The liability of multimodal transport operator

Author: Zhang, Yu

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THE LIABILITY OF
THE MULTIMODAL TRANSPORT OPERATOR

A thesis submitted to
The University of New South Wales
for the degree of
Master of Laws

by

YU ZHANG

Faculty of Law
The University of New South Wales
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ABSTRACT

The field of the international multimodal transport is one of ever increasing complexity in the modern world. With the rapidly developing door to door multimodal transport of containers, the dominant role of the multimodal transport operator who acts as a principal and responsibility for the performance of the multimodal transport contract, has been brought into full play.

Accordingly, this thesis comprises nine chapters. The first is, essentially, preliminary in nature. It introduces the characteristics of unimodal and multimodal transport, discusses the definition, functions and nature of the multimodal transport operator. It also introduces briefly the provisions of the existing unimodal transport conventions and their effect on multimodal transport. Chapter 2 examines the different durations of the liability of unimodal transport carrier and the methods of taking and handing over the goods by the multimodal transport operator. Chapter 3 deals with fault and strict liability. Also included in this chapter is a discussion of the conflict between the fault liability of the multimodal transport operator and the strict liability of relevant unimodal carriers. Chapters 4 and 5 explain the difference between the uniform, network and mixed liability systems of the multimodal transport operator and the limitation of these three liability systems. These chapters also discuss the legal relationships between the multimodal transport operator and the other relevant parties. Chapter 6 deals with the legal functions of the multimodal transport document and its conflict with other relevant unimodal transport documents. Chapters 7 and 8 explain liability for delay and the role of insurance in multimodal transport. Finally, Chapter 9 concludes that the liability regime provided by the Multimodal Transport Convention proves to be really effective and presages the future of this convention.

Finally, as multimodal transport consists of two or more different modes of transport and the Multimodal Transport Convention adopts the mixed liability system, the
thesis throughout discusses the application of each of the existing international unimodal transport conventions, such as the Hague, Visby and Hamburg Rules, the CMR, CIM and Warsaw Conventions, making some suggestions on several legal issues which arise in the actual use of the various transport laws.
# Table of Contents

**Acknowledgement**

**Abstract**

**Table of Conventions**

**Table of Statutes**

**Table of Cases**

## Chapter 1

**Introduction to the Liability of the Multimodal Transport Operator**

1. **Introduction**

2. **The Multimodal Transport of the Container**
   - 1.2.1 The Characteristics of the Traditional Transport and the Multimodal Transport  
   - 1.2.2 The Two Types of Procedure for the Multimodal Transport of the Container  
   - 1.2.3 The Advantages and Problems of the Multimodal Transport of the Container  
   - 1.2.4 The Definition of International Multimodal Transport  
   - 1.2.5 The Conditions and Characteristics of International Multimodal Transport  

3. **The Multimodal Transport Operator**
   - 1.3.1 The Definition of the Multimodal Transport Operator  
   - 1.3.2 The Functions of the Multimodal Transport Operator
1.3.3 The Nature of the Multimodal Transport Operator 13

1.4 AN INTRODUCTION TO PROVISIONS OF UNIMODAL TRANSPORT CONVENTIONS AND THEIR EFFECT ON MULTIMODAL TRANSPORT 15

1.4.1 The Significance of International Unimodal Transport Conventions 15

1.4.2 Carriage by Sea: The Hague, Visby and Hamburg Rules 16
   1.4.2.1 The Background of the Rules on Bills of Lading 17
   1.4.2.2 The Use of Other Modes in Conjunction with Sea Carriage 20

1.4.3 Carriage by Air: The Warsaw Convention 20
   1.4.3.1 Conventions and Protocols of the "Warsaw System" 20
   1.4.3.2 The Use of Other Modes in Conjunction with Air Carriage 21

1.4.4 Carriage by Road: The CMR Convention 22
   1.4.4.1 The Use of Other Modes in Conjunction with Road Carriage 23
   1.4.4.2 Its Application to Containers 24

1.4.5 Carriage by Rail: The CIM Convention 25
   1.4.5.1 The Use of Other Modes in Conjunction with Rail Carriage 25
   1.4.5.2 Its Application to Containers 25

1.5 THE MULTIMODAL TRANSPORT CONVENTION 26

1.5.1 The Background of the Multimodal Transport Convention 26
   1.5.1.1 Containers and the Need for Harmonisation of the Unimodal Transport Regime 26
   1.5.1.2 Three Solutions for International Multimodal Transport 27
Table of Contents

1.5.1.3 Some Difficulties in the Drafting of the Multimodal Transport Convention 29
1.5.2 The Description of the Multimodal Transport Convention 30
1.5.3 The Significance of the Multimodal Transport Convention 31
1.5.4 The Legal Conflict Resulting from the Multimodal Transport Convention 32

1.6 CONCLUSION 34

CHAPTER 2
THE PERIOD OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 36

2.1 INTRODUCTION 36

2.2 DIFFERENT PERIODS OF THE LIABILITY OF THE UNIMODAL TRANSPORT CARRIER 36
2.2.1 The CMR/CIM Convention: From Receipt until Delivery 37
2.2.2 The Warsaw Convention: During the Transport Including Ground Handling Operations 38
2.2.3 The Hague/Hamburg Rules: Tackle to Tackle/Port to Port 38

2.3 THE METHODS OF TAKING/HANDING OVER THE GOODS BY THE MULTIMODAL TRANSPORT OPERATOR 40
2.3.1 The Methods of Taking Over the Goods 40
2.3.2 The Methods of Handing Over the Goods 41

2.4 THE RECEIVING AND DELIVERY SYSTEMS OF THE GOODS BY THE MULTIMODAL TRANSPORT OPERATOR 42
2.4.1 The Receiving and Delivery Systems of Full Container Load 43
2.4.2 The Receiving and Delivery Systems of Less Than Container Load 44

2.5 CONCLUSION 44

CHAPTER 3
THE BASIS OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 46

3.1 INTRODUCTION 46

3.2 THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR ON DIFFERENT ELEMENTS 46
3.2.1 The Law of Bailment 46
3.2.2 The Law of Contract 47
3.2.3 The Statute Law 48
3.2.4 The Law of Tort 48

3.3 THE TWO TYPES OF THE BASIS OF THE LIABILITY 49
3.3.1 Fault Liability 49
3.3.1.1 The Difference between the Incomplete Fault Liability and the Complete Fault Liability 49
3.3.1.2 The Basis of the Liability of the Carrier by Sea 50
3.3.1.3 The Basis of the Liability of the Carrier by Air 51
3.3.1.4 The Basis of the Liability of the Multimodal Transport Operator 52
3.3.2 Strict Liability 54
3.3.2.1 The History of Strict Liability 54
3.3.2.2 The Basis of the Liability of the Carrier by Rail and Road 55
3.3.2.3 The Basis of the Liability of the Carrier under the Guatemala Protocol and Montreal Protocol No.4 56
3.3.3 The Conflict between the Fault Liability of the Multimodal Transport Operator and the Strict Liability of the Carrier by Air, Rail and Road 57

3.4 EXONERATION FROM THE LIABILITY OF THE UNIMODAL TRANSPORT CARRIERS AND THE MULTIMODAL TRANSPORT OPERATOR 58
3.4.1 "Due Diligence" Exonerating the Sea Carrier 58
3.4.2 "All Necessary Measures" Exonerating the Air Carrier 60
3.4.3 "All Reasonable Measures" Exonerating the Multimodal Transport Operator 61

3.5 CONCLUSION 62

CHAPTER 4
THE FORM OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 63

4.1 INTRODUCTION 63

4.2 DIFFERENT TYPES OF THE FORM OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 64
4.2.1 The Uniform Liability System 64
4.2.2 The Network Liability System 65
4.2.3 The Mixed Liability System 67
### 4.3 THE LEGAL PROBLEMS IN THE DUAL RELATIONSHIP OF THE LIABILITY

- **4.3.1 The Highly Onerous Liability of the Multimodal Transport Operator** 69
- **4.3.2 The Extension of the Liability of the Carrier by Sea** 70
- **4.3.3 Not Enough Time for the Multimodal Transport Operator to Give Notice of Claim to the Actual Carriers** 71

### 4.4 THE LEGAL RELATIONSHIPS BETWEEN THE MULTIMODAL TRANSPORT OPERATOR AND THE OTHER RELEVANT PARTIES

- **4.4.1 The Contractual Relationship** 75
- **4.4.2 The Sub-contractual Relationship** 76
- **4.4.3 The Relationship of Employment/Agency** 77
- **4.4.4 The Relationship of Tort** 78

### 4.5 CONCLUSION 80

### CHAPTER 5
THE LIMITATION OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 83

### 5.1 INTRODUCTION 83

### 5.2 THE NEW UNIT OF ACCOUNT FOR THE LIMITATION OF THE LIABILITY 84

- **5.2.1 The Special Drawing Rights in International Transport Conventions** 85
- **5.2.2 The Reasons for the Introduction of the Special Drawing Rights** 86
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.2.3</td>
<td>The Nature and Advantages of the Special Drawing Rights</td>
<td>87</td>
</tr>
<tr>
<td>5.3</td>
<td>DIFFERENT STANDARDS OF THE LIMITATION OF THE LIABILITY 89</td>
<td></td>
</tr>
<tr>
<td>5.3.1</td>
<td>The Single Limit under the Hague Rules, and the Warsaw, CIM and CMR</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Conventions</td>
<td>89</td>
</tr>
<tr>
<td>5.3.2</td>
<td>The Two Alternative Limits under the Visby and Hamburg Rules</td>
<td>92</td>
</tr>
<tr>
<td>5.3.3</td>
<td>The Combination of the Single and Two Alternative Limits under the</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Multimodal Transport Convention</td>
<td>94</td>
</tr>
<tr>
<td>5.4</td>
<td>DIFFERENT SYSTEMS OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 96</td>
<td></td>
</tr>
<tr>
<td>5.4.1</td>
<td>The Uniform System of Limitation for Concealed Damage</td>
<td>96</td>
</tr>
<tr>
<td>5.4.1.1</td>
<td>The Non-Water Limitation</td>
<td>96</td>
</tr>
<tr>
<td>5.4.1.2</td>
<td>The Water Limitation</td>
<td>97</td>
</tr>
<tr>
<td>5.4.2</td>
<td>The Network System of Limitation for Localized Damage</td>
<td>99</td>
</tr>
<tr>
<td>5.4.2.1</td>
<td>The Additional Regulation of the Uniform System of Limitation</td>
<td>99</td>
</tr>
<tr>
<td>5.4.2.2</td>
<td>Some Legal Problems of the Network System of Limitation</td>
<td>101</td>
</tr>
<tr>
<td>5.4.3</td>
<td>The Mixed System of Limitation</td>
<td>102</td>
</tr>
<tr>
<td>5.5</td>
<td>CONCLUSION 103</td>
<td></td>
</tr>
</tbody>
</table>

CHAPTER 6
THE MULTIMODAL TRANSPORT DOCUMENT AND THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 105
6.1 INTRODUCTION 105
   6.1.1 The Significance of the Multimodal Transport Document 105
   6.1.2 The Essence of the Multimodal Transport Document 106

6.2 THE DIFFERENCE BETWEEN THE MULTIMODAL TRANSPORT DOCUMENT AND THE THROUGH BILL OF LADING 107
   6.2.1 The Difference in mode of Transport 107
   6.2.2 The Difference in the Form of the Liability 108
   6.2.3 The Difference in the Issuance of the Document 109
   6.2.4 The Difference in Application of the Conventions 110

6.3 THE LEGAL EFFECTS OF THE UNIMODAL TRANSPORT DOCUMENT AND THE MULTIMODAL TRANSPORT DOCUMENT 111
   6.3.1 The Legal Effect of the Unimodal Transport Document 111
   6.3.2 The Multimodal Transport Document as the Contract of Carriage or Evidence of Such 113
   6.3.3 The Multimodal Transport Document as Prima Facie Evidence or Conclusive Evidence 115
   6.3.4 The Multimodal Transport Document as the Document of Title 116

6.4 THE DIFFERENCE BETWEEN THE NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT AND THE NON-NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT 118
   6.4.1 The Nature of the Negotiable and the Non-negotiable Multimodal Transport Document 118
   6.4.2 The Conflict between the Negotiable Multimodal Transport Document and the Non-negotiable Air Waybill 119

6.5 THE RIGHT TO SUIT UNDER THE MULTIMODAL TRANSPORT
DOCUMENT 121

6.5.1 The Consignee May Claim against the Multimodal Transport Operator 122
6.5.2 The Multimodal Transport Operator May Claim against the Consignee 124
6.5.3 The Insurer May be Subrogated to Claim against the Multimodal Transport Operator 125

6.6 CONCLUSION 127

CHAPTER 7
THE LIABILITY FOR DELAY OF THE MULTIMODAL TRANSPORT OPERATOR 128

7.1 INTRODUCTION 128
7.1.1 The Difference between Delay and Loss or Damage 128
7.1.2 Delay as a Primary or a Secondary Cause of Loss 129

7.2 THE CHARACTERISTICS OF THE LIABILITY FOR DELAY IN MULTIMODAL TRANSPORT 130
7.2.1 The Meaning of Delay in Delivery in Multimodal Transport 130
7.2.2 The Doctrine of Causation Used for Localizing Delay in Delivery in Multimodal Transport 131

7.3 THE TWO POSSIBILITIES TO CONSTITUTE DELAY IN DELIVERY IN MULTIMODAL TRANSPORT 133
7.3.1 Delay in Delivery in the Case of Agreed Time-Limit 134
7.3.2 Delay in Delivery in the Case of Non-Agreed Time-Limit 135
7.3.3 The Disposal of A Delay in Delivery 137
7.4 THE DIFFERENT COMPENSATION FOR DELAY IN DELIVERY BETWEEN THE MULTIMODAL TRANSPORT AND THE UNIMODAL TRANSPORT 138
  7.4.1 The Compensation for Delay in Delivery Based on the Freight 138
  7.4.2 The Conflict on the Compensation for Delay in Delivery between the Multimodal Transport and the Unimodal Transport 140

7.5 CONCLUSION 142

CHAPTER 8
THE LIABILITY OF INSURANCE OF THE MULTIMODAL TRANSPORT OPERATOR 144

8.1 INTRODUCTION 144

8.2 THE RELATIONS BETWEEN CARGO INSURANCE AND LIABILITY INSURANCE 145
  8.2.1 Cargo and Liability Insurance Influenced by the Liability Regime 145
  8.2.2 The Difference Between Cargo Insurance and Liability Insurance 147

8.3 OVERLAPPING INSURANCE INVOLVED IN TRANSPORTATION OF GOODS 148
  8.3.1 Reasons for the Occurrence of Overlapping Insurance 149
  8.3.2 Impossibility of Eliminating Two Insurance Policies 150

8.4 THE LIABILITY INSURANCE OF THE MULTIMODAL TRANSPORT OPERATOR UNDER THE DIFFERENT LIABILITY SYSTEMS 152
8.4.1 The Liability Insurance of the Multimodal Transport Operator under the Uniform Liability System 153

8.4.2 The Liability Insurance of the Multimodal Transport Operator under the Network Liability System and the Mixed Liability System 154

8.5 CONCLUSION 155

CHAPTER 9
CONCLUSION TO THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR 156

9.1 INTRODUCTION 156

9.2 AN ENTIRELY NEW LIABILITY REGIME OF THE MULTIMODAL TRANSPORT 157
9.2.1 A Liability Regime Achieving the Measure of Uniformity in Multimodal Transport Liability 157
9.2.2 A Liability Regime Benefiting the Consignor and the Multimodal Transport Operator 158

9.3 CLOSER RELATIONS BETWEEN THE MULTIMODAL TRANSPORT CONVENTION AND THE HAMBURG RULES 159
9.3.1 The Multimodal Transport Convention Being Modelled Closely on the Hamburg Rules in Many Aspects 159
9.3.2 The Entry into Force of the Hamburg Rules Affording A Considerable Measure of Improvement for the Multimodal Transport Convention 160

9.4 REASONS WHY THE MULTIMODAL TRANSPORT CONVENTION
MAY NOT BECOME EFFECTIVE IN THE NEAR FUTURE  162

9.4.1 The MT Convention being Bound by the Unimodal Transport Conventions  162

9.4.2 Hesitation for Making a Decision Resulting from Disharmony between the Multimodal Transport Convention and the Unimodal Transport Conventions  163

9.4.3 The Regulation and Control of Transport Operation Restricting the Development of International Multimodal Transport  164

9.5 CONCLUSION 166

ABBREVIATIONS 167

BIBLIOGRAPHY 169
TABLE OF CONVENTIONS

  Art. 1(6) ................................................................. 110, 112
  Art. 3(1) ................................................................. 50, 59
  Art. 3(1)(a) ............................................................. 149
  Art. 3(2) ................................................................. 50, 149
  Art. 3(4) ................................................................. 112
  Art. 3(6) ................................................................. 71, 72
  Art. 4 ................................................................. 69
  Art. 4(1) ................................................................. 61
  Art. 4(2) ................................................................. 50, 158
  Art. 4(4) ................................................................. 138
  Art. 4(5) ................................................................. 84, 90
  Art. 6 ................................................................. 39

1924 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels ... 85

1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) .................. 16
  Art. 5(1) ................................................................. 111
  Art. 9 ................................................................. 120
  Art. 16 ................................................................. 53
  Art. 17 ................................................................. 53
  Art. 18 ................................................................. 57
  Art. 18(1) ............................................................. 52
| Art. 18(2) | .............................................................. 38 |
| Art. 20(1) | .............................................................. 60 |
| Art. 20(2) | .............................................................. 52 |
| Art. 22(1) | .............................................................. 90 |
| Art. 22(2) | .............................................................. 84, 90 |
| Art. 26(2) | .............................................................. 72, 73, 74 |
| Art. 29 | .............................................................. 71 |
| Art. 31 | .............................................................. 22, 69 |
| Art. 32 | .............................................................. 63 |

**1955** Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol)

| Art. 15 | .............................................................. 73, 74 |

**1956** Convention on the Contract for the International Carriage of goods by Road (CMR Convention) .............................................................. 16

<p>| Art. 1 | .............................................................. 91 |
| Art. 1(1) | .............................................................. 24 |
| Art. 1(2) | .............................................................. 24 |
| Art. 2 | .............................................................. 23, 91 |
| Art. 4 | .............................................................. 111 |
| Art. 9 | .............................................................. 111 |
| Art. 17 | .............................................................. 159 |
| Art. 17(1) | .............................................................. 37 |
| Art. 17(2) | .............................................................. 56 |
| Art. 20(1) | .............................................................. 140 |
| Art. 23(3) | .............................................................. 91, 159 |
| Art. 23(5) | .............................................................. 139 |
| Art. 24 | .............................................................. 84 |
| Art. 26 | .............................................................. 84 |</p>
<table>
<thead>
<tr>
<th>Year</th>
<th>Convention Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>The International Convention Relating to the Limitation of the liability of Owners of Sea-going Ships</td>
</tr>
<tr>
<td>1961</td>
<td>The International Convention on the Carriage of Passengers and Luggage by Railroad (CIV)</td>
</tr>
<tr>
<td>1961</td>
<td>The International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea</td>
</tr>
<tr>
<td>1961</td>
<td>Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to international Carriage by Air Performed by A Person Other than the Contracting Carrier (Guadalajara Convention)</td>
</tr>
<tr>
<td>1967</td>
<td>The International Convention for the unification of Certain Rules Relating to the Carriage of passenger Luggage by Sea</td>
</tr>
<tr>
<td>Year</td>
<td>Convention Title</td>
</tr>
<tr>
<td>------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1969</td>
<td>Draft Convention on Combined Transport (Tokyo Rules)</td>
</tr>
<tr>
<td></td>
<td>The International Convention on Civil liability for Oil Pollution Damage</td>
</tr>
<tr>
<td>1970</td>
<td>International Convention Concerning the Carriage of Goods by Rail (CIM Convention)</td>
</tr>
<tr>
<td></td>
<td>Art. 1(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 2(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 27(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 30</td>
</tr>
<tr>
<td></td>
<td>Art. 30(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 36</td>
</tr>
<tr>
<td></td>
<td>Art. 36(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 36(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 37</td>
</tr>
<tr>
<td></td>
<td>Art. 40(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 43(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 46(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 47</td>
</tr>
<tr>
<td></td>
<td>Art. 48(1)</td>
</tr>
<tr>
<td>Year</td>
<td>Convention</td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------------------------------------------</td>
</tr>
<tr>
<td>1973</td>
<td>The Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR)</td>
</tr>
<tr>
<td>1974</td>
<td>The Convention on A Code of Conduct for Liner Conferences (Liner Code)</td>
</tr>
<tr>
<td></td>
<td>Art. 49</td>
</tr>
<tr>
<td>1975</td>
<td>Montreal Protocol No.4 to Amend the Warsaw Convention as Amended by Protocol No.1 at The Hague on 28 September 1955 (Montreal Protocol No.4)</td>
</tr>
<tr>
<td></td>
<td>Art. 18(3)</td>
</tr>
<tr>
<td></td>
<td>Art. 24(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 24(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 1(6)</td>
</tr>
<tr>
<td></td>
<td>Art. 4(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 4(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 5(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 5(4)</td>
</tr>
<tr>
<td></td>
<td>Art. 5(6)</td>
</tr>
<tr>
<td></td>
<td>Art. 6(1)</td>
</tr>
<tr>
<td></td>
<td>Art. 6(2)</td>
</tr>
<tr>
<td></td>
<td>Art. 7</td>
</tr>
<tr>
<td></td>
<td>Art. 7(1)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Art. 16(3)</td>
<td></td>
</tr>
<tr>
<td>Art. 19(5)</td>
<td></td>
</tr>
<tr>
<td>Art. 19(6)</td>
<td></td>
</tr>
<tr>
<td>Art. 20(1)</td>
<td></td>
</tr>
</tbody>
</table>

- Recognising (b) 32
- Recognising (c) 74
- Recognising (g) 32

| Art. 1 |   | 118 |
| Art. 1(1) |   | 7, 9, 10 |
| Art. 1(2) |   | 11 |
| Art. 1(3) |   | 10, 30, 75 |
| Art. 1(4) |   | 10, 30, 113 |
| Art. 1(5) |   | 125 |
| Art. 2 |   | 118 |
| Art. 2(2) |   | 33 |
| Art. 3 |   | 106 |
| Art. 3(2) |   | 32, 74 |
| Art. 5(1) |   | 41 |
| Art. 6 |   | 119 |
| Art. 7 |   | 119 |
| Art. 8(1) |   | 106 |
| Art. 10(a) |   | 115 |
| Art. 10(b) |   | 115 |
| Art. 13 |   | 32 |
| Art. 14 |   | 45 |
| Art. 14(1) |   | 40, 75 |
| Art. 14(2) |   | 31, 40, 41 |
Art. 14(3) ................................. 14
Art. 15 ........................................ 14, 77
Art. 16 .......................................... 53, 57, 68
Art. 16(1) ..................................... 61, 128, 133, 139
Art. 16(2) ...................................... 131, 134
Art. 16(3) ...................................... 137, 140
Art. 17 .......................................... 53
Art. 18 .......................................... 68, 81
Art. 18(1) ...................................... 85, 94
Art. 18(2) ...................................... 95
Art. 18(2)(a) .................................. 95
Art. 18(2)(b) .................................. 95
Art. 18(3) ...................................... 95, 159
Art. 18(4) ...................................... 139
Art. 19 .......................................... 32, 68, 81, 101
Art. 20(1) ..................................... 78
Art. 20(2) ..................................... 78
Art. 20(3) ..................................... 78
Art. 21(1) ..................................... 14
Art. 21(2) ..................................... 14
Art. 24(1) ..................................... 72
Art. 24(2) ..................................... 72
Art. 24(5) ..................................... 73
Art. 24(7) ..................................... 73
Art. 25(1) ..................................... 71
Art. 32 ........................................... 165
# TABLE OF STATUTES

<table>
<thead>
<tr>
<th>Year</th>
<th>Act/Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1855</td>
<td>Bill of Lading Act 1855</td>
<td>118</td>
</tr>
<tr>
<td>1893</td>
<td>U.S.A. Harter Act (Harter Act)</td>
<td>18</td>
</tr>
<tr>
<td>1906</td>
<td>Maritime Insurance Act 1906</td>
<td>126</td>
</tr>
<tr>
<td></td>
<td>Art. 19</td>
<td></td>
</tr>
<tr>
<td>1927</td>
<td>Uniform Sandinavian Maritime Codes</td>
<td>55</td>
</tr>
<tr>
<td>1983</td>
<td>ICC's Uniform Customs and Practice for Documentary Credits (UCP)</td>
<td>121</td>
</tr>
<tr>
<td>1990</td>
<td>ICC Incoterms</td>
<td>123, 125</td>
</tr>
<tr>
<td>1992</td>
<td>Chinese Maritime Law</td>
<td>144</td>
</tr>
<tr>
<td></td>
<td>Art. 115</td>
<td></td>
</tr>
</tbody>
</table>
# TABLE OF CASES

A. M. Collins & Co. v. Panama R.R., 197 F.2d 893, 1952 A.M.C.254 (5th Cir.1952) ......................................................... 78

Actis Co Ltd. v. The Sanko SS Co Ltd., The Aguacharm (1982) 1 Lloyd's Rep. 7 ................................................................. 59

Adler v. Dickson (1955) 1Qb. 158 (C.A.) (The Himalaya) ............ 78

Adler v. Dickson and Another (1954) 2 Lloyd's Rep.267 ............. 79

Amjay Cordage Ltd. v. The Margarita (1979) 28 N.R. 265 (Fed. ct. of Appeal of Canada) ............................................................ 123

B. Elliot (Can.) Ltd. v. John T.Clarke & Son. 704 F 2d 1305,1308,1983 AMC 1742,1746(4 th Cir.1983) ............................ 79

Blasser Bros. v. 2d 1010, Northern Pan-Am., 628 F. 2d 376, 1982 AMC 84 (5th Cir. 1980) ........................................................ 126

Bunge Corp. v. London and Overseas Insurance Co., 394 F. 2d 496 (2d Cir. 1968), Cent. den. 393 U.S. 952 (1968) ................ 126

Canada Steamship Lines Ltd. v. Desgagne, (1967) 2 Ex C.P.234 ........ 59


Corporation Argentina v. Royal Mail Lines (1964) Lloyd's Rep.188 ........ 59


Goodwin, Ferreira v. Lamport & Holt (1929) 34 Lloyd's Rep.19 ........ 40

Grain Growers Export Co. v. Canada Steamship Liners Ltd., (1918) 43 O.L.R. 330 .......................................................... 59


International Milling Co.v. Persns (1958) A.M.C.526 .................... 79
<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Midland Silicones v. Scrattons</td>
<td>(1961) 2 W.L.R.186.</td>
<td>79</td>
</tr>
<tr>
<td>Northumbrian Shipping Co. v. Timm</td>
<td>(1939) AC, (1939) 2 All ER 648,HL&gt;</td>
<td>59</td>
</tr>
<tr>
<td>Riverstone Meat Co. Pty Ltd. v. Lancashire Shipping Co.Ltd</td>
<td>(1961) AC 807. (1961) 1 All ER 495, HL</td>
<td>60</td>
</tr>
<tr>
<td>The Hellenic Dolphin</td>
<td>(1978) 2 Lloyd’s Rep.336 QBD (Admiralty Court)</td>
<td>60</td>
</tr>
<tr>
<td>United International Stables Ltd. v. Pacific Westen Airlines Ltd.</td>
<td>5 D.L.R. (3d) 67</td>
<td>60</td>
</tr>
<tr>
<td>Wilson v. Darling Island Stevedoring Co.</td>
<td>(1956) 1 Lloyd’s Rep.346</td>
<td>79</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTION TO THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

1.1 INTRODUCTION

Transport is one of the key factors in overall economic development. Generally speaking there are four main modes of transport involved in the interstate and international transport of goods, such as by sea/water, air, rail and road. As engineering and science progresses, new and combined modes are developed. International multimodal transport has emerged on the basis of the container carriage and developed rapidly with the changes of the process of the circulation, the mode of the transport, the structure of the trade and the way of the control. From the 1950's, containers have been used to "unitize" cargoes, and standardised in their dimensions so as to facilitate their use by different carriers and ease their transfer between different modes of transport. During the mid-1960's the first major cross-Atlantic containerised shipping services began. Thereafter container services have spread throughout the world. Container carriage embodies the concept of intermodal transport is one of the three main economic sectors for which the Treaty of Rome explicitly stipulates a compulsory requirement for a common policy.

Pipe lines might be one of the five modes of transport. See S. Sorkin, Goods in Transit, Matthew Bende, New York, 1987, 1.01. (hereinafter cited as Sorkin).


The terms "intermodal transport", multimodal transport and combined transport are believed to have different shades of meaning by those who show a preference for one or the other ... The terms are used interchangeably and describe a continuous shipment which moves in two or more modes of transportation, utilise frequently, although not always, in a container. See W.J. Driscoll, The Convention on International Multimodal Transport: A States Report, (1978) 10 J.M.L.C. p441.

1Transport is one of the three main economic sectors for which the Treaty of Rome explicitly stipulates a compulsory requirement for a common policy.

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4The terms "intermodal transport", multimodal transport and combined transport are believed to have different shades of meaning by those who show a preference for one or the other ... The terms are used interchangeably and describe a continuous shipment which moves in two or more modes of transportation, utilise frequently, although not always, in a container. See W.J. Driscoll, The Convention on International Multimodal Transport: A States Report, (1978) 10 J.M.L.C. p441.
transport in that the goods may be conveyed on a whole journey, which may involve both long-distance trades where carriage by sea is normally a main component and carriage to the continent where carriage by other modes, such as by road and/or rail, tends to assume greater importance. The multimodal transport is also a synthisetical and coherent mode of transport, generally regarding containers as a medium, organically combining the traditional unimodal mode of transport, such as by sea, air, rail and road. The modes of transport developed in different historical periods. It can be hold that the invention of the engines brings about the steam boats and locomotives, indicating the first innovation in transport, the invention of the internal-combustion engines brings about the truck and air transport, marking the second innovation in transport, and then the multimodal transport has symbolised the third vitally important innovation in transport.

1.2 THE MULTIMODAL TRANSPORT OF THE CONTAINER

1.2.1 The Characteristics of the Traditional Transport and the Multimodal Transport

International sale of goods is the commercial intercourse between the different nations or regions which do not belong to the same nations. The international sale transaction is in essence a sale of goods. Goods, whether a contract of sale or of construction, have to be moved from the place of one export country to that of another import country. This carriage has invariably an international character. It may be executed by sea, air, rail or road conventionally or by a combination of these modes of...

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transportation. If it is carried out by merely one mode, the international transport is unimodal and if it is done by a combination of two modes or more, it is multimodal or combined or intermodal transport. To give an example: a Japanese manufacturer sells TVs to a store in China; the consignment is carried by sea from Tokyo to Tianjin; this should be an unimodal international transport. Further, a merchant in Beijing, China, sells knitwear to an importer in Canberra, Australia; the goods are loaded into a container in Beijing, taken by truck or trailer to Shanghai; there the container is loaded on a vessel which proceeds to Sydney where it is unloaded and taken by land to Canberra; here the international transport is multimodal as it consists of three stages, a land leg, a sea leg, and again a land leg.

It is well-known that an immense area of the earth, over two-thirds in fact, is covered by water, and land masses or continents, are surrounded by water, as are also island scattered throughout the earth. In spite of recent developments in other forms of transport, such as by air, rail and road, carriage of goods by sea remains the most common and cheap method of transporting goods overseas. In terms of weight, well over 90 per cent of goods are so carried.\(^8\) Conventionally the carriage of goods by sea is effected by two methods determined by the nature of the goods. If a large quantity of goods are to be carried in bulk, eg. grain, coal, timber, ore or oil, the shipper\(^9\) may hire an entire ship to carry them to their destination by means of a charterparty.\(^10\) If individual packages have to be carried, they are normally loaded in a ship's hold or on deck under the bill of lading.\(^11\) The traditional method of

\(^8\)Day, p6.

\(^9\)"Shipper" means any person by whom the contract of carriage of goods by sea has been concluded with the carrier. He will usually be the seller under the CIF Contract, but he may also be the buyer or the buyer's agent under the FOB Contract.

\(^10\)A contract by which an entire ship or some principal part of it is let by her owner to a charterer. See E.R.H. Ivamy, Dictionary of Shipping Law, Butterworths, London, 1984, p19. (hereinafter cited as Ivamy).

\(^11\)A document signed by the carrier and issued to a shipper of goods. See Ivamy, p7.
carriage of goods by air is done under the air waybills. In the international carriage by rail and road, consignment notes are used.

In modern international transport goods other than bulk cargoes are often carried in containers. A high percentage of international cargoes is nowadays carried in containers under documents which are not traditional transport documents. Therefore, the multimodal transport is being increasingly used, particularly when cargoes are carried in containers.

1.2.2 The Two Types of Procedure for the Multimodal Transport of the Container

In international multimodal transport operation, the MTO generally makes use of some form of unitization which is the practice of forming several small parcels headed for the same general destination into one large, standardised pack. The most popular form of utilisation is containerisation which involves the packing of small parcels into large, strong, reusable boxes known as containers. Owing to the contracts of the container transport either belonging to a single consignor or various consignors, there are two different types of procedure for business in the multimodal transport of the container. In the first case, usually an empty container is sent to the consignor's premises where he loads the goods and from where the container is collected by, or delivered to the multimodal transport operator (MTO). Such a case

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12 A document which is approximately equivalent to an ocean bill of lading. It is a receipt from the airline acknowledging receipt of the consignment from the shipper and a contract of carriage between shipper and airline.

13 A document which is approximately equivalent to an ocean bill of lading. It is a receipt for the goods and an evidence of the contract of carriage between the shipper and the carrier by rail and road.


