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TOWARDS A MODERN ROLE FOR LIABILITY IN MULTIMODAL TRANSPORT LAW

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I WOULD LIKE TO THANK MY FAMILY, ESPECIALLY MY HUSBAND WHO HAD TO SUPPORT ME THROUGH ALL THE TRYING TIMES I EXERIENCED DURING THIS RESEARCH. I WOULD ALSO LIKE TO THANK MY 3 CHILDREN WHO HAD TO COPE WITHOUT A MOTHER FOR SUCH A LONG TIME.

ABSTRACT

TOWARDS A MODERN ROLE FOR LIABILITY IN MULTIMODAL TRANSPORT LAW

It is now accepted that multimodal transport plays a key role in international trade and commerce, yet its' liability regime is uncertain and unpredictable. A sound liability regime is essential to bring certainty and enhance the development of this mode of transport.

In international trade, goods may be carried in a variety of ways; by sea, road, and rail or by air. These are not the only ways that goods are carried. Increasingly, goods are being carried by a combination of modes, which has come to be known as multimodal transport.
As long as international transport continues, damage and loss to goods carried will occur; such incidences are usually followed by a variety of claims and compensations. When such loss or damage occurs during carriage by a single mode, the liability of the carrier is regulated by one of the international transport conventions. However, when such loss or damage occurs during multimodal carriage, there is no such regulation available. What might apply is one of the international conventions applicable in unimodal transport, if the loss or damage can be localised to a particular mode. This stems from the fact that these conventions are mandatory and multimodal transport is regarded as a combination of modes. When it is not possible to predict when loss or damage occurred, the problem it creates is uncertainty and unpredictability as to the liability regime applicable.
Following the attempts made over the past decades, in which attention has been focused on seeking a predictable liability regime in multimodal transport through existing mandatory law and model contracts, a consensus has emerged that unimodal solutions cannot be used to solve multimodal problems.
In the light of these discussions, this thesis argues that multimodal transport is different and deserves a liability regime that will reflect its nature and bring about predictability.
And the conclusion favoured in this work is a leadership role for multimodal transport, to lead rather than be led by unimodal transport.

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CHAPTER FOUR

INTRODUCTION

The research underlying this thesis began with the question: Why is there no predictable liability regime in multimodal transport?

International trade, advances and improvements in transport technologies have all contributed greatly to the increasing popularity of multimodal transport, and although it is widely acknowledged as the transport mode of the future, there are no adequate laws governing it. Consequently, multimodal transport is now receiving widespread interest, much attention, and concern as different groups and bodies seek to find adequate laws to govern it.[1]

In the past decade, the recognition and importance of this mode has greatly increased and it is now commonly accepted that there is a need for certain and predictable rules for the enhancement and furtherance of multimodal transport. Numerous questions exist as to how this mode should be governed, and although there is a consensus as to the need for such certain and predictable laws, there are clearly divergent views as to what it should constitute.

This is because the current debate on multimodal transport, the solutions proposed, and the literature available has been "anchored" on the basic realization that unimodal concepts and constructs should prevail in multimodal transport. This is very much driven by the presumed need not only to avoid conflict with existing unimodal transport conventions, but also to maintain current practices within multimodal transport.[2] The question then arises: how will unimodal concepts translate in practice to concrete solutions within multimodal transport? More importantly, what sort of legal practices will best solve the uncertain problem in multimodal transport?

These thesis attempts to answer these questions in the context of the reality of multimodal transport today, specifically it discusses the relationship between unimodal transport and multimodal transport.

It argues that the law applicable in unimodal transport cannot be transplanted piecemeal to multimodal transport without appropriate modifications or amendments. Further it argues that some of the assumptions on which the debate has been based ought to be reassessed, as there are mostly grounded on unimodal concepts. It is also

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[1] The different attempts at drafting uniform laws to cover Multimodal transport are dealt with in chapters 4 and 5.

[2] This is adequately covered in Chapter 2

asserted that as the debate has been framed on a fear of conflict within conventions, and a wish to adhere to known concepts in transportation, it has failed to fully recognize the full impact and potential of this mode for bringing into force a liability regime that would cover not only multimodal transport, but also include unimodal transport. On this basis, the thesis addresses the question of what liability regime should apply to support certainty and predictability while underpinning growth within multimodal transport usage.

In order to do this, the thesis analyses the principle of presumed liability as the basis of liability used within multimodal transport, and argues that the use of this liability basis has been one of the hurdles to achieving a predictable liability regime in multimodal transport. The thesis discusses whether multimodal transport as currently structured, addresses the real risks allocation inherent in moving goods using multiple modes. It suggests that the current structure has developed as a quick response to the problems as they arise and was not specifically formulated to cater for multimodal transport. Like unimodal transport, the current structure in multimodal transport is based on the particular mode(s) used, thereby linking modes with conveyance. By so doing, it fails to move coherently beyond the requirements of the individual modes used, to the global concept of carriage which is non-mode specific. The thesis argues that a more appropriate basis of liability which would bring about certainty and predictability would be strict liability with exceptions. On the basis of recent research, the author argues that this basis will be acceptable within transport circles as it will specifically address the particular problems of multimodal transport.

This thesis suggests that in this light, multimodal transport ought to take a more active part in the legal regulation of transportation, much in the way of one liability regime that will be applicable to all modes of transport regardless of mode to support predictability and certainty within global transportation.

The ability to transport goods from one country to another is what makes international trade possible. Goods may be transported by air, land or sea. There are specific legal rules that apply where goods are carried by any one of these methods. For example, The Hague Rules, The Hague Visby Rules or the Hamburg Rules would normally govern carriage by sea whilst the CMR and the CIM would govern carriage by road

and rail respectively. In certain cases however, goods may be carried by a combination of sea, air or land. In other words, a multiple mode of transportation is used now commonly referred to as multimodal transport. Multimodal transport, which is the carriage of goods by more than one mode of carriage, now dominates all other modes of transport and is now considered to be the most dynamic method of carrying goods and the focal point in the overall globalization of the law of carriage of goods. More and more, goods are being carried under a multimodal transport contract because the focus on carriage is no longer on what modes will be used but that goods are carried to their destination.[3]

Liability in transportation until recently was modally based because the history of carriage of goods was based on the different modes of carriage used. This was a product of the particular times in which these liability regimes were developed. The technical and physical constraints of the times meant that goods where carried unimodally; poor transport interface points, poor road infrastructures, inadequate rail services and less than adequate air services for bulk cargo all conspired to maintain the status quo. Therefore different liability rules were developed for the carriage of goods by sea,[4] land[5], air,[6] and rail.[7] With the different advancements in transport technology, combining modes for carriage has become the most popular method of carrying goods, and mode specification in transport contracts has lost its place.

Technological revolution in transportation brought about important innovations. A major aspect of this has been the increase use of transport containers. This has improved the ways of carrying goods and has made the single contract for multiple modes attractive to all shippers. A major advantage of multimodal transport is that the shipper has to deal with only one contract, one document and one carrier, even though

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[3] UNCTAD Secretariat: Multimodal transport: The feasibility of an legal instrument (UNCTAD/SDTE/TLB/2003/1) p. 4

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

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

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

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

the goods are being carried by different modes. Additionally, container ships are fast and therefore allow fast cargo discharge.[8]

However, the use of multimodal transport is not without its difficulties. A particular difficulty arises where the goods are transported in containers. This is because in such cases it is not always possible to identify the stage where loss or damage occurred, since the goods are encased in the container. Consequently, liability for damage which depends on the law applicable to the mode of transport at the time of damage becomes difficult to establish.

In transportation, liability issues occupy an important place. The questions that invariably come up in carriage cases are: how much am I liable for? What is my exposure and limit? And who pays for what damage? Within multimodal transport, these issues are even more complex because of the added problem of multiple liabilities. Multimodal transport comprises of different legs each representing unimodal transport to which different international conventions; national legislation and regional laws apply. Each mode involved in this transport thus has a different liability regime. Thus when loss occurs in three different modes, three different liability regimes will potentially apply, this normally happens when the loss or damage is gradual, occurring over a number of modes which also brings into focus the problem of the application of multiple modes to a single loss or damage. These liability regimes have introduced minimum mandatory standards in their respective modes, where no such rules apply; we are faced with a plethora of diverse national laws applying to the different aspects of the transport. When any international or national law does not cover loss or damage, then standard contracts apply. At other times, these regimes leave liability gaps where no law applies, and at other times two or more rules are applicable to the same loss or damage.

Multimodal transport thus has no predictable liability regime, but a complex array of liability rules regulating it.

A further difficulty arises from the fact that multimodal transport is often used in cases of international transport. This brings into play multi-jurisdictional problems.

