo owner assumes legal responsibility for the goods only when it is in his possession and for the rest of it transportation he becomes an agent of the cargo owner by concluding contracts with the relevant road, rail, air or sea carriers.⁸¹ This form of performance is regarded as the classic function of a freight forwarder.⁸² The effect of a through transport contract is that when loss or damage occurs during transportation, a cargo owner has direct cause of action against the carrier who is responsible for the mode at which the loss or damage occurred, and not the freight forwarder who acted as his agent in the parts of the transportation that were beyond his control.⁸³ The liability of a freight forwarder is

⁷⁵ Carl, H. Status and Progress of Commercial and Regulatory Aspects of Multimodal Transport, paper presented at the International Bauxite Association (IBA) 12th Biennial Conference, Paris, September 1995, p.1.

⁷⁶ Proctor op cit note 45 at 17.

⁷⁷ Ibid.

⁷⁸ Diana Faber op cit note 64 at 503.

⁷⁹ Ibid. See also Proctor op cit note 45 at 102- 103.

⁸⁰ Diana Faber op cit note 64 at 503.

⁸¹ Ibid.

⁸² Proctor op cit note 45 at 97- 98. See also Carr op cit note 59 at 403- 405.

⁸³ Diana Faber op cit note 64 at 504.

limited to where he is at fault, for instance where he fails to make arrangements for a certain leg of the multimodal carriage.⁸⁴

When the concept of multimodal transport first emerged, it was referred to as combined transport.⁸⁵ In 1973, the International Chamber of Commerce's (ICC) Uniform Rules for a Combined Transport Document were adopted and were later amended in 1975.⁸⁶ The purpose of these rules was to make available minimum standard rules for incorporation by the parties into their combined transport contracts.⁸⁷ In 1992, these rules were replaced by the UNCTAD/ICC Rules for Multimodal Transport Documents 1992.⁸⁸ Nonetheless the Rules on Combined Transport Documents, commonly known as the ICC Rules became the basis for numerous standard forms of combined transport documents such as the International Federation of Freight Forwarders Association's (FIATA) negotiable multimodal transport bill of lading commonly known as the FIATA Bill 1992 and "MULTIDOC 95" of the Baltic and International Maritime Council (BIMCO)⁸⁹.

Subsequent to the making of the Rules on Combined Transport Documents, the United Nations Conference on Trade and Development (UNCTAD) developed the United Nations Convention on International Multimodal Transport of Goods (MT Convention) which was adopted in 1980.⁹⁰ The term "multimodal transport" was used in lieu of "combined transport" to distinguish this Convention from the Rules on Combined Transport Documents.⁹¹ This Convention, the object of which was to offer mandatory international law rules to govern the multimodal transport of goods, never entered into force because of the lack of the thirty accessions required for it to come into force.⁹² The failure of the MT Convention to enter into force along with the ICC Uniform Rules being antiquated led to the establishment of the UNCTAD/ICC Rules for Multimodal Transport Documents 1992.⁹³ These Rules were made

⁸⁴ Ibid.

⁸⁵ Proctor op cit note 45 at xx.

⁸⁶ ICC Publication no. 273, 1973 & ICC Publication no. 298, 1975 (Reprinted 1985).

⁸⁷ Proctor op cit note 45 at 102.

⁸⁸ Carl, H. Paper presented at a one-day seminar on the UNCTAD/ICC Rules for Multimodal Transport Documents, organised by the Jordan Shipping Agents' Association, at ICC Amman, 20 March 1996, at 1.

⁸⁹ Proctor op cit note 45 at xx. See also Indira Carr. *International trade law*. 4 ed. (2010) 402 and also the UNCTAD report *Implementation of Multimodal Transport*. UNCTAD/SDTE/TLB/2, 27 June 2001 at 12.

⁹⁰ UN Doc. TD/MT/Conf/17 (1980).

⁹¹ Proctor op cit note 45 at 104.

⁹² Ibid at xx.

⁹³ ICC Publication no. 481.

available for voluntarily incorporation parties into their multimodal transport contracts.⁹⁴ The basis for making the Rules voluntary was because they served as a stopgap measure to support persons involved in international traders while the UNCTAD awaited the coming into force of the MT Convention.⁹⁵ The Rules further served an important measure to avoid multiplicity of documents pertinent to combined transport operations.⁹⁶

Today the most influential definition of multimodal transport is ironically⁹⁷ provided in article 1(1) of the United Nations Convention on International Multimodal Transport of Goods 1980⁹⁸ (hereinafter referred to as the MT Convention) which reads as follows:

“‘International multimodal transport’ means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.’”

From the above definition, a couple of supporting terms mentioned, namely, the multimodal transport operator and multimodal transport contract are also defined in the 1980 Convention. The Convention defines these terms as follows:

“‘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.’”

And

“‘Multimodal transport contract’ means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.’”

⁹⁴ Hans Carl op cit note 47 at 2. See also Proctor op cit note 45 at xx.

⁹⁵ UNCTAD report *Implementation of Multimodal Transport*. UNCTAD/SDTE/TLB/2, 27 June 2001 at 9.

⁹⁶ *Ibid* at 12.

⁹⁷ The irony stems from the fact that the MT Convention never came into force.

⁹⁸ Marian Hoeks. *Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods* (Unpublished Doctoral thesis, Erasmus Universiteit Rotterdam, 2009) 4- 5 and 49- 50.

In addition, the term “Multimodal transport document” is defined as ‘a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.’

The UNCTAD secretariat⁹⁹ deduced the main features of multimodal transport from the abovementioned terms provided by the MT Convention as being “the carriage of goods by two or more modes of transport, under one contract, one document and one responsible party (MTO) for the entire carriage, who might subcontract the performance of some, or all modes, of the carriage to other carriers.” The report further distinguishes the terms “combined transport” and “intermodal transport” from multimodal contract as terms that “are often used interchangeably to describe the carriage of goods by two or more modes of transport.”¹⁰⁰ It however, does not provide the circumstances to which these two terms are used to describe the carriage of goods by two or more modes of transport. This leaves one with the impression that there might be laymen terms which would be in direct conflict with Diana Faber’s submission that “combined transport” is a legal term of art used to describe the legal responsibilities of the party contracting with the cargo owner.

2.4 The legal framework for multimodal transport operations

The current multimodal liability framework is such that there is no uniform regime in place that governs liability for loss or damage in goods being transported under multimodal transport documents.¹⁰¹ Combinations of varied unimodal transport legs form multimodal transport operations. Well-established mandatory international conventions or national laws govern each of these stages of carriage.¹⁰² Since there is no existing international multimodal transport convention in force, the liability for each stage of the multimodal transport is determined by the relevant unimodal convention or national laws.¹⁰³ This therefore means that the liability of the multimodal transport operator in a claim for loss or damage to goods can vary subject to the stage of transportation during which the loss or damage occurred.

⁹⁹ UNCTAD report *Implementation of Multimodal Transport*. UNCTAD/SDTE/TLB/2, 27 June 2001 at 5.

¹⁰⁰ Ibid.

¹⁰¹ European Commission ‘International Transportation and Carrier Liability’, (1999) at 7.

¹⁰² UNCTAD report op cit not 99 at 6.

¹⁰³ Ibid at 8.

2.5. International conventions applicable to unimodal transportation

The international carriage of goods by sea is predominantly regulated by the 1924 Hague Rules and the Hague-Visby Rules.¹⁰⁴ The international carriage of goods by rail is covered by the Convention Concerning International Carriage by Rail (COTIF)¹⁰⁵ with the Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail (CIM)¹⁰⁶ attached as appendix B to it. The Convention on the Contract for the International Carriage of Goods by Road (CMR),¹⁰⁷ used mostly in Europe, is the leading international liability instrument for the carriage of goods by road.¹⁰⁸ Carriage of goods by air transport is regulated by the Convention for the Unification of Certain Rules for the International Carriage by Air (the Montreal Convention)¹⁰⁹ and the Warsaw system consisting of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)¹¹⁰, the Warsaw Convention as amended by the Hague Protocol 1955, Montreal Protocol No. 4, 1975 and the Montreal Convention, 1999.

The current legal regime for multimodal transport creates a legal system that is fraught with the lack of rules and regulations to assist claimants seeking to establish liability for the loss or damage to their goods sustained during multimodal transport operations. Another difficult issue that comes about is the extent to which the compulsorily applicable conventions that apply to unimodal transport can influence multimodal transport contract especially when some of the unimodal conventions also extend the ambit of their application to multimodal transport.¹¹¹

¹⁰⁴ Michael E Crowley 'The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem' (2004-2005) 79 *Tulane Law Review* 1467.

¹⁰⁵ Convention on the International Carriage by Rail (COTIF) 1980 Modification Protocol 1999.

¹⁰⁶ The CIM Rules apply to over 240, 000 km of railway lines and to contemporary carriage of goods on shipping lines and inland waterways. See Carr op cit note 59 at 361.

¹⁰⁷ Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

¹⁰⁸ See Carr op cit note 59 at 377.

¹⁰⁹ Adopted in Montreal in 28 May 1999.

¹¹⁰ Signed at Warsaw on 12 October 1929.

¹¹¹ UNCTAD report op cit not 99 at 6. Article 2 of the CMR and the CIM, and the Montreal Convention expressly provide for the application of these Conventions to the transportation of goods more than one mode of transport.

CHAPTER 3

PROBLEMS EXPERIENCED IN MULTIMODAL TRANSPORT CONTRACTS

3.1 Introduction

There has been a plethora of concerns/iniquities arising from claiming damages as a result of the loss or damage to goods carried under multimodal transport contracts. The problems are largely due to the current international legal framework or lack thereof, governing the transnational multimodal carriage of goods that gives rise to a lot of uncertainty in establishing liability under such contracts, particularly in the relation to the time of loss or damage, the mode and identity of the carrier, and the applicable legal regime for liability and effects thereof and consequently huge legal expense. This chapter will explore the problems in establishing liability under multimodal transport contract and in doing so case law will be used to illustrate the problems. It will also look at the extent to which transport conventions made to govern the liability issues for single modes of transport can influence multimodal transport and an examination of whether the Hague-Visby rules can be mandatorily applicable to multimodal transport.

3.2 The lack of uniformity

There is currently no enforceable uniform international regime governing liability in multimodal transport contracts.¹¹² The importance of attaining international uniformity or harmonisation in transnational commercial law has been one of the leading legal challenges among the global transport industry, law transformation organisations, governments, regional and international organisations as well as other institutions, since the late 19th century.¹¹³ The uniformity of international commercial law is postulated to establish improved stability and certainty of practices and results, prevention of contradictory laws and the increase in litigation while lessening legal risks and operation costs.¹¹⁴ It is further envisaged to have the

¹¹² Malcolm A. Clarke 'Multimodal Transport in the new millennium' (2002) 1 *WMU Journal of Maritime Affairs* 72.

¹¹³ Paul Myburgh 'Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?' (2000) *Victoria U. Wellington L. Review* 355.

¹¹⁴ See AN Yiannopoulos 'The Unification of Private Maritime Law by International Conventions' (1965) 30 *Law and Contemporary Problems* 370; MF Sturley 'Uniformity in the Law Governing the Carriage of Goods by

efficacy to increase the prospects of law reform and improve the “aesthetic symmetry in the international legal order.”¹¹⁵

Multimodal transport is being operated in circumstances where the current international cargo liability regime for the carriage of goods is not harmonised i.e. the law of carriage is substantially influenced by unimodal transport conventions.¹¹⁶ A clear uniform liability regime to govern multimodal transport is wanting.¹¹⁷ The legal infrastructure in place however has defects in that there are insurmountable differences in the rules that govern the different modes of transport, which include differing grounds of liabilities, limitations, time bars, different documentation and legal values of each mode of transport.¹¹⁸ The lack of such a regime has an adverse effect on trade because of uncertainty of the law pertaining to this form of transportation.¹¹⁹

A communication by the European community to the World Trade Organization’s Council for Trade in Goods¹²⁰ identified the concern of many sectors in international trade including goods traders and carriers as being the lack of a uniform, harmonised regime for multimodal transportation of goods. It described the effect of the current framework for multimodal transport as a makeshift of regimes which do not avail themselves to modern IT-based communications systems and practices but obstructs the establishment of a single multimodal waybill/transport document, and do not fully match the increased use of containerised transport operations through the different modes which makes “mode-specific liability arrangements inappropriate.”¹²¹

The legal framework for international multimodal transport was further described by the European Commission on Intermodal transportation and carrier liability as consisting of “a confused jigsaw of international conventions designed to regulate unimodal carriage, diverse

Sea’ (1995) 26 *JMLC* 553, 556-559; MA Clarke ‘The Transport of Goods in Europe: Patterns and Problems of Uniform Law’ (1999) *LMCLQ* 36, 39.