15 Multimodal transport operator means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract. For details see section 1.3.
is called a full container load (FCL);\textsuperscript{16} In the mixed container, the goods, which belong to several consignors, is delivered to the nearest container loading depot. These depots, called container freight stations (CFSs), are generally situated in all major industrial centres inland or at the sea ports, such as Hamburg, Rotterdam, Liverpool, Seattle, Singapore and Hongkong, where the cargo will be consolidated within the container. On arrival at the place of destination, it will be taken to the container freight station, where it will be separated and delivered to the various consignees. This case is called a less than full container load (LCL).\textsuperscript{17} Where the consignor has arranged for the delivery of goods from his place of business to the consignee’s place of business, the container transport would be a door-to-door multimodal container transport. The door-to-door container transport is one kind of nine receiving and delivery systems in container transport.\textsuperscript{18}

1.2.3 The Advantages and Problems of the Multimodal Transport of the Container

The container transport, especially the door-to-door multimodal transport has great vitality in international carriage of goods. Being a total distribution system, the use of containers is increasing every year. The amount of cargo in container moved in international trade was 148.4 million tonnes in 1972 rising to 212.8 million tonnes in 1980. This represents an increase of some 44\% over the period and a cumulative growth rate of 4.6\%.\textsuperscript{19} The container transport has many practical advantages over traditional shipping methods, and these include:

(1) A sealed packing unit protects the goods up to their destination, making transhipment easy and theft of contents difficult;


\textsuperscript{17}Schmitthoff, p525; Mankabady, "Some Legal Aspects", P325.

\textsuperscript{18}For details see section 2.4.

(2) Onward delivery from the port of destination is simple because of internationally accepted container design, so that easy transfer to barges, rail and road vehicles is possible, together with the use of Roll-on / Roll-off (RORO) vehicle ferries;

(3) Containers make stowing, loading, unloading, marking and tallying of the goods more easy and efficient. Containers assist cargo handling, making loading and unloading of container ship a quick and efficient process. This in turn allows a container port to handle more ships, thereby distributing more cargo in a given time, which allows ships to be more profitably used because each one spends less time loading and discharging, and more time sailing between ports with freight earning cargo on board;

(4) Costs can be reduced because of greater automation, less risk of loss and damage and less need for extensive packing. As an added advantage, the container itself provides storage for the goods and does away with the need for extensive warehousing during transit;

(5) Containers can be bought or hired and can, if necessary, be refrigerated self-contained units or otherwise adapted to the shipper's needs;

(6) Goods from different consignors can be grouped together and shipped in one container, thus reducing carriage costs for the several sellers involved.

In short, the container has flourished and is now widely recognised as a means to speed cargo delivery and reduce handling costs. The development of containerisation has significantly increased the importance of the multimodal transport,\(^\text{20}\) permitting individual commodities to be loaded at the point of origin and to be transported without interim handing until the container arrives at its ultimate destination. Between the points of origin and destination, the container may be transported by sea, air, rail or road with the decrease in intermediate link, shortage of lay time, reduction of carriage cost, and improvement of transport quality in comparison to that experienced

under traditional break-bulk (slumping methods) carriage.

Contrasted to the advantages are some problems which were created by the container revolution and the increase in door-to-door multimodal transport with respect to the uniformity of laws in international transport. In particular, the fact that every segment of the multimodal transport was traditionally governed by a different set of international unimodal transport conventions exposed multimodal consignor to substantial uncertainty with respect to the laws governing the carriage in general, and particularly with respect to limitation of liability.21

1.2.4 The Definition of International Multimodal Transport

"International Multimodal Transport" is defined as the "carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country".22 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.23

Thus the multimodal transport must consist of different unimodal transport, being composed of any two or more different modes of the transport. The traditional four modes of carriage are sea, air, rail and road transport. There are differences between "Modes" and "Means" of transport. "Means" of transport are the methods of the arrangements used for transport. Thus a container and a pallet are means of

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23 MT Convention, Art. 1(1).
An interesting point here is whether a pipe-line is a mode or means of transport. Suppose oil is conveyed from a field in country A through a pipe-line to a seaport, from there it is carried by a ship to country B. This is a case of multimodal transport because a pipe-line is a mode of transport.

Meanwhile the Multimodal Transport Convention (MT Convention) does not transform into multimodal transport a transport arrangement for a main mode which includes an associated pick-up or delivery movement. Accordingly a transport movement involving pick-up, delivery and transhipment of goods by truck and incidental to the carriage of those goods by air does not constitute multimodal transport for the purpose of the MT Convention. This concept applies not only to air-truck movements, but also to pick-up or delivery movements by truck, for example, combined with other main modes. Thus an air-truck movement of goods will not be regarded as multimodal transport if the road leg can be characterised as pick-up and delivery and if the contract of carriage can be characterised as a unimodal transport contract. Given a wide interpretation, therefore, almost every trucking operation before or after an air leg could be arranged to constitute pick-up and delivery under a unimodal contract for carriage by air, thus achieving the exclusion originally sought. Further, Art. 30(4) of the MT Convention, Art. 2 of the CMR Convention and Art. 2 of the CIM Convention shall not apply to international multimodal transport.

1.2.5 The Conditions and Characteristics of International Multimodal Transport

According to the MT Convention, international multimodal transport is defined as the

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27Fitzgerald, p57.
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 in which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. \(^{28}\) Thus, two conditions must be required: (a) that the goods are carried by two modes of transport; and (b) that they are carried between two different countries. \(^{29}\) Therefore, international multimodal transport should might possess the following five necessary characteristics.

First, the carriage of goods must be performed internationally. Namely, the carriage of goods must be by way of international transport crossing the border under the mode of international multimodal transport.

Secondly, the MTO must conclude the multimodal transport contract (MT contract). This contract stipulates definitely the nature of international transport and the contractual relationship between the MTO and the shipper in respect of their liabilities, responsibilities, rights and immunities. The MTO under-takes, against payment of entire freight, to perform or to transport. So the MT contract not only performs the fundamental basis of stipulating the nature of the multimodal transport, but also the main evidence for distinguishing between multimodal transport and general, traditional through carriage. \(^{30}\)

Thirdly, the MTO must use the MT document. As similar with the traditional bill of lading, the MT document might perform as the document of title and the valuable security. In order to promote the development of multimodal transport, the International Chamber of Commerce promulgated in 1975 the Uniform Rules for A Combined Transport Document (ICC Rules), providing that the bank can accept the MT document issued by the MTO if there is no any special provisions in the

\(^{28}\)MT Convention, Art.1(1).

\(^{29}\)Mankabady, p125.

\(^{30}\)For details See section 6.2.
commercial credit. Thus, these Rules offer favourable condition for the development of the multimodal transport.

Fourthly, the MTO must assume responsibility to carry or procure the whole carriage. The MTO is a person who enters the MT contract with the shipper and issues the MT document. Being a contractual carrier, the MTO is responsible for the performance of a contract for the cargo owner in the business of the multimodal transport, and for the cargo's complete journey from its original place of dispatch to its ultimate destination.

Fifthly, the MTO must contract to employ at least two different modes of transport, such as carriage by sea-road, sea-rail, sea-air, road-air and rail-road. The multimodal transport excludes the two similar modes of transport, such as sea-sea, rail-rail and air-air. Therefore, the combination of at least two different modes of transport is one of the major factors defining whether a freight transport belongs to the multimodal transport.

The above conditions can be regarded as a recipe of five ingredients. They are prescribed by the first four definitions of the MT Convention.31 If any one of these ingredients is absent, an international multimodal transport is not in existence and the MT Convention does not apply. For example, it does not apply to a carrier who contracts with a succeeding carrier for through carriage, a carriage document stipulating for a single mode of transport, nor to combined transport within one country.

1.3 THE MULTIMODAL TRANSPORT OPERATOR

1.3.1 The Definition of the Multimodal Transport Operator

A multimodal transport operator is any person who 1) on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and 2) who acts as a principal, not as an agent or on behalf of a consignor or of a carrier participating in multimodal transport operations and 3) who assumes responsibility for the performance of the contract. In other words the MTO does not have to perform the carriage himself. Providing he takes responsibility as a principal for the carriage, irrespective of whether he actually owns or controls some, all or none of the modes of transport. He may be a non-vessel operating carrier (NVOC), or a non-vessel owning common carrier (NVOCC). By definition, if the MTO enter into agreements with sub-contractors to perform any leg or all legs of the multimodal transport operation, he contracts as a principal in his own right and not as agent for the consignor.

Being an interested party in the multimodal transport and an independent legal entity, the MTO is not an agent or representative of the consignor or of the carrier who takes part in the multimodal transport. On the one hand, he is a carrier of the cargo for the cargo owner, and a shipper of the cargo for the sub-carrier on the other. As a matter of fact, the MTO is a freight forwarder as principal, concluding not only the MT contract with the consignor, but also the unimodal transport contract with the sub-carrier. So the MTO serves in a duel capacity. But under the multimodal transport, the MTO, according to the provision of the contract, is always the contracting carrier of the cargo, undertaking responsibility for the cargo’s complete journey from its original place of dispatch to its ultimate destination.

32MT Convention, Art. 1(2).
34Hill, p71; Mankabady, p126; Hare, p114.
35The Freight Forwarder: The Changing Role and the 1984 IFF Standard Trading Condition provides that when acting as an agent, the forwarder acts solely on behalf of his customer in security services by, establishing contracts with third parties such as carriers so that direct contractual relationship are established between the customer and such third parties.
The multimodal transport of the container has changed the role of the carrier by sea as much as it has that of the traditional shipping and forwarding agent. The carrier by sea, whose responsibility formerly ended when goods were delivered to the stevedores or port authorities, is now frequently an MTO, organising and taking responsibility for the door-to-door movement of containers from consignor to consignee. The sea journey still usually forms the major part of the complete transit and it is a natural development for the carrier, with the prime interest in the container movement, to assume responsibility as a principal and engage rail and road subcontractors for local collection and delivery work.\(^{36}\)

1.3.2 The Functions of the Multimodal Transport Operator

To facilitate the smooth running of business and to place himself in a better position to offer satisfactory services, the MTO must, first of all, maintain an organisation with a sufficient force of skilled hands competent to deal with all matters in relation to the conveyance of cargo entrusted to him from the point of departure to the place of delivery.

In the execution of the multimodal transport contract he has necessarily to engage the services of several carriers such as carriers by sea, air, rail or road in addition to non-carriers like terminal operators, warehouses, container freight stations, groupage or consolidation depots, container leasing organisations or freight forwarders. The range of services which the MTO provides directly or through his sub-contractors vary from MTO to MTO and to some extent from country to country, depending on the system of administration pertaining to ports, inland terminals, inland modes of transport etc.\(^{37}\) The scope of the services rendered by the MTO in terms of the routine procedures covering the multimodal transport chain consists mainly as follows.

(1) The MTO supervises the packing of less than container loads (LCL) into


\(^{37}\)ESCAP, p108.
containers at the groupage depot or container freight station at the place of origin and supervises the unpacking at the container freight station in the country of destination;

(2) The weight or measurement of cargo is done by the consignor under the supervision of the MTO;

(3) After having accepted the cargo form the consignor the MTO reserves space on the different modes of transport concerned through his sub-contractors, for the transport of cargo to the final destination;

(4) The MTO keeps safe custody of cargo until they are delivered to the consignee and supervises loading and unloading of the cargo on or from each mode of transport used in the multimodal transport chain;

(5) The necessary guarantees are given by the MTO to the customs administrations of the transit countries and stations, where necessary, and to agents at national frontiers to ensure that customs formalities and any other regulations laid down under national law are complied with;

(6) When the goods are in transit, it is the practice of the MTO to send regular telex or telegraphic reports of the positioning of the cargo at each stage to the consignor or consignee;

(7) The MTO returns empty containers to the container depots or other places stipulated by the leasing company when they are released from lease in cases where these containers are taken on lease by him;

(8) It is the MTO's responsibility to complete all necessary shipping documents.

The above usual routines must be followed by the MTO before a consignment reaches its destination. Sometimes the MTO also arranges insurance coverage for the cargo on behalf of the consignor or consignee.38

1.3.3 The Nature of the Liability of the Multimodal Transport Operator

38For details see ESCAP, p109.
Chapter 1 Introduction to the Liability of the Multimodal Transport Operator

There has been uncertainty as to the nature of the MTO’s responsibility for the actions of his servants, agents and so on.\(^{39}\) Consequently, Article 14 of the MT Convention\(^ {40}\) provides that, reference to the MTO shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract. Reference to the consignor or consignee shall also include their servants or agents. In United Nations Conference on a Convention on International Multimodal Transport, the group of 77 (developing countries) used to insist that the MTO’s liability should extend to acts of any person of whose services he made use in the performance of the multimodal transport contract. Group B (developed countries) used to argue that such an extensive scope of liability would cause the MTO to be liable when such persons went on independent “frolics”.\(^ {41}\) As a result, Article 15 of the MT Convention provides that the MTO is liable for the acts and omissions of his servants, agents, and other persons whose services the MTO uses for the performance of the contract, whenever they are acting within the scope of their employment, or in the performance of their contracts with the MTO.\(^ {42}\) Furthermore, Article 21(1) provides that the MTO may lose the right to limit his liability if it is proved that loss, damage, or delay was caused by an act or omission by the MTO done intentionally or recklessly and knowing that the loss, damage, or delay would likely result.\(^ {43}\) Furthermore, the MT Convention provides that the MTO’s servants, agents and subcontractors may lose their right to benefit from the MT Convention’s liability limits if it is proved that loss, damage, or delay was done by their acts or omissions when done intentionally or recklessly and knowing that the loss, damage, or delay would likely result.\(^ {44}\)

\(^{40}\)MT Convention, Art. 14 (3).
\(^{41}\)Driscoll & Larsen, p230.
\(^{42}\)MT Convention, Art. 15.
\(^{43}\)MT Convention, Art. 21(1).
\(^{44}\)MT Convention, Art. 21(2).
The relationship between Article 15 and Article 21 is not clearly expressed in the language of the two articles. It may be argued that a person of whose services the MTO makes use in performancing the multimodal transport contract could lose the right to limit his liability when he causes loss or damage by his intentional or reckless acts, whereas the MTO's liability limit might continue to apply. Suppose deliberate or reckless loss or damage was caused by an underlying carrier but could not be imputed to the MTO because the MTO himself at all times acted prudently in accordance with Article 21(1). In that case, it might be argued that the MTO's subcontractor would not have the benefit of limited liability under 21(2), whereas the MTO's liability would be limited because it could not be proved that loss, damage, or delay resulted from an act of the MTO done with intent and knowing that such loss, damage or delay would probably result. Consequently, if the subcontractor's intentional or reckless act cannot be attributed to the MTO, the subcontractor might be liable for the difference between the limited recovery and unlimited recovery. Such a thing might occur if the subcontractor should act outside the scope of his employment or contract with the MTO. The direct tort action against the subcarrier by the consignee might produce unlimited recovery, whereas he could recover only limited damages from the MTO.

1.4 AN INTRODUCTION TO THE PROVISIONS OF UNIMODAL TRANSPORT CONVENTIONS AND THEIR EFFECT ON MULTIMODAL TRANSPORT

1.4.1 The Significance of International Unimodal Transport Conventions

International trade has been hampered by the existence of different legal regimes creating uncertainty over the rights of exporters and importers. In some countries carriers and bailees are subject to mandatory regimes of liability under national law. In others they have virtual freedom to contract out of all liabilities. To bring some
uniformity, order and certainty into this multiplicity of different rules and regimes, the international unimodal transport conventions were devised. Elaborated over a number of years under the auspices of the United Nations and ultimately submitted for adoption by a diplomatic conference, an international unimodal transport convention comes into force as international law binding on those states which have ratified or acceded to it. Its provisions are often mandatory in their application and it is usual for states to introduce domestic legislation implementing the convention by incorporating its provisions into the national law.

International unimodal transport is governed by international conventions. They have been adopted by many countries and are of great practical effect, being aimed at facilitating international trade by increasing uniformity in international transportation law. As a result, a unimodal international transportation regime has been created under which transportation on each mode is governed by separate conventions. This unimodal system governs international carriage of goods by sea under the Hague Rules, Visby Rules and Hamburg Rules; international carriage of goods by air under the Warsaw Convention and relevant amending Protocols; international carriage of goods by rail under the CIM Convention; and international carriage of goods by road under the CMR Convention.

1.4.2 Carriage by Sea: The Hague, Visby and Hamburg Rules

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49Convention Concerning International Carriage by Rail, 7 Feb., 1970, Ver. 8th (hereinafter cited as CIM Convention).
1.4.2.1 The Background of the Rules on bills of lading

Before the 18th century, the common carrier\(^{51}\) was under a very strict liability regime making him the virtual insurer of the goods unless he could show that the loss of or damage to the goods had been caused by an Act of God,\(^{52}\) a public enemy,\(^{53}\) the inherent vice of the goods.\(^{54}\) However the carrier was allowed to alter his common law liability through making a special contract with the shipper. As a result, the number of exceptions increased to such an extent that the original positions of shipper and the carrier were almost reversed. The carrier was no longer the insurer of the goods. In fact, in many instances, he was not even liable for the loss or damage to the goods caused by his own negligence.\(^{55}\)

At the end of the 19th century, strong opposition among cargo owners and cargo insurers had grown against the great variety of far reaching exoneration and limitation clauses introduced by carriers in their bills of lading, clauses which were upheld by the courts of most countries under the doctrine of freedom of contract. Especially in the liner trade, where the carrier only accepts cargo on fixed terms, there is no room for bargaining between the shipper and the carrier. In this opposition, cargo owners were joined by banks, who have a specific interest in the bill of lading as a document of title. In this respect the bill of lading plays an important role as a security for the advancement of credit in international commercial transactions. To efficiently fulfil this role it is essential that the clauses of the bill of lading be uniform and easily

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\(^{51}\) A shipowner who offers to carry the goods of all comers in a general ship.

\(^{52}\) Any accident due to natural causes directly and exclusively, without human intervention, which no reasonable foresight could have avoided, such as lightning and a storm. See Ivamy, p1.

\(^{53}\) The armed forces of a State at war, if the ship charted is a foreign ship, with the country to which the ship belongs. See Ivamy, p129.

\(^{54}\) The sort of vice which by its internal development tends to the destruction or the injury of the goods or animal to be carried. For instance, the spontaneous combustion of flax put on board in a damp condition groundnuts suffering damage by heating due to internal moisture and kettles being damaged due to being insufficiently packed. See Ivamy, p61.

ascertainable as well as providing reasonable protection. As a result, in 1893, the American Congress enacted the Harter Act\(^{56}\) as a compromise between the interests of the shipper and the carrier. The wording of the Harter Act makes it clear that it was a reaction against what was considered to be an intolerable practice by the carrier. Acts similar to the Harter Act were soon adopted by other nations desirous of protecting the interests of their shippers against exclusion and limitation clauses imposed by most bills of lading. After the First World War, the climate became fit for negotiations between the interested parties on an international level.

In 1912, the Maritime Association of the United States had recommended that the International Maritime Committee (CMI) consider the whole subject. In September, 1921, the International Law Association (ILA), at The Hague, adopted a set of rules which had been formulated by the CMI, and which came to be known as the Hague Rules. The ILA recommended the use of these Rules by shipping interests and also recommended the passage of similar municipal legislation. After further minor amendments, the Hague Rules were submitted to the International Diplomatic Conference on Maritime Law for adoption in 1924. It has since been ratified by many countries, such as Belgium, Hungary, Italy, Japan, Poland, Romania, Spain, Yugoslavia and USA. The Hague Rules which formed the compromise between cargo owners and maritime carriers were to a large extent inspired by the Harter Act and contained a set of uniform international bills of lading clauses which would be binding upon the parties to the contract and would guarantee a minimum protection for the shipper and other interested parties to the cargo.

Over the past decade, the law relating to contractual carriage by sea as evidenced by bills of lading as contained in the Hague Rules has come under scrutiny for two

\(^{56}\)U.S.A. Harter Act (1893). United States' interests were adequately protected by the Harter Act, which was substantially similar to the Hague Rules. For instance, the Harter Act provides that the carrier shall be bound to exercise due diligence in supplying a seaworthy vessel and does not to take responsibility for faults or errors in navigation or in the management of the vessel, but the liability for faults or errors in the management of the cargo shall be borne by him.
distinct reasons. In the first place, technical changes in the manner of transporting cargo, and in particular the widespread use of the container transport, have presented problems which the traditional bill of lading is ill-equipped to handle. Secondly, there have been strong and insistent claims that the distribution of the risks of maritime transport under the Hague Rules unduly favours carriers at the expense of cargo owners. Therefore, while the Hague Rules succeeded in protecting cargo interests they did not receive universal approval in the years following their adoption. Lasting peace had not been achieved. The Hague Rules, having settled like good wine, were in ferment again. In 1963, the CMI went to work once again, searching for agreement, on what were thought to be the remaining problems. This draft, prepared by the CMI, came before the Diplomatic Conference at Brussels in 1967, and in an adjourned session in February, 1968. At that time a protocol was signed at Brussels amending the Hague Rules. These amendments are known as the Visby Rules.

In 1970 a movement began which was to demand, not the piecemeal reform of the Hague Rules, but their replacement by a totally new Convention. This movement derived from a number of different sources. There are those who considered that the Visby Rules did not go nearly far enough to modernise the Hague Rules and to remove technical defects. Others challenged financial or economic aspects of the Hague Rules and sought to impose much higher liabilities upon the carrier. In particular the cargo interests felt that the carrier still retained an unreasonable degree of protection and criticism in this respect centred on the ability to exclude liability for negligence in the navigation or management of the ship. Moreover, inflation and the intervention of the container revolution had raised acute problems regarding the unit of limitation of the carrier’s liability. In such case, the movement came of age with the report on bills of lading published by the United Nations Conference of the Trade and Development (UNCTAD). The United Nations Commission on International Trade Law (UNCITRAL) was thereafter asked to undertake an

examination of the rules and practices concerning bills of lading, including those rules contained in the Hague Rules and Visby Rules. A final draft of the UNCITRAL Rules was completed in 1976. In 1978, the UN Conference held at Hamburg adopted the United Nations Convention on the Carriage of Goods by Sea.\textsuperscript{58}

\subsection*{1.4.2.2 The Use of Other Modes in Conjunction with Sea Carriage}

The Hamburg Rules provide that a contract of carriage by sea means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another. However, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purpose of this Convention only in so far as it relates to the carriage by sea.\textsuperscript{59} This provision may extend the terms of the Convention to carriage by more than one mode of transport. The proposal as put forward by Australia was with the qualification that this provision should cease to operate when the MT Convention was adopted. This qualification was not accepted at the Diplomatic Conference which adopted the Hamburg Rules.\textsuperscript{60} Like the CMR and CIM Conventions, the Hamburg Rules tend to go beyond its traditional limits by applying its provisions to other modes of transport. As a result, conflict may arise between unimodal conventions. It is felt that it would be preferable to make it clear that the Hamburg Rules apply only to contract of carriage by sea as the MT Convention deals with the multimodal transport contract.

\subsection*{1.4.3 Carriage by Air: The Warsaw Convention}

\subsection*{1.4.3.1 Conventions and Protocols of the "Warsaw System"}

\textsuperscript{58} For more discussion see A. Ignacio, Yearbook Maritime law (1982), Kluwer Law and Taxation Publishers, Netherlands, 1984, p88. (hereinafter cited as Ignacio).

\textsuperscript{59} Hamburg Rules, Art, 1(6).

\textsuperscript{60} Hare, p202.
The Convention for the Unification of Certain Rules Relating to International Carriage by Air, was signed at Warsaw in 1929, only five years after the Hague Rules. This Convention, commonly known as the Warsaw Convention, firmly established and elaborated the principle of the air carriers' liability for damage caused to passengers, baggage and goods. As time went by and aviation began expanding on a large scale, the Warsaw Convention had to be amended or added to on a number of occasions in order to be kept up to date. The Hague Protocol of 1955 was first added to the Warsaw Convention with the aim of adapting it to the demands of modern transport. In 1961, the Guadalajara Convention sought to solve problems arising when the transport was performed by a person other than the contracting carrier. In 1971 the Guatemala Protocol substantially modified the whole regime of liability for the carriage of passengers and baggage. Finally, four amending protocols were concluded in Montreal in 1975. Protocol No. 1 allows payments made within the liability limits originally established by the Warsaw Convention to be calculated in terms of Special Drawing Rights (SDRs) as defined by the International Monetary Fund (IMF). Protocol No. 2 replaces the limits set out in The Hague Protocol by limits expressed in SDR. Protocol No. 3 deals in a similar manner with the limits specified in the Guatemala Protocol. Protocol No. 4 changes the liability rules relating to goods and introduces SDR as well. Thus between 1955 and 1975, the Warsaw Convention has been modified by no less than six Protocols, and supplemented by another Convention. These Convention and Protocols are designated as "Warsaw System".61

1.4.3.2 The Use of Other Modes in Conjunction with Air Carriage

The Warsaw Convention provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the Convention apply only to the carriage by air, provided that the carriage by air falls

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 Chapter 1 Introduction to the Liability of the Multimodal Transport Operator

within the terms of Article 1.\(^{62}\) However the situation became less clear after the approval of the Guadalajara Convention. This Convention provides that if any actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 1, paragraph (b), is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, expect as other provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.\(^{63}\) This provision was interpreted by saying that whenever there is a multimodal transport including air leg, the MTO is regarded as the contracting carrier and the whole carriage will be subject to the Warsaw Convention.\(^{64}\) However, this view is not by any means accepted since the air carrier frequently entrusts the carriage of the goods to other carriers. To deal with the liability of the actual carrier was the purpose of the Guadalajara Convention which was only concerned with the liability of the actual carrier and not the applicable law or the extension of the provision of the Warsaw Convention to non-air transport.

1.4.4 Carriage by Road: The CMR Convention

The most favourable condition for providing some uniformity for international inland transport exist in Europe where an integrated network of railways and roads is well developed and connected internationally. In practically all European countries, international transactions primarily utilize rail or road to transport cargo from one country to another. The growth in the international movement of goods by road after the Second World War in Europe led to calls for a uniform liability regime to cement the confidence, principally of users, but also to regulate the legal position of subcontractors from different states. Following initial work by the International Institute

\(^{62}\) Warsaw Convention, Art. 31.

\(^{63}\) Guadalajara Convention, Art. 2.

Chapter 1 Introduction to the Liability of the Multimodal Transport Operator

for the Unification of Private Law (UNIDROIT), the ICC and the International Road Transport Union, the Convention on the Contract for the International Carriage of Goods by Road was finally elaborated by the European Economic Community (EEC) of the United Nations and signed by nine European States on 19 May 1956, known as the CMR Convention.

1.4.4.1 The Use of Other Modes in Conjunction with Road Carriage

The CMR Convention provides that if the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterway or air and the goods are not unloaded from the vehicle, the Convention shall nevertheless apply to the whole of the carriage. Therefore, if a container is carried on a vehicle which travelled by road from state A to state B, and then was carried by sea to state C without being unloaded from the vehicle used for the initial road stage, the CMR Convention applies to the entire journey. In this case the container is considered to be carried by one mode of transport. On the contrary, if there is carriage by road from state A to state B, followed by a sea stage without vehicle to state C, the CMR Convention applies to the initial road stage between state A and B, but does not apply to the sea stage, because the vehicle did not go with the goods. Therefore, unloading ends the application of the CMR if the purpose of unloading is transfer to a different mode of transport without vehicle. However, if loss, damage or delay in delivery of the

65Nine European states refer to Austria, France, Luxembourg, Poland, Sweden, Switzerland, West Germany, the Netherlands and Yugoslavia. See A.E. Donald, "CMR-An Outline and Its History" (1975) L.M.C.L.Q. p420. (hereinafter cited as Donald).

66 The acronym CMR comes from the French title of the Convention (Convention relative au contrat de transport international de Marchandises per Route).

67CMR Convention Art. 2.


70Cf. Supreme Court of Denmark 28.4.89, (1989)24 E.T.L. p345: Transfer of a container from a vehicle to a special ship's trailer, a trailer used only during the sea stage, takes the case outside the CMR Convention.
goods occurs during the carriage by the other means of transport without fault on the part of the carrier by road but by an event which could occur only through use of the other mode, eg sea damage, the liability of the carrier will be governed by any national or international law for the carriage of goods by that means of transport, such as the Hague Rules or Visby Rules. If there is no such law applicable, the liability of the carrier by road shall be determined by the CMR Convention.

1.4.4.2 Its Application to Containers

The CMR Convention applies to every contract for the carriage of goods by road in vehicles for reward when the place of taking over of the goods and the place designated for delivery as specified in the contract are situated in two different countries of which at least one is a contracting country. The carriage being by road in vehicles is one of the major conditions for the application of the CMR Convention. Moreover, vehicles are defined to include motor vehicles, articulated vehicles, trailers and semi-trailers. The Convention does not specifically provide for containers because it was drafted before their widespread use. This creates some difficulties. Where a container, and the goods within it, remains on a skeletal or flat-bed trailer throughout, the transport will be subject to the CMR Convention even if other modes of transport are used. However, if the container is removed from its "wheels" by top lifting at a port or rail terminal and then carried separately by rail or sea, that will break the chain of the CMR Convention and an entirely new journey will begin when it is put back on other "wheels". Therefore, some containers, eg. destined for the U.K., are delivered by road to a port where they are loaded aboard ship for operational reasons for the short sea crossing. In such case the CMR Convention will not apply to the sea portion. Whereas, if the container is loaded with its "wheels", the CMR Convention will apply.

71CMR Convention, Art. 1(1).
72CMR Convention, Art. 1(2).
1.4.5 Carriage by Rail: The CIM Convention

As early as 1893, the first International Convention Concerning the Carriage of Goods by Rail came into operation, achieving uniformity in the liability regime for the transport of goods by rail. Its provisions were frequently revised and the most recent successor (1970) became effective in 1975 and is known as the CIM Convention.\(^7\)

1.4.5.1 The Use of Other Modes in Conjunction with Rail Carriage

The CIM Convention provides that Regular road or shipping services which are complementary to railway services and on which international traffic is carried may, in addition to services on railway lines, be included in the list of designated networks of railway lines referred to in Article 1.\(^7\) Therefore, road or shipping services might be subject to the CIM Convention provided that these services are considered complementary to railway services, carrying international traffic and included in the published list of lines to which the Convention applies. In such a circumstance, the CIM provision might be applicable to the carriage of the goods by road or sea because they are considered as one mode of transport despite the combination of modes.

1.4.5.2 Its Application to Containers

The CIM provides that, with the exception of some specified border transit traffic, the Convention applies to all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two contracting

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\(^7\) The acronym which comes from the French title of the Convention (re’gles Uniforms Concernant le Contract de Transport International Ferroviaire des Merchandises).

\(^7\) CIM Convention, Art. 2(1).
states.\textsuperscript{75} With regard to containers, the CIM Convention applies to containers approved by the railway authorities whether they are owned by the railway or the customer. The provisions apply both to full and to empty containers. Unless specially agreed, the contents of a container will always be regarded as a full container load, the subject of only one contract of carriage. This means that where forwarders consolidate and forward multi-loads by rail in containers there will not generally be a direct contractual relationship established between the carrier by rail and the owner of the part loads inside the container.

\section*{1.5 THE MULTIMODAL TRANSPORT CONVENTION}

\subsection*{1.5.1 The Background of the Multimodal Transport Convention}

\subsubsection*{1.5.1.1 Containers and the Need for Harmonisation of the Unimodal Transport Regime}

Since the 1950's, containers have been widely popularised because of their economic and operational advantages. This development became known as the "container revolution," stimulating further technological innovations, such as the creation of roll-on/roll-off (RORO) ships and the extended use of light-aboard-ship (LASH) barges.\textsuperscript{76} Thus, the container proved to be the means by which the same cargo could be carried on all modes during the entire journey without repacking. It greatly facilitated the transfer of cargo from one mode of transport to another, between sea or air and overland portions of a door-to-door international shipment. However, the container revolution and the increase in combined transport created problems with regard to the uniformity of laws in international transportation. In particular, every portion of combined transport was traditionally governed by a different set of national

\textsuperscript{75}CIM Convention, Art. 1(1).

\textsuperscript{76}Driscoll & Larsen, p233.
laws and international conventions, exposing the consignor to substantial uncertainty with regard to the law governing the carriage in general, and especially with regard to liability and limitations of liability. Moreover, if the consignor or consignee cannot prove on what leg of the multimodal transport the loss of or damage to the goods occurred, the cargo interests have to absorb the loss. This element of uncertainty is an impediment to the further development of multimodal transport and its use in international trade. As a result, the appeal for harmonisation of the international unimodal transport Conventions has been gaining interest and momentum.

1.5.1.2 Three Solutions for International Multimodal Transport

The history of the effort to draft a convention on the multimodal transport of goods extends back nearly four decades to the point at which containerised transport became a technological reality. Although there is no treaty in force concerning liability regime in the multimodal transport, there have been three suggested international solutions.

The first solution was the TCM Convention. As long ago as 1957, the International Institute for the Unification of Private Law (UNIDROIT) established a Working Committee to extend the principle of the CMR Convention through a Combined Transport Convention, while the CMI (International Maritime Committee) began examining the maritime aspects of combined transport. In 1969, the CMI produced a set of draft rules in Tokyo, which had focused on the Hague Rules as a model. Thereafter, the Inland Transport Committee of the ECE of the United Nations decided to convene a so-called "round table" to fuse the UNIDROIT draft

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77 Driscoll & Larsen, p.195.
78 Draft Convention of the Combined Transport of Goods known by its French initials TCM. (hereinafter cited as TCM Convention).
and the CMI's "Tokyo Rules". The Round Table held two sessions at UNIDROIT's offices in Rome leading to the publication of the "Rome Draft" of a private law multimodal convention. To provide a forum for further refining of the Rome Draft, the Economic Commission for Europe (ECE) and the Intergovernmental Maritime Consultative Organisation (IMCO) sponsored a series of four meetings between 1970 and 1977, producing a modified draft convention referred to as the TCM. The TCM, which was not an official international convention, left the question of the amount to which the liability of the combined transport operator would be limited open for future determination. Therefore, preparations were going forward for the convocation of a United Nations worldwide container conference, sponsored by the UN and IMCO.