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[8] A problem associated with this speed is the fact that goods are deemed to arrive before the documents leading to problems of waiting for the documents in which case no freight is earned or taking the risk of delivering without documents; *Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd [1959] A.C. 576 (Privy Council)*

This problem is exacerbated by the fact that there is no uniform set of international rules in multimodal transport as exists in unimodal transport.[9]

The existence of different international laws, national laws and regional agreements has created unpredictability and disunity at the international level. The shipper will not know which liability regime, which limits of liability or which system of law will apply in the event of loss or damage. In the case of unimodal transport, when loss or damage occurs, there are rules under which such loss or damage will be investigated to allocate liability. In multimodal transport, especially those carried in containers, there is usually no way of pinpointing where loss occurs and who is responsible. There is therefore a need for uniformity and predictability.[10] This lack of uniformity is disadvantageous to multimodal transport as it impedes growth and results in additional cost to stakeholders[11]. Disharmony caused by the multiplicity of liability regimes in multimodal transport has become a burning issue because of the increasing use and importance of multimodal transport.[12] This disharmony has three facets:

-No uniform set of rules.

-A Plethora of applicable international, regional and national rules potentially applicable.

-A liability regime, which can only be determined post facto.

Discontent with this aspect of multimodal transport has prompted a search for a solution to the problem. Within the past 30 years we have seen numerous attempts at drafting sets of rules to regulate multimodal transport, yet this area is still without a set of uniformly acceptable international laws. The United Nations Convention on Multimodal Transport 1980 was the first international convention in this field, but it failed to attract the requisite number of ratifications to bring it into force.[13] Since then there has been no other such effort. What abounds in this area is the model contract drawn up by international private organizations.[14]

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[9] For example in carriage of goods by sea the Hague Rules deal with cases of jurisdiction

[10] UNCTAD, *Implementation of multimodal Transport Rules* (UNCTAD/SDTE/TLB/2 and Add: 1)

[11] For example lost in localising loss or damage

[12] J. M. Alcantara, "*The new regime and multimodal transport*" [2001] LMCLQ 399

[13] Privately constituted Rules had been drawn before this convention by the ICC, in continuance of that theme, the ICC and UNCTAD also prepared a set of Rules for multimodal transport. These Rules are all contractual and subject to any applicable mandatory convention and thus not effective in achieving uniformity.

[14] UNCTAD/ICC Rules, Combiconbill, The Multimodal transport document issued by the Baltic and International Maritime Council (BIMCO) revised in 1995.

Legal scholars and international organizations have also made efforts in the search for a solution to this problem. Indeed, a large number of legal literatures on multimodal transport are centred on finding a solution to this problem.[15] The proposals that have so far been advanced are for the most part based on extending the liability regime for unimodal transport onto multimodal transport, depending on where the loss is localized.[16] These proposals in essence simply maintain the status quo whereby the liability regime in multimodal transport is the same as unimodal transport. That is to say, where loss or damage is localized to a particular mode of transport, the liability regime applicable to that mode of transport will be applicable to that loss.[17] The effect of this approach is that multimodal transport is being equated to unimodal transport even though multimodal transport is different.[18]

The aim of this thesis is three fold.

Firstly, it provides a cursory explanation of the problem of an uncertain liability regime in multimodal transport.

The first chapter discusses the nature of multimodal transport, its principal concepts, and its doctrines. The chapter begins with a discussion of the definition of multimodal transport, suggesting that there is an emerging consensus relating to the importance of separating multimodal transport from its different constitutive modes, and argues that this has an important role on how multimodal transport is eventually regulated. This chapter also highlights the important role played by the multimodal transport contract in furthering the understanding of the basic concept of multimodal transport. This chapter concludes by suggesting that multimodal transport should be understood differently from the 'chain contract' it is perceived to be to allow its liability regime to reflect its realities.

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[15] A. Diamond, '*Liability of the carrier in multimodal transport*', In International Carriage of goods; some legal problems and possible solutions' ed. Schmitthoff and Goode, 1989 London. R. De Wit, *Multimodal Transport,* London 1996.

[16] The answers to the questionnaire conducted by UNCTAD to facilitate a new convention on multimodal transport shows overwhelming preference for the basis already in use in unimodal transport.

[17] D. Faber, *'The problems arising from multimodal transport'* [1996] LMCLQ 503, Per Vestergard Pedersen. *Modern Regulation of unimodal and multimodal transport of goods (2000) 285, Marlus 35*

[18] Multimodal transport is different because of the fact that multiple modes are envisaged.

In furtherance of the discussions of the problems encountered in multimodal transport, Chapter 2 considers the role played by the different parties to the multimodal transport contract and examines the problems of an uncertain liability regime triggered by difficulties in identifying the liable party. Specifically, it examines suit against the performing carrier and the impact of *The Starsin* case on such claims.

The third chapter discusses the uncertain liability regime currently applying in multimodal transport. Dwelling on the premise that multimodal liability is inherently unpredictable and lacks uniformity, this chapter seeks to clarify this problem by examining the actual regimes that potentially apply in multimodal transport cases. It also attempts to go into the details as to the problems of the uncertain liability regime in multimodal transport; showing how and why the present legal liability regime consists of a complex array of international conventions, national laws, and standard contracts designed basically for unimodal transport. This chapter also addresses the potential negative impact of a plethora of liability regimes applicable to multimodal transport.

It addresses the basis of liability and its role as a central issue of whether the regime as currently structured addresses the risk allocation in an equitable way between the parties, especially the impact of the exception clauses. It argues that this basis of liability is inappropriate within multimodal transport. This chapter will also specifically discuss the varying limits of liability within the different transport conventions. This is discussed in the context of the applicability of one limit of liability to a multimodal transport contract which includes different modes of transport with different limits of liability.

Specifically, this chapter examines the system of international soft law based on the ICC combined transport document and the UNCTAD/ICC document for Multimodal transport. The rules are designed to address the problems of the uncertain liability regime in multimodal transport, but do so in an incomplete manner, and thus the existing legal landscape needs to be reviewed in order to appropriately address the current structure of liability in multimodal transport. Unfortunately, this system of soft laws does not form a coherent system in the same way in which an international convention would.

The chapter concludes that the current liability regime in multimodal transport fails to adequately address the needs of multimodal transport and that the individual

conventions that have tried to cover multimodal transport have done so within their various modes, not completely covering multimodal transport.

Secondly, the thesis seeks to identify the proposed solutions put forward:
Chapter 4 and 5 of the thesis analyze the international response to the problem of multimodal transport. The 1980 United Nations Convention on Multimodal Transport is discussed in chapter 4. Specifically, it looks at the key elements of this liability convention drawing out the basic reasons for its rejection, and comments on its status and future as a viable convention in multimodal transport.
In continuation of this theme, Chapter 5 discusses the key focus of recent international effort within the United Nations agencies. Specifically, it addresses the UNCITRALS Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea].
A review of the work carried out within different national legislatures to put in place laws governing multimodal transport are assessed and their relative merits as viable solutions in responding to the needs of multimodal transport discussed.
It is identified in the thesis that the proposed solutions have so far been unable to solve the multimodal transport problem. It is asserted here, that this is due to the attachment these proposals have to unimodal liability concepts and therefore do not meet the aspirations of multimodal transport.

Chapter 6 in response to these problems considers a new liability theory in multimodal transport, based on a uniform and strict liability regime. Building on the foundations laid down in chapters one to three, chapter six looks at the sort of liability theory appropriate in multimodal transport.
The final chapter looks forward and addresses the reform of multimodal transport liability. It focuses on the role a new liability principle will play within multimodal transport. Specifically, it discusses the concept of strict liability as one of the concepts that need to be considered in developing a full and efficient transparent multimodal transport regime. It is asserted here that such a regime will address and solve most of the pertinent problems in multimodal transport.

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Specifically, it argues that although the better solution would be an international mandatory convention on multimodal transport, it will take time to draw such a convention and even when drawn, it will take a longer time to go through the different

parliaments for ratification. As a result, alternative solutions must be considered in the short term while the quest for such a regime continues. Tetley's reasoning in this might be considered, 'a short and long track' for a search for such legislation.[19] In this light, a non-mandatory regime is proposed the short term preferably in the fashion of the proposed UNECE draft in which special considerations will be given to the issue of conflict of conventions and current practices within transportation.

This thesis concludes by arguing that a new liability theory, which takes into consideration the specificity of multimodal transport while circumventing the shortcomings of various problems in multimodal transport, will indeed constitute a formidable instrument. While such an instrument may call for a re-think or adjustment of the different liability provisions in unimodal transport conventions, it is hoped that it will eventually also be the instrument of choice covering both unimodal and multimodal transport contracts.

METHODOLOGY

In addressing the issues raised by this research, the thesis applies a largely traditional legal approach in reviewing and analyzing the existing related literature, together with primary and secondary legal sources. In addition to this traditional methodology, the thesis also relies to an extent on documents from the different UN agencies, notably UNCITRAL, UNCTAD and UNECE. Overall in terms of approach, the thesis tries to be interactive.