¹¹⁵ *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer* (1995) 515 US 528, 537.

¹¹⁶ S Lamont-Black ‘Claiming Damages in Multimodal Transport: A need for Harmonisation’ (2011-2012) 36 *Tulane Maritime Law Journal* 707.

¹¹⁷ Malcolm A. Clarke op cit note 112 at 73.

¹¹⁸ UNCTAD report *Implementation of Multimodal Transport*. UNCTAD/SDTE/TLB/2, 27 June 2001 at 8.

¹¹⁹ Indira Carr. *International trade law*. 4 ed. (2010) 402.

¹²⁰ G/C/W/133 ‘Issues Relating to the Physical Movement of Consignments (Transport and Transit) & Payment, Insurance and Other Financial Questions Affecting Cross-border Trade in Goods.’ 3 December 1998 at 3.

¹²¹ *Ibid*.

national laws and standard term contracts.”¹²² These sentiments towards the legal structure of multimodal transport are best confirmed by a breakdown of the frustrating challenges that cargo claimants have to undergo in order to establish the liability of the carrier’s multimodal transport contracts. A cargo claimant whose goods are lost or damaged during international multimodal transportation is confronted with numerous difficulties in establishing liability under a multimodal carriage contract as he may find himself wanting of the requirements necessary for establishing a claim and dealing with a number of different liability regimes.¹²³ What follows is a breakdown of the difficulties that a cargo claimant may encounter in his quest to recover his loss under multimodal carriage.

3.2.1 Identifying the point of damage or loss

One of the initial problems for a claimant in establishing liability is to determine when and where the cargo was lost or damaged and accordingly whether a particular transport convention for road, rail, sea or inland waterways mandatorily applies.¹²⁴ The liability of a multimodal transport operator (MTO) for loss or damage to goods varies according to the stage of transport the loss occurred. The liability factor becomes complicated when it is not possible to localise the point of loss or damage, or where the loss or damage occurred gradually during the whole multimodal transport.¹²⁵ With the exception of the container itself being lost or damaged, it is difficult to ascertain the leg of carriage in which the damage or loss of goods occurred.¹²⁶ This problem occurs particularly where a container is used.¹²⁷ The container is a sealed unit for transporting goods and as such, the goods inside the unit are not visible from the moment of loading until the moment of discharge.¹²⁸ To make matters worse, the documentation issued by the carrier would merely show the condition of the container

¹²² European Commission ‘International Transportation and Carrier Liability’ (1999), at 7.

¹²³ S Mankabady ‘The Multimodal Transport of goods Convention: A challenge to Unimodal Transport Conventions’ (1983) 32 *International and Comparative Law Quarterly* 120-121.

¹²⁴ Lamont-Black op cit note 116 at 711.

¹²⁵ UNCTAD report op cit note 118 at 8.

¹²⁶ Stephen Zamora ‘Carrier liability for damage or loss to cargo in intermodal transport’ (1975) 23 (3) *The American Journal of Comparative Law* 392. See also Diana Faber ‘The Problems arising from multimodal transport’ (1996) *Lloyd’s Maritime and Commercial Law Quarterly* 504.

¹²⁷ Carr op cit note 119 at 408.

¹²⁸ Malcolm A. Clarke op cit note 112 at 73.

when the transport agent company received it and not the condition of the goods inside that container.¹²⁹

Where it is not possible to identify the stage of transport where the loss or damage to goods in transit occurred or where it occurs slowly during the entire carriage such as in the case of small leaks, none of the unimodal transport regimes can apply pertinently and the claimant cannot therefore, bring his claim against a responsible carrier.¹³⁰ This creates a “liability gap” and leaves the matter to be determined by the pertinent national law and the standard form contract coupled with any rules or standard trading conditions incorporated into the contract.¹³¹ The claimant may also have to bring his claim against all the carriers, which results in added expenses.¹³² In such situations, the liability of a carrier is often dependent on the national laws and/or contractual agreements between the parties to a contract of carriage, which may even result in the claimant being subject to the standard trading terms that may be incorporated into such contracts.¹³³ Such was the decision reached by the Commercial Court in London in *Quantum v Plane Trucking*¹³⁴ where the limits of the carrier’s liability were decided in accordance with the general conditions provided in the contract. The Court of Appeal reversed this decision. It was however always clear in this case where the loss of the goods had occurred.

In certain circumstances, it is nevertheless possible for expert opinion to show where the damage occurred. For instance, if the damage was caused by an infiltration of sea water, this would show that the damage must have occurred during the sea leg of the multimodal carriage.¹³⁵ However, in most circumstances it is not “possible to localise the cause of

¹²⁹ Carr op cit note 119 at 408.

¹³⁰ Ibid. See also Diana Faber op cit note 126 at 507; Carr op cit note 119 at 405 and Marian Hoeks Marian Hoeks. *Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods* (Unpublished Doctoral thesis, Erasmus Universiteit Rotterdam, 2009) at 13-14 and 194-196 where she outlines the specific circumstances in which a unimodal carriage regime can apply, despite the area of loss being unlocalised. This is by Article 18(3) of Warsaw Convention and Article 18(4) of Montreal Convention when the carriage contract involves both road and air carriage and where a choice of law clause in a contract causes a convention to apply indirectly or the national law applicable to the contract refers to a convention.

¹³¹ Lamont-Black op cit note 116 at 711.

¹³² Diana Faber op cit note 126 at 507.

¹³³ European Commission ‘International Transportation and Carrier Liability’, June 1999, 7. See also Malcolm A. Clarke op cit note 112 at 73.

¹³⁴ [2001] 2 Lloyd’s Rep Q.B. (Com. Ct.) at 145, col 1.

¹³⁵ Carr op cit note 119 at 405.

damage.”¹³⁶ The laws of the various regimes are seldom applicable as they differ from case to case, which makes it difficult to solve the liability challenges.¹³⁷

3.2.2 Identifying the liable party

A further problem affecting multimodal transport contracts is the identification of the party liable for the loss or damage to cargo. In the event of loss or damage to goods transported under a multimodal transport document, a cargo claimant needs to claim damages, contractually from the carrier responsible for such loss or damage.¹³⁸ Before bringing a claim, the owner of the goods has to make a decision as to the identity of the person/company that must bear the legal liability.¹³⁹ Again, this is difficult if a container is used to transport the goods, because the stage at which the damage occurred may not be ascertainable.¹⁴⁰ This is where the signed transport document becomes important. The liable party is usually determined by reviewing the contract terms contained in the signed document, which may take various forms depending on the agreements concluded and the type of transport document issued by the contracting carrier.¹⁴¹

With regard to the multimodal transport agreements, there are various possibilities. A freight forwarder may act as the shipper’s agent and arrange a number of individual transport contracts on behalf of the shipper with the relevant road, rail, air and sea carriers. Any carrier that the freight forwarder contracts with, issues transport documents for its responsible leg of the multimodal transportation to be regulated by a unimodal transport convention applicable to that leg.¹⁴² Where the freight forwarder takes on such a role, it becomes crucial that he must sort out liability of the various parties involved in the multimodal haulage.¹⁴³ There is however no obligation for the freight forwarder to undertake the carriers’ liability.¹⁴⁴ The

¹³⁶ Ibid.

¹³⁷ Malcolm A. Clarke op cit note 112 at 73.

¹³⁸ Lamont-Black op cit note 116 at 708.

¹³⁹ Diana Faber op cit note 126 at 504.

¹⁴⁰ Carr op cit note 119 at 405.

¹⁴¹ Diana Faber op cit note 126 at 506. See also Carr op cit note 119 at 404.

¹⁴² C Proctor. *The legal role of the bill of lading, sea waybill and multimodal transport document*. (1997) 97.

¹⁴³ Carr op cit note 119 at 403.

¹⁴⁴ J Ramberg, in *International carriage of goods: some legal problems and possible solutions*. (1988) 10. See also Carr op cit note 119 at 405.

consignor in this regard is contracting directly with the carriers who perform the different legs of the multimodal transportation.¹⁴⁵

Alternatively, a freight forwarder or contracting carrier may act as principal for a specific leg of the transportation and as the shipper's agent for the other independent contracts pertaining to different legs of the carriage.¹⁴⁶ In such an arrangement, the freight forwarder assumes liability for the specific stage of the transportation to which he contracted as carrier.¹⁴⁷ Another possibility is for the shipper to conclude a single contract with a freight forwarder for the entire multimodal carriage of goods on a door-to-door basis.¹⁴⁸ Therefore, the issue of whom to sue in the eventuality of loss or damage lies squarely on the type of transport document issued by a contacting carrier.¹⁴⁹ Factors such as the amount charged by the freight forwarder, the instructions of the consignor to the freight forwarder, the extent to which the consignor and the freight forwarder communicate and the frequency thereof, their past dealing and the capacity to which the freight forwarder normally conducts his business are all taken into consideration in deciding his role in a particular multimodal transportation.¹⁵⁰

With regard to the type of transport documents, the advent of containerisation altered the long-established use of shipped on board bills of lading and paved the way for transport documents that are not connected, to sea transport. To this extent, the traditional reference to "shipped" documents has become of less relevance.¹⁵¹ A contracting carrier has a variety of transport documents to choose from. He may issue a FIATA Bill¹⁵² or a multimodal transport document that incorporates the UNCTAD/ICC Rules for Multimodal Transport Documents 1992¹⁵³ (hereafter UNCTAD/ICC Rules 1992).¹⁵⁴ Under these two documents, the carrier is responsible for goods from the moment he collects the goods until he delivers them.¹⁵⁵ By

¹⁴⁵ Carr op cit note 119 at 404.

¹⁴⁶ Diana Faber op cit note 126 at 506.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Carr op cit note 119 at 404

¹⁵⁰ Ibid.

¹⁵¹ An opinion said to have been articulated by Dr Hans Carl, UNCTAD Chief of the Multimodal Transport and Technological Development Section, Services Development and Trade Efficiency Division, as he then was. See Proctor op cit note 142 at 101.

¹⁵² FIATA stands for International Federation of Freight Forwarders Association. See Diana Faber op cit note 112 at 506 fn 2.

¹⁵³ ICC Publication no. 481.

¹⁵⁴ Carr op cit note 119 at 405.

¹⁵⁵ Ibid. See also Diana Faber op cit note 126 at 506.

way of contrast, a through bill of lading may be issued by a carrier, ensures that he is only liable/responsible for loss or damage that occurred during the leg of the carriage that he undertakes.¹⁵⁶ With this document, the contracting carrier's responsibility for the goods is determined by considering of the terms of the through bill of lading.¹⁵⁷ Customarily, the carrier under a through bill of lading undertakes responsibility only for his part of the carriage and acts as agent either for the shipper or for the "on-carriers".¹⁵⁸ Where there is loss or damage to the goods, the claimant may have difficulties in identifying the responsible carrier, especially when a container is used, because the bill of lading given by the carrier would only indicate the condition of the container when it was received, not the condition of the goods inside the container.¹⁵⁹ If the opinion of the experts shows that the cause of the damage was the ingress of seawater, this would demonstrate that the damage arose during the sea leg of the haulage.¹⁶⁰

A further problem that affects multimodal contracts arises from specific clauses adopted in the multimodal transport documents, the Himalaya clause in particular. This clause provides for the extension of a carrier's defences, indemnities and limitations from liability to certain sub-contracting third parties that perform services on his behalf.¹⁶¹ It is named after the *S.S. Himalaya*, which was the ship concerned in *Adler v Dickson (Himalaya)*,¹⁶² the Court of Appeal decision that led to the invention of this clause by extending the carriers' defences to their agents, independent contractors and servants.¹⁶³ For as long as unimodal transport solutions remain applicable in multimodal transport contracts, the Himalaya clause will continue to apply.¹⁶⁴ The issue of whether the inland carriers and their subcontractors fall within the purview of a multimodal bill of lading issued by a sea carrier has been subjected to

¹⁵⁶ Carr op cit note 119 at 405.