Next, completed in 1973 where the International Chamber of Commerce Uniform Rules for a Combined Transport Document (ICC Rules) which are modelled on the TCM Convention. ICC Rules developed a network system and adopted a new combined transport document CT document. The CY document is issued by the combined transport operator (CTO). Where loss or damage can be imputed to a particular carrier and stage of transport, then liability is determined in accordance with the applicable unimodal convention. Where loss or damage is concealed or not attributed to a particular segment of transport, then the liability of the CTO is limited to 30 francs per kilogram of gross weight of goods. However, the ICC Rules are designed to be incorporated into a CT document by private contract.

The third solution was the MT Convention. In the early 1970's the UN/IMCO container conference recommended that further studies be carried out on several aspects of multimodal transport, including basic economic implications, with special attention to developing countries. The UNCTAD was recommended as the body to carry out this week. This task was entrusted to an Intergovernmental Preparatory

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Chapter 1 Introduction to the Liability of the Multimodal Transport Operator

Group (IPG) in 1973. Over the next six years, six meetings of the IPG were held. In 1979 the IPG completed a draft convention. On May 24, 1980, the diplomatic conference adopted the Convention on International Multimodal Transport of Goods, marking the culmination of more than two decades of effort by private and intergovernmental bodies.

1.5.1.3 Some Difficulties in the drafting of the Multimodal Transport Convention

Owing to the several unsuccessful attempts made by international and private bodies at setting up a convention on multimodal transport, the United Nations Economic and Social Council (ESC) and UNCTAD to prepare a convention on this subject. However, there were many difficulties in making the multimodal transport convention because of some defects in the existing unimodal transport conventions.

Firstly, most unimodal transport conventions contain provisions on multimodal transport, such as Warsaw Convention, CMR Convention, CIM Convention and Hamburg Rules and so on. This is deemed to be an exceptional case since while the major object of each unimodal transport convention is to govern certain modes of transport, some go beyond their traditional limits by applying their provisions to other modes of transport. As a result, conflict may occur between two unimodal transport conventions.

Secondly, in view of the absence of ratification of some of the unimodal transport conventions and their amendments, there is lack of uniformity in applying these conventions. For instance, the Visby Rules are not approved as widely as the Hague Rules. Thus, the Visby Rules are applicable in some countries while the Hague Rules only are applicable in others. In carriage of goods by air, the Warsaw Convention, with or without the Hague Protocol, or Montreal Agreement, may be applicable. On the other hand the unimodal transport convention governing each mode of transport

81See section 1.3.
contains mandatory provisions. In addition, some amendments to the existing convention conflicted with other amendments to the same convention. Take air carriage as example, the Montreal Protocol No.4 of 1975 conflicts with the Guatemala Protocol of 1971. In order to avoid such a conflict, the Montreal Protocol provide that its provisions prevail over the Guatemala Protocol as regards the carriage of cargo, while the provisions of the Guatemala Protocol prevail for the carriage of passengers and baggage.82

1.5.2 The Description of the Multimodal Transport Convention

Briefly, the main purpose of the MT Convention is to establish the liability regime governing international multimodal transport of the goods. These rules govern the relationship between the MTO and the consignor and consignee. The definitions of international multimodal transport and the MTO have been mentioned before. The MT contract means a contract whereby an MTO undertakes, against payment of freight, to perform or procure the performance of international multimodal transport.83 The MT document means a document which evidences an MT contract, the taking in charge of the goods by the MTO, and an undertaking by him to deliver the goods in accordance with the terms of that contract.84

In addition to definitions, the MT Convention contains provisions which are concerned with its scope of application; mandatory application; documentation, liability of the MTO (period of responsibility, basis of liability, limitation of liability in the case of concealed and localised damage, non-contractual liability, loss of the right to limit liability); claims and actions; conflict of the MT Convention with other conventions, unit of account of monetary unit and entry into force. Many of these items, especially the liability of the MTO will be discussed in next chapters.

82Montreal Protocol No. 4. Art. 24 (1) (2).
83MT Convention, Art. 1(3).
84MT Convention, Art. 1(4).
1.5.3 The Significance of the Multimodal Transport Convention

It is obvious that the legal regimes created by the unimodal transport conventions differ widely as a result of the law relating to each mode of transport being developed separately. Although certain conventions or amendments on unimodal transport were influenced by conventions dealing with other modes of transport, there are no direct links between them as each convention was designed to stand alone. In contrast, the MT Convention does not stand alone and intentionally has close links with unimodal transport conventions. This is because the MT Convention was modelled along the lines of other unimodal conventions, such as the CMR and CIM Conventions, and especially the Hamburg Rules from which most of the provisions of the MT Convention are taken verbatim. Although it is the last of the liability and documentation conventions, it is the first of its kind to be prepared under the auspices of UNCTAD, dealing with a kind of transport supplied principally by developed market economy countries, and providing many of the most significant provisions created by the Third World developing countries. Briefly, the main purpose of the MT Convention is to establish the liability rules governing international multimodal transport of goods. These rules govern the relationship of the MTO with consignor and consignee.

Following the Convention on A Code of Conduct for Liner Conferences (Liner Code) and the United Nations Conventions on the carriage of the goods by sea (known as Hamburg Rules), the formulation of the MT Convention is another achievement for setting up the new international economic order. Being an integral part of a long-term strategy on the part of the developing countries to realise maximum economic benefits from the international transport sector, it is a significant


\(^86\) For instance, MT Convention, Art. 14(2), Hamburg Rules, Art. 4(2), etc.

document, representing a distinct departure from the earlier transport liability conventions. It can be predicted that its coming into force would have important effects on the commerce of all nations, stimulating the development of smooth, economic and efficient multimodal transport services adequate to the requirements of international trade. Furthermore the special interests and problems of developing countries have been regarded to, for example, as regards introduction of new technologies, participation in multimodal services of their national carries and operations, cost efficiency and maximum use of local labour and insurance. No matter who is the MTO as the principle, the developed country or the developing country, a fair balance of interests between supplies and users of multimodal transport services should be established and an equitable distribution of activities between these groups of countries should be attained in international multimodal transport. Therefore, the MT Convention has basically represented the interests of the developing countries with the result that it has been widely supported by these countries.

1.5.4 The Legal Conflict Resulting from the Multimodal Transport Convention

Although the aim of the MT Convention is to harmonise the unimodal transport conventions, it is not an easy task. The MT Convention itself might even come into direct or indirect conflict with these unimodal conventions because of its compulsory character. The provisions of the MT Convention make it clear that the application of it is mandatory, and therefore there is possible conflict with other mandatory provisions on unimodal transport. Several articles have been inserted in an attempt

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88 Driscoll & Larsen, p195.
89 The preamble to the MT Convention, Recognising (b).
90 The preamble to the MT Convention, Recognising (g).
91 In most of time, the supplies of the multimodal transport services are the developed countries who have gained an advantage in the transport technology and management over the developing countries who are the users of the multimodal transport services.
92 MT Convention, Art.3(2), Art.13, 19.
to avoid this difficulty. However, whether these articles can remove the conflict or not is still under discussion.

Firstly, the consignor is given the right to choose between multimodal transport and segmented transport.\(^{93}\) Where the consignor chooses the segmented transport, the application of the MT Convention would be excluded. This would remove its compulsory character. The consignor is not allowed to have a choice where the operator increases the amount of freight charges for the multimodal transport higher than those for segmented transport.

Also, under article 13, the Convention provides that the issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national laws. However, the issue of such documents shall not affect the legal character of the multimodal transport document. Therefore, the consignor might ask for an MT document or the issue of other documents to be governed by the relevant transport conventions. In the latter case, the issue of these documents again makes the MT Convention inapplicable.

Finally, under Article 18, a uniform amount of limitation of the MTO’s liability is adopted by the MT Convention. Accordingly, these rules apply regardless of when and where the loss of or damage to the goods occurred. On the other hand, The Article 19 provides for a network system of limitation of the MTO’s liability, which means that if it can be proved that the loss of or damage to the goods occurred during the course of one particular stage of the combined transport, the liabilities of the MTO will be determined according to the unimodal law governing such mode.\(^{94}\)

Although the network system can really avoid any conflict between the MT

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\(^{93}\)MT Convention, Art.2(2).

\(^{94}\)For details see section 5.4.1. and section 5.4.2.
Chapter 1 Introduction to the Liability of the Multimodal Transport Operator

Convention and the unimodal transport conventions, both Article 18 and 19 are concerned with the limitation of liability and would not prevent a conflict between them.

1.6 CONCLUSION

International multimodal transport of containers has been developing rapidly and has become widely used because of its incomparable advantages. It is the multimodal transport that makes it possible to transfer cargo quickly, safely and cheaply from one mode of transport to another, between sea or air and overland legs of a door-to-door international shipment.\(^95\)

Unfortunately there are many legal problems arisen in the multimodal transport. How is liability to be allocated where the stage at which the loss of or damage to the goods occurs is not known? Which convention is to govern the imposition and limitation of liability? How to link the uniform liability with network limitation? Thus how to apply the different legal regimes appropriately? In short there are two main legal difficulties, the one is at what stage loss or damage has occurred in a sealed container, and therefore who is liable, the other being under which rules liability is to be calculated. Although the MT Convention has not come into effect, these legal problems obviously exist and it is necessary to study these legal issues both in theory and in practice so as to improve the development of multimodal transport.

The multimodal transport involves at least two different unimodal transport carriers. The MTO assumes responsibility for the entire journey, occupying a decisive position in the multimodal transport, being placed at the very centre of the whole system. Each legal link relating to the multimodal transport converges towards him.

\(^{95}\)Driscoll & Larsen, p233.
Therefore, the topic of the liability regime applicable to the MTO appears to be the crucial question which has to be dealt with in law and practice.96

The multimodal transport is a combination of at least two different modes of transport. The MT Convention has been formulated on the basis of the existing unimodal transport conventions. Thus it is helpful to compare the liability regime of the MTO with that of unimodal carriers so as to discover some conflict and disharmony between them and then work out some solutions for the problems. Being an integrated system, the study of liability of the MTO will undoubtedly involve not only the duration, basis, form and limits of the liability, but also the documentation and time limits. On the one hand, the multimodal transport is different from the traditional transport, involving different modes of transport, different carriers and different liability regimes, therefore more legal problems. On the other hand, as the multimodal transport is currently in a period of development, it needs more improvement, especially legal assistance. In reality, as compared with considerable study of the unimodal liability regime, the liability regime in multimodal transport has suffered from a lack of systematic study. Therefore the main object of this study on the liability of the MTO is to put forward the author's point of view so as to "cast a brick to attract jade," explaining some legally difficult points, discussing some central legal issues and trying to establish some legal link between the various liability regimes.

CHAPTER 2

THE PERIOD OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

2.1 INTRODUCTION

The multimodal transport sequence may entail land, air or inland water carriage to the port of embarkation, transit storage, movement from storage to ship, loading, carriage by sea, unloading, movement from ship to storage, transit storage and land, air or inland water carriage to the consignee. To prevent gaps appearing in the chain of responsibility, each carrier should be accountable for the cargo while in his custody and liability should be standardised. In the matter of fact, the historical development of international transport conventions and domestic transport legislation have made difficult the production of a chain of liability with no gaps appearing. For these reasons the unimodal transport conventions must be left to multimodal transport conventions. For instance, maritime convention must be confined to the carrier who arranges the carriage by sea. The Hamburg Rules apply only in respect of that phase of a transport operation involving the carriage of goods by sea. Even within the perimeters of carriage by sea, the scope of the maritime law may vary. Unlike the Hamburg Rules, the Hague Rules do not govern the carrier’s liability before loading and after the discharge of the goods. Therefore to formulate the period of the MTO’s liability is very important in the multimodal transport.

2.2 DIFFERENT PERIODS OF THE LIABILITY OF THE UNIMODAL TRANSPORT CARRIER
Generally speaking the duration of liability of a carrier would not be expected to create any problems, since the duration should naturally encompass the time when the goods are in his charge. However, this is not generally accepted. For instance, in order not to extend the particular regimes of maritime and air law, the duration of liability has been more or less fixed to the period of transport conveyance itself\(^1\). As a result, the duration of liability in the respective international transport conventions are different.

### 2.2.1 The CMR/CIM Convention: From Receipt until Delivery

The CMR Convention provides that the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery as well as for any delay in delivery\(^2\). In practice, there are different interpretations for the notion of "taking over the goods" and of "delivery". Under the CMR Convention, the phrase "taking over the goods" indicates that the carrier by road takes charge of the goods from the time they are loaded in a lorry. The loading, according to such a clause, must be carried out by the sender and at his risk, but the same is not true for the stowage\(^3\). Liability ends for the carrier when the goods are delivered. Since there is no doubt that the carrier remains liable until receipt of the goods by the consignee, one must conclude that delivery includes receipt, or at any rate that the act of simply placing the goods at the disposal of the consignee does not in itself terminate the carrier’s liability. In this sense the road carrier’s liability terminates when the consignee has taken delivery of the goods and has signed a receipt in full on the consignment note, but the sender may not complain that it has been effected at another place when the consignee has accepted delivery by indicating unconditional receipt on the consignment note\(^4\).

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\(^{2}\) CMR Convention, Art. 17(1).

\(^{3}\) Ramberg, "Attempts at Harmonisation", p33.

Chapter 2 The Period of the Liability of the Multimodal Transport Operator

Under the CIM Convention, the duration of liability of the carrier by rail is similar to that of the carrier by road under the CMR Convention.\(^5\)

2.2.2 The Warsaw Convention: During the Transport Including Ground Handling Operations

The Warsaw Convention provides that the carriage by air comprises the period during which the goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.\(^6\) The duration of carriage by air does not include cover carriage outside the airport area. However, if such carriage takes place in order to carry out the air carriage contract in connection with loading on board, the delivery or the transhipment, any damage, barring evidence to the contrary, is considered to be the result of an event which took place during the carriage by air.

2.2.3 The Hague/Hamburg Rules: Tackle to Tackle/Port to Port

It is well-known that an immense area of the earth, over two thirds in fact, is covered by water. Land masses or continents, are surrounded by water, as are also islands scattered throughout the earth. Every transport mode offers possibilities and limitations. In spite of recent developments in other modes of transport, such as by air, rail and road, carriage of goods by sea is most attractive to the consignors due to its key characteristics: (1) large capacity; (2) low costs per transported unit; (3) high flexibility for various transport needs. In terms of weight, as a result, well over 90 per cent of the transported goods are so carried. However, carriage of goods by sea entails big risks and must be regarded as a slow mode of transport. As compared with the carriage of the goods by air, rail and road, the period of the liability of the sea carrier has been shorter than that of the other carriers.

\(^5\)CIM Convention, Art. 27(1).
\(^6\)Warsaw Convention, Art. 18(2).
Chapter 2 The Period of the Liability of the Multimodal Transport Operator

Under the Hague Rules there exists what is known as tackle to tackle responsibility whereby the liability of the carrier begins with loading and ends with discharging the goods from the ship. This is one of the fundamental principles of the Hague Rules which means that the rights and liabilities outside this period should be governed by the law of the country in which these operations were performed or by the contract between the parties. The Hague Rules grant complete liberty to enter into any agreement altering liability prior to loading and after discharging\(^7\) for two reasons. Firstly, procedures for handling cargo usually differ in various countries, so that it seems best to leave the period before shipment and after discharge to the jurisdiction of each contracting state. Secondly carriers are opposed to any attempt to extend liability to events over which they have no control.\(^8\) In practice, such a limited period of liability gave rise to difficulties and uncertainties, particularly the lighterage operation\(^9\) from the definition of the "ship". Where the lighterage operation is considered as part either of loading or discharging, it is covered by the Hague Rules. Otherwise, lighterage vessels are regarded outside the scope of the Hague Rules since they do not carry goods at sea.

In order to unify the regime of responsibility for all these periods, the Hamburg Rules abandoned the "tackle to tackle" rule, extending this period of responsibility of the carrier to a "port to port" responsibility, which begins with the taking in charge of the goods at the port of loading by the carrier, continues during the carriage and ends at the port of discharge with the delivery of the goods.\(^10\) In a sense, the "port to port" period of the carrier's responsibility can be regarded as a "warehouse to

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\(^7\)Hague Rules, Art.6; Strictly speaking, the period of the liability of the carrier begin at the moment that the first hook is attached to the cargo to be shipped and ends when the last hook is released from the cargo when it is transferred at the end of the voyage from the ship.


\(^9\)Lighterage operation refers to loading and unloading ships by using the barges for carrying goods in a harbour or river. It was held that discharge into a lighter has not been completed until all the cargo has been discharged.

\(^10\)Hamburg Rules, Art.4(1).
Chapter 2 The Period of the Liability of the Multimodal Transport Operator

The carrier usually takes over the goods from the consignor and delivers the goods to the consignee in the warehouse of the loading and discharging port. Accordingly, as compared with the "tackle to tackle" liability, the "port to port" liability is extended. Therefore, in theory, the carrier’s liability under the Hamburg Rules seems to cover the period from the time he takes over the goods until the time he delivered the goods. As will be seen, it seems to be similar to the period of the MTO under the MT Convention. But they are distinct in practice.

2.3 THE METHODS OF TAKING/HANDING OVER THE GOODS BY THE MULTIMODAL TRANSPORT OPERATOR

The MT Convention provides that the responsibility of the MTO for the goods covers the period from the time he takes the goods in his charge to the time of their delivery. The Convention also stipulates the methods of taking over the goods from the consignor and of handing over the goods to the consignee.

2.3.1 The Methods of Taking Over the Goods

According to the MT Convention, there are two methods in which the MTO takes over the goods and therefore is in charge of them. The first one is that the MTO takes over the goods from the consignor or a person acting on his behalf. This form is often and commonly used. The second is a taking from a government authority or other third party to whom, pursuant to law or regulation applicable at the place of taking in charge, the goods must be handed over for transport. This is a special provision. As for the second method, it must be taken into account that in the

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11Hamburg Rule, Art. 4(2).
12For detail see section 2.3.; In Goodwin, Ferreira v. Lamport and HoLt (1929) 34 Lloyd’s Rep. 192, It was held that discharge into a lighter has not been completed until all the cargo has been discharged.
13MT Convention, Art. 14(1).
14MT Convention, Art. 14(2).
circumstance of a harbour authority to whom the goods are handed over for transport, the MTO is not responsible for loss or damage to the cargo if they occur under the care of the authority.

Although the words "in charge of the goods" and "taking over the goods" are not defined, it is obvious that it links the MTO's responsibility with the supervision of the cargo. In other words, having effective supervision is an important element in taking over the goods. Taking over the goods is a question of fact. When the goods are taken in charge by the MTO, he may be required to issue a MT document at the option of the consignor. In actual practice, the MTO might take over the goods from the consignor before issuing the MT document.

### 2.3.2 The Methods of Handing Over the Goods

According to the provisions of The MT Convention, there are three methods for the MTO to discharge the goods: (i) by handing over the goods to the consignee; or (ii) in cases where the consignee does not receive the goods from the MTO, by placing then at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

The first presents no difficulty of interpretation: by handing over the goods to the consignee. The second is more complicated since there are three possible ways in which the MTO can deliver the goods if the consignee does not receive them directly from him. One possibility is the placing of the goods at the disposal of the consignee in accordance with the MT contract. The second and third possibilities are the placing

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15 MT Convention, Art. 5(1).
16 MT Convention, Art. 14(2).
Chapter 2 The Period of the Liability of the Multimodal Transport Operator

of the goods at the disposal of the consignee in accordance with the law or with the usage of the particular trade applicable at the place of delivery. What is meant by "law" could create difficulty, but could be taken to refer to regulations emanating from the bodies authorised to make them. Of course laws, and even more so regulations, can be modified. The determination of usages of the particular trade might also cause problems if they are not readily known or incorporated in the MT contract.

2.4 THE RECEIVING AND DELIVERY SYSTEMS OF THE GOODS BY THE MULTIMODAL TRANSPORT OPERATOR

The multimodal transport of the container has developed on the basis of setting up the large-scale mode of production and will follow a similar pattern. The scattered and small quantities of goods are gathered together at certain places, perhaps in an inland area. After sufficient goods have been accumulated, they are carried by inland and inland water to the container yard (CY). Generally speaking, the multimodal transport of the container (including carriage by sea and land) can be divided into the four sections. The place of inland receipt can be regarded as the first pivot station, the loading port as the second pivot station. The third pivot station is the port of discharge to which the containerised cargo have been carried by sea and the final destination can be considered the fourth pivot station. This is the typical multimodal transport of the container. There are nine options for the taking and handing over of the goods by the MTO. These options can be classified into two types of procedure for the container transport, the one is full container load (FCL), the other being less than container load (LCL). The former means that the vanning, packing, stuffing and loading of the container are done by the consignor who is also therefore

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17 A Container Yard is a place where containers are received, delivered and stored inside the port for further shipmen or after shipment.

18 See Section 1.2.2.
Chapter 2 The Period of the Liability of the Multimodal Transport Operator

responsible for completing the container load plan (CLP) and the dock receipt. Normally there is only one consignor and consignee in full container cargo load. The latter means that the vanning, packing, stuffing and loading of the container are done and the container load plan is completed by the MTO at the container freight station (CFS). There are normally at least two, and perhaps many consignors and consignees in less than container load situations.

2.4.1 The Receiving and Delivery Systems of Full Container Load

There are four options of taking and handing over the goods by the MTO in full container load, which will also determine the period of his liability.

The first one is "Door to Door", which means that the MTO takes over the goods already in container(s) from the consignor in his factory or warehouse, takes charge of the carriage of the container and then hands it over to the consignee in his factory or warehouse. Accordingly the MTO is in charge of the whole transport, linking the four sections or pivot stations. The second one is "Door to CY". The MTO takes over the container from the consignor in his factory or warehouse and hands it over to the consignee in the container yard of the unloading port. In this option, the MTO is not in charge of inland transport of the destination. The third one is just opposite to the second one, called "CY to Door". The MTO takes over the goods in the container yard of the loading port and hands them over to the consignee in his factory or warehouse. In contrast to "Door to CY.", the MTO is usually not in charge of inland transport of the origin. The fourth one is "CY to CY". The MTO takes over the goods in the container yard of the loading port and hands over the goods in the container yard of the unloading port.

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19A container Load Plan provides details as to the location of the contents within the container and will accompany the container. It can also serve as evidence of the cargo contained therein.

20A container Freight Station is a place other at a port where small lot container cargo is assembled, stored and packaged into or unpackaged from a container outside the port regardless of far or near.
2.4.2 The Receiving and Delivery Systems of Less Than Container Load

As for the options of taking and handing over the goods by the MTO in less than container load, there are five situations affecting the distinct period of his liability. The first one is "Door to CFS". The MTO takes over the individual goods from the consignor in his factory or warehouse and hands them over at the container freight station of the destination. Here the goods are taken over in the form of full container load and handed over in the form of less than container load. Relevantly, there are only one consignor and two to several consignees. The second one is "CY to CFS". The MTO takes over the goods in the destination container yard of the loading port and hands over the goods in the container freight station. There is usually one consignor and two or more consignees. The third and fourth options are just the opposite to the first and second, called "CFS to Door" and "CFS to CY". The last one is "CFS to CFS". The goods are taken and handed over, respectively, in the container freight station of the origin and destination. Both taking and handing over the goods are done in the form of less than container load.

On the whole, the period of the MTO’s liability depends on the different kind of receiving and delivery systems. Theoretically, the period of any MTO’s liability is the same, but it is different in practice because of the different needs of the trade.

2.5 CONCLUSION

The periods of the liability of the unimodal transport carriers depend on the nature and characteristics of the mode of the carriage. For instance, the risks of the carriage of goods by sea were seen to be greater than in other modes of transport which resulted in a shorter period of liability for sea carriers. However, with the development of the technology of the navigation and the improvement of the communication apparatus, the risks associated with carriage by sea are lessened.
Accordingly the sea carrier’s "Tackle to Tackle" period of the responsibility under the older Hague Rules has been challenged by the "Port to Port" period under the Hamburg Rules.

The responsibility of the MTO for the goods under the MT Convention covers the period from the time he takes the goods in his charge to the time of their delivery. The duration of the liability of the MTO is similar to the "port to port" duration of the liability of the carrier by sea. Almost all the provisions with regard to the period of the liability stipulated by the MT Convention and the Hamburg Rules are same.

In form, the responsibilities for liability under both conventions cover the period from the time they take over the goods until the time they deliver the goods. However there are some fundamental difference in practice between these two periods. For instance, in the case of the carriage of the goods by sea, the place of taking charge of the goods is limited to the port of loading. As for the multimodal transport of the container, the place of taking charge and delivery of the goods may not only include the container yard of the port of loading and discharge, but also extend to the container freight station and even the factory or warehouse of the consignor and the consignee. Therefore, in the case of a full container load, where the receiving and delivery systems of "Door to Door", "Door to CY", "Door to CFS" are adopted, the place of taking charge of the goods occurs in the factory or warehouse of the consignor, even at an inland point. In the case of a less than container load, where the receiving and delivery system of "CFS to Door", "CFS to CY", "CFS to CFS" are adopted, the place of taking charge of the goods occurs in the container freight station near the port. In the case of a full container load, where the receiving and delivery system of "CY to Door", "CY to CFS", "CY to CY" are adopted, the place of taking charge of the goods occurs in the container yard of the port. Thus, the "Door to Door" is the longest period of the liability for the MTO, whereas the shortest for him is "CY to CY" which is similar to the period of the liability for the sea carrier under the Hamburg Rules.

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21MT Convention, Art. 14; Hamburg Rules, Art. 4.
CHAPTER 3

THE BASIS OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

3.1 INTRODUCTION

It is in the nature of the liability regimes, which carve out an area of the business world and subject it to regulation, that difficulties will arise in adjusting business practice to accommodate the new requirements. Each transport convention is no exception and adds to the inevitable discomfort by the new uncertainties that arise in relation to the basis, form or limitation of the carrier’s liability. Different modes of transport attract different bases for liability. In the existing bases of the unimodal transport carrier’s liability, some aspects are similar and some are different.

3.2 THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR ON DIFFERENT GROUNDS

The legal liability of the MTO for loss of or damage to the goods is normally grounded on one or more of four different principles.

3.2.1 The Law of Bailment

The first of these strands is the law of bailment. Bailment is a common transaction

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in every day life which covers a wide range of commercial and other dealings. Typically, a bailment arises when the owner or possessor of the goods (the bailor) transfers possession of such goods to another person (bailee) in order that the bailee may perform some act in relation to the goods. While the essence of bailment is said to be possession, the mere fact of possession does not automatically give rise to a bailment. Generally, a conscious and willing assumption of possession of the goods is required before bailment can exist. The law of bailment imposes obligations on a carrier, who is in possession of goods belonging to another party. Bailment is a common law notion. It does not depend on any contract. It depends primarily on status; it results from the transfer of possession of goods to someone, such as a carrier, who receives those goods for a particular purpose. the liability imposed on the bailee may either be strict, as in the case of a common carrier, or it may be one to exercise reasonable care in the custody of the goods. The traditional rules of liability in the law of bailment have a formulistic theoretical simplicity. Under these rules, liability is a function of both the particular classification of the bailment transaction and the degree of care required in that particular form of relationship.

In the multimodal transport, the MTO is in charge of goods during the whole journey. He is under a duty to deliver the goods to the destination safely. This is imposed upon the MTO because he is in possession of another person’s goods. The source of the MTO’s duty is the relationship of bailment.

3.2.2 The Law of Contract

The second strand is the law of contract. the contract of carriage is not far removed from other types of contract, the roots springing from bailment and a combination of

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3Palmer, p1.
6Miller, p194.
locatio rei and locatio operis. The multimodal transport contract between the consignor and the MTO defines the responsibility undertaken by the MTO. Thus a MTO may undertake to carry goods from A to B, although he knows that he will not perform the work himself and although he will not have possession of the goods for the whole or even part of the journey. In this way a contract of carriage can amount to an assumption of responsibility on the part of the MTO or carrier. Likewise, the contract may contain exemption clauses which reduce the liability of the carrier, in the event of loss or damage, below whatever level would have been imposed on the carrier by virtue of the common law of bailment.

3.2.3 The Statute Law

The third strand arises because of the intervention of statute law. In the field of international carriage one is concerned with statutes giving legal force to private law conventions relating to the international carriage of goods. Such statutes apply to what may be called "unimodal" carriage, namely carriage by a single mode of transport, such as by sea, air or road. Where there is an applicable international Convention of this sort, the limits of its application are often problematic and uncertain. Statutes of this kind do not normally apply unless the particular single mode or segment of a multimodal transit cross international boundaries. Where such a statute applies, its application is normally mandatory in the sense that it lays down a minimum level of responsibility for loss or damage which the parties may not reduce by means of a term of their contract of carriage.

3.2.4 The Law of Tort

There is sometimes a potential fourth element, the law of tort. The MTO owes a duty

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to take care of the goods. If he is negligent he can sometimes be sued by a party with whom he is not in contractual relations. A typical example of this situation can arise where the consignor delivers goods to the MTO who issues a MT document and then delivers the goods to the actual carrier who subsequently issues his own bill of lading to the MTO. If the goods are lost or damaged in transit, the consignor/consignee may prefer to sue the actual carrier in tort, rather than sue the MTO in contract. The reason for this is that, if he sued the MTO, he would be bound by the MTO’s terms and conditions. Thus the consignor/consignee hopes, by suing the actual carrier, to recover in full without being bound by the actual carrier’s terms and conditions.

3.3 THE TWO TYPES OF THE BASIS OF THE LIABILITY

The possible basis for the liability regime of the international transport carriers might be divided into two major types, the one is liability based on fault, the other being strict liability.

3.3.1 Fault Liability

3.3.1.1 The Difference between the Incomplete Fault Liability and the Complete Fault Liability

Strictly speaking, liability based on fault, or fault liability, means that the carrier and his servants should bear the liability to pay compensation when the loss of or damage to the goods have been caused by their fault. In practice, the fault liability might be subdivided into two further categories: incomplete fault liability and complete fault liability. The former means the liability of negligence with the onus of proving non-negligence resting on the carrier with exceptions. The latter means the liability of negligence with the onus of proving non-negligence on the carrier without exceptions.
3.3.1.2 The Basis of the Liability of the Carrier by Sea

There are three international maritime Conventions, namely Hague, Visby and Hamburg Rules, governing the liability of the carrier by sea. On the whole, sea carrier's liability under these three Conventions is based on the principle of fault or negligence. Under the Hague Rules, the carrier by sea is liable in two major respects. Firstly he is required to exercise due diligence to make the ship seaworthy, which includes properly manning, equipping, and supplying the ship, making the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fitting and safe for their reception, carriage, and preservation. Secondly the sea carrier is required to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried, in other words, he is liable for errors in the management of the goods. This duty extends throughout the voyage and requires the carrier to have a sound system for looking after the cargo when stowed and to use reasonable means to ascertain the nature and characteristics of the cargo and care for it accordingly. On the other hand, the Hague Rules provides for a list of seventeen exceptions which state different circumstances under which the carrier can exclude his liability. In fact, the whole list can be said to be causes for loss or damage to the goods for which the carrier cannot be blamed. For instance, the carrier is not liable for the fault or neglect in navigation or management of the ship. As a result the liability of the carrier under the Hague Rules is an incomplete fault liability which means that the liability of negligence with the onus of proving non-negligence on the carrier with exceptions.

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8Hague Rules, Art. 3(1).
9Hague Rules, Art. 3(2).
10Hague Rules, Art. 4(2).
11Mankabady, "Comments", p.53.
12There is difference between negligence in the management of the ship and negligence is the management of the cargo. From consequences of the former it allows the carrier to be relieved, from those of the latter it does not. In other words, this exception deals with "nautical faults", that is fault or negligence affecting the ship and not fault or negligence affecting the cargo.
The Visby Rules is the protocol to amend the Hague Rules, but there is no difference as to the basis of liability between them. The liability of the carrier under the Hamburg Rules is still based on the principle of presumed fault or neglect and that this means that the burden of proof for non-negligence rests on the carrier, though with respect to certain cases the provisions of the Convention modify this rule. So the liability of the carrier is not a strict liability. However, the Hamburg Rules replace the list of the seventeen exceptions with four exceptions. One of the radical reforms brought by the Hamburg Rules is that the special exception for errors in navigation or management of the ship was abandoned. Therefore, the carrier is liable for the fault or neglect regardless of management of the ship or cargo. In this case, the carrier’s liability under the Hamburg Rules is a complete or absolute fault liability. Whereas, the carrier’s liability under the Hague Rules is an incomplete fault liability because the carrier is only liable for his fault in the management of the cargo. Furthermore, the Hamburg Rules provide that the carrier is liable for a claim resulting from loss of or damage to the goods if the occurrence which caused the loss or damage took place while the goods are in his charge unless the carrier can prove that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences. The term "reasonable measures" under the Hamburg Rules covers the undertaking of "due diligence" to make the ship seaworthy under the Hague Rules.

3.3.1.3 The Basis of the Liability of the Carrier by Air

It was the Warsaw Convention which firmly established and elaborated, as one of its major tenets, the principle of the air carrier’s presumptive liability for loss of or
damage to the goods which occurs during the carriage by air.\textsuperscript{17} The Warsaw Convention also provide a defence that the air carrier is not liable for the loss of or damage to the goods if he can proof that such loss and damage were occasioned by negligent pilotage or negligence in the handling of air craft in navigation and that in all other respects, he and his agents have taken all necessary measures to avoid the damage.\textsuperscript{18} Under the Warsaw Convention, therefore, the legal basis of the liability of the carrier is a fault liability, but with a ‘reversed’ burden of proof, which means that the onus of proof of a defence lies with the carrier.

As time went by and aviation began expanding on a large scale, the Warsaw Convention had to be amended on a number of occasions in order to be kept up to date. The amendments and / or additions are the Hague Protocol, the Guadalajara Convention, the Montreal Agreement, the Guatemala Protocol and Montreal Protocol. Although the Warsaw Convention was, at the time, considered to be one of the best agreements dealing with matters of private international law, some practical and legal problems had become evident as aviation expended rapidly between 1929 and 1955, necessitating a number of improvements in the original text. As a result, the provision in the Warsaw Convention relieving the carrier from liability during the transportation of the goods if he can prove that the damage was caused by negligent pilotage or negligence in the handling of the aircraft or in navigation, was deleted by the Hague Protocol in 1955.