ASSUMPTIONS AND CONSTRAINTS

It is not possible within the scope of this work to analyse all the components of multimodal transport. Besides the time constraints, this would also involve the input of a multidiscipline team. This work is thus not claiming to investigate all aspects of multimodal transport; it seeks to apply a new liability theory to the factual situation of

[19] Tetley, "Reform of carriage of Goods –The UNCITRAL DRAFT & SENATE COGSA '99'- LETS HAVE A TWO –TRACT APPROACH" [2003] 28 Tul. Mar. L.J. 1-144

loss, damage, and delay to goods carried in multimodal transport. Therefore it will not address some of the problems that apply to multimodal transport: such as the problems relating to documentary sales transactions, documentary liability and logistical and computer problems in the transfer of goods at interface points and just in time delivery services. This work however, intends to identify the key issues that appear to impede or prevent predictability in multimodal transport and seeks to answer the questions that arise.

This study is primarily based on English law although the subject is truly international. However, some consideration is given to civil law and U.S. law where this is of particular relevance.

Multimodal transport is changing rapidly and different countries are modifying and adopting national legislation to address this problem. International organizations are currently also in session trying to solve this problem. Of particular note here, is the work of UNCITRAL on its Transport draft instrument (UNCITRAL draft convention on the Carriage of Goods [Wholly or Partly] [By Sea] in which some of the provisions have not been crystallized which makes it difficult not only to understand but also to comment effectively on those provisions). And the just proposed draft of the UNECE which has not yet been deliberated on. The outcome of these deliberations may warrant that some positions taken are modified or amended. It is therefore important to define a point in time to which this work is valid. Most of the information was gathered up to and including the end of 2006.

CHAPTER ONE

INTERNATIONAL MULTIMODAL TRANSPORT: CONCEPT NATURE

This chapter seeks primarily to demonstrate that the inadequate understanding of the concept of multimodal transport is at the root of the liability problem in this mode. As evidence of the impact of this misunderstanding, this chapter discusses the definition of multimodal transport within current legal literature and shows that adopting the current approach of chained contracts led to the adoption of unimodal concepts in multimodal transport. This has obviously led to a confusing legal situation in which uncertainty and unpredictability reigns as each potential liability regime becomes applicable depending on the loss or damage history.

The purpose of this chapter is to examine the definition(s) of multimodal transport; the contention here is that an understanding of the pertinent concepts in multimodal transport allows for the development of rules aimed at encouraging actions that support certainty in the quest for a uniform liability regime in multimodal transport.

Multimodal transport that is perceived as a chain of unimodal modes as opposed to a single independent mode of carriage is also interpreted in terms of unimodal principles.[20] As a result it emulates unimodal concepts and constructs and imposes unimodal solutions to its problems. It is asserted here, that this fact constitutes a controversial issue within multimodal transport. In this light an outline of the pertinent concepts of multimodal transport are highlighted as a background to the differences that will be drawn between multimodal and unimodal liabilities. The objective is to show that multimodal transport is different from unimodal transport and ought to be treated differently.

This chapter will discuss the scope and nature of multimodal transport through its definitions as provided within the different legal instruments on multimodal transport.[21] Through these definitions, we will examine the nature of multimodal

[20] Prof Dr. K.F. Haak, "The harmonisation of intermodal liability arrangements" 5th IVR Colloquium- Vienna- 27-28 January 2005 p.2

[21] Notably the ICC, UNCTAD/ICC rules and the multimodal transport conventions. It must be noted that there are no legally binding instrument covering multimodal transport at this time.

transport in order to show that multimodal transport is different from unimodal transport and much more than the "chained contract".[22]

We will then briefly discuss the multimodal transport contract. By critically examining this contract we will further lend support to the fact that the multimodal transport contract is different from the usual unimodal contracts in the transportation of goods. It is a "New Specie" of transport contract not a possible amalgamation of unimodal transport contracts chained into one.

We will further examine the definitions of the different contracts within unimodal transport conventions, to show that multimodal transport is excluded from these definitions because it is different.

At the end of this chapter, we will conclude that, although multimodal transport contracts are undoubtedly implemented through the different modes of transport, there are basically different and should be treated differently.

1.1 HISTORY OF MULTIMODAL TRANSPORT

Multimodal transport has its origins in the through and successive transport contracts. Successive and through transport concepts, are concepts where either numerous carriers engage in the same mode effect carriage under one contract, or where one carrier contracts to carry goods over parts of the transport while contracting with other carriers for other parts of the carriage as agents for the shipper. In both the above cases, the carriers involve assume responsibility for their parts of the transport.

In the case of through transport, the carrier acting as agent, enters into transport contracts with other carriers on behalf of the cargo interest, making the latter a party to these contracts.[23] In such a case when loss or damage occurs, the cargo concern has to identify the carrier who is legally liable. If the goods are containerised it might be difficult to identify the carrier under whose charge loss or damage occurred. However, even when the cargo concern can so localise, he might find himself faced with an unknown carrier in another country facing unfamiliar laws. On the other hand, if loss is unidentified, the cargo concern finds himself in the unenviable situation of having to sue all carriers concern at enormous financial cost. The through transport concept essentially entails a situation in which the carrier enters into a contract with the cargo

[22] Prof. K.F. Haak, The Harmonisation of intermodal liability arrangements, 5th IVR Colloquium-Vienna, 27-28 January 2005. p.3, Ramberg J, "The Future Law of Transport Operators and Service Providers [2004] 46 Scandinavian Studies in Law, 135, p. 137

[23] D Faber, " The Problems arising from multimodal transport " [1996] LMCLQ pg 503

concern to ensure that his goods are carried from one point to another in some instances door-to-door. He further takes on himself the responsibility of contracting with other carriers possibly in other modes of transport to carry the goods of the shipper in furtherance of the original transport contract. What he does not do, is assume responsibility for the acts of the other carriers, while the multimodal transport carrier would assume responsibility throughout carriage. Within this thesis, it is this difference between the through transport contract and the multimodal transport contract which is highlighted.

1.2 CONTAINERISATION AND MULTIMODAL TRANSPORT

Although multimodal transport undoubtedly existed long before containerisation was recognised as a transport concept, there is little doubt that the use of containers was essential to the growth of multimodal transport. This assertion rests on the fact that, the term multimodal transport gained increased popularity with the advent of the container in the 1960's.[24] Before that time the exigencies of carriage dictated that goods were carried unimodally due to the technology available to transportation. Thus carriage of goods came to be described in terms of separate modes used and any reference to interface activities between modes was exceptional.

Transportation of goods was about the different modes used to carry goods from one place to another, it was never about carrying goods using more than one mode. And when more than one mode was involved, it entailed unpacking and transferring goods from one mode to another: this usually was slow and led to loss, damage and at times theft during the interface points.

With the advent of the container, the practice of carrying goods using different modes of carriage expanded to the extent that it is now considered to be the fastest growing method of transporting goods.[25] The success of the container has shifted the focus of the carriage from the single mode to multiple modes of carriage. Presently, one of the obvious advantages of the shipping container is that it makes loading and unloading easier, and enables rapid change from one mode to another.[26]

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[24] Pierre-Jean Bordahardy, "Containers: a conundrum or a concept? (2005) 11 JIML 342

[25] Pierre-Jean Bordahardy, "Containers: a conundrum or a concept? (2005) 11 JIML 342

[26] F. Broeze, The Globalisation of the Oceans: Containerisation from the 1950's to the Present (Research in Maritime History No. 23- International Maritime Economics history Association St John's Newfoundland 2002) ch.1 'A concept and its realisation' pp. 9-25 for a detailed examination of the use of containers.

The multimodal transport concept is a concept, which usually invokes different things to different people depending on their particular background. To the transport logistic specialists, it conjures up a carriage in which different modes are used to carry goods preferably in containers to their destination. To the lawyer it invokes a type of carriage in which one carrier assumes responsibility for the carriage of goods to a particular destination irrespective of whether he is physically involved in the carriage or not and irrespective of the mode(s) used. The first type of multimodal transport is purely physical and depends on the container; the second type that is contractual is more concerned with the legal implications of such carriage. Both are however, linked in that while physical multimodal transport can stand alone, contractual multimodal transport invariable finds itself linked to the physical side because of the prevalence of multimodal transport contracts in which the container is used. It is therefore pertinent that both concepts are examined before a definition of this concept is attempted.

Technical multimodal transport is the physical transportation of goods from one place to other using different modes of transport; this type of carriage was greatly encouraged by the prevalence of the use of containers.[27] The advent of the sea containers actually provided the impetus for the further development of multimodal transport.[28] These containers were considered at that time to be the greatest innovation in the field of transportation of goods since the innovation of the steam engine, easing greatly the transfer of goods at interface points between modes and encouraging parties to use different and multiple modes. The main stay of technical multimodal transport can be said to be the container, because although multimodal transport existed long before its introduction, its use only became widespread with containerisation. This was based on the fact that the physical act of using containers safeguarded the goods and greatly reduced the risks of loss and damage during carriage which at the time constituted the main problem in the transfer of goods at

[27] Hugh M. Kindred, Mary R, Brooks, Multimodal Transport Rules (Hague: Kluwer Law International, 1997) pp.12-13. In which the Container is viewed as a large metal box that can be loaded at the shippers premises to be carried by road, rail, container ships (and in some cases by air). During transportation the goods are not physically handled.