¹⁵⁷ Ibid.

¹⁵⁸ Carr op cit note 119 at 406. See also D Faber and A Diamond. *Multimodal transport avoiding legal problems, practical guide series*. (1997) 1.

¹⁵⁹ Carr op cit note 119 at 405.

¹⁶⁰ Ibid.

¹⁶¹ Marian Hoeks. *Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods* (Unpublished Doctoral thesis, Erasmus Universiteit Rotterdam, 2009) 127 and 260.

¹⁶² [1954] 2 Lloyd's Rep 267 (C.A).

¹⁶³ Tove Dickman Haugvaldstad. *The Carrier's Liability for Sub-carriers and the Sub-Carrier's Liability: A comparative study between Scandinavian and English law and the Rotterdam Rules* (Unpublished Master's thesis, University of Oslo, 2011) 22.

¹⁶⁴ Christine Besong. *Towards A Role for Liability in Multimodal Transport Law* (Unpublished Doctoral thesis, University of London, 2007) 82.

examination by American courts in several matters.¹⁶⁵ The issue entails the applicability of the protection offered by the Himalaya clause to carriage either than carriage of goods by sea.¹⁶⁶ In *Lucky-Goldstar Int'l (Am.), Inc. v. S.S. Cal. Mercury*,¹⁶⁷ the court held that holding the words “servants, agents and subcontractors” were not sufficient to invoke the Himalaya clause to the inland carriers, particularly where the term “inland carrier” was used elsewhere in the bill of lading. In *Sun-Bar Materials Int'l, Inc. v. Am. President Lines, Ltd.*,¹⁶⁸ the court held that the rail carrier was not entitled to the protection offered by the Himalaya Clause under an ocean carrier’s bill of lading as an “other independent contractor”. The reason was that the clause did not contain the phrase “joint service connecting carrier”, a phrase that was used to describe the services of the rail carrier in the bill of lading.

In *Norfolk Southern Railway Co. v. James Kirby, Pty Ltd*,¹⁶⁹ the Supreme Court permitted a rail carrier to rely on the protection offered by the Himalaya clause in circumstances where a train had overturned and caused damages to the amount of USD \$ 1.5 million. The grounds for this decision were that it was international custom and practice to allow third parties the benefit of the Himalaya clause. The court adopted a restrictive approach to towards the applicability of the Himalaya clause to inland carriers by stating that case law “seems to support the principle that a special degree to linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier.” This decision reversed the effect of an earlier decision in *Caterpillar Overseas S.A. v. Marine Transport Inc.*¹⁷⁰ that held that a Himalaya clause could not extend to inland carriage.

In the initial cases that dealt with this issue, the courts seemed to adopt a broader approach that described the services provided by inland carriers in multimodal carriage as a significant feature of the ocean carrier’s responsibilities.¹⁷¹ In *Tamrock U.S.A., Inc. v. M/V Maren Maersk*,¹⁷² the court held that the parties to a multimodal bill of lading for a shipment from Finland to Savannah, through Charleston, had inland carriage in mind and that, therefore, the

¹⁶⁵ Michael E Crowley ‘The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem’ (2004-2005) 79 *Tulane Law Review* 1480.

¹⁶⁶ Christine Besong op cit note 164 at 82.

¹⁶⁷ 750 F Supp. 141, 142-46, 1991 AMC 1018, 1019, 1021-25 (S.D.N.Y. 1990).

¹⁶⁸ 1993 AMC 2636, 2643-44 (N.D. a. 1993).

¹⁶⁹ 125 S. Ct. 385 [2004] A.M .C 2705.

¹⁷⁰ 900 F. 2d 714; [1991] AMC 75.

¹⁷¹ Michael E Crowley op cit note 165 at 1481.

¹⁷² AMC 676, 677, 680- 81 (S.D.N.Y 1995).

phrase “every servant, agent, stevedore, and subcontractor” was held adequate to cover an inland trucker. Furthermore, in *Herr-Voss Corp. v. Columbus Line*,¹⁷³ the court held that the inland trucker service was a “critical” link in the ocean carrier's maritime services, and that therefore the term “any other independent contractor or subcarrier” was enough to cover the inland trucker. In *Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc.*,¹⁷⁴ it was found that the phrase “servant, agent, stevedore and sub-contractor” was sufficient to cover an inland trucker hauling a shipment from a Chicago railhead to the ocean carrier's yard. In these cases, the courts paid attention to the basic meaning of the language of the contract to determine whether an inland carrier was covered.¹⁷⁵

3.2.3 Identifying the applicable regime

The current legal framework for multimodal transport creates uncertainty as to which unimodal regime governs claims of liability for cargo claimants wishing to claim for loss or damage resulting from a multimodal transport of their goods.¹⁷⁶ This occurs even where the point of loss or damage can be localised.¹⁷⁷ The term ‘regime’, as explained by Diana Faber,¹⁷⁸ means the terms that regulate issues of liability including the time limits afforded to claimants for bringing their claim as well as the financial limits of liability. The express terms of the multimodal contract may be ineffective in dealing with issues of liability and are voidable if found to be incongruent with compulsory national law or international conventions.¹⁷⁹ Therefore, in order to ascertain the liability regime governing a claim, it becomes important to determine whether an international transport convention mandatorily applies to a liability claim.¹⁸⁰

International transport conventions tend to have differing positions to issues of liability, which makes the liability of the multimodal transport operators for loss or damage unpredictable and dependent on the stage of transport to which the loss or damage

¹⁷³ 1994 AMC 77, 78-82 (D. Md. 1992).

¹⁷⁴ 796 F Supp. 336, 337-42, 1993 AMC 705.

¹⁷⁵ Michael E Crowley op cit note 165 at 1481.

¹⁷⁶ Malcolm A. Clarke op cit note 112 at 74.

¹⁷⁷ Ibid.

¹⁷⁸ Diana Faber op cit note 126 at 507.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

occurred.¹⁸¹ Even then, in some instances it is not clear which unimodal regime governs the issues of liability, such as in the case where “goods are stored before, during and after carriage”.¹⁸² It becomes unclear whether the period of storage is governed by a unimodal convention or it falls outside the ambit of the unimodal convention but is instead governed by a different regime.¹⁸³ The English case of *Mayhew Foods Limited v Overseas Containers Ltd*¹⁸⁴ provides a good example of this uncertainty. The claimant, Mayhew, was a shipper in an oral contract of carriage and Overseas Containers were the carriers. The cargo was 1100 cartons of cooked and uncooked chicken and turkey portions, and a few breaded drumsticks that were coated but uncooked. The goods were carried in a refrigerated container, as it was necessary that they should be deeply frozen at minus 18 degrees Celsius for them to remain in good condition. The carriage was expected to be from the claimant’s premises at Uckfield in Sussex to Jeddah in Saudi Arabia on board the vessel *Benalder*.

The goods were collected from Mayhew’s premises and loaded into a refrigerated container on 3 December 1981 and taken to Shoreham. From there, the container carried to Le Havre on the 5th December on board the vessel *Voline* to arrive on 6 December, where it was discharged. It remained there until it was loaded on the *Benalder* on 11 or 12 December. When the *Benalder* arrived in Jeddah on 21 December, permission to discharge the container was refused because the contents of the container had rotten and unpleasant juices were reported to be dripping from it. The cause of this were found to be that the container was refrigerated at plus 2 degrees Celsius and 4 degrees Celsius instead of the required minus 18 degrees Celsius and could not be deeply frozen. The food was returned to Mayhew on 25 February 1982 and was found to be unfit for human consumption. The carrier accepted that because of the failure, it had breached the contract and the law in failing to take reasonable care of the goods and to carry, keep and care for them properly and carefully.

The bill of lading issued by Overseas Containers indicated Mayhew as the shipper and, among other things, the conditions on the reverse made provisions for a combined transport shipment. Clause 6 of the conditions provided for the carrier’s responsibility in combined transport as being liable for loss or damage to the goods occurring between the time when it

¹⁸¹ UNCTAD report op cit note 118 at 8.

¹⁸² Malcolm A. Clarke op cit note 112 at 74.

¹⁸³ Ibid.

¹⁸⁴ [1984] 1 Lloyd’s Rep. 317 Q.B. (Com. Ct.)

receives the goods for transportation and the time of delivery. Clause 7 specified the method of calculating any compensation recoverable and set an upper limit of U.S. \$2 per kilo of gross weight of the goods lost or damaged. Clause 8 provided that clause 7 was subject to The Hague Rules or any national law or international convention having compulsory effect with regard to the damage. Clause 21 provided that the carrier could at any time and without notice to the merchant, use any means of transport or storage of any kind; transfer goods from one conveyance to another, including transshipping or carrying on another vessel than the named vessel, or on any other means of transport of any kind; load and unload at any place or port, regardless of whether such port is named or not, and store the goods at any place or port.

The court accepted that it was common cause that the goods were carried by way of combined transport shipment. The issue, however, concerned the limits of liability. Overseas Containers sought to rely on the provision of clause 7, which limited its liability to U.S. \$17,370. Mayhew, however, claimed that the English Carriage of Goods by Sea Act, 1971, incorporating the Hague-Visby Rules as a schedule thereto, governed the carriage and that, therefore, the contractual limitation of damage was of no effect. The carrier argued, in return, that the Act and the rules were not applicable to the carriage until the goods were shipped on board the *Banaldar* and that even if it was applicable to the period of carriage by sea from Shoreham to Le Havre, it was not applicable when the goods were lying ashore at Le Havre before being taken on board the *Banaldar*. It was further contended that in any period when the Act and the rules were not applicable, the carrier was entitled to limit its damage in accordance with clause 7 and that by the time the goods were loaded on board the *Banaldar*, in which the Act and the rules applied, the goods were already deteriorated to an extent that the claimant thereafter suffered no loss or damage as a result of the carrier's failure to refrigerate.

The court did not accept the first contention by the carrier. Bingham, J.¹⁸⁵ held that the contract was for the carriage from Uckfield to the number berth in Jeddah and that although the rules did not apply in terms of section 1(3) of the Act, it clearly provided for shipment at a United Kingdom port, intended to be Southampton and held that, therefore, from the time of shipment, the Act and the rules applied. He further held that "the parties clearly expected and

¹⁸⁵ *Mayhew Foods* supra at 320, col. 1.

intended a bill of lading to be issued and when issued, it duly evidenced the parties' earlier contract" and that since the bill of lading was issued in a contracting state and provided for carriage from a port in a contracting state, it was clear that the rules applied from the point the goods were loaded on board the vessel at Shoreham.¹⁸⁶

The court also dismissed the second contention that the Act and the rules did not apply when the goods were lying ashore at Le Havre before being shipped on board the *Benalder*. Bingham, J. relied on the principle that the rights and liabilities under the rules attach to a contract and held that the rules do not apply to carriage or stowage before the port of shipment or after the port of discharge because that was inland carriage, but between those the ports, the contract was for carriage of goods by sea.¹⁸⁷ He also added *obiter* that if during the carriage the carrier chose to discharge, store or tranship, as was its contractual right, doing so would have qualified as an operation relating to or in connected with the carriage of goods by sea in ships in accordance with the Act.¹⁸⁸

The court held that it did not therefore matter, whether the damage occurred before or after the container was loaded on the *Benalder*, provided that it occurred after the shipment at Shoreham. Bingham, J. added that if the state of the goods were discovered when the container was loaded on board the *Benalder*, it would have been too late in all probability to salvage the uncooked products although the cooked products and breaded drumsticks could have been frozen at that stage and sold at their invoice price.¹⁸⁹ The court rejected a letter produced by the claimant purporting to prove the value or the market price of the goods but instead concluded that, in its view, the claimants should recover no more than their CIF invoice price, less the deduction of the animal food sale price that was subsequently made.¹⁹⁰

This case also illustrates the view of the European Commission on Intermodal transportation and carrier liability that the uncertainty as to the applicable legal regime has an adverse effect

¹⁸⁶ *Mayhew Foods* supra at 320, cols. 1 and 2.