\textbf{3.3.1.4 The Basis of the Liability of the Multimodal Transport Operator}

The basis of the liability of the MTO has imitated the basis of the carrier’s liability under the Hamburg Rules. The liability of the MTO is based on the principle of fault or neglect. He is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay

\textsuperscript{17}Warsaw Convention Art. 18(1).
\textsuperscript{18}Warsaw Convention, Art. 20(2).
in delivery took place while the goods were in his charge as defined in Article 14, unless the MTO proves that, he, his servants or agents or any other person referred to in Article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.\textsuperscript{19} The preamble to the MT Convention further clarifies that the liability of the MTO should be based on the principle of presumed fault or neglect. Alternatively, he might defend by proving that the consignor or consignee caused the loss or damage. In mixed or combined fault, the MTO is only liable for his own fault or neglect provided he can prove his part which attributed to the loss or damage.\textsuperscript{20}

In practice, it is not easy to establish the "occurrence" which caused the loss that took place while the goods were in the MTO's charge. There are two main problems. First, what is an "occurrence"? The occurrence is something other than the fact that the goods have sustained damage or loss while they are in the MTO's charge. The occurrence is whatever caused this, for instance, where the goods deteriorate in the course of a sea transit because the carrier has failed to take any steps to ventilate the goods. Here the word "occurrence" will be construed to cover this situation where the cause of the loss was something which in reality never occurred at all.

Then the second problem on this part of the Rule is whether it is for the MTO to prove that the relevant "occurrence" did not occur while the goods were in his charge. When all the evidence has been brought out, it rarely matters where the onus originally lay, the question is which way the balance of probability has come to rest.\textsuperscript{21} However, it is only the exceptional cases where all that is known for certain is that goods have arrived in a damaged condition and the cause of the damage is either unknown or else is a matter of hot debate between the MTO and the consignee.

\textsuperscript{19}MT Convention, Art. 16.
\textsuperscript{20}MT Convention, Art. 16,17.
Chapter 3 The Basis of the Liability of the Multimodal Transport Operator

A good example of the latter situation is where fresh fruit or vegetables have arrived in a mouldy condition. The consignee believes that the occurrence which caused this was that the fresh goods were badly stowed or improperly ventilated. The MTO retorts that the only relevant occurrence was the inherent vice of the goods, that is to say their inability at the time of shipment to withstand an ordinary voyage. Is it for the consignee to prove improper stowage or for the MTO to prove inherent vice? The MT Convention provides that the burden rests on the MTO. In this case, it is easy for the consignee to prove improper stowage. Where a clean MT document is issued, then delivery in a damaged condition is sufficient, in itself, to raise a presumption that the relevant occurrence occurred while the goods were in the MTO’s charge.

3.3.2 Strict Liability

Strict liability means that the carrier is liable for the loss of or damage to the goods, regardless of negligence, with exceptions. In one sense, strict liability is but another aspect of negligence, both being based on responsibility for the creation of an abnormal risk.22

3.3.2.1 The History of Strict Liability

There is a principle of strict liability in early Anglo-American, French and Scandinavian Law. In early English law, the common carrier, as distinguished from the private carrier, is placed upon strict liability. He is bound to answer for all loss or damage to the goods however caused, irrespective of whether he is fault or not. He only enjoys the benefit of four excepted perils: act of God, act of the Queen’s enemies, inherent vice of the goods and the consignor’s own fault.23


23For detail see Ramberg, "Attempts at Harmonisation", p5.
The principle of the carrier’s strict liability was accepted by the United States Supreme Court in Niagara v. Codes\textsuperscript{24} where it is stated that under common law the carrier by land or water is an insurer and liable for every loss or damage in all events, unless it happens by the act of God or the public enemy.

Similarly, the principle of the carrier’s strict liability is also expressed in early French Law, where the carrier is liable for loss of or damage to the goods unless it has been caused by inherent vice of the goods and force majeure.\textsuperscript{25}

The basic principle of the carrier’s strict liability was also provided by the Uniform Scandinavian Maritime Codes before the 1930s. It provided that the carrier was liable unless it could be assumed that the loss or damage was caused by a marine accident, capture or other accident which it was impossible for the master to avoid or by insufficient package of inherent vice of the goods.\textsuperscript{26}

However in Anglo-American law, the common carrier could alleviate the strict liability by contractual provisions and thus achieve the same position as a private carrier who is only liable for negligence in law. Therefore, in practice, the normative rules governing the carrier’s liability were able to be altered under the principle of freedom of contract. As the carrier was in principle permitted to contract out of liability, particularly in marine transport, this advantage was frequently used to the detriment of the shipper. As a result, the mandatory Hague Rules were introduced.\textsuperscript{27}

3.3.2.2 The Basis of the Liability of the Carrier by Rail and Road

Both the liabilities of the carrier by rail and road are based on strict liability. Under

\textsuperscript{24}(1858) 62, United States Supreme Court Reports, 7.

\textsuperscript{25}Ramberg, "Attempts at Harmonisation", p.4.

\textsuperscript{26}Ramberg, "Attempts at Harmonisation", p.6.

\textsuperscript{27}Ramberg, "Attempts at Harmonisation", p.10.
Chapter 3 The Basis of the Liability of the Multimodal Transport Operator

the CIM Convention, the carrier by rail is liable for the loss of or damage to the goods.\textsuperscript{28} But the carrier is relieved of the liability if the loss, damage or delay was caused by the four reasons, such as inherent vice of the goods.\textsuperscript{29} If the carrier wishes to rely on the fourth of these relieving grounds, it is not sufficient for him to show that he did not act negligently.\textsuperscript{30} The carrier has to show that the loss could not be avoided.

The basic liability of the carrier by road closely corresponds to that of the carrier by rail.\textsuperscript{31} Under the CMR Convention, the carrier by road is also relieved by the four reasons, such as circumstances which the carrier could not avoid.\textsuperscript{32} But there seems to be an additional argument for the standpoint that Article 17(2) of the CMR Convention does not mean a general principle of the strict liability, since Article 17(3) of the CMR Convention specifically stipulates a strict liability for loss or damage caused by deficiencies of the vehicle. This would have been quite unnecessary if a general principle of the strict liability was intended by Article 17(2) of the CMR Convention.

3.3.2.3 The Basis of the Liability of the Carrier under the Guatemala Protocol and the Montreal Protocol No.4

The Guatemala Protocol of 1971 provides for the strict liability of the air carrier for the death of, or personal injury to, passengers carried internationally. The Montreal Protocol No.4, further amending the Warsaw Convention, contains some fundamental modifications. Its main feature is a shift of principle, in that the fault liability of the carrier for the transportation of the goods has been replaced, in the same manner as

\textsuperscript{28}CIM Convention, Art. 36(1).
\textsuperscript{29}CIM Convention, Art. 36(2).
\textsuperscript{30}See Schnitthoff, p551.
\textsuperscript{31}CIM Convention, Art. 36(1); CMR Convention, Art. 17(2).
\textsuperscript{32}CIM Convention, Art. 36(2).
the Guatemala Protocol does for the passengers, by strict liability. Thus, under the Montreal Protocol No.4, the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage took place during the air carriage. The air carrier can only escape liability if he proves that the loss or damage resulted solely from the four exceptions.

3.3.3 The Conflict between the Fault Liability of the Multimodal Transport Operator and the Strict Liability of the carrier by Air, Rail and Road

It is obvious that a conflict exists between the fault liability of the MTO under the MT Convention and the strict liability of the rail carrier under the CMR Convention, the road carrier under the CIM Convention and especially the air carrier under Montreal Protocol No.4. The liability of the MTO is based on the presumption of fault with the reversed burden of proof, so in that sense, the MT Convention does not differ in principle from the Warsaw Convention in force.

There is a difficulty in that the Montreal Protocol No.4 (1975) is based, with respect to cargo, on the principle of strict liability regardless of fault. This regime applies only in the case of loss of, or damage to the goods, the old fault liability regime being retained in the case of delay. If both the MT Convention and Montreal Protocol No.4 were to enter into force, the co-existence of the two regimes of liability, which are fundamentally different, could cause some difficulties. The regime of liability was relevant in particular in the case of localised damage. It has been believed that the conflict would arise in the case of non-localised damage where the Warsaw Convention might also apply. However, the MT Convention provides that, in the case

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34 Montreal Protocol No.4, Art. 18(3).
35 MT Convention, Art. 16; Warsaw Convention, Art. 18.
of localised damage, only the limit and not the liability regime of the Warsaw Convention would apply where the damage was ascertained as having occurred on the air leg. The liability regime applicable would be that of the MT Convention itself.

3.4 EXONERATION FROM THE LIABILITY OF THE UNIMODAL TRANSPORT CARRIERS AND THE MULTIMODAL TRANSPORT OPERATOR

Owing to the liabilities of the MTO and other unimodal transport carriers being based on the presumption of the fault or neglect, the MT Convention, Hague and Hamburg Rules and the Warsaw Convention provide certain relevant substantive defences that the MTO, the sea and air carriers might use to exonerate themselves from the liability. Since these Conventions adopt the same principle of the basic liability, the substantive defences stipulated by them are similar.

3.4.1 "Due Diligence" Exonerating the Sea Carrier

The concept of due diligence adopted by the Hague rules stems from the Harter Act. The Harter Act is framed in terms of what cannot be inserted in the bill of lading. It prohibited clauses exonerating carriers from liability caused by the lack of due care to make the vessel seaworthy prior to the voyage, and the lack of due care in the management of cargo. At the same time, it provided that if "due diligence" was exercised in providing a seaworthy vessel, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.


\[\text{\textsuperscript{37}} \text{Williston, p118.}\]
Due diligence to make a vessel seaworthy\(^{38}\) with regard to a loss is one of the most controversial concepts in the Hague Rules, being similar to, but not identical to the exculpatory exception: latent defects not discoverable by due diligence. Seaworthiness means that the vessel with her master and crew is herself fit to encounter the perils of the voyage and also that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage.\(^{39}\) Thus the obligation to make a ship seaworthy itself includes an obligation to see that the ship is fit for cargo service. Where the particular service is specified in the contract, it is an obligation to see that the ship is fit to carry the specified cargo on the specified voyage.\(^{40}\) In practice, there are some different interpretation for due diligence. Due diligence to make the vessel seaworthy may be defined as a genuine, competent and reasonable effort of the carrier to fulfil the obligation.\(^{41}\) The French version of the Hague Rules uses the words "diligence reasonable". This illustrates that the diligence required is not absolute, but only reasonable.\(^{42}\) Due diligence can be also defined as not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so, i.e. seaworthy, as far as diligence can secure it.\(^{43}\) Some English judges hold that due diligence is a synonym of reasonable care. Therefore, the carrier's duty is one of reasonable care and lack of due diligence is negligence.\(^{44}\) Moreover whether due diligence has been exercised is a matter of fact in each case. Cases on this point have related to a failure to provide sufficient bunker fuel,\(^{45}\) a failure to instruct engineers in the operation of

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\(^{38}\) Hague Rules, Art. 3(1).


\(^{41}\) Tetley, p369.

\(^{42}\) Tetley, p370.


\(^{44}\) The Amstelscot (1962) 1 Lloyd's Rep. 539; Corporation Argentina v. Royal Mail Lines (1964) Lloyd's Rep. 188.

\(^{45}\) Northumbrian Shipping Co. v. Timm (1939) AC, (1939) 2 All ER 648, HL.
Chapter 3 The Basis of the Liability of the Multimodal Transport Operator

an oil fuel system, a failure to examine the shell plating of a vessel, a failure to see that a valve was properly tightened, and a failure to notice that a vessel's sanitary water system was in order.

3.4.2 "All Necessary Measures" Exonerating the Air Carrier

The Warsaw Convention provides that the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. In practice, "necessary measures" has been interpreted as "reasonable measures". In every conceivable circumstance if the carrier had taken all "necessary measures", the accident would obviously not have occurred. Thus the only possible interpretation would be to understand "necessary" as "reasonable". The Canadian Court even used the expression "all reasonable necessary measures". If the carrier cannot prove he was totally free from any wrong doing, active or passive, then he will be held liable. Furthermore, the Warsaw Convention permits the carrier to exonerate himself for damage to cargo occasioned by errors in piloting, navigation or aircraft handling except where the Hague Protocol applies.

Like "due diligence", in practice, it is not easy to interpret the "all necessary measures". "All necessary measures" means all measures that a prudent carrier would

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48Riverstone Meat Co Pty Ltd. v. Lancashire Shipping Co. Ltd. (1961) AC 807. (1961) 1 All ER 495, HL.
50Warsaw Convention, Art. 20(1).
51United International Stables Ltd. v. Pacific Western Airlines Ltd. 5 D.L.R.(3d) 67.
have taken in order to avoid the particular accident.\textsuperscript{53} Some courts have defined "all necessary measures" to encompass those that are reasonably available to prudent carriers and calculated to prevent the damage or avoid the accident.\textsuperscript{54} The American courts adopted a very restrictive attitude in their interpretation and required that all "possible" measures be taken, or that the carrier did everything in his power to take the necessary measure. Therefore, the air carrier could not avoid liability when there was a particular measure which could have avoided the damage, or lessened the risk of its occurrence, and that this measure was not taken.

3.4.3 "All reasonable Measures" Exonerating the Multimodal Transport Operator

Under the MT Convention, the MTO can exclude his liability if he proves that he, his servants or agents or any other person took all measures that could reasonably be required to avoid the occurrence and its consequences.\textsuperscript{55} Accordingly, the MTO must prove the occurrence or how the loss was caused in order to prove that he took all reasonable measures.\textsuperscript{56} This exception is identical to the one adopted under the Hamburg Rules.\textsuperscript{57} The "reasonable measure" test is a matter of fact to be decided according to the circumstances of each case.

There is some controversy over this exception due to possible differing interpretation of the word "reasonably". The term "reasonable measures" is wide enough to include many of the exceptions provided for in the Hague Rules.\textsuperscript{58} The standard of these measures is an objective one. In other words, in determining the reasonable measures,

\textsuperscript{53}Mankiewicz, p100.
\textsuperscript{54}Mankiewicz, p86; Grein v. Impercal Air Ways 53 Lloyd's Rep. 51 (K.B.Q 1935); 55 Lloyd's Rep. 318 (C.A.1936).
\textsuperscript{55}MT Convention, Art. 16(1).
\textsuperscript{56}Tetley, p368.
\textsuperscript{57}Hamburg Rules, Art. 5(1).
\textsuperscript{58}Hague Rules, Art. 4(1).
regard must be given to the course which would be pursued by a prudent MTO according to the circumstances of the each case. Further, as science advances and new knowledge and methods are available, the standard required will become higher so that more will be expected from the carriers.\textsuperscript{59} Meanwhile, it is possible that the defence available to the MTO under the MT Convention is less burdensome to the MTO than the air carrier’s defence under the Warsaw Convention. In this view, as it would be somewhat more difficult for the original consignor to recover from the MTO, there would be a correspondingly reduced possibility of a recourse action by the MTO against the underlying air carrier.\textsuperscript{60}

\textbf{3.5 CONCLUSION}

The multimodal transport involving road or rail transport will be very complicated because of the different basic regimes of liability. The liability of the carrier by road or rail is based on the strict liability. However, the liability of the MTO is based on fault with a reversed burden of proof. The MTO Convention follows the Warsaw Convention and the Hamburg Rules which provides the familiar phrasing that the MTO shall be liable for loss, damage, or delay while he is in charge of the goods unless he proves that he took all measure that could reasonable be required to avoid the occurrence and its consequences. This is the basic liability regime for the multimodal transport, which is often called presumed fault or presumed liability. The fault of the MTO is assumed upon proof of damage and the plaintiff will be absolved from proving any fault of the MTO in order to receive an award of damages. Conversely, the MTO has a defence against liability when he can prove that he took all reasonable measures to avoid the loss, damage or delay. Alternatively, he may defend by proving that the loss of or damage to the goods were caused by the consignor or the consignee.

\textsuperscript{59}Mankabady, "Comments", p54.
\textsuperscript{60}Fitzgerald, "The Implications", p32.
CHAPTER 4

THE FORM OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

4.1 INTRODUCTION

It is obvious that each legal link with respect to the multimodal transport converges towards the MTO. The MTO concludes an MT contract with the consignor and then concludes the contract necessary for the carriage of the goods by different carriers. Therefore the MTO is placed at the very centre of the multimodal transport.\(^1\) The liability regime applicable to the MTO appears to be the crucial question which had to be solved by the MT Convention, although each mode of transport already has its own regime and these regimes are largely incompatible. The core of the problem is that some of the existing unimodal conventions are mandatory. For instance, the Warsaw Convention provides that any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.\(^2\)

In the present system of international containerised multimodal transport, there are three possible forms regimes for the liability regimes of the MTO in charge of the container carriage. The first one is uniform liability, which means that the whole voyage is dealt with according to the uniform principles of liability imposed upon the person who is in charge of the container transport. The MTO will accept a uniform

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\(^1\)Racine, p224.
\(^2\)Warsaw Convention, Art. 32.
level of liability for loss or damage to cargo irrespective of where the loss occurs during the entire period of multimodal transit. Secondly, there is network liability, where, again, the person who is in charge of the container transport assumes responsibility for the whole voyage, but where the principles for compensation for damage to the cargo depend on the law applicable for the different transport section. When the place and cause of the loss or damage can be established, the MT document will be subject to the appropriate rules. When the place and cause cannot be established, the Hague Rules are deemed to apply. The third form of the liability is mixed or hybrid liability, which lies between uniform and network liability. Namely it is fundamentally the same as the uniform liability system on the extent of the liability, the same as the network liability system on the limit of the liability.3

4.2 DIFFERENT TYPES OF THE FORM OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

4.2.1 The Uniform Liability System

The uniform liability system is the one in which the MTO is liable for loss of or damage to the goods wherever it occurs. In other words, this system regulates the MTO’s liability "uniformally" in all stages of the multimodal transport operation. The liability regime of the MTO is then, in every respect, such as type of liability, limits, claims and actions, distinct from the liability regimes applicable to the subcontracting carriers under unimodal conventions.4

The advantages of this system are its simplicity and the elimination of disputes. The consignee claims from the MTO who in turn claims from the responsible unimodal carriers. In addition, as will be discussed shortly, the uniform system gives more

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3For details see section 4.2.3.
4Racine, p225.
protection to the consignee than the network system. Furthermore, it avoids double insurance. Finally, it seems that transport law, in its various branches, is leaning towards this uniform system and so its adoption would be in line with current thinking on the subject. It is obvious that if the risk and liability are limited to one party, who would be the MTO, it would be logical to adopt the uniform liability system. The MTO would be the only person to seek insurance cover, and this would be an advantage to the consignee as damage caused by delay is usually excluded in cargo policies.

Meanwhile, the uniform system has two defects. Firstly the uniform liability is in conflict with the mandatory character of the existing unimodal transport convention, when it is established that the damage occurred at a particular stage of the transport governed by such a convention. The most obvious example here is the cargo which is lost in an aircraft accident, the damage being attributable without any doubt to the airline. In such a case, the uniform system would lead to determination of the claim for damages according to provisions other than those of the Warsaw Convention. Secondly, the uniform system establishes two categories with different treatment upon a basis which is in any case not logically justifiable. The distinction designation would depend on whether the goods have been carried under a MT contract or a unimodal transport contract. In order to avoid these defects, the network liability system was invented.

4.2.2 The Network Liability System

Under the network liability system, if it can be proved that the loss of or damage to the goods occurred solely during the course of one particular stage of transport, the MTO’s liability will be determined according to the law governing such mode of transport. In other words, under this system, the liability of the MTO is governed by any international convention or national law which may be applicable to each of the

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5For detail see section 4.2.2.
separate forms of transport. The network liability system fulfils several purposes. Firstly, it protects the applicability of the existing international unimodal transport conventions where it proves possible and necessary to do so and also reduces the risk of conflict with these existing conventions. Lastly, it removes the gap between the MTO’s liability under a uniform standard and the liability of his sub-contractors under the separate regimes and enables him to reclaim by recourse actions what he may have had to pay the consignee.6

In fact, the network liability system retains in the multimodal transport operation the various systems of liability as if the consignor has contracted separately with each carrier. This system will preserve a fair balance between the interests of the MTO and the various carriers. It also avoids any conflict between the MT Convention and the existing conventions relating to specific modes of transport. Although the network liability system is the one which best avoids the conflict of conventions, there are some problems in practicability because of its aleatory character.

In many cases, the loss of or damage to the goods which is caused in stage 1 of the multimodal transport does not actually occur until stage 2 or stage 3 of that journey. This poses a major question: how to establish where and when the loss of or damage to the goods occurred? Did it happen in the sea (stage 2) or inland leg (stage 1 and stage 3)? Therefore, it takes a very long time to determine where the damage occurred and sometimes it remains unknown. As a result the goods are subject to different systems of liability at each stage and where, as with containerised shipments, the place and cause of the loss or damage is difficult to establish, the position is even more complicated. Accordingly this is the reason why an attempt has been made to simplify it by modification.

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6Ramberg, "The MT Documents", p33; Racine, p226.
4.2.3 The Mixed Liability System

The mixed liability system lies between the uniform liability and the network liability. The mixed liability system is similar to the network liability system, in that in case of localised damage it likewise refers to the mandatorily applicable unimodal convention or national law. But instead of the whole of the provisions of that convention or national law being substituted for the rules of the MT Convention, only its limit of liability is applied. Otherwise, the provision of the MT Convention remain applicable, for instance, as to the basis for liability. Accordingly the mixed liability system not only overcomes the objection to the uniform system creating an unwarranted market advantage over unimodal carriers, but also overcomes the network system’s creation of a lack of incentive on the part of the MTO to pursue redress against the carrier at fault. Moreover, the mixed liability system also affords to the cargo insurer the opportunity to recover from the MTO damages in excess of the uniform monetary limit. However, he must bear the onus of proving the particular leg of the operation in which the damage was caused. If the MTO is the participating carrier on that leg, the consignee might expect to get cooperation from him.

However, the mixed liability system has three disadvantages. First of all it suffers from an aleatory character. Secondly In addition, this mixed system, like the network liability system, is also in conflict with the mandatory characters of the existing unimodal transport conventions. For instance, the Warsaw Convention is not only mandatory in respect of its limits of liability, but in respect of its entirety. Finally, under the mixed system, in case of localised damage, a third legal regime will be created by taking a limit of liability extracted from a unimodal legal instrument and combining it with the provisions of the MT Convention. But each legal regime for national or international transport constitutes a well-balanced system, with the severity of some provisions being counterbalanced by some others which are more favourable. Therefore, drawing on two regimes at the same time may not achieve a

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7Racine, p227.
coherent result.

4.3 THE LEGAL PROBLEMS IN THE DUAL RELATIONSHIP OF THE LIABILITY

Under the MT Convention, there are concurrent relationships created in the international multimodal transport, namely, the relationship of indemnity liability between the MTO and the consignor or the consignee and between the MTO and the sub-contractor. Owing to the mandatory nature of the MT Convention, the former is restricted by the Convention which provides that the MTO is not allowed to reduce the limitation of the liability, nor is he allowed to shift responsibility to the cargo owners. As for the latter relationship, there are no provisions in the MT Convention with regarding indemnity between the MTO and the sub-contractor. As it currently stands, conflict arises in international multimodal transport because of different liability systems. For instance, the incomplete fault liability regime is adopted for the carriage of goods by sea under the Hague Rules, the complete fault liability regime for the carriage of goods by air under the Warsaw Convention, the strict liability regime is adopted for the carriage of the goods by road or rail under the CMR or the CIM Convention. The liability level of the carrier by sea under the Hague Rules is the least onerous among these regimes.

The above problem on liability system apparent in the MT Convention will not be easily solved. Such problems can be solved gradually so long as the relevant conventions and rules make the relevant provisions. It is believed in the world shipping field that these problems will be settled naturally after the Hamburg Rules comes into force. However, this point of view may make too much of the coming into force of the Hamburg Rules, as they are just a convention which has been

\[8\text{MT Convention, Art. 16,18,19.}\]
\[9\text{For detail see section 3.3.}\]
improved in relation to one mode of the transport. The legal problems that will continue to exist reflect the inconsistencies that result from the dual relationships of the indemnity liability.

4.3.1 The Highly Onerous Liability of the Multimodal Transport Operator

According to the existing unimodal transport convention or the provisions of certain mandatory national law, the application of the existing unimodal transport convention in the multimodal transport will contribute to the continuation of the present order of international carriage of the goods and insurance policies. However one of the main problems is that the legal responsibilities occurred during the entire transit might be shifted onto the MTO. Such responsibilities may be too onerous for the MTO to bear. To take the carriage of the goods by sea as example, in light of the Hague Rules,\(^{10}\) the carrier is not liable for the loss of or damage to the goods occurred by his neglect or default in the navigation or management of the ship. However, under the MT Convention, the MTO should be liable for this loss or damage and he will not have recourse against the carrier by sea. In addition, the Warsaw Convention provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air.\(^{11}\) Meanwhile, the operation of pick-up and delivery of goods by truck have prevailed for a long time in the carriage by air. In form the combined formation of carriage by air and road has been constitute. But in fact such an operation of pick-up and delivery of goods by truck may be regarded as one component part or extension of the carriage by air. Therefore the MTO’s indemnity liability will be increased if the Warsaw Convention is applicable for him the MTO instead of the MT Convention.

\(^{10}\)Hague Rules, Art. 4.
\(^{11}\)Warsaw Convention, Art. 31(1).
4.3.2 The Extension of the Liability of the Carrier by Sea

Under the mixed liability system, the MTO would naturally desire, according to the multimodal transport contract into which he has entered with the consignor, that the sea carrier would bear liability in same degree, so as to maintain consistency liability between the concurrent relationships. However, the question is whether the sea carrier can accept this requirement. Of course, the aim of the MTO’s requirement is to adjust reasonably the distinction between himself and the sea carrier, but not to abate the contents of the applicable unimodal transport conventions or the regulations of applicable national law. Even where it may be feasible in the eyes of the law, it may in practice be difficult to gain acceptance by the sea carrier. The reason is obvious in that if the carrier by sea accepts this requirement, his liability will be more onerous in respect of the following points.

Firstly, the carrier by sea would be surrendering the incomplete fault liability stipulated by the Hague Rules and the exception clauses which protect his own vital interests. Secondly, the Hague Rules are silent as to delay in delivery. If the carrier by sea accepts the MTO’s requirement, he will bear the same responsibility as the MTO does, namely, he will be liable for the delay in delivery.12 Thirdly, according to the MT Convention the limitation of the liability of the carrier by sea will be increased 4.7 times.13 Finally, the liability of the sea carrier will become more onerous if the sharing method is adopted. The sharing method means that the loss belonging to the MTO are is shared by each participating carrier. Once this sharing method is adopted, the loss of the MTO and the sea carrier’s special exceptions and low limitation amount will be shifted onto each participating carrier. The sea carrier will be the first to be affected by this sharing method since his liability is the least onerous and limitation of his liability is the lowest.

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12For details see Chapter 8.
13For details see Chapter 5.
4.3.3 Not Enough Time for the Multimodal Transport Operator to Give Notice of Claim to the Actual Carriers

The time limit for actions relating to international multimodal transport under the MT Convention is set at two years. However, notice of a claim must be given within six months, otherwise it will be time-barred. This provision grants the MTO sufficient time to seek recourse against any actual carrier who may have caused the loss or damage, since the corresponding unimodal transport convention periods for an action are longer: one year under the Hague Rules, the CMR and the CIM Conventions; two years under the Hamburg Rules and the Warsaw Convention. Regarding loss or damage which is not apparent when the goods are handed over to the consignee, the MT Convention provides that if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee, the prime facie rule will apply, i.e. that the condition of the goods delivered by the MTO is as described in the MT document.

Once the damage has been localised, the MTO who has compensated the consignor/consignee, should then be able to bring an action against the relevant subcontractor. Now, if the consignee under the MT contract gives his notice to the MTO within the described time, the prime facie evidence rule does not apply in favour of the MTO. Therefore The MTO will not be able to give timely and similar notice to the actual carrier if the contract for the actual carriage is subject to a certain unimodal transport convention containing the same period of notice as the MT convention or a shorter period than that in the MT Convention. Consequently, there are conflicts between the regimes effecting the concurrent relationship that create difficulties for the MTO. For instance the Warsaw Convention provides that in the case of damage, the person entitled to delivery must complain to the carrier forthwith.

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14 MT Convention, Art. 25(1).
15 Hague Rules, Art. 3(6); CMR Convention, Art. 32; CIM Convention Art. 47; Hamburg Rules, Art. 20(1); Warsaw Convention, Art. 29.
after the discovery of the damage, and at the latest within seven days from the date of receipt in the case of goods.\textsuperscript{16} Failing a complaint within this time period, no action shall lie against the carrier, save in the case of fraud on his part.\textsuperscript{17} Under these circumstances, it is not easy for the MTO to bring recourse action against the carrier by air for two reasons. On the one hand, the MT Convention lays down a time limit for notice of claim. Where the loss or damage is not apparent, notice in writing must be given within six consecutive days after the day when the goods were handed over to the consignee. As mentioned, such handing over is prima facie evidence of the delivery by the MTO of the goods as described in the MT document.\textsuperscript{18} On the other hand, it may also take a long time to know whether the loss of or damage to the goods can be localised or not. Where the consignee gives notice of the damage in writing in the sixth consecutive day to the MTO, there is only one day left for the MTO to localise the damage and bring a recourse action against the carrier by air.

The situation is the exactly the same in the multimodal transport involving the road and rail leg. The consignees are only allowed to give notice of the damage within seven days by the CMR and CIM Conventions\textsuperscript{19} under which the MTO has no enough time to give notice of claim to the carriers by road and rail. Furthermore, a recourse action by the MTO against the carrier by sea would be excluded from the start if, under the MT Convention as finalised, the consignee is entitled to give notice of the damage to the MTO after the end of the time (within three consecutive days) fixed in the Hague Rules.\textsuperscript{20}

The same problem happens on time limits for giving notice of claims for delay. The MT Convention provides that no compensation shall be payable for loss resulting

\textsuperscript{16}Warsaw Convention, Art. 26(2).
\textsuperscript{17}Warsaw Convention, Art. 26(4).
\textsuperscript{18}MT Convention, Art. 24(1)(2).
\textsuperscript{19}CMR Convention, Art. 30(1); CIM Convention, Art. 46(2).
\textsuperscript{20}Hague Rules, Art. 3(6). Under Art. 19(6) of Hamburg Rules, the period for giving notice of claim for loss or damage is 15 consecutive days.
from delay in delivery unless notice has been given in writing to the MTO within 60 consecutive days after the day when the goods were delivered by handing over to the consignee.\textsuperscript{21} This is similar to the notice period under the Hamburg Rules,\textsuperscript{22} whereas the notice period for claiming for delay is only 7 days under the Warsaw Convention and 14 days under the Hague Protocol.\textsuperscript{23} It is obvious that the 60-day period effectively precludes the MTO from giving notice in time to permit a recourse action by the MTO against the actual carrier where the underlying carriage is subject to one of the unimodal conventions.

In addition, the MT Convention provides that if the notice period terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.\textsuperscript{24} Therefore, the notice may be given on the next working day. Such an extension of the notice period is not found in the Hamburg Rules nor in the Warsaw Convention. Suppose the last day of the notice period was not a working day at the place of delivery, the consignee is still entitled to submit the notice of claim to the MTO on the next working day (the eighth day) after the day when he received the goods. In this case the MTO cannot reject the claim from the consignee under the MT Convention. Unfortunately the notice of claim was submitted to the MTO too late to enable him to make a claim under the time limits applying between himself and the carrier by air since the notice period is only seven days under the Warsaw Conventions. Therefore even if this is the case, it will effectively preclude the MTO from claiming against the carrier by air.

There are two possible solutions. One solution is to abolish the extension of the notice period or to shorten that period set out in the MT Convention. In fact, the notice period is cut down to half its length (only 3 working days) by agreement in

\begin{itemize}
\item \textsuperscript{21}MT Convention, Art. 24(5).
\item \textsuperscript{22}Hamburg Rules, Art. 19(5).
\item \textsuperscript{23}Warsaw Convention, Art. 26(2). Hague Protocol, Art.15.
\item \textsuperscript{24}MT Convention, Art. 24(7).
\end{itemize}
some combined bills of lading. \(^{25}\) Exactly the reverse in the case of hidden damage, some combined bills of lading extend the notice period by one day (7 consecutive days), \(^{26}\) which is similar to the notice period fixed in the Warsaw, CMR and CIM Conventions. \(^{27}\) Therefore the other solution is to extend the notice period of the corresponding unimodal transport convention. The good example is that the 7-days notice period fixed in the Warsaw Convention is extended to 14 days by the Hague Protocol. \(^{28}\)

### 4.4 The Legal Relationships Between the Multimodal Transport Operator and the Other Relevant Parties

In international multimodal transport, it is often the MTO's duty to take over the goods within the boundaries of one country and to hand them over within the boundaries of another country. However the MT Convention provides that the consignor is entitled to choose freely between multimodal transport and segmented transport service. \(^{29}\) Therefore the legal relationships are very complicated since the whole voyage may be completed by varieties of agents and actual carriers. There are many legal relationships in multimodal transport, such as the contractual relationship between the MTO and the consignor, the sub-contractual relationship between the MTO and his sub-contractor, the relationship of employment or agency between the MTO and his servant or agent, and the relationships of tort between the consignor, consignee and the servant, agent and sub-carrier of the MTO. With so many legal relationships involved, with differing duties and liabilities, it is very important to know the legal structures under the multimodal transport so that the other legal

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\(^{25}\) See Clause 6(4) of OCL Combined Transport Bill of Lading.


\(^{27}\) Warsaw Convention, Art. 26(2); CMR Convention, Art. 30(2); CIM Convention, Art. 30(1).

\(^{28}\) Hague Protocol, Art. 15.

\(^{29}\) Basic Principles of the MT Convention, (c); MT Convention, Art. 3(2).
relationships can be aligned to the contractual relationship between the MTO and the consignor with according consistency as to their duties and liabilities.