[28] Plinio Manca, "The legal outline of carriage by containers [1968] 3 ETL 491. Containerisation changed the transport landscape in the 1960s. See also, Samuel Robert Mandelbaum, "International Ocean Shipping and Risk allocation for cargo loss, damage and delay" J Transt'I. L. & Policy p.4, Johnathan B.L.K, Jervell III, Anthony Perl, Patrick Sherry, Joseph S, Szyliowicz, " Symposium on Intermodal Transportation; Intermodal Education in Comparative Perspective" (2000) 27 Transp. L.J. 419 at p.420

interface points between modes.[29] Containerisation can in this way therefore be said to be the cornerstone of a developing multimodal transport, accounting for the fact that most multimodal transport contracts use the container as the physical unit in which goods are transported, Bisset Stated that,[30]

"The theory of intermodal transport is based on the consolidation of several break-bulk units into a single interchangeable transportation unit that can be carried via a combination of modes of transportation under a single document and a single freight charge, from the shippers warehouse. The container is the interchangeable unit, which it was hoped would Prove to be the integrating element of an intermodal system".

Legal multimodal transport on the other hand is synonymous to contractual multimodal transport, in which one person contracts to transport goods from one place to another using more than one mode and accepts responsibility for the goods throughout this carriage.

1.3 THE DEFINITION OF MULTIMODAL TRANSPORT[31]

Although it can be argued that Multimodal transport is essentially the international carriage of goods by more than one mode of transport during a single, seamless journey in which one carrier assumes legal and physical responsibility for the goods, there is no consensus definition of multimodal transport.[32] Despite this generally used

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[29] Roger de Cadt, "The Container and the Overseas Trade", [1968] ETL p.533. De Orchis, M.E. " Maritime Insurance and the Multimodal muddle3 [1982] ETL p 691.Simon Seymour, " The Law of Containers" (1974) JMLC p 564

[30] Tallman Bisset, " The operational Realities of Containerisation and the effect on the package limitation" Containerisation International (1988) p 26

[31] Multimodal transport, combined transport, intermodal transport, integrated transport are synonymous and there is no basic difference in meaning. Multimodal transport is used in this work in imitation of the United Nation Convention on International Multimodal Transport 1980. However De Wit, R, Multimodal Transport, Lloyds of London Press 1995, Para, 1.3 is of the opinion that multimodal transport differs slightly from combined transport, which is a term used to describe combinations in the same mode of transport. Intermodal transport is also used to describe this type of carriage although it is more prevalent in cases where goods are moved in the same unit unloaded for further transportation by another mode. TRANS/WP.24/2000/1.Clarke, " Multimodal transport in the new millennium" (2002) 1 WMU Journal of Maritime Affairs p 71., UNCTAD Review of Maritime Transport 1997 (UNCTAD RMT(97/1)

[32] W. Brad Jones, C. Richard Cassady, Royce O. Bowden, "Developing a standard definition of Intermodal Transportation" (2000) 27 Transportation Law J. 345,

definition the reality is based on the viewpoint of the definer.[33] Different parties tend to define multimodal transport as a function of the particular activity there are involved in. Therefore, companies or entities involved in different modes define multimodal transport as a function of their modes. The Inland Transport Committee of The UNECE Secretariat defines *"intermodal transport as where the major part of the European transport is by rail, inland waterway or sea and any initial and/or final legs carried out by road are as short as possible."* [34] This definition does not capture the essence of multimodal transport as it limits or specifies what it should be; by omitting air transport this definition falls short of a truly multimodal transport definition.

The Merriam-Webster defines [intermodal] transport as involving transportation by more than one form of carrier during a single journey.[35]

Diamond [36] defines multimodal transport as one *"...that involves at least two different modes of transport"*.

Xerri [37] defines [Combined Transport] as a contract *"... whereby the carrier undertakes to transfer goods from one place to another employing two or more modes of transport"*. Likewise, Glass defines multimodal transport also in terms of multiple modes used.[38]

Rule 2(a)[39] of the International Chamber of Commerce rules for a Combined Transport Document defines it as *"the carriage of goods by at least two different modes of transport"*. This stance is also followed in the United Nations Convention on Multimodal Transport 1980 Art (1)[40] where it is defined as *"the carriage of goods by at least two different modes on the basis of a multimodal transport contract"*.

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[33] Ibid, p.346, see also the Eno Transportation Foundation "Top transport Issues in 1993" Results of a survey of major transportation Organisations for the first Annual Eno transportation leadership development conference, April 1993.

[34] Terminology on Combined transport (Trans/WP.24/2000/A, 1.2.2000, Para 1.2) For the European railway industry, combined transport refers to bimodal transport by road and rail. (UNCTAD/SDD/MT7, Para. 64) CNC transport, a French company which carries multimodally also defines multimodal transport, as "the conveyance of goods via a combination of at least two transport modes within the same chain, during which there is no change in the container used for transport and in which the major parts of the journey are by rail, inland waterway, or by sea, whereas the initial and final part of the journey is by road and it is short as possible." CNC transport, http:/www.cnc-transport.com/uk/interrmodal/intermodal.html

[35] Merriam-Webster Dictionary, http:/www.m-w.com/cgi-bin/dictionary

[36] Diamond, supra note 12 at p35

[37] Xerri, Supra note 12 at p 138

[38] Glass, Freight Forwarding and Multimodal Transport Contracts (2004) P. 3

[39] ICC Publication No 298 [1975]

[40] United Nations Conventions on International Multimodal Transport of Goods 1980, published in [1980] ETL, 361

The general consensus from the five definitions of multimodal transport is that multimodal transport is defined in terms of the modes used. The conception here is that multimodal transport comprises of a 'chain' linking all the various modes into one contract.[41] The question that presents itself here is the veracity of that assumption. A lot has been written about the controversy surrounding the definition and nature of the legal multimodal transport concept.[42] At the centre of this controversy is the need to explain the distinguishing features of multimodal transport, which differentiates it from unimodal transport.

So far three views have been advanced to explain the legal character of multimodal transport. Firstly, the most popular view regards multiplicity of modes as its most distinguishing feature.[43] According to this view, two or more modes of carriage have to be used for multimodal transport to be diagnosed. The second view regards multimodal transport as based on a non-specification of mode(s); according to this view there are instances in which some contracts are non specific as there are dissociated from the provisions of transport conventions.

The third view is that whenever modes are combined within a contractual framework; a new contract is formed which can no longer be regarded as a contract for each of the individual modes.

1.3.1 Multiplicity of Modes

The most widely use basis for defining multimodal transport is one that defines it in terms of multiple modes of transport.

Before analysing the implications of these various definitions it is imperative to understand what the concept of mode entails. Most definitions refer to "modes" and the question is what a mode is? What are the constitutive elements of such a mode? Is the determinative criterion the conveyance (ship, truck or plane) or the method of carriage (air, sea, and road) or both?

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[41] Haak, supra note 20 p.3

[42] Diamond, A, Liability of the carrier in Multi-modal transport' in International Carriage of Goods: Some Legal Problems and Possible Solutions. Edited by C. Schmitthoff and R. Goode, 1988, London, p 35. Massey, E A, 'A critical look at the TCM' (1971-72) 3 JMLC 725 Driscoll, W J, 'The Convention on International Multimodal Transport: A Status report' [1977] 9 JMLC 441. Xerri, A. 'Combined Transport: A new attempt at unification '[1980] Revue de *Droit Uniforme*, p138.

[43] De Wit, R. Multimodal transport, (London 1995) at p. 18

The Multimodal Transport Convention, 1980,[44] Art 1(1) while defining multimodal transport as made up of multiple modes fails to define what a mode is, thereby leaving open the question of what should constitute a mode. However, what were thought to be the existing modes were enumerated in the TCM,[45] Art 1(2) as "Transport by sea, inland waterways, air, rail, and road"; without a determinative criterion as to what should constitute a mode in the future. From this restrictive definition, the conclusion to be drawn would be that the ranks of "mode" are closed, thereby eliminating any potential new means of carriage from qualifying as modes. Presently the increasing use of pipelines and barges in international transport highlights the question of modes: would these be modes?[46] Within multimodal transport, this concept has been interpreted and supported variously, ranging from being based on the legal regime to the conveyance used.