¹⁸⁷ *Mayhew Foods* supra at 320, col. 2.

¹⁸⁸ *Mayhew Foods* supra at 320, col. 2.

¹⁸⁹ *Mayhew Foods* supra at 321, col. 1.

¹⁹⁰ *Mayhew Foods* supra at 321, col. 2 and 322, col. 1.

on the speed and cost of claims handling and is likely to lead to litigation.¹⁹¹ The Commission gave the following points to expound on their view:

- “Provisions in standard term documents are often difficult to understand and give precedence to mandatory national and international law without providing further guidance as to which regime may be mandatorily applicable.
- Which mandatory laws will be applied depends not only on whether the stage of transport where a loss occurs can be established, but also on the courts in the country in which proceedings are brought - a matter which can only partly be foreseen at the time of contracting.
- As potentially relevant regimes were often drafted for commercial practices that are less widespread today, existing regulation is fragmented and incomplete. Whether a particular regime covers a loss in any given instance is often subject to nationally different rules and views.
- The diversity of contractual as well as mandatory national and international liability rules creates difficulty of comprehension on central issues, notably the differing liability systems, the differing onus of proof and the differing requirements for the successful institution of legal proceedings.
- The proliferation of potentially relevant regimes encourages ‘forum shopping’ and costly multiple proceedings.”¹⁹²

The applicable law in multimodal transport changes with the vehicle (truck, train, ship or plane) and depends upon where that vehicle is.¹⁹³ The law is outdated and unsuitable to deal with multimodal carriage.¹⁹⁴ Various other factors in multimodal transport stemming from the current legal framework create uncertainty and disturb the process of claims handling. Although substantial uncertainty arises with respect to whether a regime is applicable, it also arises in part because of the excess of regimes that were drafted for commercial practices that are no longer popular, mainly the transportation of goods that are not in sealed units.¹⁹⁵

¹⁹¹ European Commission ‘International Transportation and Carrier Liability’, June 1999 at 8.

¹⁹² Ibid.

¹⁹³ Malcolm A. Clarke op cit note 112 at 72.

¹⁹⁴ Michael E Crowley ‘The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem’ (2004-2005) 79 *Tulane Law Review* 1462. See also Anthony Diamond QC ‘The Rotterdam Rules’ (2009) *Lloyd’s Maritime and Commercial Law Quarterly* 445-446.

¹⁹⁵ European Commission op cit note 191 at 17.

Furthermore, in seeking to identify the applicable legal regime, there is also the issue of whether liability in a multimodal transport document is capable of being, effectively and suitably, decided on using a unimodal transport convention. This issue has more to do with the extent to which conventions that are mandatorily applicable to unimodal transportation can also influence multimodal transport contract especially when some of the unimodal conventions also extend the ambit of their application to multimodal transport.¹⁹⁶

Even the courts seem to experience difficulty in deciding the applicability of conventions. In *Quantum Corporation LTD. and Others v. Plane Trucking LTD. and Another*,¹⁹⁷ the court held that the draftsmen of the Convention on the Contract for the International Carriage of Goods by Road (CMR)¹⁹⁸ did not intend to make their Convention applicable to the road leg of a multimodal contract. However, that was overturned on appeal when Lord Justice Mance,¹⁹⁹ on behalf of a unanimous Court of Appeal held (at 40, col. 1) that the “CMR should apply to the whole of any multimodal transport, regardless whether any not-road leg was conduct by roll-on, roll-off transport.”

3.2.4 Limitation of liability in multimodal transport

Limiting liability is an important aspect of any regime. The different international conventions making up the current legal framework for multimodal transport offer different limits of liability and this becomes a problem for the limits in multimodal transport in that the limits will also differ as to the particular law that eventually becomes applicable.²⁰⁰ The parties to a multimodal contract become subject to varying levels of limits that are difficult to predict. This has the effect of worsening the issue of liability. The current position, for instance, is that under the UNCTAD/ICC Rules, where sea carriage is one leg of the multimodal contract, the liability limits of Hague-Visby Rules apply if the point of damage cannot be localised and the CMR limits apply in all other contracts where there is not sea leg

¹⁹⁶ UNCTAD report op cit not 118 at 6. Article 2 of the CMR and the CIM, and the Montreal Convention expressly provide for the application of these Conventions to the transportation of goods more than one mode of transport.

¹⁹⁷ [2001] 2 Lloyd’s Rep [Q.B. (Com. Ct.) at 141, col. 1.

¹⁹⁸ (Geneva, 19 May 1956) U.N.T.S. 189.

¹⁹⁹ *Quantum Corporation LTD. and Others v. Plane Trucking LTD. and Another* [2002] EWCA Civ 350; [2002] 2 Lloyd’s Rep (C.A.).

²⁰⁰ Christine Besong op cit note 164 at 157.

of transport.²⁰¹ This is clearly a makeshift measure. It is important for certainty that limitation of liability must relate to the particular regime that is found to be applicable in to contract.

3.2.4.1 An in-depth look at the Quantum Case

*Quantum v Plane Trucking*²⁰² provides a good illustration of the problems that can arise in multimodal carriage. The second defendant, Air France, agreed to carry a consignment of 11,250 hard disk drives sent by the first claimant, Quantum Corporation, in Singapore to the second claimant, Quantum Products, in Dublin. The third and fourth claimants were freight forwarders. Because Air France had no direct flight from Singapore to Dublin, the air waybill that was issued recorded that the goods were to be carried in two stages. The first stage was from Singapore to Charles de Gaulle airport in Paris by Air France and the second stage was from that airport to Dublin on a road vehicle operated by Air France. The carriage by road on a roll-on, roll-off basis from Charles de Gaulle to Dublin was subcontracted by Air France to the first defendant, Plane Truck, for transportation by a truck. The truck crossed the English Channel by ferry, reached the Manchester depot and left for Dublin. The goods were lost in North Wales by a fabricated “hi-jack” in which the truck driver and one of Plane Trucking’s supervisors were involved as accomplices. The claimants sought compensation in respect of the loss for U.S. \$ 1.5 million and applied under CPR Part 24 for summary judgment. Air France accepted liability but argued that it was entitled to limit its liability to 17 Special Drawing Rights (SDRs) per kilogram in line with article 11.7 of its general conditions of carriage by air for cargo.

The issue in the court *a quo* was determining which regime governed the liability of Air France. The claimants argued that the Air France General Conditions were expressly subject to any applicable convention and were only applicable to the extent that the conditions were consistent with such convention. The claimants further argued that the CMR Convention was compulsorily applicable and that in terms of article 29 of the CMR, Air France could invoke the CMR limits of liability because of the wilful misconduct of Plane Trucking and/or its employees, which was to be viewed as the wilful misconduct of Air France. The claimants further contended that if that was wrong, then the Warsaw Convention for the Unification of

²⁰¹ Ibid.

²⁰² *Quantum* supra note 197.

Certain rules relating to International Carriage by Air as amended at the Hague in 1955²⁰³ (Warsaw Hague Convention) was applicable with a stretched definition of what constituted carriage by air and that in accordance with article 29 of this Convention, Air France could not invoke the limits of liability therein because the action of Plane Trucking and/or its employees was to be regarded as an act or omission of their servants or agents done with the intent to cause damage and done within the cause and scope of their employment.

Air France denied that their general conditions incorporated any version of the Warsaw Convention but contended that if any convention was made applicable it was the Warsaw Hague Convention as amended by Protocol No. 4 of Montreal, 1975.²⁰⁴ Under this version of the Convention, the limits of liability in respect of the cargo were the same as those contained in the general conditions of Air France and could not be exceeded by any circumstances giving rise to the liability.

The court first dealt with the question whether a contract having the described characteristics can properly be described as a contract for the carriage of goods by road. Tomlinson, J.²⁰⁵ held that it could not. His reasons for holding so were that it is a contract chiefly for carriage by air, that the place of taking over of the goods specified in the contract could only be Singapore and, such place, must be the place at which the contractual carrier assumes liability for the goods as provided in article 17(1) of the CMR. He further held that it seemed to him that, either the whole of the carriage must be governed by the CMR or none of it. He concluded that it is obvious that the CMR cannot apply to the whole contract of carriage from Singapore to Dublin and that therefore the CMR Convention as currently drafted did not fit the situation *in casu*.²⁰⁶ Tomlinson, J. held that draftsmen of the CMR did not intend to make their Convention applicable to the road leg of a multimodal contract, except in so far as achieved by article 2, which can only be relevant where a contract for the carriage of goods

²⁰³ Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 as amended by Hague Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague Protocol) 1955.

²⁰⁴ Montreal Additional Protocol No 4 to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 as amended by Hague Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague Protocol) 1955 of 1975.

²⁰⁵ *Quantum* supra note 197 at 139, col 2.

²⁰⁶ *Quantum* supra note 197 at 139, col. 2.

by road had first been identified. He explained that there was nothing in the Convention supporting the suggestion that the contract concerned was a contract for carriage.²⁰⁷

The court then went on to deal with whether the Warsaw Convention was incorporated by the contract. Tomlinson, J. held that the rules relating to liability established by the Warsaw Convention only imposed liability on the carrier for the duration of the carriage by air²⁰⁸ and that article 11 of the Air France general conditions only applied in circumstances where the Warsaw Convention did not cover Air France's liability.²⁰⁹ The court ultimately concluded that, therefore, Air France was entitled to limit its liability in line with article 11.7 of its general conditions because the loss had occurred outside the scope of the Warsaw Convention.²¹⁰

The final issue that the court looked at was whether Plane Trucking could avail itself to the same limitation of liability as Air France in terms of clause 7 on the reverse of the Airway bill. Clause 7 was a Himalaya clause which provided that any exclusion or limitation of liability applicable to carrier shall apply to and be for the benefit of carrier's agents, servants and representatives, and established that that for the purposes of this provision the carrier acts as agent for all such persons. Tomlinson, J. considered at article 10 of the contract between Air France and Plane Trucking and pointed out that Plane Trucking was to be exclusively liable for all damage caused to the goods and held that therefore this clause prevented the conclusion that Air France intended to contract on behalf of Plane Trucking in issuing the air waybill. He added that it could not be said that the Air France general conditions should also apply to Plane Trucking.²¹¹ In the end it was held that the claimants were not entitled to the relief they sought under CPR Part 24 and that instead they were entitled to judgement for damages to be assessed.²¹²

Quantum appealed and the issue before Court of Appeal was whether CMR Convention applied to the trucking leg from Charles de Gaulle to Dublin. Lord Justice Mance²¹³ pointed

²⁰⁷ *Quantum* supra note 197 at 141, col.1.

²⁰⁸ *Quantum* supra note 197 at 143, col. 2.

²⁰⁹ *Quantum* supra note 197 at 144, col. 1.

²¹⁰ *Quantum* supra note 197 at 145, col. 1.

²¹¹ *Quantum* supra note 197 at 146, col. 1.

²¹² *Quantum* supra note 197 at 146, col. 2.