4.4.1 The Contractual Relationship

The MT Convention divides the multimodal transport into two levels of legal relationships: one between the MTO and the consignor, the other between the MTO and the underlying carrier.\(^{30}\) The MT Convention applies only to the contracts for the multimodal transport and requires that the multimodal transport is governed by a single contract of carriage between the MTO and the consignor. The MTO is defined as a person who enters into multimodal transport contracts as a principal, and who assumes responsibility for the performance of the contract.\(^ {31}\) The MT Convention governs only the contractual relationship between the MTO and the consignor. Hence, the MTO deals only with the consignor, remaining liable for the loss of or damage to the goods throughout the entire carriage. In case of loss of or damage to the goods, the MTO is liable to the consignor.\(^ {32}\) The MTO might either perform the various portions of the multimodal carriage himself or might subcontract with unimodal carriers for the various legs of the route. In any circumstance, the MTO is liable to the consignor for loss or damage occurring between taking charge of the goods and delivery regardless of which mode of transport is involved at the time of loss. Instead of having to go after the particular unimodal carrier involved under whichever statute or convention applies to that mode, the consignor merely needs to claim against the MTO. Therefore, the multimodal transport is governed by the MT Contract concluded between the MTO and the consignor, and the resulting relationship is governed solely by the MT Convention. If any of the sub-contracted unimodal carriers is responsible, the MTO might seek recovery under the pertinent unimodal conventions.

\(^{30}\)Nasseri, p136.

\(^{31}\)MT Convention, Art. 1(3).

\(^{32}\)MT Convention, Art. 14(1).
4.4.2 The Sub-contractual Relationship

Apart from the multimodal transport contract with the consignor, the MTO might in turn function as a direct carrier, performing the contract himself, either in part or in its entirety, or he might sub-contract for actual carriage with an underlying carrier. The MTO’s relationship with the underlying carriers is governed by the existing unimodal transport convention. However, the consignor does not need to concern himself with the MTO’s sub-contracts. He can recover directly from the MTO, who assumes responsibility for the performance of the MT contract. If the sub-contractor is the cause of loss of or damage to the good, then the MTO will have recourse against the underlying carrier for failure to perform the sub-contract.

It is obvious that if the damage has been localised, the MTO who has compensated the consignor, should then be able to bring an action against the relevant sub-contractor. However there are conflicts between the regimes effecting the concurrent relationships that create difficulties for the MTO. For instance the Warsaw Convention provides that in the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest within seven days from the date of receipt in the case of goods. Failing complaint within this time period, no action shall lie against the carrier, save in the case of fraud on his part. Under these circumstances, it is not easy for the MTO to bring recourse action against the carrier by air for two reasons. On the one hand, the MT Convention lays down a time limit for notice of claim. Where the loss or damage is not apparent, notice in writing must be given within six consecutive days after the day when the goods were handed over to the consignee. Such handing over is prima facie evidence of the delivery by the MTO of the goods as described in the MT document. On the other hand, it may also take a long time to know whether the loss of or damage to the goods can be localised or not. Where the consignee gives notice of the damage in writing in the sixth consecutive day to the MTO there is only one

33Driscoll & Larsen, p216.
day left for the MTO to localise the damage and bring a recourse action.

### 4.4.3 The Relationship of Employment/Agency

Multimodal transport is defined as the movement of cargo from point to point by various transport modes on the MT document which is concluded between the MTO and the consignee. To fulfil the duties under the MT document, however, the MTO may sign the subcontract with the actual carriers and enter into other third-part contracts with stevedores and terminal operators to ensure that the goods arrive at their destination. Thus many parties may take part in the performance of the MT contract. The precise scope of these parties’ obligations often depends not only on the provisions of the multimodal transport but also on the terms of the subordinate contractual arrangements for the performance of the various phases of the multimodal transport.

The MT Convention provides that the multimodal transport operator is liable for the acts and omission of his servants or agents, when any such servant or agent is acting within the scope of his employment. The MTO is also liable for the acts and omissions of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omission were his own.  

34 If one accepts the sui generis character of multimodal transport where one person would be liable for the entire carriage, it follows that the MTO is liable for the acts and omissions of his servants or agents. Therefore, the taking of the goods into the charge of the MTO’s servants or agents can be regarded as taking the goods into the charge of the MTO himself, both having the same legal effect. However, as for the owner of the vessel, he is an independent contractor of the MTO with whom he does not have a relationship of employment or agency. Therefore the MTO is not liable for his

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34 MT Convention, Art. 15.
independent contractor.35

4.4.4 The Relationship of Tort

In the multimodal transport of the goods the majority of litigation arises from the breach of contracts, while an act arising in tort usually relates to a third party who has no contractual relationship with the party. The collision of the ship is a typical act involving tort. In some countries, the victim sufferer is entitled to have concurrent claims, namely, the claimant can bring an action in both contract and tort. In such circumstances, the MTO will suffer from the dual suit. These concurrent claims might lead to the MTO not to enjoy the limitation of the liability stipulated by the MT Convention. Furthermore the limitation of action is not applicable. If so the Convention will lose its practical significance whenever a tort claim exists. Therefore the MT Convention provides that the defences and limits of liability apply in any action against the MTO in respect of loss of or damage to the goods, as well as from delay in delivery, regardless of whether the action is founded in contract, in tort or otherwise.36

As for the servants or agent of the MTO, it seems doubtful for them to enjoy the rights of the MTO. Therefore the MT Convention provides that if an action in respect of loss resulting from loss of or damage to the goods is brought against the MTO’s servant or agent who proves that he acted within the scope of his employment the servant or agent is entitled to avail himself of the defences and limits of liability which the MTO is entitled to invoke under this Convention.37 In fact this provision is similar in effect to the use of a "Himalaya Clause",38 granting non-carriers any

35Hare, p200.
36MT Convention, Art. 20(1). The similar provision can be found in Visby Rules, Art. 3(1) and in Hamburg Rules, Art. 7(1).
37MT Convention, Art. 20(2).
38The "Himalaya Clause", so-called from the English case, Adler V. Dickson (1955) 1 QB. 158 (C.A.); The Fifth Circuit had held, in A.M. Collins & Co.v. Panama R.R., 197 F. 2d 893, 1952 A.M.C. 2054 (5th Cir. 1952) that the carrier’s defenses apply, of their own force, to agents or servants of the
immunity defence, limitation or other protection afforded to the MTO by the MT document. Himalaya Clause provides that the employee or agent of the carrier is on the carrier's same legal footing, namely that the limitation of the liability and immunities for the carrier are also applicable to his agent or servant if the loss of or damage to the goods are caused directly or indirectly by them. Therefore, stevedores, terminal operators or other third parties are entitled to avail themselves of the benefits of the MT Convention if the parties to the MT contract clearly and unequivocally expressed an intention to allow these servants or agents of the MTO to limit their liability. For instance, in the multimodal transport business, assume that a certain container is damaged in the transit due to the neglect of the MTO's servant. The consignee can bring an action against either the MTO or the MTO's servant. Since there is an MT contract between the MTO and the cargo owner, the filing of suit applies naturally to the MT Convention. However, there is no contractual relationship between the MTO's servant and the consignee, the filing of suit does not apply naturally to the MT Convention. Suppose the value of the loss is actually $2000 SDR. The MTO's liability can be limited to an amount not exceeding 920 SDR under the MT Convention when the cargo owner brings an action against him. However in an action in tort the cargo owner can get $2000 when he brings an action against the servant or agent of the MTO. Naturally the servant or agent will at last bring recourse action against the MTO after having compensated the cargo owner. If so, it will deny the limitation of the MTO's liability. Thus, the MT Convention provides that the aggregate of the amounts recoverable from the MTO and from a servant or agent or any other person of whose services he makes use for the performance of the MT carrier.


contract shall not exceed the limits of liability provided for in this convention.\footnote{MT Convention, Art. 20(3).}

The attempt is made to bar claims in tort against both the MTO and any sub-contractors engaged by the MTO. In a clause of the OCL Combined Transport Bill of Lading, the consignee undertakes that no claim will be made against any subcontractor or any person chartering space on the MTO’s vessel. If such a claim is made, the MTO is entitled to be indemnified against all consequences which flow from the claim.\footnote{OCL Combined Transport Bill of Lading Clause 4(2)(3).} The sub-contractors are thus given a Himalaya type benefit of all the provisions in the combined bill of lading which confer protection on the MTO or limit the MTO’s liability.

Under the IFF Conditions\footnote{In 1984 the UK Institute of Freight Forwarders (IFF) issued new Trading conditions.} a "circular indemnity" is designed to discourage claims being brought in tort against a forwarder by persons with whom there is no privity of contract, such as a consignee’s consignee. The effect of the clause is that where such claims are made against the forwarder, he has a right to turn to his consignee and request that the consignee reimburse the difference between the amount the consignee could have claimed under the 1984 Conditions and the amount the forwarder actually had to pay out where the claim was in tort and the conditions therefore did not apply.

4.5 CONCLUSION

There are two alternatives for the form of the MTO’s liability in international multimodal transport, the one is uniform liability system, the other being network liability system. The TCM Convention adopts the network liability system. In theory, it seems that the uniform system of liability presents a more flexible framework since
it allows the possibility of incorporating non-uniform provisions. On the other hand, it would appear that the network system of liability is more flexible since it allows modification in the relationship between the MTO and the consignee on an incremental (stage by stage) basis. In practice it is the network system which can best avoid the conflict of conventions, but there is still some problems in its practicability. If the place of loss or damage is not known it would seem unfair to impose on the MTO a system of liability which goes beyond the existing rules. Since both the uniform and network liability system contain certain advantages and disadvantages a compromise proposal was adopted. Therefore the Convention follows a mixed liability system.\textsuperscript{44}

The MTO can be either a carrier who makes connecting arrangements or a forwarder performing no actual carriage. In either case, the MT Convention requires the MTO, subject to various defences, to compensate the consignor or consignee for any loss or damage arising during the multimodal through movement, regardless of where it occurred or who had control of the cargo. As compared with unimodal transport of the goods, there are many legal relationships in the multimodal transport. The MT Convention, however, does not govern the relationship between the MTO and the sub-carriers, leaving this sub-contractual relationship outside its scope to the existing legal regimes. For the purposes of this relationship, the MTO is considered a consignee rather than a carrier, and will be entitled to recover against the sub-carrier on the basis as other consignees. Therefore the contractual relationship governed only by the MT Convention between the MTO and the consignor insulates the sub-contractors from direct recovery by the consignor or consignee. This uncertainty could be resolved by clarification in later protocols to the MT Convention.

There are concurrent relationships of the indemnity liability in the multimodal transport due to the mixed liability system. Consequently the conflicts between the MT Convention and the existing unimodal conventions are visible. The difference

\textsuperscript{44}MT Convention, Art. 18.19.
between the basis of the liability regimes of unimodal and multimodal transport is the focal point of these conflicts and which is not easily solved. In addition, the MTO’s right might be prejudiced in seeking recourse against the actual carriers due to widely-varying time limits set out in different international transport conventions.
CHAPTER 5

THE LIMITATION OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

5.1 INTRODUCTION

Closely associated with the form of the MTO’s liability is the question of the MTO’s limitation of liability. It is not surprising, therefore, that limitations have also found their way into the law. The law developed two major systems of monetary limits of liability. First, the limits where the maximum value or the ceiling of liability is not fixed in advance; secondly, where the limits are established even before the damage occurs. In international transportation, in order to enable the carrier to calculate his risk and to cover his liability by insurance, the limitation of the carrier’s liability to a fixed amount is a common feature in statute, treaty or convention regulating the carrier’s liability. The maritime law precedent had already demonstrated that there was a world-wide acceptance of the principle of limited liability for international carriage. Moreover, it was a general rule in all the jurisdictions considered here that carriers of goods were allowed to limit their liability. Originally, the limitation of liability was seen as a quid pro quo for the presumption of fault which was placed on the carrier. Plaintiffs would not be required to prove the carrier’s negligence, but the liability of the carrier would be limited.1 Obviously, the carrier’s liability can be limited in a manner which, for practical purpose, avoids the insurer nature of common carrier liability and relieves the carrier of liability for negligence, unseaworthiness2 etc. One of the methods by which the carrier sought to overcome

1Miller, p72.
the effect of liability in the nature of the insurer was to limit the amount of his liability. The shipper then has an opportunity to purchase greater protection. If the shipper wants a high limit he must make a declaration of value and, in most cases, pay an extra amount in addition to the freight.3

5.2 THE NEW UNIT OF ACCOUNT FOR THE LIMITATION OF THE LIABILITY

The unit of account adopted in international transport liability conventions used to be a highly controversial topic during the 1970's. International transport liability conventions dealing with the international carriage of cargo incorporate specific amounts to which carriers may limit their financial responsibility for claims arising out of loss of, or damage to the goods. The objectives of these conventions include the attainment of international uniformity in the legal regimes applicable to such movements and the establishment of acceptable and definitive amounts to which liability may be limited.4 An integral element in these conventions is the unit of account in terms of which limits of liability are specified. In general terms, a unit of account measures the amount of any particular currency that holders can obtain for it.5 In the context of liability conventions, maximum levels of liability are denominated in terms of a unit of account, while actual compensation is received in terms of the applicable national currency. The unit of account serves only as the basis for calculating the maximum amount of compensation in terms of the currency in question at the recognised exchange rate.

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3Hague Rules Art. 4(5); CIM Convention Art. 36; CMR Art. 24, 26; Warsaw Convention Art. 22(2).
5Ward, p2.
5.2.1 The Special Drawing Rights in International Transport Conventions

By 1970's, limits of carrier liability were generally denominated in gold francs in all international transport conventions, defined in terms of a certain weight and degree of fineness. The unit of account adopted in most maritime and air conventions was the Poincare franc, defined as 65.5 milligrams of gold of millesimal fineness 900. Other conventions, notably those dealing with carriage by road and rail, as well as for inland navigation, adopted the Germinal franc-10/31 grams of gold of millesimal fineness 900. Two other transportation conventions used gold pound sterling to express the limit of liability. During the 1970's, however, gold ceased to function satisfactorily as a unit of account and the Special Drawing Rights (SDRs) of the International Monetary Fund (IMF) was adopted by the recent international transport conventions. Accordingly, being a new unit of account, the SDR was employed by the MT Convention to express the maximum liability of the MTO.

The Special Drawing Right was created by the IMF in 1969 to replace gold. The first step towards the adoption of the SDR as a new unit of account in international transportation conventions was taken during the International Conference on Air Law in Montreal in 1975, to amend the Warsaw Convention or Protocols subsequently adopted. Thus, for the first time in the history of private law conventions, the

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9 MT Convention, Art. 18(1).

Special Drawing Right as a new unit of account was used, influencing drafters of other international transportation conventions. Consequently, in 1976, the Intergovernment Maritime Consultative Organisation (IMCO) held an International Conference on Limitation of Liability for Maritime Claims and another three protocols, with similar changes. The same formula was used by the International Conference on Air Law in 1978 on revision of the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface. The SDR was also accepted by the Hamburg Rules. All of these modifications are of minimal importance to mention here. What is important is that neither conference discussed the suitability of the SDR to express the limit of the liability. In almost all deliberations and comments the SDR is cited only as a counter unit to gold. Moreover, since the SDRs was already used in the Montreal Protocols of 1975, it was probably assumed that discussions were held at the Montreal Conference on the suitability of the SDR to express the limit of liability in transportation conventions. Therefore, the replacement of the gold unit of account in transportation conventions by the SDR occurred as a result of the international economic and monetary situation which exclude gold from serving as a unit of account.

5.2.2 The Reasons for the Introduction of the Special Drawing Rights

There is no doubt that the adoption of gold franc or gold pound sterling to express the limit of the liability was nothing more than a convenient way to establish a fixed unit of account. Accordingly each transport convention referred to the gold of the currency in respective clauses, and any subsequent change in the value of the currency had no effect on the limit of the convention. Therefore gold, in view of its physical and historical role, provided a stable and firm economic guarantee of just

\[ ^{11} \text{The first modifies the International Convention on Civil Liability for Oil Pollution Damage, 1969; the second modifies the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; the third modifies the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974.} \]

\[ ^{12} \text{Toolewski, p170.} \]
and equitable awards for damages. However, after the First World War, the position of gold fluctuated and it has had its ups and downs, especially during the depression of economies. As a result two problems appeared. The first problem is that when convertibility of the U.S. dollar into gold was suspended, the value of gold began to fluctuate, resulting in the establishment of the so-called "two-tier" gold market.\textsuperscript{13} The transport Conventions which were drafted at a time when the official and market gold prices were, for all practical purposes, equal, did not specify which price should be taken as a basis for the conversion of the gold units, in which limits of liability were expressed. The market price of gold is often as high as five times the official price,\textsuperscript{14} and if the level of the liability were to be calculated on this basis, compensation would be far in excess of that calculated on the basis of the official price. Another problem is the effect of inflation on the adequacy of limitation of the liability. Inflation is by no means a new phenomenon, but the recent rate of increase in consumer prices the world over has enhanced its importance and its effect on liability limits. Thus, to avoid these problems, and as an alternative to the gold clause in liability conventions, the SDR of IMF as a unit of account was adopted. The SDR is seen as a better remedy for the uncertainty related to gold price fluctuations and liability limitations.

5.2.3 The Nature and Advantages of the Special Drawing Rights

It was impossible to find any currency that was maintained in value in relation to gold through which the values of other currencies could be arrived at in terms of the


\textsuperscript{14}Under the articles of the IMF, the value of the U.S. dollar had been established on the basis of the official value of this currency in terms of gold; one U.S. dollar had a par value of 0.888671 grams of fine gold which was equivalent to the official rate of $35 an ounce of gold. Under the "two-tier" system, this official rate was retained only for transaction between central banks, and sales of gold from official stocks to the free market were discontinued. A free market for newly minted and privately held gold was established on which gold could be purchased or sold by privately person.
SDR. The SDR is calculated on the basis of a basket of defined amounts of sixteen currencies. This method of valuation became effective in 1974. From 1981, the basket was reduced to the currencies of the five IMF members having the largest exports of goods and services for the period 1975-79. These five currencies are those used to calculate the interest rate on the SDR and the change was implemented to simplify and enhance the attractiveness of the SDR. The amount of each currency in one SDR is determined by the percentage weights assigned to each currency. The weights reflect the relative importance of each in world trade. The weights for the basket of five currencies during the early 1981’s were the U.S. dollar 42%, the Deutsche mark 19% and 13% each for the French franc, the Japanese yen and the pound sterling. And again in 1986, the U.S. dollar 42%, the Deutsche mark 19%, Japanese yen 15% and 12% for the French franc and pound sterling. The value of the SDR is determined by the sum of the dollar values of each currency component based on daily market exchange rates. As a result, the effects of the fluctuation of any component currency on the value of the SDR will be directly related to that currency’s weight in the basket.

The SDR becomes a suitable unit of account for international transport conventions because of three advantages. Firstly, being the official unit of account of the IMF, the SDR commands a high degree of international acceptance. Then the IMF determines and publishes exchange rates of currencies of member states in terms of the SDR, and that the value of the SDR is quoted daily in the press. There is thus no need for official machinery, such as a statutory instrument, to publish the appropriate exchange rate. Secondly, the method of valuation applied by the IMF is normally to be binding, facilitating the conversion of the unit of account into any member currency. Thirdly, the SDR ensures uniformity in the valuation of currencies because


16Ward, p3.

17Diamond, p18.
the value of a fixed member of SDR in terms of any convertible currency will be identical at any given point in time.

However, in an environment of floating exchange rates, the value of the SDR in terms of any currency will normally fluctuate on a daily basis in response to that currency’s movements in relation to those of SDR component currencies. While this fluctuation is necessary to ensure uniformity in the valuation of currencies under fluctuating exchange rates, it will affect the maximum level of compensation which may be approved claimants in terms of a national currency at any given point in time.18

5.3 DIFFERENT STANDARDS OF THE LIMITATION OF THE LIABILITY

Different measures of the carrier’s liability leads to different limitation of the carrier’s liability. Generally speaking, there are, in practice, two basic standards for the limitation of the carrier’s liability: limits according to the weight and unit limitation.19 In addition these two standards of limitation of the liability are sometimes combined with one another. Even if the same technique is used in fixing the limits, different amounts apply to different modes of transport. Furthermore, when efforts are made to guard against depreciation of the value of the unit of account, the standard of the higher amount is chosen.

5.3.1 The Single Limit under the Hague Rules, and the Warsaw, the CIM and the CMR Conventions

The single limitation of liability means limits are determined according to the weight

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18 Ward, p3.
19 Limitation per incident, General Conditions of the Nordic Forwarder’s Association (1959), Art. 20. For detail see Ramburg, “Attempts at Harmonisation”, p18.
or unit. The Hague Rules, Warsaw Convention, CMR Convention and CIM Convention employed the single limits. The liability of the carrier by sea is limited according to the unit. Under the Hague Rules, the liability of a carrier for loss of or damage to goods is limited to 100 pounds sterling per package or unit, unless the bill of lading provides for a higher figure, or unless the nature and value of the goods are declared by the shipper before shipment and inserted in the bill of lading.\footnote{Hague Rules, Art. 4(5).} Difficulties have been caused in operating this rule. Therefore, the desirability of revising this provision has arisen in particular from two facts. First, it is widely admitted that the limitation of liability has not proved to be satisfactory in a view of the erosion of its real value to a fraction of its original level and of currency depreciations since 1924. The Visby Rules amended this by providing that unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship is liable for the loss or damage exceeding the equivalent of Francs 10,000 per package or unit or Francs 30 per kilo of gross weight of the goods, whichever is the higher.\footnote{Visby Rules, Art. 2(a).} Secondly, there is considerable uncertainty about the meaning of the expression "package or unit". It is an important but contentious question under the Hague Rules whether a full container together with its contents is one package or unit, so that the total liability for its loss or damage is limited to 100 pounds sterling. The Visby Rules also dealt with this matter.\footnote{For detail see section 5.3.2.}

On the contrary, the liability of the carriers by air, rail and road is limited according to the weight. The Warsaw Convention limits the liability of the carrier by air to 250 francs poincare' per kilogram unless the consignor has made a special declaration of value and had paid a supplementary sum, if the case so requires, at the time that the package was handed over to the carrier.\footnote{Warsaw Convention, Art. 22(1).}
value and the supplementary sum has been paid, the carrier is liable to pay a sum not exceeding the declared value, provided that the declared value is not greater than the actual value to the carrier at delivery.\textsuperscript{24}

Under the CIM Convention, liability of the carrier by rail, except for gross negligence or wilful misconduct, is limited to 17 units of account per kilogram of gross mass short.\textsuperscript{25} The unit of account is SDR. In addition, the railway is required to refund the carriage charges, customs duties and other expenses in connection with the carriage of lost goods. Although the CIM Convention provides for liability in respect of rail-sea multimodal transport and for additional exemption from liability in the event that the loss of or damage to the goods occurs in the course of the sea journey, it would appear that the limitation of liability in CIM Convention continues to apply.\textsuperscript{26}

The CMR Convention follows the general pattern of the CIM Convention with respect to the carrier's liability, but the limitation amount is less, namely 8.33 units of account per kilogram of gross weight short.\textsuperscript{27} The unit of account is the SDR. The amount paid for freight, customs duty and other charges incurred are also required to be refunded by the carrier by road in proportion to the loss. The CMR Convention is applicable to multimodal transport provided that the goods are not unloaded from the vehicle.\textsuperscript{28} For countries which have not adopted the protocol to the CMR Convention changing the limit of liability to SDR basis, the limitation of liability remains at 25 germinal francs per kilogram of gross weight short. The carrier cannot avail itself of the limitation of liability if it is found guilty of wilful misconduct.\textsuperscript{29}

\textsuperscript{24}Warsaw Convention, Art. 22(2).
\textsuperscript{25}CIM Convention, Art. 40(2).
\textsuperscript{26}CIM Convention, Art. 48(1).
\textsuperscript{27}CMR Convention, Art. 23(3).
\textsuperscript{28}CMR Convention, Art. 1.2.
\textsuperscript{29}CMR Convention, Art. 29.
Chapter 5 The Limitation of the Liability of the Multimodal Transport Operator

5.3.2 The Two Alternative Limits under the Visby and the Hamburg Rules

More than forty years have passed since the Hague Rules came into force. Decisions of the courts during that time revealed that some parts of the Hague Rules had lost their significance, others had been interpreted differently, or did not correspond to the present needs and requirements of international trade. However, one of the main reason which led to the revision of the Rules was the limitation of the carrier's liability.\textsuperscript{30} There are two major problems arising from Art. 4(5) of the Hague Rules. First, the words "per package or unit" lacked any real precision. The other problem centred on the limitation figure itself.\textsuperscript{31} As a result of devaluation of the pound, the limitation of the carrier's liability of "100 pound sterling per package or unit" is no longer adequate compensation for the consignee.\textsuperscript{32} Due to these circumstances, the limitation of liability was one of the main amendments introduced by the Visby Rules.

Under the Visby Rules, the monetary limitation was raised, and the unit concept was also softened by allowing the limitation alternatively by weight: 10000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.\textsuperscript{33} Thus there are for the first time two alternative limits, the first being the traditional limit "per package or unit"; the second, being based on weight. The overall intention of having two alternative limits is reasonably clear. In the case of relatively small package or units, the 10000 franc limit is used, since the weight alternative results in a lower limit. However a moment's calculation shows that if a package or unit weights more than 333.34 kilos then the weight alternative produces a higher limit. Therefore the general rule is to take 10000 franc as the limit.

\textsuperscript{30}Mankabody, "Comments", p32.
\textsuperscript{31}Diamond, p11.
\textsuperscript{32}Mankabody, "Comments", p32.
\textsuperscript{33}Visby Rules, Art. 2(a).
for package or units weighing 333.3 kilos or less; but the weight alternative for heavier packages or units. A sole package or unit limit is unfair to consignees of large and expensive packages. A package/weight alternative can counteract this unfairness, covering both low weight high value packages and high weight high value packages.

However, the package alternative is available to low weight low value packages which are shipped in large numbers, such as carcasses of lamb, cartons of toys, foodstuffs etc., so that these two alternative limits, in many instances, give the consignors or consignees full recourse to the carriers. In such a case, the carrier’s liability might rise sharply as a result of this new basis for calculating limits of liability.

In addition, with the major development of the use of containers in ocean transport, significant disputes arose from the Hague Rules concerning whether the container itself, or the package or the limits inside the container, should be considered as a package or unit for calculating the carrier’s limitation of the liability. The Visby Rules handled this problem by providing that the number of packages stated on the bill of lading constitute the packages for purposes of calculation, or if the bill of lading does not state the number of packages, then the container is considered the package or unit.

The Hamburg Rules follow the Visby Rules in adopting what is sometimes known as a dual standard of limitation of liability and provide that the liability of the carrier for loss of or damage to the goods is limited to 835 SDR per package or other
shipping unit, or 2.5 SDR per kilogram of gross weight, whichever is higher.\textsuperscript{38} The package or unit problem is also dealt with in a manner similar to the Visby Rules.\textsuperscript{39}

The package or unit problem in the MT Convention is dealt with in a manner similar to the Visby and Hamburg Rules. However, a conflict still exists in multimodal transport. Under the Hague Rules, the maximum is assessed per package or unit instead of by weight. In the MT contract between the consignor and the MTO, the package or unit is not the container but the package or unit which is received by the MTO, whereas in the sub-contract between the MTO and the actual carrier by sea, the package or unit is likely to be the container itself if it is to be carried at the standard rate of freight. Consequently, the MTO’s liability to the consignee for loss or damage proved to have occurred at the stage of sea transport would be his Hague Rule’s liability, on the basis that he had made a direct MT contract with the consignor for that stage alone to carry the number of package or units referred to in his MT contract. His maximum recovery from the actual carrier would be based upon a single unit—the container in which the goods were shipped.

5.3.3 The Combination of the Single and Two Alternative Limits Under the Multimodal Transport Convention

Since international multimodal transport is very complicated, the MT Convention employs the method of combining the single limit with the two alternative limits, aiming at suiting the needs of the different mode of the carriage of the goods. For the two alternative limits, the MT Convention provides that when the MTO is liable for loss resulting from loss of or damage to the goods, his liability is limited to 920 SDR per package or other shipping unit or 2.75 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. For the single limit,\textsuperscript{40} the MT

\textsuperscript{38}Hamburg Rules, Art. 6(1).
\textsuperscript{39}Hamburg Rules, Art. 6(2).
\textsuperscript{40}MT Convention, Art. 18(1).
Convention provides that if the international multimodal transport does not, according to the MT contract, include carriage of goods by sea or by inland waterways, the MTO's liability is limited to 8.33 SDR per kilogram of gross weight of the goods lost or damaged. Accordingly, in the case of the multimodal transport including the carriage of the goods by sea, if the package or unit weighs less than 334.5 kilos the limit is 920 SDR. If the package or unit weighs more than 334.5 kilos, the limit is still 920 SDR unless the gross weight of the goods lost or damaged is more than 334.5 kilos. Finally, if the weight of such goods is more than this, then the weight alternative of 2.75 SDR per kilo produces the higher limit. Therefore the method of the two alternative limits under the MT Convention works in the same way as the comparable method currently in force under the Visby and the Hamburg Rules. Whereas in case of the multimodal transport excluding the carriage of the goods by sea, the single standard of limit to 8.33 SDR per kilogram under the MT Convention works in the same way as the comparable standard currently in force under the CMR Convention.

Concerning the amount of limitation in the case of the goods consolidated by a container, it is necessary to find out whether the packages or other shipping units are enumerated in the MT document. Where the MT document enumerates the contents of the container individually, each of the packages is a unit, otherwise the whole contents would be regarded as one shipping unit. As for the container itself, if it is not owned or otherwise supplied by the MTO, it would be considered as one separate shipping unit. Thus a unified rule for the calculation of the amount of liability is applied without taking into account the fundamental differences between the case of the full container load (FCL) and the less than full container load (LCL).

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41MT Convention, Art. 18(3).
42See section 5.3.2.
43See section 5.3.1.
44MT Convention, Art.18(2)(a).
45MT Convention, Art. 18(2)(b).
In the case of full container load, usually an empty container is delivered to the consignor's premises where he loads the cargo and from where the container is collected by, or delivered to, the MTO. In the case of less than container load, the cargo which belongs to several different consignor is delivered to the container freight station (CFS) where the MTO or his agent will then park the goods within the container. The fundamental difference is that in the full container load the consignor undertakes the stuffing of the container which will not be opened before arrival at its destination. Whereas in the less than full container load, the loss of or damage to the goods could be caused by various reasons.

5.4 DIFFERENT SYSTEMS OF THE LIMITATION OF THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

5.4.1 The Uniform System of Limitation for Concealed Damage

Under the MT Convention, the problem of the amount of limits of liability would be of relevance if it is not known on which leg the damage occurred. After all in the case of concealed damage, the MTO is liable and has no recourse against the subcarrier. The ceiling limit of the MTO's liability first depends upon the multimodal transport contract. The MT Convention makes an attempt to cast off the shackles of limits applicable to the water modes. Thus, according to the Art. 18 of the MT Convention, there are two different amounts of limitation which depend on whether the international multimodal transport includes carriage of goods by sea or by inland waterways.

5.4.1.1 The Non-Water Limitation

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{\textsuperscript{46}} Fitzgerald, "Implications", p64. 
{\textsuperscript{47}} Fitzgerald, "Implication", p65.
If the international multimodal transport excludes carriage of goods by sea or by inland waterways, the liability of the MTO is limited to an amount not exceeding 8.33 SDR per kilogram of gross weight of the goods lost or damaged. Obviously this is a single standard limit, aiming to conform to the limitation amount of all the carriers other than the water carriers, to avoid the complex of the matter about the limitation amount. This amount was calculated by reference to the limit of liability contained in the CMR Convention. Under the Warsaw Convention, the limit is 17 SDR per kilogram, under the CIM Convention it is 16.67 SDR per kilo. No provision is made for a liability limit to be calculated on the basis of the number of packages or other shipping units used, as this is regarded as relevant only in cases involving a sea leg. Whereas the liability of the MTO is limited to an amount not exceeding 2.75 SDR per kilogram if the international multimodal transport includes carriage of goods by sea. Accordingly the non-water limitation amount of the MTO increases by 303% as compared with the water limitation amount of the MTO. However, as compared with the limitation amount of the unimodal transport carriers, the non-water limitation amount of the MTO is lower. It presents over a 200% decrease on the CIM Convention and the Warsaw Convention and equates with the CMR Convention. As the foregoing limits are applicable in the case of concealed damage, the question of a recourse action against the subcontractor would not arise since the MTO alone is liable for concealed damage. It is obvious that the non-water limitation amount is one of the lowest in all the existing conventions on the carriage of the goods except international multimodal transport including the carriage of the goods by sea.

5.4.1.2 The Water Limitation

In the case of multimodal transport with a sea leg, the MT Convention formulation defines limits by weight or per package, at the claimant’s choice. This definition revives the issue of whether a container is a package. The MT Convention follows

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48 Hare, p176.
the Visby and the Hamburg Rules, resolving this issue by stating that the packages with a container constitute the measure of the liability limit per package. However, when the packages are not enumerated separately on the MT document, the container constitutes the package for limitation purposes. The problems experienced with the Hague Rule's limitations are overcome by the two alternative limits. The consignor is encouraged to itemise containerised packages whose value is disproportionately higher than their weight. In fact, if the consignor and the MTO agree, the declared value of goods exceeding the monetary limit calculated under the above formula will substitute for the standard limit.