1.3.1.1 Differentiation of Mode by Legal Regime

It has been suggested that the legal regime is the differentiating element in the determination of a mode of carriage[47]. The number of modes will thus be dependent on the number of legal regimes applicable to each contract of carriage. It is asserted here that the use of a legal regime as a determinative factor is artificial, given that two different legal regimes might govern carriage carried on a single conveyance by a single carrier, or a single regime will apply although different carriers used different modes of carriage. For instance, a contract of carriage by road from one country to another, under the CMR might involve a situation in which two different modes are used; under Art. 2 (1) of the CMR if the vehicle is carried by sea unloaded, the CMR convention continues to apply. In such a case although that carriage is obviously [multimodal] carriage, only one legal regime is applicable. It is submitted here that this criteria is insufficient to define "mode".

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[44] The United Nations defines a mode of carriage as the method of transport used for the movement of goods e.g. by rail, road, sea or air. ECMT UNECE European Commission "Terminology on combined transport" www.cemt.org/online/glossaries/termcomb.pdf.

[45] (TCM) Transport Combiné de Marchandise, UN Doc Trans/370, see Massey, E A, 'A Critical look at the TCM' (1971-2) 3 JMLC 725.

[46] Mankadaby, 'The Multimodal Transport Convention; A Challenge to Unimodal Transport' (1983) 32 ICLQ121 at 125

[47] De Wit, R, Multimodal Transport, Lloyds of London Press, 1995 Par.1.4

This is a unimodal as well as a multimodal reality as laws have different scope of application and will always apply when the carriage falls within their scope of application.[48]

1.3.1.2 Differentiation of Mode by Conveyance

Conveyance is the traditional criterion used to differentiate mode: here 'mode' is seen as a method of carriage.[49] This is due to the fact that transportation so far has been compartmentalised; and the different conveyances are associated with different types of carriages, i.e. ship-used in carriage by sea, planes-carriage by air, train-carriage by rail, and truck-carriage by road. Although this criterion is clear cut, it is not without ambiguities, i.e. Art 2 of the CMR, states that the CMR governs carriage of goods carried by another conveyance, provided the goods are not off-loaded from the vehicle for such further carriage. Thus when a road vehicle is carried by sea, the CMR still applies and the carriage is considered to be carriage by road, although a ship and sea were also used.

1.3.1.3 Differentiation of Mode by Carriers

This distinction exists only in Italian Doctrine, where multimodal carriage is regarded as carriage involving two or more carriers involved in carrying the same unit load.[50] This means that multimodal carriage occurs whenever two carriers carried goods even when only one conveyance was used.[51] This definition is also used by the Norfolk Southern, a rail provider, and defines [intermodal] as "*the movement of trailers and container rail cars*".[52] This interpretation suggests only one mode of carriage and therefore fails to capture the multimodal concept. This interpretation is therefore inappropriate.

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[48] Art 2 (1) of the CMR Art 2 (1) of the CMR
The conveyance used to transport goods has no status in multimodal transport. The MTO does not promise to carry by aircraft, ship, train or articulated road vehicle, he promises only to carry to a precise destination.
In unimodal transport, the underlying emphasis on conveyance is reiterated by the different conventions and is presumably an essential term of the contract in each case.

[49] This is the definition favored by the United Nations multimodal transport handbook

[50] This concept is usually understood as successive carriage

[51] Xerri, supra note 12 p.139. See also "Berlinbari ad Verruchi il Transporto combinato nueve problematiche' in Terra di responsabilita e documentazione seminario sui Transporti Combinato, Geneva 1974, p.17.

[52] Intermodal for Norfolk Southern Corporation, http:/nscorp.com/nscorp/html/conrail/finkbiner-over.html

Within academia, De Wit[53] contends that, the concept of mode is made up of two basic ingredients, the type of vehicle used and the medium used, one on its own cannot constitute mode and would not define efficiently the concept of multimodal transport.

Thus even within this concept in which multimodal transport is seen as dependent on the modes used, there is no universal standard by which modes are defined. What actually is a mode? It is a method of carriage, means of carriage, a branch of transport law or just a legal concept differentiating one type of carriage from another. The assertion here is that the use of mode as the determinative criteria in the definition in multimodal transport is based on the traditional forms of transport in which the different vehicles used in the transport was a determinative criteria, and not on any implications as to what multimodal transport was. This stance was supported by the regulation of transportation along modal lines relating to the "hardware" rather than the "software" of transport.[54] Each and every mode of transport was discussed in isolation, because exigencies of the time dictated that carriage was unimodal. However, the landscape of transportation has changed from the case of particular modes to contracts in which the emphasis is on "in time" deliveries as opposed to modes used.

I.3.2 Non-Multiplicity of Modes

Although the definition of Multimodal Transport highlights the fact that Multimodal transport is predicated on the potential use of two or more modes, there is no requirement that these modes be specified.[55]

This is because the specification of the mode of transport is not usually an essential requirement of the contract of carriage. The liberty to choose the modes used in the multimodal transport contract means that, most multimodal transport contracts will not include the mode(s) to be used.[56] A distinction must here be made between a contract which specifies or clearly contemplates that particular mode(s) will be used and one in which the contract leaves open the choice of modes; although both might

[53] De Wit Supra 46 Para 2.207, p. 171

[54] Jan Ramberg, "The Future of Transport Operators and Service Providers," [2004] 46 Scandinavian Studies in Law, 135 at p.137

[55] B Whebel, "The development of a combined transport document" [1972] Il Diritto Marittimo 312, p.320

[56] This liberty clause is essential in Multimodal transport.

be multimodal transport, one would be restrictive as to the modes. This tendency of specifying the modes intended to be used is seen increasingly within unimodal transport contracts, in most cases the contract previews the use of another mode of transport and states it.[57] While the other form, the non-specified method, is mostly found within Multimodal transport in which the carrier is not a unimodal carrier and does not need to specify any of the modes to be used. This may be the case in which the customer leaves the choice of carriage to the carrier. This non-specification of modes is what makes multimodal transport inherently different from unimodal transport.[58]

This second stand on the nature of multimodal transport, views it as an autonomous contract not based on the 'chained' concept. Early debate on the importance of the use of different modes as a constitutive element in multimodal transport had conceptualised the issue of "modes" as one of little importance. The view here is that the multimodal transport concept is greater than the sum total of the transport modes that might be chained together. It constitutes not only carriage but also all the activities that constitute total transportation; the promise to carry from A-B;[59] Ramberg states that

> *"It is not the combination of various modes of transport as such that disconnects theContract from existing international conventions, governing the respective branches of transport law, but rather the fact that the promise of transportation does not contain any reference to a particular mode"*[60]

Early recommendation on multimodal transport touched on the importance of modes. As far back as 1972,[61] Lord Diplock had recommended that it might be better if the contract included a clause to the effect that the modes used were not stated. This question was also a moot point during the conference leading up to the TCM.[62]Stating the modes in the contract was not recommended on the ground that it would limit the freedom to choose mode(s) and limit the flexibility of the

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[57] This tendency is seen increasingly in Unimodal transport, a case in point is *Quantum Corporation v. Plane Trucking [2002] 2 Lloyd's. Rep 25.*

[58] Faber D "The problems arising from multimodal transport" [1996] LMVLQ 503 p. 504, Asariotis, European Commission, "Intermodal Transportation and the Carrier Liability" (Report (1999), 5-11

[59] Prof. K.F. Haak, The Harmonisation of Intermodal liability arrangements, 5th IVR Colloqium-Vienna, 27-28 January 2005 p.2

[60] Ramberg; "Harmonisation of the Law of Carriage of Goods." [1973] Scandinavian L R, p 312

[61] Diplock (Lord), Genoa Conference on Multimodal Transport (1972) 74 Diritto Maritimo, p177.

[62] Massey, supra, note 12 p 731

carrier. The rationale behind this stance was that multimodal transport was not dependent on multiple modes, but was meant to address the problem of selecting the best mode of transport or combination of modes when more than one mode can or should be used, thus to force carriers to choose would hamper the basic nature of multimodal transport.

This view was widely supported and gained such prominence that all multimodal transport contracts presently in use contain clauses to the effect that a choice as to the mode(s) to be used is not important.

Clause 6 (1) of COMBIDOC states that the "[CTO] is entitled to perform the transport. *"...by any reasonable means, method and route".*[63]

The view expressed by this liberty clause has the effect of endorsing the opinion that the critical feature of multimodal transport is not multiple modes.

It is asserted here that the multimodal transport contract is basically one, which is non-specific and is dissociated from the particular modes of transport.[64] These types of contracts are now hailed as the new types of transport contracts, which have overtaken the unimodal transport contract. It has been shown that within multimodal transport the cargo concern are less interested in specifying the modes to be used, content to let the carrier decide.[65] Initially, shippers where quite happy with concluding contracts on particular modes of carriage; road, sea, air or rail, but with the development of modern ways of carrying, the mode of carriage has become irrelevant. The customer is content to conclude a non-specified modal transport contract.[66] The move is now towards transport logistics, and the focus is on ensuring that goods are carried from one point to another through a combination of all the necessary ancillary services needed for the transport operation. These ancillary services of warehousing, storage, distribution etc are now amalgamated within one contract with the MTO. It becomes increasingly obvious that the constructs of unimodal transport can no longer be implemented when such a variety of services are concerned.