²¹³ *Quantum Corporation LTD. and Others v. Plane Trucking LTD. and Another* [2002] 2 Lloyd's Rep (C.A.) at 27, co.1.

out that the issue raised a point of principle concerning the applicability of the CMR Convention, scheduled to the English Carriage of Goods by Road Act, 1965, in a multimodal transport contract.²¹⁴ He looked at article 1 of the CMR Convention and stated that two questions presented themselves, the first being to what extent was the application of the convention depended on a carrier having obliged itself contractually to carry by road (and by no other means of transport). The second was to what extent, if any, a can a contract be both for the carriage of goods by road, within article1, and for some other means of carriage, to which the CMR Convention does not apply.²¹⁵

For the first question, Mance L.J. noted that the rights and liabilities regulated by the Convention are those arising out of actual carriage by road under a contract to which the Convention applies and that the provisions consider whether there is a contract for carriage and on what conditions can be determined by reference to a document which will necessarily reflect the reality that the contract has now become, by agreement or election, one for carriage of goods by road.²¹⁶ The learned Justice then concluded that determining whether there was a contract for carriage within article 1 of the CMR Convention should take into account the actual operation of the contract under its terms.²¹⁷

Mance, L.J. upheld the statement of Tomlinson J. that the purpose of the CMR Convention was to standardize conditions governing international carriage by road and stated that the express confirmation of this is found in the preamble of the Convention. He however found that standardization would be incomplete and potentially unpredictable if the application of the Convention depended on whether the carrier could be said to have contracted unconditionally and at the outset to carry by road.²¹⁸ The Court of Appeal held that the CMR should be applied to the carriage of the cargo by road from Paris to Dublin, subject to the answer for the second question.²¹⁹

²¹⁴ *Quantum Corporation* supra note 213 at 27, col.1.

²¹⁵ *Quantum Corporation* supra note 213 at 30, col.2.

²¹⁶ *Quantum Corporation* supra note 213 at 31, col. 2.

²¹⁷ *Quantum Corporation* supra note 213 at 31, col. 2.

²¹⁸ *Quantum Corporation* supra note 213 at 32, col. 1.

²¹⁹ *Quantum Corporation* supra note 213 at 38, col. 2.

For the second question, the Court of Appeal held that the CMR Convention is applicable to an international road leg of a larger contract in three instances.²²⁰ First is where the carrier may have promised unconditionally to carry by road and on a trailer, Secondly, where the carrier may have promised this but reserved either a general or a limited option to elect for some other means of carriage for all or part of the way or thirdly, where the carrier may have left the means of transport open entirely or as between a number of possibilities at least one of them being carriage of goods by road. The court further added that the CMR is also applicable where the carrier may have undertaken to carry by some other means of transport but reserved either a general or a limited choice to carry by road.²²¹ Mance, L.J.²²² said that the underlying reason for his conclusion was that the concept of a contract of carriage by road embraces a contract providing for or permitting the carriage of goods by road on one leg, when such carriage actually takes place under such contract. He added that the place of taking over and delivery of the goods under article 1(1) of the CMR are to be read as referring to the start and end of the contractually provided or permitted road leg.

Furthermore, the Court of Appeal considered Tomlinson, J's conclusion that the CMR was incapable of applying to a contract for carriage by road unless the whole contract was for carriage by road or article 2. He pointed out that this conclusion in effect, required as the key to the application of the CMR an overall characterization of the whole contract and an individual characterization of each leg as involving carriage by road. Mance, L.J. held that the logic of this appear to be that the CMR should apply to the whole of any multimodal transport, regardless whether any leg other than road was conducted by roll-on, roll-off transport, that the overall characterization of the whole contract would be to take agreed international carriage by road outside any Convention (Warsaw or CMR) in circumstances where the contract overall could not be characterized as mainly for road carriage.²²³

The Court of Appeal overturned the decision of the Queen's Bench and held that the contract was for the carriage by road with article 1(1) of the CMR with respect to the roll-on, roll-off leg from Charles de Gaulle, Paris to Dublin, that Air France's own conditions, to the extent that they would limit Air France's liability, were overridden accordingly and that the

²²⁰ *Quantum Corporation* supra note 213 at 39, col. 1.

²²¹ *Quantum Corporation* supra note 213 at 39, cols. 1 and 2.

²²² *Quantum Corporation* supra note 213 at 39, col. 2.

²²³ *Quantum Corporation* supra note 213 at 40, col. 1.

claimants were entitled to invoke article 29 of the CMR to the effect that there was wilful misconduct or a similar default that bars Air France from limiting its liability for the loss.²²⁴

Malcolm Clarke laments over the time and expense it took to reach a sensible outcome and expresses the view that this is caused by the lack of a single clear legal regime for multimodal transport.²²⁵ This view is also shared by Diana Faber²²⁶ who states that this is not only confusing but also wasteful in that “enormous sums, which would be better applied commercially, are spent in legal disputes as to whether the contract terms or a Convention and, if so which Convention, should apply to govern relations between contracting parties.” The *Quantum* case also seems to highlight the problem of the innumerable potential issues that can arise in trying to recover damages for loss. The approach taken by the Court of Appeal to the applicability of the CMR in multimodal contracts has been subjected to some criticism. It is seen as allowing the CMR to prevail under circumstances where the contract is not predominantly for carriage by road and therefore making the CMR to be in conflict with the other unimodal conventions.²²⁷

3.2.5 Time limits

The different unimodal liability regimes have different time limitations for bringing a claim for damages.²²⁸ The different conventions contain different consequences to the passing of the period for notification of damages.²²⁹ Some conventions, such as the CIM²³⁰ and the Montreal Convention²³¹, provide for an extinction of rights and apply differing timelines. Some conventions, such as the CMR and the Hague-Visby Rules only link to it a prima facie

²²⁴ *Quantum Corporation* supra note 213 at 41 cols. 1 and 2.

²²⁵ Malcolm A. Clarke op cit note 112 at 72.

²²⁶ Diana Faber op cit note 126 at 518.

²²⁷ Christine Besong op cit note 164 at 35.

²²⁸ Lamont-Black op cit note 116 at 711.

²²⁹ *Ibid* at 721.

²³⁰ Uniform Rules Concerning the Contract for the International Carriage of Goods by Rail. Article 47 provides where acceptance of goods extinguishes all rights of action against the carrier unless the procedure for ascertaining partial loss or damage has been followed; or in the case of non-apparent damage, if ascertainment is sought immediately after discovery and not later than seven days after discovery; and for delay, claims made within sixty days.

²³¹ Convention for the Unification of Certain Rules for the International Carriage by Air. Article 31(1)-(2), (4) requires notification of damage in writing forthwith after discovery or, at the latest, within fourteen days of receipt of the cargo, and in case of delay, within twenty-one days from when the cargo is placed at the recipient's disposal, failing which the claim is extinguished.

rule that goods have been delivered as described in the transport documents.²³² The repercussions of making a mistake between the applicability of conventions are therefore huge. The cargo claimant is thus faced with the problem of ensuring that he brings his suit within the time limits set by the liability regime that is applicable to his claim.²³³

3.2.6 The Hague-Visby Rules and multimodal transport contracts

The question whether the Hague-Visby Rules can be compulsorily applicable to a multimodal transport document entails examining the procedural and substantive requirement of the Rules and whether the multimodal contract complies with the requirements.²³⁴ For the rules to be compulsorily applicable to any contract, there are three requirements that have to be satisfied, namely, there must be a carrier as defined by the Rules, the contract must be a contract of carriage and there must be a bill of lading or a similar document of title. At the outset of the examination it is clear that the Hague-Visby Rules have a narrow scope²³⁵ in that they apply to contracts of carriage ‘covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea’, and only for the ‘period the time when the goods are loaded on to the time they are discharged from the ship’²³⁶ also known as tackle to tackle.

The Hague-Visby Rules define the carrier as including ‘the owner or the charterer who enters into a contract of a carriage with a shipper.’²³⁷ The Rules do not go any further in their definition of a carrier. The author Diana Faber states that the word “includes” as used in the definition indicates that the Rules apply to a party that agrees to take responsibility as carrier despite not being the owner or charter of a vessel such as a freight forwarder who agrees to be responsible for the carriage.²³⁸ It is submitted that there is nothing in the Rules that support that her statement. The purpose of the Rules is to govern the liability of the carrier in charge of the vessel during the time of the carriage of goods by sea.

²³² Lamont-Black op cit note 116 at 722.

²³³ Carr op cit note 119 at 405.

²³⁴ Diana Faber op cit note 126 at 507.

²³⁵ A Diamond QC ‘The Rotterdam Rules’ (2009) Lloyd’s Maritime and Commercial Law Quarterly 445-446.

²³⁶ Hague-Visby Rules, Article 1(b) and (e).

²³⁷ Hague-Visby Rules, Article 1(a).

²³⁸ Diana Faber op cit note 126 at 509.

The requirement that the contract must be a contract of carriage under the Hague-Visby Rules has not featured well in multimodal contracts. In two cases, English and Australian, it was held that a house bill of lading in which the forwarding agent accepts responsibility for arranging transport but does not take on liability for the carriage does not constitute a contract of carriage. Neither of the cases however decided the issue for the purposes of the Hague-Visby Rules.²³⁹ In *A. Gagnier & Co. v. The Eastern Company of Warehouses*²⁴⁰ a document issued by a forwarding agent on a form of a bill of lading but only evidenced a promise by the forwarders to arrange the forwarding of goods on the usual terms for each part of the transportation as between the owners of the goods and the owners the steamships or railway lines to the different destinations. The court held that the forwarders were not liable on contract for loss of the goods in the country of destination pointing out that, despite the form of the contract, it did not represent “an undertaking by the defendants of an absolute character to carry the good anywhere”.²⁴¹

The Supreme Court of New South Wales in 1991 considered a similar type of document in *Carrington Slipway Pty Ltd v. Patrick Operations Pty Ltd (The Cape Comorin)*²⁴² where Japanese manufacturers sold two engines to the plaintiff who was an Australian buyer under a contract in which the buyer was to arrange transport. The letter of credit under the contract of sale required ocean bills on “Peace Line” from which evidenced shipment. The buyer gave instructions to Pacific, a forwarding agent, trading as “Peace Line” to arrange the carriage of the two engines. Space was booked on the Cape Comorin which was time chartered to Simsmetal and two bills were issued for the engines. The first bill was a “received for shipment” Peace Line Bill showing the seller Nissho as the shipper, consigned to his order and endorsed in blank. The bill bore a stamped “on board” notation signed by Pacific’s Japanese agents. The second bill was a shipped bill of lading signed on behalf of the carrier on a Simsmetal form showing Pacific’s Japanese agents as shipper and consigned to Pacific. The stevedores in Australia damaged the goods during discharge.

The issue before the court was whether the Peace Line bill was a bill of lading. The court noted that a received for shipment bill had been signed by the freight forwarder despite not

²³⁹ Ibid.

²⁴⁰ (1921) 7 Ll.L.Rep. 188.

²⁴¹ *A. Gagnier & Co.* supra note 238 at 198.

²⁴² (1991) 24 N.S.W.L.R. 745 (N.S.W. C.A.).

having received the goods and not having any authority to sign the bill on behalf of the charterer or the ship. The court then held that the bill evidenced a contract of affreightment with the forwarder and not with the ocean carrier. In reaching its decision, the Supreme Court referred to *Scrutton on Charterparties and Bills of Ladings*,²⁴³ which stated that “a house bill of lading issued by a forwarding agent solely in the capacity of an agent to arrange carriage is not a bill of lading at all, but most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper.” The two cases demonstrate that for there to be a contract of carriage, the party entering into a contract with the cargo interests must accept responsibility for the carriage.²⁴⁴ Diana Faber suggests that this principle should also apply for Hague-Visby Rules to be compulsorily applicable in multimodal transport.²⁴⁵

A contract governed by the Hague-Visby Rules has to be “covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea.”²⁴⁶ This is the third requirement for the mandatory applicability of the Rules. The question that arises in multimodal transport is whether the fact that a multimodal transport document includes inland transport as well as sea carriage would preclude it from being a bill of lading or similar document of title.²⁴⁷ In *Pyrene Co. v. Scindia Steam Navigation Co.*²⁴⁸ Devlin, J. pointed out that Article 1(e) defines carriage as covering the time from when the good are loaded to the time when they are discharged. The learned judge stated that in circumstances where a contract covers both inland and sea transport, the Rules only governs the part relating to the carriage of goods by sea.²⁴⁹ This has been see as giving support to the suggestion that the Rules could apply to multimodal contract.²⁵⁰

3.3 Conclusion

The current liability framework for multimodal contract has proven inefficient in bring uniformity and harmony. The collaboration of unimodal regimes leads to unnecessary complex difficulties, overlapping legal instruments, and results in gaps for multimodal

²⁴³ Thomas Edward Scrutton et al. *Scrutton on Charterparties and Bills of Lading*. 19 ed. (1984) at 384.