If the MT contract provides for carriage of the goods by sea or inland waterway, then the MTO's liability, in the case of non-localised loss or damage, is limited to an amount not exceeding 920 SDR package of other shipping unit or 2.75 SDR per kilogram of gross weight of the goods lost or damaged, whichever is higher. As compare with the single standard limit, this is a limit with a dual formulation: a limitation per package and a limitation per kilogram at the option of the claimant, namely, the limitation ceiling is the higher of two alternative. It is enough to judge the water limitation as it stands. Such a limitation account per package represents a 10% increase on the limits of the Hamburg Rules to compensate for inflation since the Hamburg Rules were adopted in 1978. As with the Visby and the Hamburg Rules, the weight formula begins to exceed the package formula between 334 and 335 kilos. Thus, the limitation ceiling of the carrier by sea is increased all the time. On the other hand, the water limitation account per kilogram represents 303% decrease on the CMR Convention, 606% decrease on the CIM Convention and 618% decrease on the Warsaw Convention. Therefore, the carriers by road, railway or air benefit from the compensating method of a dual formulation. The principle that these limits of dual formulae only apply to the multimodal carriage with a sea leg is based

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49Visby Rules, Art. 2(c); Hamburg Rules, Art. 6(2); MT Convention, Art. 18(2).
50Driscoll & Larsen, p236.
on the premise that the sea leg is almost always the major leg.\textsuperscript{51}

In practice different MT documents provide different standards and amount of limitation. For instance, an MTO issued a combined bill of lading in respect of two crates which it had loaded into a container for road, rail and sea transportation from New York to Australia. Upon arrival at destination one of the two crates in the container was discovered missing. Since the combined bill of lading incorporated COGSA and also contained a clause providing that the hidden damage would be regarded to have occurred during the sea leg, the MTO was permitted to rely on the COGSA $500 per package limitation for the disappearance of the crate at some undetermined point during the multimodal transport. In this case the MTO benefited from the combined bill of lading by its lower package limitation. In addition, some combined bills of lading\textsuperscript{52} provide that compensation shall not exceed 2 SDR or US $2.5 per kilo of the gross weight of the goods lost or damaged. Therefore there is only a sole weight limit instead of the package/weight alternative limits set out in the MTO Convention. On the other hand, the limitation amount is rather low, representing a 73\% decrease on the MT Convention.

\textbf{5.4.2 The Network System of Limitation for Localised Damage}

\textbf{5.4.2.1 The Additional Regulations of the Uniform System of Limitation}

As the uniform system of limitation provides for such a low limitation amount, which may be harmful to the interest of the consignor or consignee, the Art. 19 of MT Convention has also adopted a network system limitation as a remedial measure, providing it provides that when the loss of or damage to the goods occurred during one particular leg stage of the multimodal transport, the limit of the MTO's liability

\textsuperscript{51}Ramberg, "The Multimodal Transport Documents", p58.

\textsuperscript{52}For instance, OCL Combined Transport Bill of Lading and FIATA Combined Transport Bill of Lading.
for such loss or damage is determined by reference to the higher limits of liability which are provided by an applicable international convention or mandatory national law. Therefore, if the loss of or damage to the goods can be localised during one particular leg of the multimodal transport, the network system of limitation is used, whereby the limit applicable from the relevant international unimodal convention could be carried over, by the MT Convention, to the original consignor and the MTO. The unimodal carriers will not, in a recourse action by the MTO, normally be faced with anything in excess of the limitation under the unimodal conventions, since that is the most that the MTO would have paid to the original consignor, except upon the application of provisions whereby the MTO is entitled to no limit.

In fact, the uniform system of limitation may be increased by the network system limitation if the cargo plaintiff can identify on which particular unimodal leg the loss of or damage to the goods occurred. The intention of network system of limitation is to substitute for the basic limitation, a higher unimodal ceiling appropriate to the mode of transport used when the loss or damage occurred. In effect, this will benefit the consignor only for non-sea leg portion of the transport. Unless the Convention limitations are increased, the network limitation will not vary the MTO's limitation in respect of a sea-leg, because the Hague, the Visby and the Hamburg Rules do not exceed the minimum ceiling struck by the uniform system of limitation. But the increase could be significant for other modes of transport. Where the sea leg conventions apply, the higher uniform system amounts will apply. Whereas the uniform system of limitation for non-localised damage is either 2.75 SDR per kilo or 8.33 SDR per kilo, the network limitation ceiling for localised damage is 8.33 SDR per kilo for road, 16.67 SDR per kilo for rail, 17 SDR per kilo for air, and when the Montreal Protocol for air transport comes into effect, 18 SDR per kilo. Therefore the difference between the uniform limitation and network limitation could be as much as about 14 SDR per kilo.53

53 Hare, p217.
Chapter 5 The Limitation of the Liability of the Multimodal Transport Operator

The network system of limitation might make up the weakness of the uniform limitation, but the compensations for the loss of or damage to the goods are still restricted by the MT Convention if one particular stage of such loss or damage is not localised. This condition seems unreasonable because as the damage might occur in any stage of the entire voyage, all the carriers who took part in the multimodal transport should bear the relevant liability to pay compensation. Judged by the reasonableness of the limitation of the liability, the relevant specific ratio should be made in accordance with the CIM, CMR and Warsaw Convention. For instance, the limitation of the liability of the carrier by road can adopt the average of the limitation of the liability of the carrier by road and railway, the operations of pick-up and delivery of the goods within 500 miles by air and road can not be regarded as the multimodal transport and its limitation of the liability depends on the Warsaw Convention. Actually this is an interim remedy.

5.4.2.2 Some Legal Problems of the Network System of Limitation

There are some possible legal problems that may arise in connection with the localised damage limitation which are created by the phrase "an applicable international convention or mandatory national law."\(^{54}\) The first one is that the convention or legislation must apply to the MT contract and the MTO. And then the convention or legislation must apply to the leg on which the loss of or damage to the goods occurred. However, the existing unimodal conventions apply only to international unimodal carriage. The third problem arises where countries which enacted the MT Convention have not enacted the appropriate unimodal conventions, such as the CMR or the CIM Convention. As a result, if the loss of or damage to the goods occurs on a road or rail leg of an international multimodal transport, no applicable international convention or mandatory national law provides for a limit, whether higher or lower than the MT limit. In this case, for example, the local law may permit unlimited liability and leave it to the parties to the subcontract relating

\(^{54}\)MT Convention, Art. 19.
Chapter 5 The Limitation of the Liability of the Multimodal Transport Operator

to the carriage of the goods to determine a limit for that contract. Here, irrespective of whether or not the parties to the subcontract agree upon a limit, the test that must be satisfied, for the purposes of network limitation, is that of a higher limit required by convention or law and not merely a higher limit stipulated by the contract between the MTO and the underlying carrier.

5.4.3 The Mixed System of Limitation

A combination of the two systems of limitation appears in the MT Convention, that is Art. 18 provides for a uniform system of limitation while Art. 19 adopts for a network system of limitation. The uniform amount of limitation applies regardless of when and where the loss of or damage to the goods occurred. The advantage of this system is its simplicity but its weakness lies in the fact that, where the place of the loss of or damage to the goods is localised, it is difficult to see why the consignee should be allowed to rely on rules other than the relevant existing conventions on the amount of limitation. It would be rather difficult to prevent the MTO from attempting to exclude his liability if this is allowed under the Hague Rules. For instance, if a uniform ceiling is struck at the low maritime rate, it may cause the MTO's safety standards to decline. In addition, the MTO would gain a windfall profit from recourse against the unimodal carrier who is subject to a higher ceiling. This may be no objection, because it provides incentive to the MTO to pursue recourse against the unimodal carrier and the surplus should be reflected in freight savings. However the distinction between a low MTO ceiling and high unimodal carrier ceiling would confer an artificial competitive advantage on the MTO if he himself were a participating carrier. He would operate under a lower limitation ceiling than the unimodal carriers and his safety standards could afford to decline. In brief, the uniform system of limitation might bring the MT Convention into conflict with the existing unimodal conventions and might lead to an increase in insurance premiums. For these reasons the network system of limitation attempts to assimilate the MTO's limitation with that of the unimodal carrier responsible for the loss of or damage to
the goods.

Under the network system limitation, if it can be proved that the loss of or damage to the goods occurred solely during the course of one particular leg of carriage, the liability of the MTO is determined according to the existing unimodal convention governing the relevant mode. In fact, the network system of limitation can avoid any conflict between the MT Convention and the existing unimodal transport conventions. However, its weakness is obvious that if the MTO is also the unimodal carrier on a non-sea leg portion of the transport, he is unlikely to co-operate with the cargo insurances in identifying himself as the carrier at fault when he can escape the higher unimodal limitation applied through the network system and rely upon the lower concealed damage limitation of uniform system.

Although the MT Convention adopts the mixed system of limitation when the loss of or damage to the goods occurred during one particular stage of the multimodal transport, the principle of the liability for such stage can be still adopted which does not conform with the nature of the MT contract. From the point of view of the legal relationship, the consignor and the MTO are two parties of the MT contract. If the occurrence which caused the loss or damage can be localised, the consignor or consignee will deal with the unimodal transport conventions which have nothing to do with him. Thus it is ambiguous and vague and harmful in both law and practice that the MT contract is restricted by the unimodal transport convention.

5.5 CONCLUSION

At present, there is a great variety of different limits of liability, any of which may be possible contenders if loss of or damage to the goods occurs in the course of the multimodal transport. The ceiling of the MTO's liability is higher under the network system than under the uniform system of liability. The MT Convention establishes
two-tier liability limits: the first tier of liability limits with a dual formulae, the second tier of liability limits with a single standard. Therefore in the case of concealed damage, the liability limits of the MTO applies the Hamburg Rules limits (8.35 SDR per package, 2.5 SDR per kilo) with a 10% increase and the CMR Convention limits (8.33 SDR per kilo) whenever a sea leg is not indicated on the MT contract. Whereas in the case of localised damage, an applicable international convention or mandatory national law would provide a higher limit than the limits set for the concealed damage. Then the higher limit will govern the liability of the MTO. Therefore the MT Convention creates what can be termed a mixed system of limitation. Being a compromise formula, this combination of the single limits and the two alternative conforms to the needs of international trade and transport and the interests of the carriers and the cargo owners. Meanwhile, the MT Convention also adopts the mixed system of limitation. If the loss or damage can be localised as having occurred during a particular stage of the multimodal transport, then any higher unimodal convention or national law limits will apply. They cannot be lower than the Hamburg Rule’s limit with the ten percent inflation increase (the lower of the two alternatives). Owing to the advantages and disadvantages of both uniform and network systems of limitation, the combination of them is employed by the MT Convention so as to take into account the present situation of the existing unimodal transport conventions. Theoretically and economically, the mixed system of limitation of liability per package or unit and per kilo plays a significant role in the development of international trade law, leaving it to the claimant to choose the more profitable of the two, but still many difficulties appear in this mixed system of limitation in both law and practice.
6.1 INTRODUCTION

6.1.1 The Significance of the Multimodal Transport Document

The transport of the container reflects concept of multimodal transport in that the goods might be conveyed on a whole journey which may involve carriage by road and/or rail in addition to carriage by sea.\(^1\) This multimodal transport, where different carriers are involved, might be covered by different transport documents. When more than one document of transport is issued, it is necessary to find out where and when the loss of or damage to the goods has occurred because of the different transport conventions applicable to each document. In practice, the consignee is faced with many evidential difficulties in proving the time and the cause of loss or damage or even in raising doubts as to the existence of such cause. In many instances, the cause remains unknown or is determined by surveyors through conjecture. For the MTO, these difficulties were resolved by inserting a number of clauses in his document.

The MTO, by issuing one documents, might gain the optimum economic benefits of new transport techniques, namely one document might meet the needs of the different transport legs in the multimodal transport. For instance, in the multimodal transport of the containers, the goods might be transhipped directly from one mode of transit

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\(^1\)Hill, p63.
Chapter 6 The Multimodal Transport Document and the Liability of the Multimodal Transport Operator

into another without needing reunpacking, repacking and rechecking, thus simplifying the procedure, saving the time and reducing the expenditures. Therefore it is best for the MTO to issue one document called an MT document whereby he assumes liability for the whole journey instead of issuing several documents. In addition one document, together with one contract, one price and one insurance, is very convenient for the consignor and consignee, satisfying the needs of the different transport legs in the multimodal transport since each multimodal transport operation is completed by fulfilling the clauses of the MT document. It is, just like the traditional bill of lading, very important in the international multimodal transport.

6.1.2 The Essence of the Multimodal Transport Document

The multimodal transport contract means a contract whereby a MTO undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport. Accordingly, when a contract of carriage is concluded which provides for door to door transport and delivery, the modes of transport which are to be involved must be set forth. That is to say that it is the intention of the parties at the time they enter into the contract of carriage which is crucial. If it is impossible to construe, from initial agreement, the parties' intention to use multimodal transport, then the MT Convention would not apply. It would always be a matter of evidence as to what the parties intended. The MT Convention provides that the information to be given in the MT document should include the intended journey route, modes of transport and places of transhipment if known at the time of issuance of the MT document. In the usual situation, information contained in the MT document would meet this requirement, and it would be apparent whether the contract was a multimodal one.

^ankabady, "Multimodal Transport", p121.

3 MT Convention, Art. 3.

4 MT Convention, Art. 8(1).
The essence of the MT document proper is that one carrier, namely the MTO, makes himself responsible for the entire multimodal transport operation. He might subcontract each stage with the actual carriers, but he contracts with the consignor as principal. He is liable, according to the MT document, to the consignor or consignee if the goods are damaged or lost on any of the stages. Although if he is sued for the loss of or damage to the goods caused while the goods are in the custody of another carrier, he should be able to recoup his loss from that other carrier according to the subcontract.

6.2 THE DIFFERENCE BETWEEN THE MULTIMODAL TRANSPORT DOCUMENT AND THE THROUGH BILL OF LADING

6.2.1 The Difference in Mode of Transport

The definitions of multimodal transport and through transport are different. Through transport means the combined transport by the same modes of transport. For instance, where carriage of the goods by sea involves transhipment from Shanghai to Hong Kong by one carrier and from Hong Kong to Sydney by another, this is called a unimodal transport. Originally, a bill of lading was issued to cover each part of the journey. Alternatively, the shipper might have preferred to have a single bill of lading which could be sent to the consignee or his bank. In time, the practice of issuing what is termed a "through bill of lading" emerged. Therefore, the through bill of lading may be defined as a bill of lading involving a series of contracts to carry goods to a final destination by two or more successive ocean carriers. Thus, the through bill of lading is a series of separate contracts of carriage by the ocean carriers independent of one another.

5 Mankabady, "International Shipping Law", p227.
6 Mankabady, "International Shipping Law", p78.
7 Tetley, p927.
Chapter 6 The Multimodal Transport Document and the Liability of the Multimodal Transport Operator

The multimodal transport involves at least two different modes of transport. One earlier draft of the MT Convention (Tokey Rules) strictly restricted the constitution of the multimodal transport, providing that there must be at least two modes of transport for carriage between the two countries, one of which must be carriage of the goods by sea. Obviously such language excludes from the convention tune multimodal transport without a sea leg. However, the MT Convention has no such restriction for the modes of transport under the multimodal transport and applies wherever there are two modes of transport.

6.2.2 The Difference in the Form of the Liability

The carrier that issues a through bill of lading usually acts as principal only whilst the goods are in his actual care and only as agent at all other times. During the latter, his liability is limited to whatever he recovers from his sub-contractor. The form of the liability of the carrier under the through bill of lading is either a single liability system or a network liability system. The former means that each carrier is liable for loss or damage to the goods which occurred in his own leg of transport. Such a system can easily lead to disputes in practice. For instance if there is a controversy on the damage of the goods between the consignor and the carrier who is in charge of the second leg of the transport, the issue will arise whether such carrier and the consignor are parties to a contract. As a consequence, this liability form is currently scarcely used in the through bill of lading. The network liability system means that the person who issues the through bill of lading takes responsibility for the whole voyage, but the compensation for the damage is still handled according to the regulation applicable during the leg in which the damage to the goods occurred. Therefore, each carrier is only responsible for the goods whilst in his possession and during the time that the carrier's own bill of lading applies. The carrier who issues the through bill of lading claims to be only acting as agent when the goods are no

longer in his possession.

However, the MTO issuing the MT document acts as a principal to contract the whole of a multimodal carriage, subject to a published set of terms and conditions, under which he accepts responsibility throughout the carriage, regardless of the level of recourse to subcontractors. The MT Convention adopts the mixed system liability, namely the MTO who issues the MT document is liable for the whole voyage. The claimant can get the compensation for the damage from the MTO. Therefore, the MTO assumes not only responsibility for delivery of the goods at destination but also for all the unimodal carriers and third parties engaged by him for the performance of the whole transport.

6.2.3 The Difference in the Issuance of the Document

There are differences in the issuer of the document, the time and place of the issuing the document, between the through bill of lading and the MT document. In practice, the through bill of lading is usually issued by the ocean carrier who owns the conveyance of transport or his agent. Whereas the MT document is issued by a person who may or may not own the conveyance of transport, but who controls the multimodal transport operation and is liable for the whole carriage, a person such as a non-vessel carrier or an international freight agent. Generally speaking, the through bill of lading is issued after the actual shipment of the cargo in the port of the loading. Whereas the place at which the MTO takes the goods in his charge may include the container freight station (CFS), container yard (CY), the factory or warehouse of the consignor. Furthermore, the MT document is issued by the MTO or his agent after he takes the goods in his charge from the consignor. Therefore, the place of issuing the MT document is not the port of loading and additionally there may be a period between the taking of the goods for shipment to the actual loading.

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9 Dockray, p55.
10 Hill, p43.
6.2.4 The Difference in Application of the Conventions

The through bill of lading is subject to the Hague, Visby or Hamburg Rules. The Hague Rules define the contract of carriage as a contract 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.\(^\text{11}\) Furthermore, the Hague Rules provides that carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. However it is not clear whether the word "discharged" refers to the place of destination, or to the "discharge" at any intermediate port. If the former interpretation is correct, the compulsory system of the Rules will be applicable up to the time the cargo is discharged at that ultimate destination, but if the latter is correct, the Hague Rules will only apply up to the time when the contracting carrier delivers the cargo to the on-carrier.\(^\text{12}\) Where the through bill of lading limits the carrier's liability to the time while the goods are in his possession, the consignor or consignee can only have a claim against the contracting carrier if he can prove that the loss of or damage to the goods has occurred during that part of the transport undertaken by the contracting carrier. If the goods are lost or damaged while they are in the possession of the on-carrier, the consignor or consignee cannot sue him on the basis of the terms of the through bill of lading as there is no contractual relationship between them. However, the consignor or consignee can sue the on-carrier in tort for his negligence in handling the cargo.

As for the MT document, where the loss of or damage to the goods is non-localised it applies the MT Convention. Where the loss of or damage to the goods is localised, the MT document applies a variety of formulae to determine basis of recourse. Inevitably the Hague, Visby or Hamburg Rules are applied at sea and the existing international transport conventions governing international air, road and rail transport are applied when appropriate.

\(^{11}\) Hague Rules, Art. 1(6).
\(^{12}\) Mankabady, "International Shipping Law", p234.
6.3 THE LEGAL EFFECTS OF THE UNIMODAL TRANSPORT DOCUMENT AND THE MULTIMODAL TRANSPORT DOCUMENT

6.3.1 The Legal Effect of the Unimodal Transport Document

In existing international unimodal transport, there are two main kinds of transport documents. The one is consignment note, the other being bill of lading. These two transport documents are considerably different in their contents, forms and especially legal effects.

The consignment note is adopted for international carriage by air, road and rail. The Warsaw Convention provides that every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note." Every consignor has the right to require the carrier to accept the document.13 The air consignment note, which was replaced by the air way bill in Hague protocol in 1955, is evidence of conclusion of the contract for the receipt of the goods and for the conditions of carriage. The air consignment note dose not function as a document of title. This is because the carriage by air is noted for its fast delivery and the cargo often arrives at the destination before the air consignment note is delivered to the consignee by the consignor. Therefore in practice on the air consignment note are the words "non-negotiable." When the goods arrive at the destination, the consignee can deliver the goods by a "Notice of Arrival".

The CMR Convention also requires the contract of carriage by road to be confirmed by the making out of a consignment note,14 which functions as evidence of the making of the contract of carriage, as the conditions of the contract and as the receipt for the goods by the carrier.15 In practice, the consignment note is delivered together

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13 Warsaw Convention, Art. 5(1).
14 CMR Convention, Art.4.
15 CMR Convention, Art.9.
with the goods from the origin to the destination and then to the consignee. Therefore, the consignment note is non-negotiable and has no role as a document of title.

The bill of lading is for international transport by sea. It has experienced a long historical process of evolution. It is a versatile document which performs, in the eyes of the law, three separate but related functions: it is either the contract of carriage, or evidence of the terms of the contract; it is a receipt for the goods shipped; and it is a document of title.\(^{16}\)

In international commerce, the most important function of the bill of lading is to enable the transfer of title to the goods in transit. Moreover, the consignor could, by retaining the original bill of lading, protect himself against the consignee's insolvency and require payment for the goods before their delivery to the consignee. As a result, the bill of lading controls the right to the goods in transit and is required for the release of the goods at destination, where it should be surrendered to the carrier in exchange for the goods.\(^{17}\)

The bill of lading is similar to the MT document in two respects. First, international trade has been improved by navigation. In terms of weight, well over 90% of all goods are carried by sea. Therefore international transport has taken the carriage of goods by sea as the dominant factor. In 1960, the ocean container bill of lading was used. Under this document, the carrier is only responsible for the loss of or damage to the goods which occurred in his leg of transport and he discharges his responsibility when the goods are unloaded from his ship. The particulars regarding the land transport are also included in such a bill of lading thereby rendering the document "multimodal". Second, some of the existing international freight forwarders

\(^{16}\) These functions are included in Hague Rules, Art. 1(6), Art. 3(4) and also in Hamburg Rules, Art.7, Art.16(3).

\(^{17}\)Schmitthoff, p3.
and the non-vessel carriers have extended their business toward the sea and have organised the land-sea or land-sea-land transport by issuing their own combined transport bill of lading. The scope of the business of the combined transport bill of lading is wider than the ocean bill of lading. Since international multimodal transport is an extension from carriage by sea to carriage by land on both ends, the legal effect of the bill of lading has been gradually grafted into the MT document.

6.3.2 The Multimodal Transport Document as the Contract of Carriage or Evidence of Such

The MT document serves as a record of evidence of what is stated in the document. First, the MTO would invariably in any MT document refer to the goods taken in charge for carriage. Second, the MTO would refer to his conditions of carriage either by including the text of such conditions more or less in the MT document or, alternatively, by reference clauses.\(^{18}\) In recent years there has been controversy in circles of shipping and science of law as to whether the transport document constitutes the contract of carriage or merely evidence of such.

The MT Convention provides that the MT document evidences a multimodal transport contract.\(^{19}\) Accordingly, the MT document, like the traditional bill of lading, is in theory the evidence when the consignor books the space for the goods on the carrier's conveyance, long before the goods are actually delivered to the wagon, truck or ship for carriage. The consignor takes in exchange an MT document for a Dock Receipt\(^{20}\) after the goods have been in charge of the MTO. Therefore the MT document is issued after the establishment of the multimodal transport contract. It is merely a document occurred in the process of performing the MT contract. The


\(^{19}\) MT Convention, Art. 1(4).

\(^{20}\) The function of the Dock Receipt is similar to the Mate's Receipt used in the carriage of the goods by sea.
MT contract is reduced into writing when the MT document is issued. There is no normal procedure of acquisition by the two parties of the same view in advance for making a contract, namely the MT document cannot be considered an MT contract since it is not a bilateral contract. It is drawn up by the MTO on the basis of requirements and data provided by the consignor on the one hand and on the basis of his own data on the other hand. The another reason is that the verbal contract of carriage concluded between the consignor and the MTO obviously has terms and conditions which are intended to apply to the MT document. These terms and conditions are laid out in clauses in the MT document form eventually signed by the MTO or agent on his behalf. It is obvious that the MT document cannot itself form the MT contract if only because it contains at the foot only one party’s signature. An essential quality of a written contract is that both parties evidence their consent by signature. Thus the lack of two signatures appears to suggest the MT document is only the evidence of the MT contract.

It is sometimes suggested that the transport document does not only constitute evidence of the contract of carriage but actually represents the contract itself. In practice, it depends on the factual situation. The MT document can actually comprise the contract of carriage in laws under certain circumstances. Where the MT document has been transferred by endorsement to a third party, its contents cannot be challenged. Such a third party may well be unaware of any terms agreed between the consignor and the MTO. As between the MTO and the holder of the document, the MT document, after it has been negotiated, will in fact represent the MT contract even though, as between the MTO and original consignor it would have been mere evidence of the MT contract. As a result, the possession of a negotiable MT document may give independent rights to person other than the MTO's original

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6.3.3 The Multimodal Transport Document as Prima Facie Evidence or Conclusive Evidence

Although being regarded as a receipt for the goods, the legal effects of the MT document are different according to the identity of the same. The MT document has evidentiary value in two important respects. First, the information in the document constitutes prima facie evidence of the taking in charge by the MTO of the goods as described therein. Therefore in the hands of the consignor, the statements in the MT document are prima facie evidence of the receipt of the goods as described. It is however, open to the MTO to rebut the argument against him if the particulars in the document, such as quantity and condition of the goods furnished by the consignor, is at variance with the facts. For instance, if the MTO can show that the goods were never carried, he can escape liability in respect of them. Secondly, under the MT Convention, proof to the contrary by the MTO is not admissible if the MT document is issued in negotiable form and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein. An endorsee of the MT document is presumed to have no knowledge of the goods other than that obtainable from the MT document. In such a case, the MT document should be regarded as the conclusive evidence. No evidence may be brought to contradict the MT document statements. In short, the details set out in the MT document are prima facie evidence that the goods matched those particulars. The MTO can refute such presumption and the burden of proof lies on him. However, this presumption cannot be rebutted where a negotiable MT document has reached the hands of a third party acting in good faith. In that case, the information contained in the MT document will be binding on the MTO and will be conclusive evidence.

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24 MT Convention, Art. 10(a).
25 MT Convention, Art. 10(b).
6.3.4 The Multimodal Transport Document as the Document of Title

A document of title is a document evidencing ownership of goods described in it, or the right to their possession. This comprehends any document, including an MT document, used in the ordinary course of overseas trade as proof of the possession of goods. Where goods are sold on any trade shipment terms, the delivery of the MT document, together with the commercial invoice and sometimes the policy of insurance, normally passes the ownership of the goods to the consignee. Thus the MT document acts as a document of title, enabling the holder of the document to transfer the title to the goods in transit.26 Thus it is generally assumed that the MT document controls the right to the goods in transit and is required for the release of the goods at destination to the MT document holder. It like the "key to a warehouse" gives the consignee the right to collect the goods at the destination. Accordingly in a sense, the MT document could be said to represent the goods themself.27

The MT document acts as a document of title to the goods as far as the MTO is concerned. The MTO is obliged and entitled to deliver the goods to the holder of the MT document, who is entitled to possession. Delivery in good faith to the holder of the MT document discharges the MTO of all liability for the goods. The MTO expressly undertakes to deliver the goods only to the holder of at least one original document upon its surrender.28 Moreover, the MTO is entitled to withhold delivery of the goods from their rightful owner until the MT document is produced. Delivery of the goods to a person who has not produced the MT document is at the MTO’s own risk, and he is liable to the true owner of the goods if the person to whom delivery is made does not have title to the goods.

In practice, it is not always possible for the MTO to insist on production of the MT document.

The Multimodal Transport Document and the Liability of the Multimodal Transport Operator

document by the consignee of the goods before delivery is made. It is often the case that the consignee is not yet in possession of the transport document when the goods arrive at the destination. For example, delays in transfer of the document occur where it is held as security by a bank for an advance made to one of the parties, or a short voyage may be completed before the paper transactions which accompany it, or the document may simply be delayed in the mail. In these circumstances, the MTO often delivers the goods to the consignee who claims title to them in return for the giving of security against possible claims.

Transfer of the MT document to the consignee or endorsee effects transfer of the right and liabilities in the MT document. The ultimate transferee can stand in the shoes of the consignor shipper and claim the goods. Any terms of the contract of carriage between the consignor shipper and the MTO which are not contained in the MT document do not bind the consignee or endorsee on transfer. Delivery to someone without the MT document can, in certain cases, amount to the tort of conversion even if he is the named consignee or the true owner. If the consignee has pledged the MT document to a bank as security for a loan, the pledgee does not pass the ownership of the goods to the bank. However, if the MTO delivered the goods to the consignee without production of the MT document, the bank could sue him in conversion because a pledge has sufficient title to bring such an action.

Nevertheless, the crucial question is whether the MT document transfers to the consignee the right to possession on discharge since the MT contract is originally concluded by the consignor and the MTO. In practice most combined transport documents include the consignee in the definition of the word "Merchant", presumably on the basis that this would give the consignee a possessory interest in the goods and contractual locus standi against the carrier. Thus, the P&O Containers bill of lading reads, that "Merchant" includes the shipper, Holder, Consignee, Receiver of the Goods, any Person owing or entitled to the possession of the goods or of this Bill of Lading, any person having a present or future interest in the goods.
and anyone acting on behalf of any such person.\textsuperscript{29} Moreover, "Holder" means any person for the time being in possession of this Bill of lading to whom the property in the goods has passed on or by reason of the consignment of goods or the endorsement of this Bill of Lading or otherwise.\textsuperscript{30}

Furthermore, the Negotiable FIATA Combined Transport Bill of Lading boldly proclaims itself to be a document of title; clause 3.1 of the document reads: 'by accepting this Bill of Lading the Merchant and his transferees agree with the Freight-Forwarders that, unless it is marked "non-negotiable", it shall constitute title to the goods and the holder, by endorsement of this Bill of Lading, shall be entitled to receive or to transfer the goods herein mentioned'. The aim of these clauses is clearly to give combined transport documents the same legal effects as shipped on board bill of lading.

\textbf{6.4 THE DIFFERENCE BETWEEN THE NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT AND THE NON-NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT}

\textbf{6.4.1 The Nature of the Negotiable and the Non-negotiable Multimodal Transport Document}

The MT Convention provides that the MT document is signed by the MTO or by a person on his behalf and may be in either negotiable or non-negotiable form at the option of the consignor. This document is to be issued when the MTO takes charge of the goods.\textsuperscript{31} The signature on the document may be in handwriting, printed in

\textsuperscript{29} for similar clause, see Atlantic Container Liner Ltd, cl1 1 and 2; COMMBICONBILL, Clause 2; COMBIDOC, Claus 2.

\textsuperscript{30} Bills of Lading Act 1855, Sec.1. OCL Combined Transport Bill of Lading, Clause 1.

\textsuperscript{31} MT Convention, Art. 1.2.
facsimile, perforated, stamped, in symbols or by any other mechanical or electronic means provided that it is not inconsistent with the law of the country where it is issued. The legal effects of negotiable and non-negotiable MT documents are distinct.\(^{32}\) Where a negotiable MT document is issued, delivery of the goods is made against its production and the MTO is discharged from his obligation by delivering the goods to the person holding it. The negotiable MT document shall be transferable by endorsement if made out to "order" but endorsement is not required where the document is made out to "bearer". Accordingly the negotiable MT document is provided to enable the document to be used like the bill of lading in documentary credit arrangements.\(^{33}\) Where the non-negotiable MT document is issued, the MTO is discharged from his obligation to deliver when he makes such delivery to the consignee named therein.

6.4.2 The Conflict between the Negotiable Multimodal Transport Document and the Non-negotiable Air Waybill

In the eyes of law, the ocean bill of lading is a document of title. However, the transport documents used for the carriage of the goods by air, rail and road are always non-negotiable documents.\(^{34}\) While goods carried by sea frequently may change ownership in transit, this is rather unusual with other modes of transport. Therefore, a bill of lading is not used for such transport by one mode which does not involve carriage of the goods by sea. For carriage of goods by air, rail and road, transport documents are used whereby the carrier undertakes to deliver the goods not to the holder of an original transport document but to a named person. This, which may be called "waybill system", does not enable parties to a contract of sale to transfer title to the goods by the mere transfer of the transport document. Waybills,

\(^{32}\) MT Convention, Art. 6.7.

\(^{33}\) Hill, p72.

\(^{34}\) In practice, the non-negotiable air waybill is used although the Hague protocol in 1955 did not prevent the issue of a negotiable air waybill.
in this sense, are non-negotiable transport documents. Accordingly, legal difficulties arise when containers are carried partly by sea and partly by air because the bill of lading is a document of title but the air consignment note is not. The combination of these two documents does not give the has no character of a document of title. In such case, the single MT document can replace the unimodal transport documents so as to facilitate the multimodal transport operation.

However in practice, there are still some legal difficulties. The unimodal transport carrier is very much attached to the document which is quite familiar to him. For instance, the Warsaw Convention provides that if an air carrier takes the goods in his charge without an air waybill having been issued, he is then no longer entitled to avail himself of the limitation of liability. No carrier ever likes taking this risk. Therefore, the air carrier will probably not refrain from issuing the usual air waybill on the sole ground that the goods are already accompanied by the MT document. In any event, where the air carrier takes into his charge the goods which are carried under the MT contract, his relationship with the MTO may be regulated by the Warsaw Convention. This convention will therefore govern a recourse action by the MTO in case of damage manifestly imputable to the air carrier. As a result, two documents circulating simultaneously may create confusion. An MT document can be issued in the negotiable form and its beneficiary may possibly change during the period of transport.

On the contrary, the air waybill is in practice never issued in negotiable form and its beneficiary always remains the same. Under such circumstances, where the carriage of goods by air is the last leg of the multimodal transport, two different consignees may be legally entitled under the different instruments to take delivery of the goods, the consignee of the way bill and the endorsee of the negotiable MT document.

36Racine, p230.
37Warsaw Convention, Art. 9.
Evidently it would be the MTO's responsibility to ensure that appropriate arrangements are made so as to avoid such a situation, but it may happen because of his failure to fulfil this duty.\(^{38}\) Therefore, where the air leg forms such an important part of the multimodal transport movement as to render the movement of short duration, the consignor may, in practice, decide that it is not in his best interest to require the MT document to be in negotiable form.\(^{39}\) In addition, a further reason for discontinuing the practice of issuing negotiable transport documents for multimodal transport follows from the ICC's Uniform Customs and Practice for Documentary Credits (UCP) of 1983 which stipulates that banks may accept any transport document unless the credit instructions stipulate otherwise. As a result, negotiability of the MT document is particularly objectionable to air carriers who do not want the burden of having to hold goods while the negotiable MT document is processed through the bank.\(^{40}\) If the negotiable MT document is issued, and one of the multimodal legs is an air leg, then the carrier by air either accepts the inconvenience or he might decline the cargo.\(^{41}\)

### 6.5 THE RIGHT TO SUIT UNDER THE MULTIMODAL TRANSPORT DOCUMENT

The basic rule of privity of contact doctrine\(^{42}\) states that only a party to a contract may sue, or be sued on it. In principle, a third party can neither sue nor be sued, however closely connected with the contract they may be. Third parties are also prevented from benefiting directly from any exemption clauses or defences in the

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\(^{38}\)Racine, p231.