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[63] See also FIATA Combined transport document clause 12, " The reserves to himself the liberty as to the means, route and procedure to be followed"

[64] Whebel B, " The Development of the Combined Transport Document" [1972] Il Diritto Marittimo, 312, p.320

[65] UNCTAD Doc, "Institutional and technological changed in transport/Logistic Field" (4th March 1999) UNCTAD/SDTE/TIB/3, 5.

[66] Ramberg J, Supra note 59 p 137

The problem here is that, at the time of concluding such a contract, the parties would not know what liability regime would apply under the current framework of applicable regimes in multimodal transport. This is what has come to be known as the "multimodal transport problem", where different transport conventions might apply to different aspects of the same contract. No such difficulty would apply if these conventions were limited to unimodal transport within their modes, because, they apply also to potential multimodal contracts once carriage commences a conflict situation might arise. Such a conflict is bound to arise whenever in exercise of such a liberty, only one mode of carriage is used. In such a case is the contract redefined as unimodal, or does it stay multimodal, although it was executed as unimodal? The mandatory application of most international conventions, ensure that such contracts may be subjected to a specific law once a mode is chosen to effect transport, and in cases where multimodal transport is used a "network" of laws become applicable. This issue was dealt with in the Montreal Convention 1999, under Art. 18 of the convention, all modes used will be deemed to be carriage by air if the contract reflects only intended carriage by air. The solution here is that the contract is determinative.[67]

Under German legislation,[68] the opposite view was taken, that once a mode is used which is different from the contractual mode, the regime applicable is that of the mode used not contracted. This view also reflects the question of nomenclature, can the parties derogate from a particular law by calling the contract something else?

In *Street v. Moutford* [69]the question before the House of Commons was whether a "licence was really a licence and not a tenancy. If it was a tenancy it was subject to the Rents Act, but not if it was a licence.

Lord Templeton was of the opinion that

"...If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence".

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[67] Art 18 reads as follows, " If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air"

[68] German Supreme Court, Subsection 413 H.G.B., 13th October 1983, Vers. R, 1984, 680, Transp. R, 1984, 172

[69] (1989) AC 809

In carriage of goods the academic opinion favours the stance taken by The Montreal Convention, that the carrier has the freedom to choose the modes of transport and there is no reason why his liability should vary according to how he exercises this option; what applies is the contract choice.

De Wit interprets this clause as tailor made to cater for situations in which although the contract is multimodal its execution is eventually unimodal to preserve the integrity of the multimodal contract.[70]

The outcry against such an interpretation is based on its ability to allow circumvention of unimodal conventions, but it is highly unlikely that parties would seek to choose multimodal transport to circumvent any unimodal conventions.[71]

The increasing response to the problem within academia is that dismissal of the predominance of modes in multimodal transport might have been mistaken. Firstly Glass[72]cautions that it is indeed "*difficult to think away the modal association*" or to draw a *"bright line"*[73] in multimodal transport, for once one defines it in terms of modal non-subjectivity one is in the realms of unspecified contracts. [74]

It is contended here that this thinking is flawed. Multimodal transport is different from unimodal transport not because it entails two or more modes of carriage. The concept of through carriage also entails two or more modes of transport but it is not called multimodal transport. The distinguishing feature of this mode is the fact that it does not specify that a particular mode of transport will be used. It is this liberty to use different modes unspecified that disconnects this mode from unimodal transport. Once the modes to be used are stated at the beginning of the contract, we find ourselves within the realms of unimodal transport, especially in light of recent developments in case law. A case in point is the *Quantum case*[75].

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[70] De Wit R, *Multimodal Transport*, Lloyds of London Press, 1995 Para 1.4; Erik Rose., 'The application of the Convention for the Carriage of Goods for Multimodal Transport' 1988 LMCLQ 316 & 329

[71] De Wit, supra note 69

[72] Glass; Multimodal transport, in Yates, International Contracts for the carriage of goods, 1996, Lloyds of London Press 6.4.1.3.

[73] Glass, "Meddling in Multimodal Muddle? –a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea] [2006] JBL 307 p.315

[74] Jan Ramberg, A paper presented in a seminar on multimodal transport in Ravenna June 1996, organised by the chamber of commerce in association with the Mediterranean Maritime Arbitration Association. See also Rolf Herber, "Towards the Harmonisation of carriers liability (1992) 94 II Diritto Marittimo 935. For a contrary view see Ramberg, "Harmonisation of the law of Carriage of Goods [1973] Scandinavian L.R. p.312

[75] Quantum v. Plane Trucking [2002] 2 Lloyd's Rep 25

1.3.2 A NEW CONTRACT

The third view is that whenever, modes are combined within a contractual framework; a new contract is formed which can no longer be regarded as a contract for each of the individual modes. This stance is the logical follow-on from the non-modally specified contracts. The logic here is that such multimodal transport contracts should be considered to be different from unimodal transport contracts. The Quantum case has modified this stance which is the most logical way of viewing multimodal transport.[76]
In the case, the court considered that a multimodal transport operation might have two separate aspects where it would be possible to combine liability systems from different modes of transport.
In the case, the contract was for the carriage of goods from Singapore to Dublin under an air waybill. The first part was to be for the carriage by air from Singapore to Paris and the second part was by road from Paris to Dublin. During this carriage, goods where lost through theft preventing the goods from reaching their destination. At first instance, the court held that, The CMR did not apply to the contract, as Art. 1(1) of the CMR was limited to road contracts, therefore it was the nature of the contract that must be examined, and that since there was a single air contract of carriage pursuant to which the goods were carried from Singapore to Dublin the CMR was inapplicable. This reason was rejected on appeal.
The arguments were stated as,
"The CMR was applicable to an international road leg of a large contract where, (a) the carrier may have promised unconditionally to carry by road and on a trailer , (b) the carrier may have promised this but reserved either a general or limited option to elect for some other means of carriage for all or part of the way or (c) the carrier may have left the means of transport open either entirely or as between a number of possibilities at least one of them being carriage by road; CMR was also applicable where the carrier may have undertaken to carry by some other means but reserved either a general option to carry by road."[77]

[76] ibid
[77] ibid at p. 39

"CMR should apply to the whole of any multimodal transport regardless of whether any non- road leg was conducted by roll-on, roll-off transport; overall characteristics of the whole contract would be to take agreed international road carriage outside any convention (Warsaw or CMR) in circumstances where the contract overall could not be characterised as primarily for road carriage; and it would be inconsistent with the general European approach; contract would by their nature or terms two separate aspects and the present, despite the length of the air leg was just such a contract"[78]

Mance L.J proceeded on the grounds that to characterise this contract otherwise would open up the *"prospect of metaphysical arguments about the essence of the contract, arguments best avoided"*[79]

Most commentators on the CMR agree with this stance[80], on the grounds that any criteria based on the length of the carriage will add another dimension to the CMR.

The approach of the Quantum case seems to be that the CMR would prevail under circumstances where the contract was not primarily for road carriage; thereby bringing the CMR in conflict with different conventions. Of particular note would be the position of the UNCITRAL draft instrument Vis-a Vis the CMR in the light of this case, because the scope of application of the draft instrument will coincide with that of this interpretation. It will be difficult to be able to state when one will apply as opposed to another. A case in point will be the carriage of goods from the UK to Italy; the first leg is for the carriage of goods to Dover and then by road to Italy. In this case, the Draft instrument will cover the whole carriage so would the CMR. In this light conflict would always exist in such cases.

A more conducive decision in the case of multimodal transport would have been the decision at first instance, which clearly sought to differentiate unimodal transport from multimodal transport. This stance coincides with the modern form of carriage in which it is the contract, which should be examined.

What should be clear is that multimodal transport should not be regulated using unimodal concepts as this will lead to conflict within laws. This provides ample reason for insisting on the non-specification of modes in multimodal transport

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[78] ibid p. 41

[79] ibid, p 62

[80] Clarke, International Carriage of Goods by Road: CMR (4th ed,. 2003) Para 15, Clarke, "The line in Law between Land and Sea"[2003] JBL 522, Theunis, International Carriage of goods by Road (CMR) London, 1987), p. 247

contracts as any foray into mode specification undoubtedly will lead to the application of unimodal conventions and possible conflict of conventions.

1.4 An Evaluation of Multimodal transport

Arguably, the question that needs to be answered is whether the term multimodal transport is the right term to address the new way in which goods are carried today. Using the term multimodal invokes the concept of multiple modes and perpetuates the view that the industry is made up of different modes whose differences are more important than the overall carriage concept. This view which is widely accepted within the industry and academia today seems archaic given that the industry is changing into a highly integrated transport system.

During the first part of the last century, the different modes carried goods on their own terms under their respective conventions which laid down basis liability rules. Containerisation has changed all that, now the focus has shifted from modal carriage to multimodal carriage.[81] This trend is reflected within transportation itself in which shippers are no longer interested in modes but on timely deliveries.