²⁴⁴ Diana Faber op cit note 126 at 510.

²⁴⁵ Ibid.

²⁴⁶ Hague-Visby Rules, Article 1(b).

²⁴⁷ Diana Faber op cit note 126 at 510.

²⁴⁸ [1954] 2 Q.B. 402.

²⁴⁹ *Pyrene* supra at 415.

²⁵⁰ Diana Faber op cit note 126 at 511.

transport. There is inconsistency in the applicability of the unimodal conventions in their respective legs of carriage where the contract is multimodal in nature. The regulation of rights and liabilities contained in each convention is different from the other conventions. There is no way of knowing whether the other conventions, such as the Hague-Visby Rules, require the same sort of instances as those set out by the Court of Appeal in the *Quantum* case for the CMR to be applicable to multimodal transport. The discussion on the applicability of the Hague-Visby Rules has demonstrated the difficulty in determining whether a mandatorily applicable unimodal transport convention also applies to multimodal transport. The nature of multimodal transport documents as being received for shipment documents makes it difficult to conclude that such documents are in fact bills of lading. Uncertainty exists on whether a multimodal transport document can be classified as a similar document of title since there is neither statutory nor case law guidance as to what has to be similar to a bill of lading. There is uncertainty as to whether a multimodal contract has all the compulsory characteristics of a bill of lading for the purposes of The Hague Visby Rules. Users of multimodal transport require a predictable and cost effective liability regime which removes much of the existing uncertainties whilst cutting the costs related recovering what they have lost during transportation.

CHAPTER 4

PREVIOUS ATTEMPTS AT UNIFORMITY AND THE INDUSTRY SOLUTIONS

4.1 Introduction

There have been many attempts made towards achieving uniformity for liability regime governing multimodal transport. The efforts date back from the advent of containerization which created a need to change the law on international transport as the application of national laws and international unimodal conventions to different legs of multimodal carriage brought about many uncertainties and problems in recovering damages for loss or damage to goods arising from multimodal transport contracts. The conventions also fell short in resolving the complex issues under multimodal transport outlined in chapter 2. As a result, various organisations and countries started working towards creating international uniform regimes to regulate multimodal transport. None of these attempts however has yielded international uniformity. This chapter will look at the attempts and the reasons these attempts could not achieve uniformity.

4.2 Draft Convention on the Combined Transport of Goods (TCM)

The earliest attempt at unifying regulation of liability for multimodal transport can be traced back to the 1930s when the international transport and insurance communities anticipated the need for a regulatory regime to cover the movement of goods from door to door.²⁵¹ The International Institute for the Unification of Private Law (UNIDROIT) began on a draft work on the international combined transport of goods regulation driven by the wish to make one transport document serve various stages of transport where multimodal transport was used and to make sure that the shippers or consignees were able to pursue their claims against one responsible party rather than to bring claims against several carriers involved in the transport.²⁵² This draft was completed in 1965.²⁵³ The UNIDROIT attempt was followed in

²⁵¹ See *Preparation of a Preliminary Draft of a Convention on International Intermodal Transport*. UNCTAD Document TD/B/AC.15/2,1973, at 3.

²⁵² *Ibid.*

1969 by the Comité Maritime International's (CMI) preparation and adoption of a Draft Convention on Combined Transport, which became known as the Tokyo Rules.²⁵⁴ The UNIDROIT and CMI drafts were different. The UNIDROIT draft was founded on the Convention on the Contracts for the international Carriage of Goods by Road 1956 (CMR) covering combined carriage of goods by containers while the CMI draft was based on the liability regime of The Hague Rules of 1924 covering only combined transport having a sea leg.

These two drafts were subsequently joined in 1970, under the support of the Inland Transport Committee of the United Nations Economic Commission for Europe (UN/ECE) into a document known as the "Rome Draft".²⁵⁵ This draft was modified by meeting of the UN/ECE and the Intergovernmental Consultative Organization (IMCO) during the period of 1970 to 1971 which culminated in the "Draft Convention on the International Combined Transport of Goods", commonly known as the "TCM draft".²⁵⁶ This Draft consisted of 17 articles and it addressed the scope and applicability of the convention, the obligations of combined transport operators (CTO), documentation, the liability of the CTOs for loss and damage, the negotiability of the combined transport documents, delay in delivery, the time for bringing a claim, and the link of any national laws applicable to the combined transport operations.²⁵⁷ The TCM Draft was made in a manner that promoted voluntary application of the convention. Instead of describing the rules for the international intermodal shipment of cargo, it made the terms applicable only by agreement of the parties that prescribed documentation can be issued in a manner that made the convention binding.²⁵⁸

Despite the years of preparing, this draft never progressed any further, instead the UN/IMCO Container Conference, which was tasked with finalizing the draft in 1972, made recommendations that the subject of combined transport be further studied, particularly the economic implications and the requirements of developing countries.²⁵⁹ Its provisions,

²⁵³ See UNIDROIT Document U.D.P. 1965, Etude: XLII. Doc.32.

²⁵⁴ Mahin Faghfourı 'International Regulation of Liability for Multimodal transport – In search of Uniformity' (2006) 5(1) *WMU Journal of Maritime Affairs* 96.

²⁵⁵ UNCTAD report *Implementation of Multimodal Transport Rules*, UNCTAD/SDTE/TLB/2 at 9.

²⁵⁶ *Ibid.*

²⁵⁷ William J. Driscoll 'The Convention on International Multimodal Transport: A Status Report' (1977-1978) 9(4) *Journal of Maritime Law and Commerce* 443.

²⁵⁸ *Ibid* at 444.

²⁵⁹ Faghfourı op cit note 254 at 96 – 97.

however, were later reproduced in standard bills of lading such as the Baltic and International Maritime Conference's (BIMCO) Combiconbill and in the International Chamber of Commerce's (ICC) Uniform Rules for a Combined Transport Document of 1973.²⁶⁰

There have been various reasons given to explain the unsuccessful attempt of the TCM Draft. These reasons included the voluntary nature of the Draft and its adoption of a so called "network system" of liability instead of a "uniform system", which made the liability regime of the TCM applicable only if damage or loss could not be localised.²⁶¹ The author Kurosh Nasser, ²⁶² who was one of the observers of the Draft, stated that the attempts to preserve the existing unimodal conventions resulted in the multimodal convention that was too weak to achieve the target of uniformity and efficiency in multimodal transportation. He further stated that the continued application of the limits of the various unimodal conventions and the addition of a document on top the compulsorily existing ones made it clear that the TCM Draft Convention would not have simplified the problems in multimodal transport.²⁶³

4.3 United Nations Convention on International Multimodal Transport of Goods 1980

Following the discontinuing of the TCM Draft, UNCTAD was recommended to undertake the task of a further study. The Trade and Development Board set up by the Intergovernmental Preparatory Group (IPG) in 1973 which, after a thorough investigation, prepared the draft convention that led to the adoption of the United Nations Convention on International Multimodal Transport of Goods on 24 May 1980 (hereinafter the MT Convention).²⁶⁴ More than 80 States, 15 Intergovernmental organisations and specialized agencies and 11 non-governmental organisations had partaken in the 7 years of discussions.²⁶⁵ Despite all of this, the MT Convention never came into force due to lack of sufficient signatories.²⁶⁶

²⁶⁰ UNCTAD report op cit note 255 at 9.

²⁶¹ Faghfoury op cit note 254 at 97.

²⁶² Nasser, K 'The Multimodal Convention' (1988) 19(2) *Journal of Maritime Law and Commerce* 235-236.

²⁶³ Ibid.

²⁶⁴ UNCTAD report op cit note 255 at 9.

²⁶⁵ Faghfoury op cit note 254 at 97.

²⁶⁶ Diana Faber 'The Problems arising from multimodal transport' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 507.

The MT Convention endeavours to deal with the existing problems in multimodal transportation, which included the issues of documentation and the liability of the multimodal transport operators.²⁶⁷ It envisioned the issuing of a single multimodal transport document as a contractual basis for the various legs of the transportation period as well as for the liability of the multimodal transport operator²⁶⁸ to extend the entire period for which he is responsible for the goods, being from the time he becomes in charge until its delivery.²⁶⁹ The MT Convention applies to all contracts of multimodal transport between places in two States, that is, if the place of taking in charge or delivery of the goods as provided for in the multimodal transport contract is located in a contracting State.²⁷⁰ Though Article 3 recognizes the right of the consignee to choose between multimodal and segmented transport, its provisions apply compulsorily to all multimodal transport contracts that fall within the provisions of the Convention.²⁷¹ The liability of the multimodal transport operator for loss or damage to goods under the MT Convention is centered on the principle of “presumed fault or neglect”, which attaches liability to the multimodal transport operator if the incident which causes the loss or damage takes place during the period when the goods were in his charge, unless he proves that he, his servants, agents or any other person of whose services he employs to perform the contract, did all that they could reasonably be required to do in order to avoid the incident and its consequences.²⁷²

The liability system adopted by the MT Convention is a “uniform” system that provides for the liability regime of the Convention to apply irrespective of the stage of transport in which the loss or damage occurred.²⁷³ The choice between the “uniform” and “network” system of liability has been an important issue in the framework establishing the liability of the multimodal transport operator for loss or damage to goods.²⁷⁴ The difference between the two systems is that the uniform system enforces the same liability regime to claims arising from

²⁶⁷ Ibid.

²⁶⁸ Article 1(2) of the United Nations Convention on International Multimodal Transport of Goods defines a multimodal transport operator as “any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as 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.

²⁶⁹ United Nations Convention on International Multimodal Transport of Goods, article 14.

²⁷⁰ Article 2.

²⁷¹ Article 3.

²⁷² UNCTAD report op cit note 255 at 10.

²⁷³ Article 16(1).

²⁷⁴ UNCTAD report op cit note 255 at 10.

multimodal contracts irrespective of the mode of transport during the time of loss or damage whereas the network system provides that claims arising from multimodal contracts must be resolved using the unimodal convention relevant to the leg of transport in which the claim arose.²⁷⁵ There is one exception, however, to the uniform system adopted by the MT Convention. It is found in its provision that with respect to the limits of liability of the multimodal transport operator and that is where there is localised damage; the limits of liability must be determined by referring to any applicable international convention or compulsory national laws which provides a higher limit to that of the MT Convention.²⁷⁶

The liability of the multimodal transport operator for loss or damage under the MT Convention is limited to a sum not higher than 920 units of account per package of other shipping unit, or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher of these.²⁷⁷ However, article 18(3) provides that if, according to the multimodal contract, the international multimodal transport does not include carriage by sea or by inland waterway, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged. This raises the amount to a higher level, which is identical to the CMR limits of liability.²⁷⁸ If it is proved that the loss or damage to goods occurred as a result of an act or omission of the multimodal transport operator intended to cause loss or damage, or an act or omission done recklessly and with knowledge that such loss, damage would probably occur, the multimodal transport operator is not entitled to benefit from the limitation of liability under the MT Convention.²⁷⁹

With respect to time limits, the MT Convention gives two years within which a claimant can institute a claim for loss or damage before the can be time-barred.²⁸⁰ The limitation period runs from the day after the day on which the multimodal transport operator has delivered the goods or part thereof.²⁸¹ With respect to jurisdiction, the MT Convention provides various options to claimants for instituting an action for claims relating to international multimodal

²⁷⁵ Diana Faber op cit note 266 at 507-8.

²⁷⁶ Article 19.

²⁷⁷ Article 18(1).

²⁷⁸ UNCTAD report op cit note 255 at 10.

²⁷⁹ Article 21.

²⁸⁰ Article 25(1).

²⁸¹ Article 25(2).

transport under article 26. This article provides that a plaintiff may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of the principal place of business or residence of the defendant, the place where the multimodal contract was made, the place of taking the goods in charge or the place of delivery, or any other place agreed upon and evidenced in the multimodal transport document.