\(^{39}\)Fitzgerald, "The Implications", p60.

\(^{40}\)Driscoll & Larsen, p224.

\(^{41}\)Driscoll & Larsen, p225.

\(^{42}\)The privity of contact doctrine, which is a doctrine pretty well peculiar to English common law systems.
The basic rule of privity of contract is that only the parties to a contract may sue on it. The Rule applies to the MT contract. In form, it is the consignor who contracts with the MTO, and when he does, he is therefore competent to sue for breach of contract. In reality, however, the consignor who has contracted with the MTO is usually not the person who suffers the loss when the goods are damaged during carriage and he thus has no claim against the MTO.

The following will discuss that who may take suit or claim depends on numerous factors, including whether the claim is taken in contract or in tort, whether the MT contract is governed by the MT document, and especially the conditions of the sale between the seller and buyer.

6.5.1 The Consignee May Claim against the Multimodal Transport Operator

In international sales of transactions, the main body of the contract of sale regulates the right and responsibilities of the two parties by a variety of clauses. The all important price clause will most often contain trade terms which are usually expressed by way of several English abbreviated letters. These trade terms have particular implications as regarding the division of the responsibilities, risks and payment between the seller and the buyer.

Under "Carriage Paid To" (CPT) or "Carriage and Insurance Paid to" (CIP) trade terms, it is seller’s duty to arrange transportation and the buyer agrees to pay not against delivery of the goods at the destination, but against tender of the MT document. Therefore the responsibility for making the MT contract falls upon the

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43 Tetley, p154.
44 Tetley, p183.
seller. In this case, as the consignor/seller is an original party to the MT contract, he may sue on the contract itself if the loss of or damage to the goods is occasioned through the MTO's fault. However, while the consignor can retain title to the goods until payment is made in exchange for the MT document, the consignee bears the risk from the time when the goods are taken over by the MTO. Thus, the consignor in a CPT or CIP sale has no interest in claiming against the MTO and cannot recover substantial damages, since he has not suffered loss by the breach of contract. Assuming the goods were in apparent good order and condition when they were handed over to the MTO, the consignee who bears the risk of loss vis-à-vis the consignor will have to take up the documents and pay for the goods, and will have no recourse against the consignor where the goods have been damaged or destroyed in transit. The consignor will either have already been paid for the goods, or he will be entitled to payment from the consignee. The consignee may, therefore, wish to sue the MTO. However, he is not party to any express MT contract and, at the common law, all rights under the contract of carriage remain with the consignor. However, according to the terms and conditions provided by some combined transport documents, the consignor includes the consignee, the holder of the combined transport document, the receiver and the owner of the goods. In such a case, the consignee in fact is an express party to the MT contract and also one of the parties to the MT document. The consignee in this situation is therefore entitled to sue the MTO for loss of or damage to the goods on the contract in the MT document. The remedy so available to the consignee is adequate and fair to both parties. There is no need for any parallel or alternative remedy in tort for negligence, in that all rights in respect of the contract contained in the MT

46 For detail see INCOTERMS 1990 (ICC PUBLICATION 460).
47 Tetley, p468.
50 Todd, p273.
document continue in the original consignor or owner, and it is expedient that such rights should pass with the property. Thus much of the value of the MT document lies in the contractual actions it gives the successive holders against the MTO.

6.5.2 The Multimodal Transport Operator May Claim Against the Consignee

Conversely, the MTO also stands vis a vis the consignee/buyer or eventual receiver of the cargo under the terms of the MT document and may sue for outstanding freight or demurrage. Additionally, the MTO would not willingly carry cargo if he thought that the exemption clauses in the MT document would not protect him. For instance, in the case of an FCA sale contract, the arrangements for the carriage of the goods are left to the consignee/buyer, the consignor/seller's duty being simply to send the goods to the MTO in his factory or warehouse, container yard or container freight station. Upon this being accomplished, delivery is complete and the risk of loss in the goods is then transferred to the buyer. It is the buyer's duty to provide means of transport at the appointed place, and to send notice of its arrival to the seller in order that the seller may be in a position to fulfil his part of the contract. The buyer is thus at once a party to the contract of sale and a party to the contract of carriage contained in the MT document. In such a case, the buyer wears two hats, he is not only a consignor but also a consignee. The seller, on the other hand, while clearly a party to the contract of sale, would appear not to be a party to the contract of carriage, that contract being concluded between the MTO and the buyer.

Under an FCA (Free Carrier) trade term, the buyer is in practice a contractual consignor, whereas the seller is an actual consignor. Similarly, there are two consignors in the multimodal transport. They are two different legal entities. As the MT Convention provides that "consignor" means any person by whom or in whose name or on whose behalf a MT contract has been concluded with the MTO, or any person by whom or in whose name or on whose behalf the goods are actually
delivered to the MTO in relation to the MT contract. Consequently, the only thing the seller can do with the MTO is to deliver the goods to him. There is no contractual link between them. Being a contractual consignor who concludes the MT contract with the MTO, the consignee/buyer bears the risk after the goods are delivered to the MTO and has claim against the MTO when the goods are damaged during carriage. However, the MTO might actually want the seller to be bound by the contract of carriage contained in the MT document so as to take advantage of exclusion clauses or limitation clauses contained therein. Although the buyer was contractor, the seller was party to an implied contract of carriage with the MTO, even though he didn’t expressly make the contract of carriage. The reason adopted was that the buyer, the seller and the MTO were all parties in a joint venture. Therefore the seller was bound by the exemption clause despite not being an express party to the MT contract. The reason is that the contract contained in the document covers the whole of the MT transport operation, and where under an FCA shipment trade term, the seller must need take part in these. The consignor/buyer concludes the contract partly as the agent for the seller.

6.5.3 The Insurer May be Subrogated to Claim against the Multimodal Transport Operator

Where the insurer pays for a loss, either of the whole or of any apportionable part of the subject-matter insured, he becomes entitled to take over the interests of the insured in whatever may remain of the subject-matter so paid for and is subrogated to all the right and remedies of insured in and in respect of that subject-matter as

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51 MT Convention, Art. 1(5).
52 Todd, p166.
53 Under INCOTERMS 1990, FCA based on the same main principle as FOB, is designed to meet the requirement of the multimodal transport.
from the time of the casualty causing the loss.\textsuperscript{55} The right of subrogation is a necessary incident of a contract of indemnity insurance. It operates on every right and remedy by which the loss insured against can be diminished. Accordingly, as in the multimodal transport the consignee or holder of the MT document can claim against the MTO, the cargo insurer might claim against the MTO for the loss of or damage to the goods. The insurer might sue the MTO in his own name or in the insured’s name, after having been subrogated and after having paid the insured’s claim.\textsuperscript{56} Where an insured brings an action against both the MTO, on the MT contract, and the insurer, on the contract of the indemnity, and both the MTO and insurer are found liable, the insurer is also subrogated to the insured’s rights and can thereupon crossclaim against the MTO.\textsuperscript{57}

Every person who is interested in a transport adventure has an insurable interest. The normal relationship of the consignor to the goods is that of the person who suffers loss if the goods are lost or damaged. When responsibility for loss or damage is transferred to the consignee, the consignor’s relationship to the goods changes as he is no longer responsible for their loss or damage. In other words, the consignor loses his insurable interest and the consignee’s insurable interest attaches. Under a CPT (Carriage Paid To) or FCA (Free Carrier) trade terms, the buyer/consignee bears the risk of destruction to the goods and normally seeks to protect himself against his loss or damage by way of insurance. The insurance is thus effected by the buyer/consignee to cover his interest only. The insurance policy does not cover the interest of the seller/consignor. Therefore if the goods are damaged or lost the insurer might be subrogated to the right of the consignee to claim against the MTO.

Under a CIP contract of sale, it is expressly the duty of the seller/consignor to enter

\textsuperscript{55}Maritime Insurance Act 1906, Art. 19.


\textsuperscript{57}Blasser Bros. v. 2d 1010, Northern Pan-Am., 628F. 2d 376, 1982 AMC 84 (5th Cir. 1980).
into the contract of insurance with the insurer and the insurance policy is one of the
documents which he must send to the buyer/consignee in order to fulfil his
contractual obligation. However, the consignor has an insurable interest in the goods
until the documents are accepted by the consignee. Therefore the insurer may take
suit but must be properly subrogated to the rights of their assured who, for his part,
must be the party who suffered the loss and who had a valid claim against the MTO.
In contrast the insurer subrogated to the rights of the consignor could not take suit
against the MTO because the consignor did not have an interest.

6.6 CONCLUSION

Containerisation has created new opportunities for the MTO to diversify his activities
by offering a door to door service for container movement. A distinction must be
drawn between the MTO who assumes responsibility for the complete movement as
a principal, a responsibility usually defined by the issue of the MT document, and the
carrier who engages in the through transport. The latter assumes responsibility only
during the period when goods are in his actual custody and refers the consignor or
consignee to his sub-contractors for recourse in any other case.

According to the MT Convention, the MT document can be theoretically issued as
a negotiable transport document and can probably continue to exist in that form for
quite some time. However in practice, the legal difficulties might arise because of the
other unimodal transport document, especially the air waybill which is virtually never
negotiable. Consequently, if the air leg is one of the multimodal transport, the
consignor might require the MTO to issue the MT document in non-negotiable form.
Otherwise, to whom the MTO should deliver the goods, the endorse who holds the
negotiable MT document or the consignee who holds the non-negotiable air waybill.
CHAPTER 7

THE LIABILITY FOR DELAY OF THE MULTIMODAL TRANSPORT OPERATOR

7.1 INTRODUCTION

7.1.1 The Difference between Delay and Loss or Damage

There are significant differences between loss, damage and delay. Currently there is a tendency that delay is dealt with together with loss or damage. For instance the MT Convention provides that the MTO is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge.\(^1\) All three are the effects of particular behaviour by the MTO. If the goods are lost outright, damaged in transit or delivered late, the consignee will lose money and therefore the MTO will be required to make compensation. In practice, loss of or damage to the goods may be total or partial, but will certainly be a permanent deprivation of the goods to that extent. Loss or damage in this sense belong to the class of direct and physical loss as well as economic loss. Where the loss is only economic and arises from the temporary deprivation of the goods, the loss is often termed "delay".\(^2\)

Delay is a concept of time. In law it can be used to connote the postponement of performance of some act or step beyond the point of time when the act or step should

\(^1\)MT Convention, Art. 16(1).
have been performed. Accordingly, the delay is not the loss itself, but it might cause different types of losses. In the first place it might cause physical loss, such as deterioration or wasting of the goods. Secondly it also might cause all kinds of indirect losses or economic losses, such as loss suffered because of a falling market or because the goods delayed cannot be used for an exhibition or available for further sale.

7.1.2 Delay as A Primary or A Secondary Cause of Loss

Delay might lead to either physical or economic loss, or both. If the carry by sea sails at a slower speed and fails to arrive at the port of destination, the delay might cause physical loss of cargo due to rotting, or might cause economic loss such as a fall in market value. When delay occurs, it might be either the primary or the secondary cause of the ensuring loss. Delay is the primary cause when, as in the previous situation, it is the principle reason for the loss. As a cause if loss, delay has its own rules of liability just as unseaworthiness or deviation, two other ways of breaching the carriage contract that can result in loss. In this situation, the delay is the effect of another primary cause which determine the liability of the carrier for that loss. For instance, under the Hague Rules, if the carrier exercises due diligence and yet the ship still needs repairs during a voyage so that a delay appears, the carrier is not liable for that delay because the unseaworthiness is excusable.

As a second cause, delay is subsumed under the regime of law governing the primary cause. For instance, take the following, scenario. A ship arrives in the port of loading 5 days late because of sailing at a slower speed. Then a strike of dock workers lasting 10 days delays the carrier in loading the cargo. In the following transit, 5 days were added to the length of the voyage by a deviation to pick up other cargo. Upon

\[\text{Granado & Kindred, p19.}\]
\[\text{Granado & Kindred, p24.}\]
\[\text{Granado & Kindred, p24.}\]
leaving the port in which the carrier picked up these goods, the ship met bad weather which delayed the voyage by a further 5 days. Finally the ship arrived in the port of discharging 25 days late. As a result, some cargo had started to deteriorate. Resales of other cargo had been lost and on other resales the consignees had suffered heavy penalties. In this example, except for the negligent lateness in arriving at the port of loading being considered as a primary cause of loss, the delays caused by the strike, the deviation and the bad weather might be deemed as a secondary cause of loss. The liability of the carrier to excuse himself for a delay depends on the cause of the delay. Here the difference between delay as a primary cause of loss and delay as a secondary cause of loss is very important. Thus all these delays were instrumental in producing the direct physical and indirect economic losses. However, among them, the strike and bad weather can be excusable, while the slow speed and the deviation cannot be excusable.

7.2 THE CHARACTERISTICS OF THE LIABILITY FOR DELAY IN MULTIMODAL TRANSPORT

7.2.1 The Meaning of Delay in Delivery in Multimodal Transport

It is very difficult to localize the delay in delivery in practice because of different modes involved in the multimodal transport. Normally there are three legs, namely two land legs and one sea leg, used in the door to door multimodal transport of containers. Suppose a delay of six days occurs on the first leg in a multimodal transport segmented into three stages, but also that the carriage under the two last legs is performed so rapidly that the original delay is neutralised through a net profit of three day’s time under each leg. In such a case, the final result of the multimodal transport as a whole, in the relationship between the MTO and the consignee, will be that the goods arrive in due time at the final place of destination. Therefore, in so far as the consignee in relation to the MT contract is concerned, there is no damage
caused by delay. However, there is a delay in the sub-contractual relationship between the MTO and the first sub-carrier, which relationship is completely covered by the contract of sub-carriage between those two parties. It has nothing to do with the consignee.

Nevertheless, it does seem appropriate, in the above example, that the time to be considered in connection with delay should relate to the duration of the entire multimodal operation and not to the duration of carriage or of storage by a sub-contractor of the MTO. This leads to an important consequence, when it comes to deciding under what part of the whole multimodal transport a certain delay occurred. In principle, the loss of or damage to the goods can easily be pinned down as to time and whereabouts. All rules of this kind are focused on the goods themselves and it usually can be shown at what time and place the goods were when the damage occurred. However, some difficulties might appear when the event causing damage happened at one place and time but the effect of this event was realised only at a later stage of events.

According to the MT Convention, the MTO's liability for delay is appropriately not focused on the goods but on the contractual time-limit, or a time otherwise determined by what is reasonable in the circumstances to permit a diligent MTO to perform his contract. Additionally when this time-limit is exceeded and thus a legally relevant delay occurs, the excess can be said to have been caused by this or that event.

7.2.2 The Doctrine of Causation Used for Localising Delay in Delivery in Multimodal Transport

Examining a door to door multimodal transport segmented into three stages, if a delay in delivery occurs, the question of attributing the delay to a particular segment

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6MT Convention, Art. 16(2).
Chapter 7 The Liability for Delay of the Multimodal Transport Operator

of the multimodal transport operation would be resolved based on the doctrine of causation. This can be illustrated by a couple of examples of delay in multimodal transport.7

The first example is that the goods have arrived at the destination late by ten days. It is true that half the delay is attributed to the first stage and the other half to the third stage of the voyage. The causes being independent of each other and each causing half of the damage. Naturally, other proportions might appear more appropriate. If the total delay of ten days is considered to be the result of concurrent causes, no part of the damage capable of being exclusively attributed to the first or to the third stage of the voyage, there exists the legal method of apportioning the damage, where both the first actual carrier and the third actual carrier may be blamed without discrimination, sharing 50% of the damages each. But it is also possible that the first delay of five days meant that the goods arrived too late for the third leg under the existing time table and thus was delayed by a further five days. In such a case, the total delay of ten days can be said to have been caused during the first leg, and the further five days delay on the third leg may be looked upon as a consequence only of the delay on the first leg. Accordingly, the MTO bears financial responsibility to the consignee for the delay in delivery and then he can recoup for this loss from the first subcarrier.

Another example is more complicated. Assume that ten days delay has occurred on each of the first and second stages of the voyage, but the MTO, in accordance with his options under the MT document, has used another method or route of transport, e.g. air transportation, for the third leg and succeeded in reducing the total delay by half resulting in a delivery late by ten days. The question arises, on which stage of the multimodal transport this delay of ten days occurred. It is perhaps the most reasonable solution to apportion the gain of time in this way: five days to be

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attributed to the first leg and five days to the second.

A last example illustrates another difficulty when attributing a delay to a specific stage of the multimodal transport operation. Assume that only one whole day's delay is considered legally relevant. Assume also that no delay occurred on any leg if looked upon in isolation. But if the slight delay of half a day on the first leg is added to the same slight delay on the third leg, the final result will be one full day's delay. Thus it is true that a relevant delay occurs. In this case, the MTO is liable for one day's delay in delivery, but the question arises, from whom may he recoup his loss. There are two answers to this question. The first one is that the final delay is to be considered as occurring during the last stage of the transport, as the second delay of half a day is necessary in order to turn an irrelevant delay into a relevant delay. Thus the MTO might recoup from the last actual carrier for one day's delay in delivery. The other answer is that both the delays of half a day together create the relevant delay. As a result, the damages resulting from one day's delay might be apportioned 50-50 between the first and the third stage of the voyage. From the above examples, it can be realised that subtle arguments may be required in order to localise the relevant delay.

7.3 THE TWO POSSIBILITIES TO CONSTITUTE DELAY IN DELIVERY IN MULTIMODAL TRANSPORT

The MT Convention provides that the MTO is liable for loss resulting from delay in delivery\textsuperscript{8} and then defines what is to constitute delay in delivery. There are two possibilities provided for.

\textsuperscript{8}MT Convention, Art. 16(1).
7.3.1 Delay in Delivery in the Case of an Agreed Time-limit

The Article. 16(2) of the MT Convention provides that there is delay in delivery if parties of the MT contract have expressly agreed upon a time for delivery and the goods are not delivered within that time. In theory, the parties of the MT contract should specifically agree to a time for delivery. However, any presumption of agreement is theoretical only. In practice, it is unreal to suppose that the MTO and the consignor will solemnly agree to a period for delivery and then insert that agreement into the MT contract. A far more likely result is that the MTO would insert a new standard printed clause into the various standard conditions of the MT document, which clause will state that unless a shorter period has been inserted upon the face of the MT document, the agreed period for delivery is to be 6 months or 1 year after taking over the goods from the consignor. As a result, the effect of the clause would be to free the MTO from liability for delay in all but the most extreme circumstances. Suppose that a perishable cargo is physically damaged as a result of the fact that a carriage which normally takes two weeks takes two months. If the standard clause in the MT document lays down a six months delivery period, the MTO can argue that his only obligation is to be delivered within 6 months. If the MTO is not therefore liable for any physical damage caused by the passage of any less period, the result would be extremely unattractive to consignors. Therefore, the consignor or consignee would look for ways of avoiding this result.

There are two possible legal approaches. The first is to adopt the approach that the standard term should be ignored or overridden on the ground that it conflicts with the basic adventure contemplated by the parties, namely the carriage of a perishable cargo. The MTO could attempt to preclude this argument by simply having this delivery period provision stamped on the face of the MT document rather than having

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9MT Convention, Art. 16(2).
it set out on the reverse as a standard clause. The second solution is to confine loss resulting from delay in delivery to purely financial loss, such as falling markets or loss of resale contracts. In other words, "loss resulting from loss of the goods", "loss resulting from damage to the goods" and "loss resulting from delay in delivery" might be construed as mutually exclusive categories of loss, so that the Art. 16(2) of MT Convention only applies to the last category of loss. This might have one odd side effect. If the MTO and the consignor make a particular agreement as to the delivery period for a perishable cargo, based perhaps upon the consignor’s representation as to what the carriage life of the perishable cargo was, the MTO could not rely upon the delivery period agreement in itself as a defence to a claim where the cargo had in fact deteriorated, even though carried and delivered within the agreed period. This side effect is perhaps more of a theoretical anomaly rather than a practical problem.11 Of course, another practical approach is for the consignor to negotiate a specific term as to date for determining delay.

7.3.2 Delay in Delivery in the Case of Non-Agreed Time-Limit

According to the Article. 16(2) of the MT Convention, if there is no expressly agreed time-limit, there is delay if the goods are not delivered within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. Here three questions might arise.

The first question is whether the "circumstance of the case" are the circumstance of the actual voyage or the circumstance of a notional reasonable voyage. For example, suppose the multimodal transport has been performed in three legs, the first and the third being road legs, the second a sea leg. The whole carriage which in the usual course of events would be completed by a diligent MTO in four weeks. A stevedore strike occurs while the vessel is loading at the port of shipment, so that the goods arrival at the place of destination is delayed by two weeks. If the circumstances of

11Pollock, p2.
the actual case are to be considered, then clearly there has been no delay in delivery because of the occurrence of the strike being wholly beyond the control of the MTO. If, however, it is a notional voyage which is to be considered, then four weeks was the time which it would be reasonable to require for delivery, and the occurrence of the strike on the actual voyage would be irrelevant. While the delivery of the goods would have been delayed, the MTO would not be held liable for such delay since the strike would not be his fault.

The second question involves the definition of "reasonable time". Whenever the timing of the MT contract is not fixed by the parties, the MTO is bound to take measures to ensure that the goods are delivered to the consignee within a reasonable time. In other words, when time is not of the essence of the MT contract, the MTO is responsible to carry the goods with reasonable dispatch. Reasonable time for the performance of acts under a contract might be defined as such a period of time as suffices for their performance if the one whose duty it is to perform uses such diligence in the performance as a person of ordinary diligence and prudence would use under like circumstances. Assume the MTO should have taken about 30 days to complete the whole voyage among which 20 days is for the second sea leg, five days for the first road leg and five days for the third road leg. On the basis of comparison with other ship's performance, the fact that the MTO took 40 days to do so amounts to approximately 25 days, which would be unreasonable for a person of ordinary diligence. Thus the condition of reasonable time has invariably held to mean that the party upon whom is the incumbent duty fulfils his obligation, not withstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

The third question concerns the meaning of "a diligent multimodal transport operator". Here it is not clear whether this means that he is personally diligent or that he is not only personally diligent but is blessed with diligent servants and agents. Moreover, there are some different constructions on "a diligent multimodal transport
Chapter 7 The Liability for Delay of the Multimodal Transport Operator

operator". Once the delay in delivery occurs, whether the MTO is diligent or not might be judged by the actual situations. For instance, where delay in delivery was caused by harmful weather which effected the loading and unloading of the goods, although the MTO is very diligent, he will be unable to do what he wants very much to do. It is unclear whether the MTO will be liable in such a situation.

7.3.3 The Disposal of A Delay in Delivery

There are two ways which might be adopted by the consignee for dealing with a delay in delivery where goods are actually tendered. First, the consignee might accept the cargo and then claim for compensation for damages caused by the stoppage of work, production and business, a falling market and idleness of funds. Secondly, under the MT Convention, the MTO’s failure to effect delivery within 90 consecutive days following the date of delivery agreed expressly in the MT document or, where no such agreement, failure to effect delivery within 90 consecutive days after the time it would be reasonable to allow for diligent completion of the MTO, will give rise to the claimant’s right to treat the goods as lost. In such case, where delivery is tendered after such date, the consignee might reject the cargo and claim for the whole indemnification. In reality, of course, they have not actually been lost, but are sitting safe and sound in the holds of a delayed vessel. Therefore a problem arises concerning the ownership of the goods. It seems manifestly unjust that the consignee could elect to treat the goods as lost, collect damages on the basis of their full value and then lay claim to the goods. The possible solution for this matter is that the treating of the goods as lost results in a transfer of title from the consignee to the MTO by operation of law. In that case the MTO, whether he likes it or not, could become the owner of the goods.13

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12 MT Convention, Art. 16 (3).
13 Pollock, p5.
7.4 THE DIFFERENT COMPENSATION FOR DELAY IN DELIVERY BETWEEN THE MULTIMODAL TRANSPORT AND THE UNIMODAL TRANSPORT

Liability for delay is difficult to regulate for exhaustively under international conventions. Shortsightedly, delay has not generally been considered of major importance in the maritime law relating to the carriage of goods by sea, particularly in carriage covered by the bill of lading. Thus, the Hague Rules do not expressly refer to the concept of delay, nor do the Visby Rules, so that the general law applies as regards liability in principle.14 Traditionally delay has been dealt with only as a subsidiary topic, related to some other major concern such as loss or damage to the goods, or deviation by the ship.15 It is true that most existing international transport conventions contain provisions relating to delay, but their treatment of the issue differs widely. Two distinct principles have been adopted for these conventions, one is in respect to the freight, the other concerns the loss of or damage to the goods. Compensation for delay in delivery based on the freight is provided for under all the transport conventions except the Warsaw Convention, which limits liability for delay in the same way as it limits that for loss or damage.

7.4.1 The Compensation for Delay in Delivery Based on the Freight

Commercially, the time required for the transport is inversely related to the freight charge. The higher freight paid for air transportation is primarily justified by the shorter transit time. Consequently, the method used in the CIM Convention of paying indemnity in proportion to the freight and fixing the ultimate limits as corresponding

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14 Ramberg, "Attempts at Harmonisation", p16; The deviation is referred to in Art. 4(4) of the Hague Rules which provides that any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

15 Ganado & Kindred, p1.
to double the freight amount seems to be appropriate.\textsuperscript{16} This principle, however, may require specific rules for cases of protracted delay. The CMR provides that in the case of delay, if the claimant proves that damage has resulted therefrom the carrier pays compensation for such damage not exceeding the carriage charges.\textsuperscript{17} In the case of delay, compensation is recoverable for economic loss, such as loss of market at the place of delivery. Whether it also includes physical damage to the goods caused by delay, such as deterioration due to prolonged exposure to the conditions of transit, is controversial, but the view of the majority is that it does not. In any event, the amount of compensation for delay is limited to the amount of the carriage charges.\textsuperscript{18}

The MT Convention provides that the MTO is liable for loss resulting from delay in delivery if the occurrence which caused the delay in delivery took place while the goods were in his charge.\textsuperscript{19} The concept of unreasonable deviation is not referred to in the MT Convention. Moreover, considering that the deviation problem is not serious in the carriage of the goods by land and air, the MT Convention also does not mention the matter of reasonable deviation which is referred to in the Hamburg Rules. The reasonable deviation is allowed in the practical shipping transit as the Hamburg Rules provides that the carrier is not liable where delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.\textsuperscript{20} The MT Convention requires the amount of compensation for delay in delivery interrelated to the freight, providing that the liability of the MTO for loss resulting from delay in delivery is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the MT contract.\textsuperscript{21} Accordingly the compensation for delay in delivery under

\textsuperscript{16}CIM Convention, Art. 43 (1).
\textsuperscript{17}CMR Convention, Art. 23 (5).
\textsuperscript{18}Clarke, p479.
\textsuperscript{19}MT Convention, Art. 16 (1).
\textsuperscript{20}Hamburg Rules, Art. 5(6).
\textsuperscript{21}MT Convention, Art. 18 (4).
the MT Convention is directly proportional to the cardinal number of the freight. For instance, if the freight payable for the goods delayed does not exceed 40% of the total freight, the compensation for delay is limited to an amount equivalent to two and a half times this freight. On the contrary, if this freight exceeds the 40% of the total freight, the standard of two and a half times automatically ceases to be in force. In this case, the compensation for delay could not exceed the total freight payable under the MT contract. The compensation for delay under the Hamburg Rules is similar to that under the MT Convention.

Sometimes one simply does not know whether the goods have been lost, or whether the MTO may sooner or later be in a position to bring them on to the destination. As a result, the MT Convention contains conversion rules to the effect that the claimant may treat the goods as lost if they have not been delivered within 90 consecutive days following the date of delivery.\textsuperscript{22} Under the Hamburg Rules, 60 consecutive days are required. Whereas, the CIM and CMR Convention provide that the goods are deemed to have been lost when 30 days have elapsed after the expiry of the agreed delivery time.\textsuperscript{23} In cases where no time has been agreed for the transport, the period required for conversion under the CMR Convention is 60 days from the time when the carrier took over the goods.\textsuperscript{24}

**7.4.2 The Conflict on the Compensation for Delay in Delivery between the Multimodal Transport and the Unimodal Transport**

In the multimodal transport, the MT contract can be segmented into at least two subcarriages being performed by different modes of transport, with the consequence that problems arise out of the fact that different rules of liability govern the various modes of transport. For instance it is not easy to determine which rules are applicable

\textsuperscript{22}MT Convention, Art. 16 (3).

\textsuperscript{23}CIM Convention, Art. 30; CMR Convention, Art. 20 (1).

\textsuperscript{24}CMR Convention, Art. 20 (1).
to the liability for the delay when the delay has been attributed to more than one leg of transport. As the rules on compensation for delay might not always be in harmony with each other, additional problems appear. This fact might be illustrated on some aspects.25

Firstly the sea leg is part of the multimodal transport. Customarily, the sub-carrier by sea includes in his sub-contract with the MTO an exception clause relating to delay, which is considered valid under applicable law, since the Hague Rules are constructed as covering cases of loss of or damage to the goods only. The MTO, on the other hand, is considered liable under the MT contract to the consignor irrespective of this exception clause, as the mandatory Hague Rules under the applicable law of the MT contract are constructed in the reverse, i.e. as covering cases of delay.26 The carrier by sea has caused the delay while the goods were in his charge. The application of the same set of rules on delay to the MTO on the one hand and to the sub-carrier on the other hand leads to different results.

Secondly the multimodal transport may additionally or alternatively involve an air leg. The MTO has a limitation sum for damages by delay which is valid under applicable law. The carrier by air performs part of the multimodal transport with a much higher limitation amount according to the Warsaw Convention. Thus in the case of delay in delivery, the MTO might claim a higher compensation from the carrier by air on the basis of his sub-contract of carriage sub-carriage than can the consignee from the MTO on the basis of his MT contract.

Finally, where the multimodal transport has been performed in two legs, the first being a rail leg under the CIM Convention, the second a road leg under the CMR Convention. The delay in delivery has occurred which was caused partly on the rail

25 Gronfors, p489.
and partly on the road leg of the multimodal transport. The CIM Convention stipulates a limitation of liability for delay corresponding to double the freight, whereas the CMR Convention includes a corresponding limit amounting to the freight only. Now the problem is how to fix the limitation sum of the MTO in relation to the consignee provided his liability mirrors the network system. Furthermore, the liability system of the CIM Convention and the CMR Convention are closely related but divergent. Both on the rail and on the road portion, the event causing the delay may be of the same type and must be classified as a circumstance that the carrier could not avoid and did not have the possibility to prevent. However, this phrase under the CIM Convention is restrictively constructed as meaning a kind of force majeure, while under the CMR Convention it is understood in a milder way as referring to a liability with a reversed burden of proof as far as negligence is concerned. Because of this dissimilarity, the same type of event is qualified as falling outside the concept of force majeure on the rail part and thus attracting liability, while on the road part it is construed as falling outside the concept of negligence and thus does not lead to liability.

The above examples might sure beyond doubt that there are many legal conflicts on the compensation for delay in delivery between the MT Convention and the existing unimodal transport conventions. It is very hard to achieve harmony of rules since the different modes of transport differ greatly in liability regimes.

7.5 CONCLUSION

Loss to be compensated includes loss because of delay. The definition of the delay in MT Convention is rather narrow which defines two possibilities to constitute delay in delivery. In practice, the disposal of loss resulting from delay in delivery is more

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complicated than the disposal of loss resulting from loss or damage to the goods because of primary cause and secondary cause. Moreover, the MTO's liability for delay is limited to two and a half times the freight which is similar to the carrier's liability for delay under the Hamburg Rules and higher than that under the CIM Convention, but less than that under the CMR Convention.
CHAPTER 8

THE LIABILITY OF INSURANCE OF THE MULTIMODAL TRANSPORT OPERATOR

8.1 INTRODUCTION

Generally speaking, insurance means that the insurer promises to pay a sum of money in case of accident, loss, injury, death, etc. Since international trade began, goods in transit, particularly by sea, have been at risk. Accordingly, the first marine insurance policy appeared in the early 15th century. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the loss of objects of insurance or liabilities caused by the agreed relevant navigation accidents which are usually referred to as Acts of God or fortuitous accidents.1 According to the insurable interest and the various objects of insurance, marine insurance can be divided into three main categories, such as hull insurance, cargo insurance and freight insurance. However, as can be readily appreciated, the ordinary policies of marine insurance do not cover every liability that a carrier may be called upon to meet. With his marine cover a carrier knows the extent of his liability, i.e. the value of his vessel, whereas there are many areas for which he cannot quantify his requirements for cover, for example, oil pollution, carriers’ liability for cargo and many more. It is therefore prudent for him to arrange some form of additional insurance to provide suitable extra cover. This is done by joining a P & I association.2

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1Chinese Maritime Law, Art. 115.
2"P & I" is abbreviated from the "Protection and Indemnity". P & I association or P & I club is a group of shipowners who have joined together to help each other on a mutual basis to meet the expense of additional liabilities in accordance with a set of rules agreed between them.
8.2 THE RELATIONS BETWEEN CARGO INSURANCE AND LIABILITY INSURANCE

8.2.1 Cargo and Liability Insurance Influenced by the Liability Regime

It is recognised that the kind of liability regime which is embodied in a convention can have profound effects on the nature and patterns of insurance. It is true that the liability system should be such as to provide a role for both cargo and liability insurance.3 In the area of multimodal transportation, we are faced with a situation in which each party has assumed definite risks and responsibilities.