The way goods are carried has been modified and maybe the term multimodal transport should also be modified to reflect the new concept by a more appropriate term which places emphasis on the basic embodiment of multimodal transport which is continuity. This of course will be wishful thinking as a change of name will not solve the Multimodal transport problem. However, even if such a name change was effectuated modalism will continue to play an important role in transportation. (The rich transportation history that exists is based on individual modes.) Recognising the force of this history and the attachment different parties have to their respective modes might explain why so far no attempts have been made to move beyond unimodal concepts to a concept that is free from modal attachments even in defining multimodal transport.

A closer look at the literature in transportation, paints a picture in which each mode stretches to accommodate multimodal transport.[82] The changes in the way goods are being carried today calls for a change of thinking; away from modes. The reality of

[81] Authur Donovan, "Intermodal transportation in Historical perspective" (2000)27 Transportation Law Journal 317 at p.318

[82] See Art 2 CMR, Art 38 Montréal Convention for the carriage of Goods by air.

multimodal transport shows that this is possible. Conceptually, this is one of the strengths of multimodal transport and deserves to be capitalised on. Multimodal transport has obviously departed from the attachment to modes; now calls should be centred on modal non-subjectivity in which modes are not mentioned. This obviously is the future of transportation.

1.5 THE MULTIMODAL TRANSPORT CONTRACT

The multimodal transport contract is a contract whereby a single carrier, the multimodal transport operator, undertakes the carriage of goods from one place to an ultimate destination with the possibility of using any mode or combination of modes against the issuance of a single transport document.[83]

The Multimodal Transport Convention 1980 defines the contract as one

> *"Whereby the [MTO] Multimodal Transport operator undertakes against the payment of freight to perform or procure the performance of international multimodal transport"*[84]

The ICC Rules for a Combined Transport document defines it as a

> *"Contract to carry and/or to procure the performance of [International] multimodal transport".*[85] What inures from these definitions is the fact that this contract is not a contract to carry per se as found in unimodal transport, but a contract to effect carriage either by carrying or procuring or both[86]

1.5.1 THE ELEMENTS OF THE CONTRACT

The payment of freight and the international nature of the contract are common traits in all international contracts for the carriage of goods, and as such do not hold a special place in multimodal transport.

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[83] Xerri, A., supra note 12 at p 138, defines multimodal contracts as contracts, whereby the carrier undertakes to transfer goods from one place to another employing two or more modes of transport. This definition which lays emphasis on two or more modes of transport is concurred by Diamond QC, supra note 2 pp 35-37

[84] Art 1 (3), of the UN Multimodal Transport Convention 1980

[85] Rule 2 (b) ICC Publication N° 298, Uniform Rules for a Combined Transport Document.

[86] The ICC Rules prefers the terms "and/or" between carry and procure, while the United Nations Conventions shows preference for "or" between carry and procure.

The elements, from which different legal consequences flow, arise from the fact that the contract is to carry and or to procure carriage.

1.5.1.1 CONTRACT TO CARRY OR PROCURE

The Multimodal Transport Convention, the ICC Rules and the ICC/UNCTAD Rules on multimodal transport and all the contracts that incorporate these Rules have as a common element, the fact that the contract is to carry or to procure carriage.[87]

This gives the MTO a wide margin; he can carry or procure carriage.

1. He can contract to carry
2. He can contract as a principal to procure carriage
3. He can contract to carry and procure

1.5.1.2 CONTRACT TO CARRY

The multimodal transport operator will contract to carry the goods to their final destination irrespective of actual carriage on his part. He takes on himself the physical and legal responsibility to ensure that the goods are carried to their final destination.

1.5.1.3 CONTRACT TO PROCURE

Initially procuring transport was the traditional domain of the freight forwarder as agents for shippers. For this reason a person who procured carriage was not considered to be a carrier under any of the conventions, as these conventions covered only contracts of carriage.

In multimodal transport procurement is placed on the same level as carriage and the fact that a person only procures carriage, will not affect his status as a carrier neither will it make any legal difference to the liabilities of the parties. Whether he contracts only to "procure" or to "carry" the MTO has the same responsibility as the carrier. [88]

1.5.1.4 CONTRACT TO CARRY AND PROCURE

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[87] Art 1(3) of the Multimodal transport Convention 1980

[88] Schmitthoff, C, "The development of the Combined Transport Document" (1972) 74, *Il Diritto Marittimo*, p 312

The MTO can contract to do both: Carry and Procure. In this case he will carry over part of the carriage contract and procure the parts that he does not carry to others, but at all times being responsible for the goods under the contract until they are delivered at destination.[89]

The mandate to procure carriage is one of the elements that effectively differentiates multimodal transport from unimodal transport where the contract is usually only to carry goods. The importance of multimodal transport and the influence it has on unimodal transport is now influencing the concept of the carrier. [90]

The discussions and debates within unimodal transport now are including the concept of the performing carrier as opposed to being limited to the contracting carrier; this is a reflection of the reality of multimodal transport within transportation generally. The Draft Convention on the carriage of goods by sea proposed by the UNCITRAL[91] includes the concept of the performing carrier. It defines it as,

> *"A person who performs, undertakes to perform, or*
> *Procures to be performed any of a contracting carrier's*
> *Responsibilities under a contract of carriage, at the request*
> *Of, or under the supervision or control of, the contracting*
> *Carrier, regardless of whether that person is a party to,*
> *Or identified in, or has legal responsibility under the*
> *Contract of carriage."*

The performing carrier concept in unimodal transport acknowledges the importance of procuring carriage but does not go as far as to combine the two functions in one person.

1.5.2 THE NATURE OF THE CONTRACT

[89] Early transport cases clearly emphasised the divide between carrying and procuring carriage. *Jones v European and General Express* (1920) 4 LiL. Rep 127 (CA), *Heskell v Continental Express* (1950) 83 LiL. Rep 443 at 445

[90] See Chapter 3 on the liable party under multimodal transport

[91] See the report of the Commission at its thirty –third session, 2 June 2000, General Assembly Official Records, fifty-fifth session, Supplement No.17 (A/55/17)

From the definition of the contract, we see that the contract is to effect carriage from the place of delivery to the place of destination in a situation in which more than one mode of carriage [may] be used. This contract could be executed using many modes, but it is a single contract between the consignor and the multimodal transport operator for carriage to a particular destination. It is not a chain of contracts glued together to which different provisions in different unimodal conventions will apply. This contract is a seamless contract evidenced by one document irrespective of who has the goods for carriage.

What makes this contract different is not the fact that two or more modes of carriage may be used, but the fact that it does not depend on the mode(s) to be used. This contract is based on a modal objectivity and not the modal subjectivity of unimodal contracts. The multimodal transport contract, which states the modes to be used is not a new innovation, it has always been a part of transportation.[92] This is epitomised in the different provisions found under unimodal contracts catering for such contracts. Such contracts must be distinguished from the true multimodal transport contract, for while

> Such contracts fall under the scope of application of unimodal transport conventions, the true multimodal transport does not,[93] though some of these conventions cater for limited multimodal transport.
>
> Art 31 of the Warsaw Convention states that
>
> *"In the case of combined carriage performed partly by any other mode of carriage, the provision of this convention shall apply only to the carriage by air provided that the carriage by air falls within the terms of Art 1."* [94]
>
> The above provision means that only the part of the contract performed by air is governed by the Warsaw Convention, any other mode included will have to look elsewhere. This point was forcefully made at first instance in *The*

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[92] *Stafford Allen & Son Ltd v Pacific Steam Navigation Company* [1956] 1Lloyd'sRep.495,*Crawford Law v. Allan Lines* [1912] AC 130, *Moore v Harris* [1870] 1 AC 318, *Lufty Ltd v Canadian Pacific Railway Co* [1974] 1 Lloyd's Rep 106.

[93] Erling Selvig, "Through carriage of goods by sea" (1979) 20 AJCL p 369.

[94] The Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air 12 Oct 1929, as amended by the Hague Protocol of 1955.
The Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air 12 Oct 1929, as amended by the Hague Protocol of 1955

Quantum case[95] where the judge interpreted a contract in which the carriage was to be performed in two stages, by air and road as "essentially and predominantly" a contract for the carriage of goods by air, but held that the Warsaw convention could not apply to the road portion of the carriage.

Similarly, Act 2 (1) of the CMR, however, states that

> *"Where the vehicle containing goods is carried over part of the journey by sea, rail, inland waterways or air.... and the goods are not unloaded from the vehicle, this convention shall nevertheless apply to the whole of the carriage".*[96]

This goes a little further than the Warsaw Convention, because it covers multimodal transport to the extent that another conveyance is used, for instance, a ship or a plane carries the vehicle. This is a common situation when goods are carried in a ferry from France to Britain, and the goods are not unloaded. However if under Article 2 the goods are damaged or loss through an act, which is exclusively considered to be due to sea carriage, the liability of the carrier will be determined by the sea convention applicable. Thus although multimodal carriage in the sense of two different methods of carriage is performed, the contract is governed by the CMR only to the extent that damage was caused during road carriage.