The MT Convention requires the ratification of 30 States in order to enter into force.²⁸² It has been 30 years however since its adoption without coming into force and it has only managed to attract eleven ratifications with the last one dated 7 October 1991. The United Nations Conference on Trade and Development (UNCTAD) secretariat conducted a large scale survey of industry and government in the early 2000s on the feasibility of establishing a new international legal instrument for multimodal transport which it then made a report titled *Multimodal Transport: The Feasibility of an International Legal Instrument*.²⁸³ This report outlined the various factors that lead to the failure of the MT Convention to gather international support.²⁸⁴ The factors were described as the lack of information and cognizance on the part of shippers and consignees and their representatives, as well as uncertainty about the benefits of the liability regime. The MT Convention was considered to be excessively complex or not sufficiently transparent; the resistance the Convention encountered from the transport and the maritime industry coupled with adverse lobbying. Other reasons were the inadequate consultation with both public and private parties and the fact that the MT Convention required quite a large number of ratifications in order to come into force. Some governments of developed States pointed out that the lack of interest by other leading maritime nations played an important role in their decision not to ratify the MT Convention and that the Convention did not have the interests and views of the relevant industries. For some developing states, the reluctance on the part of industrialised nations, the opposition of major shipping interests and lack of motivation on the part of some developing States to ratify the Convention was a key factor for the Convention not coming into force.

²⁸² Article 36.

²⁸³ UNCTAD Document UNCTAD/SDTE/TLB/2003/1, 13 January 2003.

²⁸⁴ *Ibid* at 11.

As underlying reasons for the abovementioned lack of support and resistance, a number of respondents to the survey highlighted close relation of the MT Convention with the United Nations Convention on Carriage of Goods by Sea (the Hamburg Rules) adopted in 1978 but unsuccessful in gaining support among the main shipping nations.²⁸⁵ Three factors were particularly emphasised as causes for concern by the carrier interests with regard to increased liability. First, was the basis upon which liability was founded; the Hamburg Rules were used as the model for liability rather than the Hague-Visby Rules, secondly, the monetary limits of liability of offered by the MT Convention were considered excessive and thirdly, the Convention's uniform system of liability was viewed as a cause for concern because it gives a multimodal transport operators recourse actions against subcontracting unimodal carrier and it introduces compulsory liability levels in transportation that are not covered by mandatory law. Some respondents to the survey saw an unsuitable "complicating factor" the addition of customs provisions to the Convention as an inappropriate.²⁸⁶

Despite not coming into force, the provisions of the MT Convention have been a major influence to the type of multimodal transport legislation enacted in many countries and regions.²⁸⁷

4.4 UNCTAD/ICC Rules for Multimodal Transport Document

While the entry into force of the Multimodal Transport Convention was still awaited, an UNCTAD/ICC joint working group was established under a resolution of the UNCTAD's Committee on Shipping to discuss a novel set of rules for multimodal transport documents using the international convention that were in force and existing standard documents such as the International Federation of Freight Forwarders Association's (FIATA) FBL (FIATA Bill of Lading) and the ICC Uniform Rules for a Combined Transport Document.²⁸⁸ The working group came up with UNCTAD/ICC Rules for Multimodal Transport Document in 1991 which entered into force the 1st of January 1992.²⁸⁹

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ UNCTAD report op cit note 255 at 10.

²⁸⁸ UNCTAD'S Committee on Shipping Resolution 60 (XII), November 1986.

²⁸⁹ See International Chamber of Commerce (ICC) publication No. 481. These Rules superseded the previous ICC Rules for a Combined Transport Document, 1973 (as modified in 1975) which were founded on the "Tokyo Rules" and the "TCM" draft.

The UNCTAD/ICC Rules have many important common features with the MT Convention which include the multimodal transport operator's basis of liability. They differ from the Convention most noticeably in the limitation of liability as they provide for a network system and "nautical fault and fire" exemptions where there is loss during the sea leg of the multimodal carriage which is similar to that of the Hague Rules.²⁹⁰ The Rules have enjoyed much support from the transport industry and this is clear from their incorporation in commonly used multimodal transport documents for example the FIATA FBL of 1992 and the "MULTIDOC 95" of the Baltic and International Maritime Council (BIMCO).²⁹¹

The most important feature of the UNCTAD/ICC Rules is that they have no 'force of the law' but instead they are contractual in nature. They are applicable on the basis that they are incorporated into a transport contract, regardless of whether such a contract is for unimodal or multimodal transport and not dependent on whether a document has been issued.²⁹² As soon as the Rules form part of a contract, they overrule any provisions in the contract that are contradictory to them, with the exception of the Rules increasing the responsibility or obligations of the multimodal transport operator. The Rules, however, being contractual as they are, can only have influence to the extent that they are not conflicting with the compulsory provisions of international conventions or national law that applies to the contract.²⁹³ Because of this, it is still essential to establish when and in which mode of transport the loss occurred and whether any of the law pertinent to that mode is compulsory for the cases in question.²⁹⁴

Another comparable feature of the UNCTAD/ICC Rules to the MT Convention is that the multimodal transport operator's liability is founded on the principle of presumed fault or neglect. The multimodal transport operator is liable for loss or damage to goods if the incidence that causes the loss or damage takes place when he is in charge of the goods, unless it is proven that it was due to no fault or neglect of his own, his servants or agents or any

²⁹⁰ Ibid. Articles 6(4) and 5(4).

²⁹¹ See UNCTAD report op cit note 255 at 12.

²⁹² Article 1.

²⁹³ Article 13.

²⁹⁴ Malcolm A. Clarke 'Multimodal Transport in the new millennium' (2002) 1 *WMU Journal of Maritime Affairs* 74- 75.

other person of whose services he made use of for the performance of the contract, caused or contributed to the loss or delay in delivery.²⁹⁵

4.5 The transport industry solution for multimodal transport

In view of the delay in attainment a proper legal framework to govern multimodal transport, the transport industry has stepped up to find solutions for its members by producing multimodal transport documents, consignment notes and standard terms to form parts of contracts. The Baltic and International Maritime Council's (BIMCO) has introduced multimodal transport documents such as the BIMCO COMBICON 95 and MULTIDOC 95. The International Federation of Freight Forwarders Association's (FIATA) has a multimodal transport document known as the FIATA multimodal transport bill of lading form and this document together with the BIMCO MULTIDOC 95 incorporate the UNCTAD/ICC Rules for Multimodal Transport Documents.²⁹⁶ The transport industry has also come up with CMR and CIM consignment notes, as well as the use of standard terms for multimodal transport that focuses primarily on road or rail. It has also established the use of standard terms through contracting on terms such as BIFA STC 2005A, UIRR General Conditions 1999 or NSAB 2000 General Conditions.²⁹⁷

However, the problem with these attempts by the international transport industry, as with the UNCTAD/ICC Rules for Multimodal Transport Documents, they are only effective to extent that they are not conflicting with the compulsory provisions of international conventions or national law that apply the contract.²⁹⁸ Therefore, the unimodal conventions override any contradictory provisions of the form contracts and standard conditions.

4.6 Conclusion

Notwithstanding numerous attempts to form a uniform legal framework to govern international multimodal transport, there is no such international regime in force. The

²⁹⁵ Rule 5(1).

²⁹⁶ S Lamont-Black 'Claiming Damages in Multimodal Transport: A need for Harmonisation' (2011-2012) 36 *Tulane Maritime Law Journal* 711.

²⁹⁷ *Ibid* at 712.

²⁹⁸ *Ibid*.

Multimodal Transport Convention has been unsuccessful in attracting the necessary support to enter into force. The UNCTAD/ICC Rules for Multimodal Transport Documents, which was a subsequent stopgap measure is without force of law being merely standard contract terms that can be incorporated into multimodal transport documents and thus have no influence and can be superseded by compulsory law. This chapter has shown that despite incorporating the UNCTAD/ICC Rules or using the transport documents and standard terms provided by the transport industry, the parties to a multimodal contract could still be confronted with challenges of determining whether these documents and standard terms are not overruled by any relevant transport Convention. The need for a satisfactory international legal framework to govern international multimodal transport has given rise to legislation being enacted by governments, regional and sub regional intergovernmental bodies in order to deal with the problems and uncertainties that accompany the current legal framework. This raises concerns that the rise of such unique and divergent laws will propagate the current confusion and uncertainty in the governing international multimodal transport.

CHAPTER 5

THE ROTTERDAM RULES

5.1 Introduction

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea²⁹⁹ (the Rotterdam Rules) marks the latest attempt to unify and harmonise the liability regime of international multimodal transport. These Rules were adopted on 11 December 2008 by the General Assembly of the United Nations by Resolution 63/122 and the signing ceremony took place in Rotterdam on 23 September 2009.³⁰⁰ The main aim of the Rotterdam Rules is to replace the three international regimes regulating carriage of goods by sea, namely the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.³⁰¹ Unlike these three regimes, the scope of the Rotterdam Rules is extended to cover multimodal sea transport. These Rules are not yet in force as the condition for their entry into force is that 20 countries must ratify the Convention and only three countries so far have done so.³⁰² The important question then becomes whether the Rotterdam Rules could be the desired solution to harmonise the legal framework governing multimodal transport.

5.2 Background of the Rotterdam Rules³⁰³

In 1994 a working group was set up by the Comité Maritime International (CMI) to deliberate on the existing disharmony in the law concerning the carriage of goods by sea. This resulted in the Draft Instrument on Transport Law being produced in 2001. In 1996, the United Nation's Commission on International Trade Law (UNCITRAL), in response to the CMI initiative, also commenced work on the international carriage of goods by sea and set up a working group called The Working Group on Transport Law.³⁰⁴ A decision was then made

²⁹⁹ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Feb. 2, 2009).

³⁰⁰ See Sturley, MF 'Transportation Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' (2008) 14 *Journal of International Maritime Law* 461. for a brief report on the *Travaux Préparatoire*.

³⁰¹ Kerim Atamer 'Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties' (2010) 41(4) *Journal of Maritime Law & Commerce* 469-470.

³⁰² Spain, Togo and Congo.

³⁰³ For a thorough discussion of the background to the Rotterdam Rules see Anthony Diamond QC 'The Rotterdam Rules' (2009) *Lloyd's Maritime and Commercial Law Quarterly* 445-448.

³⁰⁴ Malcolm A. Clarke 'Multimodal Transport in the new millennium' (2002) 1 *WMU Journal of Maritime Affairs* 75.

that the deliberations in the Working Group on Transport Law should at first cover sea transport operations although the Working Group was at liberty to consider the appeal and viability of dealing with multimodal transport operations.³⁰⁵ In 2002, UNCITRAL converted the CMI Draft into a Preliminary Draft Instrument³⁰⁶ and the Working Group on Transport Law reported that there was an increase in contracts for carriage by sea particularly in containerized goods which included inland carriage before and after the carriage of goods by sea and therefore it was necessary to draft an instrument that makes provision for the relationship between the draft instrument and conventions governing inland transport which were applicable in some countries.³⁰⁷

The report by the Working Group resulted in a provision³⁰⁸ which was proposed by the CMI, dealing with carriage preceding and subsequent to sea carriage which was described as a providing for a network system.³⁰⁹ The significance of this provision was that it extended the draft to cover inland transport from the door of the consignor by land to the port of departure and from the port of arrival by land to the door of the consignee.³¹⁰ The Preliminary Draft Instrument resulted in a succession of negotiations and a combined effort by experts resulted in continuous amendments.³¹¹ When it was completed, it was presented to the General Assembly of the United Nations, which in 2008 passed a resolution to adopt it as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. The Convention comes into force a year after the twentieth United Nations Member State ratifies it.³¹² The General Assembly was well aware of the significance of accelerating the drafting of Rotterdam Rules as there was a possibility that some countries were considering to pass new legislation that deviated from the current conventions.³¹³

³⁰⁵ See the Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-16 April 2002) (UNCITRAL A/CN.9/510).

³⁰⁶ Kerim op cit note 301 at 472. See also Sabena Hashmi 'The Rotterdam Rules: a blessing?' (2011-2012) 10 *Loyola Maritime Law Journal* 227.