It is obvious that the owners of the goods cannot rely fully on recovery from the carrier or other bailee of goods when they are lost or damaged. Even in the case of the most favourable of the international transport conventions, such as the CMR and the CIM Conventions, there are still excepted perils.4 There is thus no guarantee of recovery. Even when liability is accepted by the carrier there is invariably limitation amount placed on that liability. Therefore the cargo owner in the multimodal transport still needs his own insurance coverage against loss or damage to the goods from risks not accepted by the MTO. In the case of higher value goods a full recovery may well not be made. In those circumstances the prudent consignor will insure them whilst in transit and may indeed be required to do so by a CIP trade term in the contract of sale. In other than CIP situations, the buyer may wish to insure the goods. In fact, the consignor/consignee has a direct interest in the cargo wishing to receive the cargo safely and on time. To protect that interest, he has recourse to the potential liability of the carrier and, if that is not considered adequate, his own insurance. This insurance, known as cargo insurance, is referred to as "first party" insurance as the consignor or consignee is insured against loss arising in regard to his goods. In practice, if the multimodal transport involves one sea leg and two inland

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3Driscoll, p449.
4CIM Convention, Art. 36(2).
legs, it is necessary for the consignor/consignee to obtain marine cargo insurance on a "warehouse to warehouse" and then to extend the marine portion of the insurance to cover inland transit and intermediate warehousing from point of dispatch to final destination. It stands to reason that cargo insurance premiums should be lowered as the MTO's responsibility is increased. If the MTO is held strictly liable for the full value of the cargo, the consignor or consignee might forego cargo insurance, and on the other hand the freight rates would probably rise to reflect the cost to the MTO of insuring his added liability. The converse should also be true, with freight rates falling as the MTO's liability is reduced.

The MTO has the obligation to deliver the cargo in good condition. To protect himself from liability should he be unable to fulfil that obligation, the MTO also needs insurance coverage against liability in respect of the risks accepted by him under his MT contract with the consignor. This insurance, known as "third party" insurance, covers the liability of the purchaser of the policy, the MTO, to a third party, the consignor. The requirements for and the cost of cargo and liability insurance are determined in the light of the rules of the system governing the particular carriage. Where the MTO does not provide and operate all the actual means of transport used, there will inevitably be some duplication of liability insurance. The liability insurance needed by the actual carrier at each stage of the transport will not be affected by the fact that the carriage forms part of the multimodal transport operation, expect to the extent that nonexamination of the goods at the completion of the stage will make it more difficult to establish his responsibility for any loss or damage to the container's contents discovered when it is opened at its final destination. Therefore insurance requirements and the cost of satisfying them are directly related to the legal system applicable to the risk involved. As compared with the allocation of risks under the Hague Rules, several extra risks have been shifted

5The "Warehouse to Warehouse" insurance attaches from the time the goods hereby insured leave the warehouse or place of storage named in the Policy for the commencement of the transit and continues in force in the ordinary course of transit until the insured goods are delivered to the consignee's final warehouse or storage at the destination named in the Policy.
under the MT Convention from the consignor to the MTO and have been covered by his insurance. Consequently his liability has been extended beyond that of the sea carrier. Increased carrier liability would certainly increase the overall transportation costs as a consequence.⁶

### 8.2.2 The Difference Between Cargo Insurance and Liability Insurance

The primary service of cargo insurance is indemnification of claimants for proven loss or damage. This enables the consignor or consignee to have access to funds to replace goods with a minimum disruption of his business and without recourse to demands on his own financial resources or credit.⁷ Cargo insurance, with respect to loss of or damage to the cargo for which the carrier is responsible, is a banking service, because the cargo insurer advances the amount of the loss so that the claimant may put the funds to use promptly.⁸ This is especially beneficial given that it may be very expensive and time consuming for the consignee to recover against the MTO. Therefore, the consignor acquires cargo insurance so that he need not rely on the liability of the MTO. However, the recourse action of the cargo insurer against the liability insurer is also difficult and expensive. This would mean that the overall charge for insurance premiums on the multimodal transport might increase. Additionally premium of cargo insurance might not change correspondingly to the same extent as changes in liability insurance costs.⁹

Generally speaking, the liability of almost all the unimodal transport carriers is tending towards extension. However, since carrier’s liability is not made strict, the cargo is still exposed to some risks of loss or damage over and above those risks for

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⁶Mankabady, "Comments", p17.
⁸McDowell, p509.
which they can hold the carrier responsible. Accordingly the consignor or consignee will prefer to continue buying cargo insurance to cover to obtain the desisted benefits. As a result, the content and scope of cargo insurance is currently much broader than those of any form of carriers’ liability.\(^\text{10}\)

In liability insurance, by contract, defence against unfounded claims places a considerable burden upon the insurer. Furthermore, the party who suffers the loss under a liability policy is the carrier, who has an interest in holding indemnification to a minimum so as to keep down his premium. Cargo insured and insured are partners in a transaction, whereas carrier and consignor in a claim situation are adversaries. Therefore, depending upon the nature of the carrier’s liability, the consignor or consignee might have to prove negligence or breach of contract on the part of the carrier, while under cargo insurance he needs only prove loss or damage.\(^\text{11}\) Under the Hamburg Rules or MT Convention, the carrier or the MTO who will be exposed to the new limits of liability towards the shipper or consignor, has to take out liability insurance. Liability Insurance puts an additional financial burden first on the carrier but by means of the freight rate on the consignor as well.

8.3 OVERLAPPING INSURANCE INVOLVED IN TRANSPORTATION OF THE GOODS

The liability regime governing the carriage of goods in international trade is neither uniform nor simple. It is a complex patchwork of various principles that underlie individual portions of transport depending on the type or mode of carriage employed. The position of the carrier by sea is by far the most privileged compared to other carrier’s liability regimes.\(^\text{12}\) Hence, independent cargo insurance plays an important

\(^{10}\)McDowell, p510.
\(^{11}\)McDowell, p509.
\(^{12}\)Massey, p771.
role in international trade. Marine cargo insurance thus forms an integral part of any international transaction involving the movement of goods by sea. Meanwhile the carrier insures his limited liability by means of a P. & I. policy under the existing bill of lading conventions. Where the carrier is liable, his insurance actually inures to the benefit of the cargo insurer, who is subrogated, as against the carrier, to the rights of the beneficiary to whom payment was made under the cargo policy.13 As a result, a certain amount of double or overlapping insurance is involved. This is particularly true in the case of door to door transport of containers under the MT Conventions.

8.3.1 Reasons for the Occurrence of Overlapping Insurance

The shipper or consignor might insure the risks which he feels obliged to cover either because liability for those risks is not accepted by the carrier or because the risks are uncertainly allocated between the parties concerned.14 On the other hand, the shipper should not need to insure against the risks of loss or damage to his goods which are covered by the liabilities falling upon the carrier under the contract of carriage. Take maritime for example. These risks and liabilities are stipulated in the Hague Rules which provide that, apart from the carrier’s obligation to make the ship seaworthy,15 he is required to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.16 However, the apportionment and definition of risks and liabilities are not at all clearly demarcated in the Rules, and the position is further complicated by the uncertainties concerning such matters as the burden of proof, and procedure. In this case, the consignor has no choice at all but to over-insure, lest he be exposed to incidence of risk for which the carrier might not compensate him, even though the carrier may be responsible to do so under the

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13Massey, p771.
14Massey, p770.
15Hague Rules, Art. 3 (1)(a).
16Hague Rules, Art. 3(2).
contract of carriage.  

Under the Hague Rules, the apportionment of risk between the parties necessitates a dual system of insurance. On the one hand, the consignor or consignee insures his cargo with the cargo insurer and the carrier insures his liability generally with P.& I. insurer on the other. This means that there is no overlapping insurance owing to each claim being paid only once, but there can be an overlapping of insurance coverage. As such, the cargo insurer reimburses the consignor or consignee in the event of his cargo being lost or damaged whereas the P.& I. insurer reimburses the carrier in the event of the consignee or cargo insurer establishing by way of recourse that the loss of or damage to the goods was caused in circumstances for which the carrier is responsible. In such a case, where the carrier is at fault but the consignee does not exercise his right of recovery from the carrier, there is an overlap of insurance. This overlapping insurance must involve extra expense through the bringing of recourse actions by the cargo insurer against the carrier or the P.& I. insurer in that both set of insurers have to maintain separate departments dealing with similar subjects, such as claims records and reinsurance claims. Therefore, the additional insurance by the consignor or consignee includes insurance against risks for which the carrier is already responsible. If the consignor or consignee could be assured that he could recover the full value of his claims, he would have no need to go outside his terms of carriage and pay cargo insurance premiums to cover the same risk. Nevertheless, under the existing international transport conventions and the MT Convention, this situation is impossible. The consignor has to pay unnecessary insurance premiums to provide for protection against the uncertainty that remains.

8.3.2 Impossibility of Eliminating Two Insurance Policies

As has been discussed, there are two insurance policies in international transportation,

\[17\] Massey, p771.
\[18\] Massey, p771.
one is cargo insurance policy, the other being liability insurance policy. If the goods are lost or damaged no insured can recover more than the amount of the loss. If the carrier is responsible, his insurer pays up to the limit of the carrier’s liability and should the damages exceed that limit, then the cargo insurer pays the balance. If the carrier is not responsible, the cargo insurer pays. This system might be said to divide the risk between the consignor and carrier with the respective insurers each picking up their allocated portion. However, this division of risk results in duplicative costs, and these costs might be considered as a form of overlapping insurance. Both the cargo and liability insurers must incur overhead expenses. When the loss of or damage to the goods occurs, the cost of establishing which insurer bears the loss or damage will fall on both insurers. If there were only one insurer, these costs would be eliminated. However, the elimination of the necessity for two insurance policies might only be accomplished if a workable liability system can be devised that is not dependent on a division of the risk between the consignor and the carrier.

Meanwhile to avoid overlapping insurance, and to place the risk where the balance of convenience would have it, would probably require a drastic change in the liability regime for carriage of goods in international trade. In the case of the multimodal transport of containers, this may mean a uniform high level of liability to be apportioned between the respective carriers according to distance with insurance being the responsibility of the respective carriers, and the entire transport being subject to an acceptable MT document. However a change in the direction proposed would be undesirable.

In the carriage of the goods by sea, the ocean carrier must exercise due diligence in his custodianship of the goods. The exposure to liability of the carrier by sea is lower than those of carriers by other modes. For full indemnification in event of the loss

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19 Massey, p751.
20 Massey, p753.
of or damage to the goods, the consignor or consignee might look to cargo insurance. If the negligence of the carrier can be proven, the insurer usually subrogates against the carrier on behalf of the consignor or consignee when the loss or damage is substantial in amount. This pattern of liability and cargo insurance has worked successfully for many years. It is submitted however, that cargo insurance is outmoded and that concentration of both liability and insurance functions on the carrier or the MTO would be better for consignor and consignee than the division between cargo and liability insurance, for the several reasons, such as ocean freight rates would probably increase, the consignee would face serious delays in receiving indemnification for loss or damage from the MTO or carrier and the consignor would lose his advantage of being able to work with one insurer on all his shipments, by all carriers, to all destinations. In summary, cargo insurance offers itself as the most effective means of protecting the interests of the consignor or consignee and of keeping transport costs to a minimum. An extended form of carriers’ liability would probably result in much higher transport costs, which ultimately would have to be borne by the consignor or consignee.22

8.4 THE LIABILITY INSURANCE OF THE MULTIMODAL TRANSPORT OPERATOR UNDER THE DIFFERENT LIABILITY SYSTEMS

In the international multimodal transport, the insurance arrangements are stipulated by fault liability under the MT Convention. Accordingly the cargo is covered by cargo insurance against which the consignee will claim. Whatever the system of fault liability, the consignee will continue to carry insurance to cover losses for which the MTO is not liable, to cover losses in excess of the MTO’s limit and for the facility of streamlined reimbursement by insurance claim in preference to the potentially protracted and involved enforcement of rights against the MTO. The subrogated insurer may seek redress against the MTO who in turn might raise a claim on his

22McDowell, p508.
liability insurer. It is true also that the MTO will continue to carry liability insurance to cover his vicarious responsibility for the sub-contractors and his personal liability as carrier.

8.4.1 The Liability Insurance of the Multimodal Transport Operator under the Uniform Liability System

As compared with the unimodal transport carrier, the MTO bears more risk due to the additional service he provides. As will be explained the net effect is to shift the risk from cargo insurance to liability insurance. On the other hand, the MTO’s liability might appear to create an additional insurance in regard to the relationship between the non-carrying MTO and the unimodal carriers. Under the uniform liability system, the MTO’s limitation amount is static, being unaffected by the unimodal carrier’s limitation. Thus, the MTO is burdened with a higher limitation ceiling than the unimodal carrier such as maritime carrier currently bears. The MTO’s liability cover must absorb the excess which the MTO is unable to recover from the unimodal carrier in the case of the concealed damages. Theoretically, the uniform system might not create additional insurance cost. The increment of liability cover can be offset by a reduction in cargo insurance. But in practice the MTO’s liability cover must absorb the additional burden of a high uniform limitation over the lower limitation of the unimodal carrier but the excess is a risk which would have been carried by the cargo insurance. The effect is therefore to transfer the risk bearing from cargo to liability insurance. Where the loss of or damage to the goods are not localised, the uniform system might transpose the concealed risk from cargo to liability insurance. The liability insurance premium is more expensive than cargo insurance premium in its basic rate in that it anticipates the necessity of investigation and litigation of liability. As a result the liability system which transfers risk to liability insurance might increase the overall cost of insurance. Nevertheless, if the uniform system adopts as its limitation ceiling the lowest limitation of the unimodal convention, the impact of
Chapter 8 The Liability of Insurance of the Multimodal Transport Operator

this burden is cushioned.23

8.4.2 The Liability Insurance of the Multimodal Transport Operator under the Network Liability System and the Mixed Liability System

Under the network system, the MTO’s liability is identical with the liability of the unimodal carrier on whose leg the loss, damage or delay occurred. Obviously, the problem of liability for damage to the goods has become more acute in the door to door multimodal transport of containerisation. On the one hand damages are declining and there is less theft due to the relative security of containers. On the other hand, it has become much more difficult to establish in which leg the damage occurred and who is responsible for that damage. Containers move from one carrier to the next and from mode to mode without being opened and inspected. When the damage is discovered at the final destination, there usually is little evidence of who is responsible.24 Thus under the network liability system, the consignee bears the risk where the damage to the goods cannot be localised. And also the network is designed to obviate any adjustment in the MTO’s liability cover in that the MTO’s limitation is identical with that of the unimodal carrier. As compared with the uniform system, the network system might shift the risk from liability insurance to cargo insurance. The network system, in respect of localised and concealed damage, disturbs the cargo risk least of all.

The mixed system is a hybrid scheme whereby the MTO’s liability is equated to the liability of the unimodal carrier unless the loss of or damage to the goods cannot be localised in which case the MTO bears a uniform liability. As compared with the uniform system, the mixed system does not maintain a static limitation amount for the MTO. Therefore, the mixed system retains the advantage of the network system where the loss can be localised but, as with the uniform system, it places the burden

23Hare, p122.
24Massey, p754.
of concealed damage onto liability insurance.\textsuperscript{25}

\textbf{8.5 CONCLUSION}

Higher liability of the carrier means more business for the liability insurers, in particular P.& I. insurers and possibly less business for the cargo insurers. There is an overlapping insurance in the unimodal and multimodal transport. Liability insurance and cargo insurance depend on each other for existence. It is impossible for them to be eliminated under the existing liability regime. The MT Convention is therefore thought to lead to an increase of liability insurance premiums. Under the network system, the MTO's liability insurance is identical with the liability insurance of the unimodal carrier on whose leg the loss, damage or delay occurred. Whereas under the uniform and mixed system, the MTO has to carry insurance to cover not only his own responsibilities but the responsibilities of the sub-carriers to the extent these responsibilities are less than those owed by him to the consignor or consignee.

\textsuperscript{25}Hare, p122.
CHAPTER 9

CONCLUSION TO THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

9.1 INTRODUCTION

The MT Convention adopts a mixed system approach.¹ The MT Convention is "uniform" in setting only one basis for liability, namely the MTO is liable for loss, damage or delay unless he proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences, but it is network as to liability limits. Here the consignee is entitled, if he can establish where the loss or damage occurred and that that stage of transport is governed by an international convention, to the limit of liability under that convention if it is higher than the general limit set out in the MT Convention. Everything divides into two. The MT Convention has many advantages and some disadvantages without doubt. The advantages of the MT Convention cannot be denied since it is the first convention for the international multimodal transport, aimed at harmonising the different modes of transport, such as by sea, air, road and rail. The advantages of the MT Convention are clear since there is a world of difference in the liability regimes of the different unimodal transport conventions. The Disadvantages of the MT Convention may prevent it from being put into effect in the near future.

¹As discussed in Chapter 4, a uniform system would be one where the convention laid down a single basis of liability and a single set of compensation limits. A network system relates the basis of liability under any applicable international convention.
9.2 AN ENTIRELY NEW LIABILITY REGIME OF THE MULTIMODAL TRANSPORT

9.2.1 A Liability Regime Achieving the Measure of Uniformity in Multimodal Transport Liability

A major difficulty with the multimodal transport operation is that different international transport conventions might govern each part of the operation. Thus the carrier’s liability varies depending on where the loss of or damage to the goods occurs. The basis and limitation of the various unimodal carriers’ liability are different. However, the liability system under the MT Convention might achieve a high measure of success in uniformity in the area of multimodal transport liability, the effect of the MT Convention would be to remove the defect in the present liability regime in that no existing unimodal transport convention or national law is applicable to govern the multimodal transport liability. In particular, the MT Convention introduces the mixed liability system which happily combines the uniform basis of liability system and the network limits of liability system. Comparatively speaking, such mixed liability system is the better one in theory because it incorporates the legal advantages of both uniform and network system. In the final analysis, the nature of the uniform liability system is that it eliminates or diminishes the difficult legal problem of the burden of proof which apply in the case of concealed damage in the network system. On the other hand, the nature of the network liability system avoids and diminishes the difficult legal problem of the conflict of the existing unimodal conventions. While some legal problems might arise in practice with regard to the multimodal transport liability regime, as the MT Convention contains some inevitable defects. All things considered, the Convention is one of the most important international conventions, which will playing a significant role in international trade law.
9.2.2 A Liability Regime Benefiting the Consignor and the Multimodal Transport Operator

The liability Regime provided by the MT Convention represents a major step forward for the consignor and the consignee, thus greatly facilitating the development of the door to door multimodal transport of containers. It is true that the growth of international multimodal carriage of the goods, to a great extent, has been hampered by the complexities and disharmony of the existing unimodal transport systems in that the legal regime governing liability for the loss of or damage to the goods changes each time the cargo is transfer to a different mode of transportation. The liability regime of the existing unimodal transport conventions often leaves the consignor and the consignee without adequate protection as a consequence. However, the liability regime of the MT Convention eliminates these complexities and disharmony by guaranteeing the consignor and the consignee maximum legal protection.

Furthermore, the increased multimodal transport is also promoted by the MT Convention by greatly simplifying the MT document. Therefore, since the MT Convention affords the opportunity of engaging in one-stop international shipping of the goods, the consignor and the consignee would be confident of concluding an MT contract with the MTO. Thus the consignor and the consignee no longer worry about the complex questions about where the loss of or damage to the goods occurs or which national law or international convention governs his ability to recover.

Meanwhile the liability regime stipulated by the MT Convention benefits the MTO, for whom it is convenient to escape the higher unimodal limitation applied through the network system in the case of localised damage and to rely on the lower limitation of uniform system in the case of the concealed damage. On the other hand, the MT Convention also favour the unimodal carrier, who would continue to be governed by the existing unimodal transport convention in his relation with the MTO.

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2For instance, the Art.4(2) of the Hague Rules provides for a list of seventeen exceptions which state different circumstances under which the carrier can exclude his liability.
Besides, the cargo insurer will benefit from the new coverage that would be required by the MTO since the concealed risk might be shifted from the cargo insurer to the liability insurer.

9.3 CLOSER RELATIONS BETWEEN THE MULTIMODAL TRANSPORT CONVENTION AND THE HAMBURG RULES

Although there are no links between the existing transport conventions as each convention is designed to stand alone, they do more or less have an influence upon each other. For instance, although the carriage of the goods by sea is quite different from the carriage of goods by air in respect of the risk, speed and cost of the transport, the Hague Rules provides the yardstick for the drafting of the Warsaw Convention. The liability regime of the CIM and the CMR Conventions are similar, which are applicable to the carriage by rail and the carriage by road in Europe, providing a substantial number of defences. The Hamburg Rules follows mainly the structure of the CMR Convention. As for the MT Convention, it has close links with the existing unimodal transport conventions in that it is modelled on the CMR and the CIM Conventions, and especially the Hamburg Rules so as to dovetail the relevant rules with existing transport unimodal conventions.

9.3.1 The Multimodal Transport Convention Being Modelled Closely on the Hamburg Rules in Many Aspects

The door to door international multimodal transport of containers generally involves three stages: one sea leg and two overland legs. As compared with the overland leg, the sea leg takes the bigger risk and more time in transit so that the majority of the

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3CIM Convention, Art.37; CMR Convention, Art.17.
4The liability limit of the CMR Convention (8.33 SDR) has been adopted by the MT Convention whenever no sea leg is involved. See MT Convention, Art. 18(3) and CMR Convention, Art. 23(3).
loss of or damage to the goods occur at sea. Therefore the liability regime of the international carriage by sea might be first taken into account as of prime importance. As a result, the MT Convention is modelled fairly closely in many aspects on the Hamburg Rules, which is the latest international convention concerning the carriage of the goods by sea. For instance, the liability based on fault is introduced by both the MT Convention and the Hamburg Rules. The limits of liability under the MT Convention is ten percent higher than that under the Hamburg Rules. The amounts of liability under the MT Convention are 920 SDR per package or 2.75 SDR per kilogram, whichever is higher; if carriage of goods by sea involved, the limit is 8.33 SDR per kilogram. In addition, damage resulting from delay in delivery under both Conventions is limited to two and a half times the freight payable. The MT document must also include the information required for the bill of lading under the Hamburg Rules. Furthermore, the MT Convention generally uses the language of the Hamburg Rules, being treated as interrelated and thus viewed as part of the same package.

9.3.2 The Entry into Force of the Hamburg Rules Affording A Considerable Measure of Improvement for the Multimodal Transport Convention

Since the Hamburg Rules and the MT Convention are considered as related treaties, the increase of carrier’s liability provided in the Hamburg Rules which was adopted in 1978 has facilitated the preparation of the MT Convention. Consequently, the MT Convention was adopted in 1980, just two years later. As compared with the Liner Code requirement of ratification by countries having at least 25% of the world’s liner tonnage, the entry into force of the MT Convention depends on adoption by straight member of ratifying countries, which is similar to the formula of the Hamburg Rules, but requires a substantially higher number of states (30 states, compared to 20 for the Hamburg Rules). Obviously, entry in force of the MT Convention might be dependent on the previous coming into force of the Hamburg Rules in that the new

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liability regime in carriage by sea is a condition for its application. So far only about 7 countries\(^6\) have ratified or acceded to the MT Convenion which will not enter into force until 12 months after 30 states have become contracting parties. 10 states have become contracting parties to the MT Convention while 30 contracting parties are required to bring it into force. There is little likelihood that the MT Convention will come into force within the foreseeable future since the Hamburg Rules only became effective in 1992. Accordingly the Hamburg Rules are fundamental to the MT Convention. It can be envisaged that the entry into force of the Hamburg Rules will promote the adoption of the MT Convention and will give rise to much greater support for it. Whether this will come true remains to be seen as a large number of countries firmly prefer the network liability system over the mixed liability system as embodied in the MT Convention. In short, it can be seen that at present the world of multimodal transport is a complex one, but it is unlikely that the MT Convention will come into force for a long while. It is true that the MT Convention represents a great step forward in creating an efficient liability system in the multimodal transport operation, although the value of it should not be overestimated.

Since the MT Convention and the Hamburg Rules are viewed as related treaties, the Group of 77 states (the developing countries) have adopted their stance toward the Hamburg Rules as their position with respect to the MT Convention. Thus it can be expected that the developing countries that have considered themselves to be cargo-oriented countries will be more enamoured of the MT Convention than the developed countries which have been traditional suppliers of liner shipping service. The shipper countries will be attracted by the possibility of documentation facilitation and the mixed system of the liability regime, whereas the liner countries are concerned that the MT Convention will inhibit innovation and flexibility in the multimodal transport operations and result in higher total costs.\(^7\)

\(^6\)Four countries of ratification are Chile, Mexico, Morocco and Norway, three countries of accession are Malawi, Rwanda and Zambia. See International Transport Treaties, Suppl. 17 (September 1993) p100.2.

\(^7\)Nasseri, p246.
9.4 REASONS WHY THE MULTIMODAL TRANSPORT CONVENTION MAY NOT BECOME EFFECTIVE IN THE NEAR FUTURE

The MT Convention was adopted on May 24, 1981, and remained open for signatures until August 31, 1981. Since then only seven countries have ratified or acceded to the MT Convention, which falls far short of the 30 states required for entry into force of this Convention. Therefore, in view of such a slow rate of progress, the MT Convention has not been supported by commercial interests. The possibility of entry into force of the MT Convention is quite uncertain in this century. There are many reasons for this lack of support. A number of the MT Convention’s articles have been attacked on technical grounds, reflecting widespread differences in approaches to liability, limitations and documentation questions.8

9.4.1 The MT Convention being Bound by the Unimodal Transport Conventions

Comparatively, the network liability is preferred over uniform liability by the actual carrier, insurer and bank in the present multimodal transport operations. The indemnity liability of the MTO and his special indemnity liability with the actual carrier can be easily combined by the network liability in accordance with which the limitation of the liability of the MTO and the application of the law have been stipulated. For instance, in the multimodal transport, if the loss of or damage to the goods occurred in the leg of the sea due to the neglect of navigation and management of the ship by the carrier, the Hague Rules is applied for this leg of sea transport. Under such circumstance the MTO is not responsible for the compensation since the carrier can be exempted from the liability for the neglect of navigation and management of the ship. In reality, in most instances, the loss of or damage to the goods occurring during the multimodal transit can be localised and is subject to the relevant provisions of the existing unimodal transport conventions. Therefore the legal

8Nasseri, p246-253.
system of the multimodal transport is in a sense a collection of some of the existing unimodal transport conventions. To a certain extent, an independent legal system of multimodal transport will never be set up. Although the mixed liability regime has been theoretically adopted by the MT Convention, a certain unimodal transport convention will be applied for a certain leg of transport where the damage to the goods has been localised. This is why business circles, especially in the developed countries, preferred the network liability systems which they regard as the most reasonable system. On the contrary, the modified liability system may give rise to conflict between the MT Convention and the unimodal transport conventions and may require commercial organisations to do some adjustments as to suit the needs of this system. Furthermore, under the modified liability systems, the transport cost may be increased, which will seriously interfere with the trade of all the countries. There is little support for the MT Convention’s approach and therefore adoption even though the Convention had been finally adopted by way of package, which was seen to afford to a rallying point for the divergence in business and law. For instance, the carriers by sea in particular, speaking through the International Chamber of Shipping (ICS), were virtually unanimous in their opposition to its adoption.9 On the other hand, the legal nexus falls easily into chaos. The MT contract was concluded originally between the MTO and the consignor, but a certain unimodal transport convention or a certain national law will be applied for the localised damage. Therefore it will be harmful in practice for the MT Convention since it may be restricted by an unimodal transport convention.

9.4.2 Hesitation for Making a Decision Resulting from Disharmony between the Multimodal Transport Convention and the Unimodal Transport Conventions

Being the first convention in respect of international multimodal transport, the MT Convention has fallen into dire straits because of some unacceptable articles of itself. For instance, the contract of carriage has been stipulated in explicit terms by the

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9Nasseri, p243.
existing international unimodal transport conventions, such as the Hamburg Rules and the Warsaw, CIM and CMR Conventions. Once any state ratifies any of these conventions, the national law of this state should be made consistent with that convention. Consequently, any contract of carriage within the bounds of any unimodal transport convention, according to the national law, only performs the right and the responsibility provided by that convention. Namely, a certain existing unimodal transport convention is suitable for the MT contract provided by the MT Convention. Conversely, the conflict is unavoidable between the MT Convention and the unimodal transport convention if their contents of carriage regarding to the right and responsibility by these two conventions are inconsistent. Under such a circumstance, the state cannot fulfil her obligations for the two conventions at the same time after she ratified these conventions. The gravity of the question lies in the fact that if the national law regulates that it is the MT Convention, not a certain existing unimodal transport convention, that determines the MTO's right and responsibility, the state may deviate from the unimodal transport conventions. In view of the above-mentioned disharmony, therefore, hesitation for making a decision for ratifying the MT Convention exists unavoidably in these countries who are going to accede to this Convention. Furthermore these countries have adopted a wait-and-see policy with respect to the MT Convention as to who will benefit from international multimodal transport which may be bound by inconsistent existing unimodal transport conventions.

9.4.3 The Regulation and Control of Transport Operation Restricting the Development of International Multimodal Transport

With the rapid development of science and technology, each existing unimodal transport convention has been continuously amended and perfected so as to make not only the rights and responsibilities between the carrier and the shipper more reasonable, but also the legal standards more clear. Meanwhile the system of each unimodal transport convention has infiltrated and effected the others, gradually
forming some legal standards with general characteristics. However these legal standards belong to the category of international private law which is totally different in nature from international public law.

The natural or juridical person is the legal subject of the private law which adjusts foreign civil legal relationship and their disputes arising are generally settled by the judicial organs or arbitration organisation of one country. By contrast, the sovereign state is the legal subject of the public law which adjusts the relationship between the states and their disputes arising are settled by negotiation and mediation or by force. Therefore the adjusting object of international multimodal transport naturally belongs in theory to the foreign civil legal relationship and the MT Convention only adjusts the rights and responsibilities between the MTO and the consignor. But in fact the MT Convention provides that each state has the right to regulate and control at the national level multimodal transport operations and multimodal transport operators for the national economic and commercial interests.\(^{10}\) In form regulation and control of multimodal transport is necessary since the container transport needs some suitable port equipment and the conditions of land transport. However, the MTO and the consignor are the interested parties of the MT contract about which the state need not bother. On the other hand, it should be fully realised that international multimodal transport is a new and an active field in international trade and transport, any convention for this field should be made with more encouragement and promotion. Furthermore, it is not right to include in the MT Convention some relevant regulations of the public law, especially customs matters\(^{11}\) which only belong to the scope of customs organ and system. Therefore the MT Convention has for the first time broken the bounds of international conventions between the private and public law. It is true that some of the public-law provisions of the MT Convention being made as a result of trade-offs and the compromise may be harmful to the unity of commerce and law and reduce the chance for the Convention to become effective.

\(^{10}\)MT Convention, Art.4.

\(^{11}\)MT Convention, Art.32.
9.5 CONCLUSION

Theoretically the sui generis approach is that the MT Convention governs the liability relationship solely between the MTO and the consignor or consignee, and that the legal relationship between the MTO and the sub-contracting carriers (e.g., sea, air, road or rail) is an entirely separate matter. Hence there is no conflict between the MT Convention and the other conventions (the Hague, the Visby and the Hamburg Rules; the Warsaw, CMR and CIM conventions). Practically the sui generis approach is untenable, and there could be some conflicts between the MT Convention and other conventions. Although the MT Convention represents a compromise between the developing countries who wanted public-law provisions in the Convention and the developed countries who wished to have a liability convention, there are still some subjects which need approaching and solving in both theory and practice. In form the entry into force of the Hamburg Rules is helpful to the entry into force of the MT Convention. From a practical standpoint, however, as of September, 1993, only 7 countries of 30 required had ratified or acceded to the MT Convention since 1981 when the Convention remained open for signatures. In view of such a slow rate of progress, the MT Convention will not be effective by the end of this century. Nevertheless, with the development of international trade, the MT Convention will eventually come into force as long as mutual understanding and further agreement can be reached.
# ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>A.A.S.L.</td>
<td>Annals of Air and Space Law</td>
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<td>CFS</td>
<td>Container Freight Station</td>
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<td>CIF</td>
<td>Cost Insurance Freight</td>
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<td>CIM</td>
<td>International Convention Concerning the Carriage of Goods by Rail</td>
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<td>CIP</td>
<td>Carriage and Insurance Paid</td>
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<td>CLP</td>
<td>Container Load Plan</td>
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<td>CMI</td>
<td>International Maritime Committee</td>
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<td>CMR</td>
<td>Convention on the Contract for the International Carriage of Goods by Road</td>
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<td>CPT</td>
<td>Carriage Paid To</td>
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<td>CTO</td>
<td>Combined Transport Operator</td>
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<td>CY</td>
<td>Container Yard</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>ESC</td>
<td>Economic and Social Council</td>
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<td>ESCAP</td>
<td>Economic and Social Commission for Asia and the Pacific</td>
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<td>ETL</td>
<td>European Transport Law</td>
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<td>FCA</td>
<td>Free Carrier</td>
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<td>Full Container Load</td>
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<td>FOB</td>
<td>Free on Board</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<td>ICLQ</td>
<td>International Comparative Law Quarterly</td>
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<td>ICS</td>
<td>International Chamber of Shipping</td>
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Abbreviations

ILA International Law Association
IMCO Intergovernmental Maritime Consultative Organisation
IMF International Monetary Fund
IPG Intergovernmental Preparatory Group
J.B.L. Journal of Business Law
J.M.L.C. Journal of Maritime Law and Commerce
J.W.T.L. Journal of World Trade Law
LASH Light Aboard Ship
LCL Less than Container Load
L.M.C.L.Q. Lloyd’s Maritime and Commercial Law Quarterly
MTO Multimodal Transport Operator
NVOC Non-Vessel Operation Carrier
NVOCC Non-Vessel Owning Common Carrier
P & I Protection and Indemnity
RORO Roll-On/Roll-Off
SDR Special Drawing Right
TCM Convention of the Combined Transport of Goods
T.L.R. Tulane Law Review
T.M.L.J. Tulane Maritime Law Journal
UCP Uniform Customs and Practice for Documentary Credit
UNCITRAL United Nations Commission on International Trade Law
UNCTAD United Nations Conference of the Trade and Development
UNIDROIT International Institute for the Unification of Private Law
BIBLIOGRAPHY

I. BOOKS


Bibliography


II. ARTICLES