³⁰⁷ Report of the Working Group on Transport Law op cit note 305 at para 26.

³⁰⁸ Article 2.2.1 of the Preliminary Draft Instrument.

³⁰⁹ Report of the Working Group on Transport Law op cit note 305 at 26.

³¹⁰ Malcolm A. Clarke op cit note 304 at 76.

³¹¹ Sabena Hashimi op cit note 306 at 227.

³¹² The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, article 94.

³¹³ Sabena Hashimi op cit note 306 at 228.

5.3 Application of the Rotterdam Rules in multimodal transport

Article 5 of the Rotterdam Rules, dealing with the general scope of application, provides as follows:

“1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

(a) The place of receipt; (b) The port of loading; (c) The place of delivery; or (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.”

In order to understand the scope of application of the Rotterdam Rules, it is necessary to be familiar with a series of definitions, provisions, and exclusions provided by the Convention. The most important of these are the definition of the contract of carriage; door-to-door transport; the provision that the carriage must be international; the contract's connection to the contracting states; the exclusions under article 6 and the application to certain parties under article 7.

5.3.1 Definition of Contract of Carriage

The Convention defines a contract of carriage as a “contract in which the carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage.”³¹⁴ This is a welcomed definition when compared to Article I(b) of the Hague-Visby Rules which limits the contract of carriage to one that is covered by a bill of lading or a similar document of title, in so far as those relate to the carriage of goods by sea. It is also a departure from Hamburg Rules, which provide under Article 1(6) that “a contract which involves carriage by sea and also by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage

³¹⁴ The Rotterdam Rules, article 1(1).

by sea”.³¹⁵ The definition features the concept of “modes of transport”, which is a familiar concept from the United Nations Convention on Multimodal Transport (MT Convention) and its predecessors, except that the Rotterdam Rules require one of the modes must be carriage of goods by sea and this distinguishes the Rotterdam Rules from the definition of “international multimodal transport” as provided by the MT Convention.³¹⁶

The Rotterdam Rules function as a unimodal convention if the transportation is only by sea as the word “may” in the definition of contracts of carriage makes allowance for carriage by other modes of transport without necessarily making them a requirement.³¹⁷ By being able to function as a unimodal convention, flexibility is ensured. Although the definition of contract of carriage seems to be wanting in precision, it does make it clear that there is no requirement that the carriage by other modes should be additional to that of carriage by the sea or that such carriage must not be lengthier than the sea carriage.³¹⁸ However, since sea carriage is an important pre-requisite for the application of the Rotterdam Rules, the Rules are applicable to a multimodal transportation by sea and road, but are not applicable to a carriage without a sea leg, such as by air and road.³¹⁹ This renders the scope of the Rules limited and unclear and makes it a possibility for parties to look to other transport conventions to govern their transport contract.³²⁰

Moreover, the wording of the definition of a contract of carriage in Article 1(1) and Article 5 of the Rotterdam Rules, provides that the Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States if, according to the contract of carriage, any one of the four places is located in a Contracting State, appears to be making the terms of contract determine the application of the Convention.³²¹ Therefore this leads to interpretation problems and begs the questions whether the Convention would apply if, in terms of the contract, sea carriage was required but it was not done and instead goods are carried by some other mode of transport? Does it apply if, in terms of the contract, the

³¹⁵ Anthony Diamond QC op cit note 303 at 451.

³¹⁶ Ibid.

³¹⁷ Yvonne Baatz et al. *The Rotterdam Rules: A Practical Annotation*. (2009)16.

³¹⁸ Anthony Diamond QC op cit note 303 at 451.

³¹⁹ D. Rhidian Thomas. *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*. (2009) 291.

³²⁰ Ibid.

³²¹ Anthony Diamond QC op cit note 303 at 451- 452.

goods should have been carried by air, for instance, but instead they are carried by sea? What about if the contract does not specify the mode of transport or contains a contractual option to carry by sea and they are in fact, carried wholly or partly by sea?³²² While the Convention can be said to be applicable in some of these scenarios, this has the potential to lead to litigation. It is not going to be possible to confidently predict how the definition of a contract of carriage and Article 5 is to be interpreted.

5.3.2 Door-to-door transport

In order to deal with the current challenges in the international carriage of goods, the Rotterdam Rules have designed practical solutions on “door-to-door” to avoid potential conflict between them and the other Conventions, such as the CMR, CIM and the Montreal Convention, which apply to modes other than sea carriage. The Rotterdam Rules contain two Articles, 26 and 82, that caters for the legal regime to apply in door-to-door transport.

Article 26 of the Rotterdam Rules, which is headed “Carriage preceding or subsequent to sea carriage”, provides that:

“When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- (b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

³²² Ibid at 452.

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.”

The intention behind this article was to provide a “network solution” to the problem of potential conflict between the Rules and the other Conventions.³²³ For it to apply, it must be possible to localise the point at which the loss or damage occurred and this point must be before the goods are were loaded on board a vessel or after the goods were discharge from the vessel. If, however, the loss or damage occurred during different stages or gradually between different stages, then more than one convention may be applicable with contradictory results.³²⁴ Article 26 also seems to have a limited scope for resolving conflicts as it provides that the Rotterdam Rules are to apply with regard to provisions of the carrier’s liability, limitation of liability, or time for suit only if such provisions cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

Article 82 of the Rotterdam Rules, which is headed “International conventions governing the carriage of goods by other modes of transport”, provides that:

“Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

- (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
- (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
- (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.”

³²³ Anthony Diamond QC op cit note 303 at 452.

³²⁴ Ibid.

This article is the Rotterdam Rule's network solution of governing the carriage of goods by air, road, rail and inland waterways. In view of the fact that the Rotterdam Rules contains no liability regulating these modes of transport, it employs the liability regimes of any existing convention on these modes of transport to be responsible for regulating liability. This is the Rules way of compensating for its shortcomings. This is clear evidence that the Rotterdam Rules cannot provide the "universal system of law intended".³²⁵ Furthermore, the contracted and vague drafting of Article 82 is a cause for concern.³²⁶ A conflict may arise, for example in the CMR concerning not only the roll-on, roll-off carriage, but also regarding a road transit crossing state borders before or after any sea carriage.³²⁷ It becomes problematic to predict how frequently a conflict will arise between the Rotterdam Rule and another Convention, and the extent to which the Rotterdam Rules would succeed in avoiding such conflicts.³²⁸

5.3.3 The Internationality of the Carriage

Article 5 of the Rotterdam Rules sets out that the "Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States". This implies that the Rotterdam Rules only apply to international carriage. The test for internationality is twofold. It is not only the place of receipt and place of delivery that must be in different States but also the port of loading of a sea carriage and the port of discharge of the same sea carriage must be in different States. This restriction to international carriage has the significance of emphasising the "maritime plus" characteristic of the Rotterdam Rule and may provide a reduction of potential conflict with other conventions.³²⁹

5.3.4 The carriage contract's connection to the contracting states

Article 5 (1) of the Rotterdam Rules sets out the proviso to the application of the Convention as being if, according to the contract of carriage, any one of (a) the place of receipt, (b) the

³²⁵ Victoria Anderson 'A Critical Assessment of the Rotterdam Rules' Potential to be Ratified, in Light of the Proposed Multimodal Transportation System and the Proposed Changes to the Obligations and Liability of the Carrier' (2015) 5 *Southampton Student Law Review* 22.

³²⁶ Sabena Hashimi op cit note 306 at 235.

³²⁷ Christopher Hancock QC 'Multimodal Transport and the New UN Convention on the Carriage of Goods' (2008)14 *J.I.M.L.* 493.

³²⁸ Erik Røsaeg 'Conflicts of Conventions in the Rotterdam Rules' (2009) 15 *J.I.M.L.* 239.

³²⁹ Anthony Diamond QC op cit note 303 at 457.

port of loading, (c) the place of delivery, or (d) the port of discharge is located in a Contracting State. Article 92 of the Rules indicates that a Contracting State is one that signs, ratifies or accedes to the Rotterdam Rules.³³⁰ The intention for the proviso in Article 5(1) was for the Rotterdam Rules to apply to inward and outward cargo from and to a Contracting State.³³¹ This, it was thought, would have ensured greater diversity within the Rotterdam Rules.³³²

5.3.5 The exclusions and application to certain parties

The application of the Rotterdam Rules as provided in Article 5 is subject to the specific exclusions set out in Article 6. Thus in considering the scope of application of the Convention, it is necessary to determine, not merely whether the contract of carriage fulfils the already discussed requirements in Article 5, but also whether the contract is or is not excluded by any of the specific exclusions contained in Article 6 in light of article 7 and the definitions of “line” and “non-liner” transportation.³³³ The definition of “line” and “non-liner” transportation are provided in Article 1(3) and 1(4) of the Rotterdam Rules respectively as follows:

““Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

“Non-liner transportation” means any transportation that is not liner transportation.”

Article 6 of the Rotterdam Rules, dealing with specific exclusions, provides that:

“1. This Convention does not apply to the following contracts in liner transportation:

- (a) Charter parties; and
- (b) Other contracts for the use of a ship or of any space thereon.

³³⁰ Yvonne Baatz et al op cit note 317 at 17.

³³¹ Anthony Diamond QC op cit note 303 at 458.

³³² Yvonne Baatz et al op cit note 317 at 17.

³³³ Anthony Diamond QC op cit note 303 at 458.

2. This Convention does not apply to contracts of carriage in non-liner transportation except when:

- (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
- (b) A transport document or an electronic transport record is issued.”

Article 7 of the Rotterdam Rules, dealing with the application of the convention to certain parties, provides that:

“Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.”

The purpose of Article 6, read with Article 7 is to exclude from the application of the Rotterdam Rules the contracts in which there exists an agreement that the parties thereto must have the independence to be able to contract freely on the terms they desire.³³⁴ Charterparties, which are excluded under Article 6(1)(a), it is said have for a long time been regarded as an epitome of contracts in which there should be freedom of contract because of their individually negotiated nature and that there are no concerns of protecting a weaker party from the bargaining power of a stronger party.³³⁵ It has been suggested that what is meant by “charter parties” and “contracts for the use of a ship or of any space thereon” in Article 6 of the Rotterdam Rules will have to be referred to the courts for determination.³³⁶

Article 7 provides for an all-encompassing principle that the Rotterdam Rules apply between carrier and any other party that is not an original party to the contracts of carriage excluded for the application of the Rules under Article 6.

³³⁴ Ibid at 459.

³³⁵ Ibid.

³³⁶ Ibid.

5.4 Conclusion

The analysis of the application of the Rotterdam Rules to multimodal transport has been met with despair as far as the possibility of harmony in the liability regime regulating multimodal carriage contracts is concerned. The convention does not cater for all aspects of multimodal transport. Instead, it is predominantly a unimodal sea carriage convention that purports to find solutions for the modes of carriage closely associated with such carriage. The manner in which it does so, creates a complicated network of uncertainty to which those who wish to determine if they are covered by the convention have to see themselves through. The provisions are difficult, narrow and have the potential to conflict with other international conventions largely because of poor drafting. In order to determine whether the convention applies, parties to a contract of carriage have to go through a series of definitions, provisions, provisos, and exclusions provided by the Convention, some of which are not clear and may have to be determined by the courts. Instead of the Rotterdam Rules having the final say as to whether a contract of carriage is one covered by these Rules, the contract of carriage itself is given the deciding vote when applying the Convention

Instead of adopting a uniform system of liability, the Convention mirrors the same inadequate unimodal transport convention provisions that currently make up the legal framework of international multimodal transport for solutions to regulating means of transport other than carriage by sea. The Rules is not self-sufficient. The Rules are not capable of solving the problems in multimodal transport contracts. They provide no solution with respect to non-localised loss or damage. Instead, they have the tendency of further complicating the problems. The answer, therefore, to the question whether the recently formed United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) has what it takes to meet the demands of modern multimodal transport has to be in the negative due to the narrow and limited scope of application of the Rotterdam Rules. Although the application of the Rotterdam Rules to door-to-door transport is praiseworthy, the result of its proposed applications seem to create more questions than answers, with poor drafting plays a major role in this uncertainty.

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