Neither the Hague Rules nor yet the Hague Visby Rules contain provision for multimodal transport.

The Hamburg Rules Art 1 (6) does so, it states that the,

"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 carriage by sea".[97]

Under the CIM "Regular road and shipping services which are complementary to railway service and on which international traffic is carried to be included in the list

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[95] [2001] All E R 916, p.926, [2001] 2 Lloyd's Rep 133, reversed [2002] EWCA Civ 350; [2002] 2 Lloyd's Rep. 25

[96] (CMR) Convention for the International Carriage of Goods by Road, May 1956. Transport.

[97] Hamburg Rules (1978)

referred to in Art 1" [98] are also covered by the convention, provided Art 48 is met. Art 48 states that

"In rail, sea transport by the services referred to... each states may by requesting that a suitable note be included in the list of lines to which the convention applies".

The rail provision may be said to regulate multimodal transport more than any of the other convention, because a contracting state may by including road and sea services to the list make the CIM a multimodal type convention, as the CIM would regulate those other modes as if they were carriage by rail.

As seen above, each convention, though purporting to regulate multimodal transport, applied only to carriage performed under its scope of application and does not extend to other modes. This is very unsatisfactory because

(1) It allows documentary cover without the concomitant liability cover for the same contract.

(2) It allows a situation in which different legal regimes become potentially applicable to the same contract and

(3) It is deceptive in that with the exception of the Hamburg Rules they come under the heading of multimodal or combined transport giving the impression that they actually cover multimodal transport, which they do not.

It must be stressed here that the provisions in unimodal transport conventions do not solve the multimodal transport problems; their main aim is to ensure that they resolve the problems of multimodal transport contracts within their modes.[99]

The absence of a mandatory applicable regime in multimodal transport means that standard terms in the contract will dictate the obligations and liabilities of the parties. Multimodal transport is conducted mostly on the basis of standard form contracts issued unilaterally by the carrier (MTO); this usually means that the contract turns to be more favourable to the carriers. Thus arguably, the carrier can exclude liability arising from certain functions or parts of the contract performed by other carriers. Thus a cargo owner who engages the MTO to transport his goods under a multimodal

[98] COTIF/CIM (Convention for the International Carriage of Goods by Rail) 1956 and 1980.

[99] See Chap 2

transport contract may find that the MTO is not liable for the whole carriage.[100] The absence of such a mandatory standard for the contract might seem to pose difficulties in this mode. [101]

A burning and pertinent issue within multimodal transport is the status of the contract. Is it a contract "sui generic", essentially different from unimodal transport contract, or is it a "chain contract" bridging the different unimodal transport contracts constituting it?[102] This question is usually at the heart of any enquiry as to conflicts with other conventions. There are generally two arguments to support this principle.

The different legal opinions are based on two main facets.

(1) Firstly that the contract being a combination of modes is dependent on modal rules and thus not sui generis.

(2) Secondly that because the contract is non-mode specific by nature it is not a contract of carriage but of procurement and therefore is not a contract of carriage sui generis.

The first group of legal commentators led by De Wit,[103] while stating that multimodal transport is a mode of transport, and affirming the belief that the means of carriage is less significant to the overall contract, concedes that once a carrier elects to use a particular mode, the contract is automatically subjected to the specific legal rules appropriate to that mode(s).

He is of the opinion that the contract is basically one of carriage. The MTO, who carries under a particular mode, does so in an additional capacity as carrier and should be subjected to the appropriate mandatory regime.

Led by Lord Diplock,[104] those who hold that the contract is one of procurement and not "sui generis" use conflict avoidance with other transport conventions as their reason.

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[100] It is hoped that market forces will ensure that the terms will be fair otherwise cargo concerns will take their business elsewhere.

[101] These difficulties are not insurmountable, as the cargo concerns and insurers could put pressure on carriers by examining the contractual terms on offer and rejecting unreasonable ones.

[102] E Selvig, " The background to the convention ", Multimodal transport, The 1980 UN Convention, papers of a one day Seminar held at Southampton University Faculty of Law, 12th September 1980, A 17; See also, David A Glass, "Meddling in the multimodal transport muddle? A network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea], [2006] LMCLQ 307 p.313

[103] De Wit., Multimodal Transport (1995) para 2.207

[104] Lord Diplock, "The Genoa Seminar" (1972) Il Diritto Marittmo p 179

Lord Diplock states that the contract should be one to procure transport to reduce the risk of conflict with national laws, recommending that the MTO should restrict himself to "Storing the goods in containers (stuffing and stripping). Storing the loaded containers at intermodal points and transferring them from one mode of transport to another".

Lord Diplock believed that it would be preferable if the Multimodal carrier were a separate legal entity, separate from any of the carriers who physically execute the carriage. His Lordship's statement, beyond indicating a personal disposition against the contract being one of carriage, isolates the aspect of the contract that in Schmitthoff's[105] opinion has impeded its acceptance as a separate contract.

Schmitthoff's view is that, this contract is one of procurement of transport, the MTO's duty being the use of reasonable care in the selection of « actual» carriers. Thus as a contract of procurement, he states that the different mandatory conventions would not apply to it.

More than any other feature, the fear of conflict has contributed to this confusion in multimodal transport. The analytical point of departure however is found within the conventions themselves, where by their own provisions they expressly exclude from their scope of application multimodal transport contracts. Thus, on the basis of the very conventions by which the multimodal contracts conflict they are excluded.[106]

While Diplock is of the opinion that the Multimodal contract is not a contract of carriage sui generis, and Schmitthoff that it is not a contract of carriage at all, the multimodal transport contract is a contract sui generis and a contract of carriage. It is a contract of carriage because by the freedom of contract recognised under English law, the parties are free to contract on any terms agreeable to them, and as such the parties are free to state that their contract is for carriage or not, and from the nature of the contract there is no reason why such a restriction would be placed on the

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[105] Schmitthoff, "The Development of the Combined Transport Document" (1972) Il Diritto Marittimo, 312 p 314

[106] Art 31 of the Warsaw Convention states that the Warsaw Convention would apply to any phase of a multimodal contract. The implication is that it will apply to the carrier by air when he executes the air phase but not to other modes of carriage (Article 1) Similarly Art 2 of the CMR deals with multimodal transport in circumstances in which goods are not unloaded. . In this case the contract though stating that other modes will be used is not a multimodal but a unimodal contract, with the promise that the vehicle must be carried unloaded

multimodal transport contract. However, in spite of hostile academic opinion as to the status or the contract as sui generis, and the lack of judicial pronouncement on this, the majority of the countries in attendance at the United Nations Conference for the Convention on international multimodal transport, were of the opinion that the contract was "sui generis".[107]

This was based on the fact that the multimodal transport was increasingly being seen as separate from unimodal transport with a separate legal regime, and thus no conflict was apparent.

A small group of countries were however not convinced that such a legal separation was possible, in the light of mandatory regimes applicable to the different sections of a multimodal carriage. To put their fears to rest, Art 30 (4) and Art 38 were passed to ensure a clear separation. (The provisions on non- derogation of other international conventions, and the respect of rights and obligations secured under these conventions)[108]

The main premise here remains that the MT contract is a contract "sui generis", this interpretation will per se break the link that this contract potentially has with unimodal transport.

It is contended here that this argument is tenable especially when examined from the basic tenets of multimodalism.

1.5.3 THE STATUS OF THE CONTRACT WITHIN UNIMODAL CONVENTIONS

The main thrust of academic and judicial opinion is that, unimodal transport conventions apply only to contract of carriage in their relevant modes.

Art 1 of the CMR refers to contracts for the carriage of goods by road, Art 1 of the Warsaw Convention, "carriage of goods by air" and defines carriage in Art 1 (b) as an agreement to carry, while Art 1 and (b) of the Hague-Visby Rules also applies to contracts for the carriage of goods by sea.

The multimodal transport contract is none of the above, it is a contract to effect carriage with the possibility of using a combination of modes or only one mode, and

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[107] E Selvig, supra note 101

[108] See Chapter 4 which looks at the Convention

as such does not fall within the ambit of these rules. Additionally the fact that the contract in some cases is one of procurement also brings the MTO outside the ambit of international mandatory provisions, although these unimodal conventions might well apply to contracts of procurement in instances in which an original contract of carriage becomes a contract of procurement. In *Ulster Swift V. Taunton,*[109] the CMR carrier, decided to sub-contract the whole carriage to another carrier, and did not carry over any part of carriage. He was held to be the carrier and the contract one of carriage under the CMR, although only as successive carrier (Art 34) because he had contracted to carry, it was stated to be irrelevant how the contract was executed. This stems from the fact that the actual execution of the contract of carriage is not in itself significant what is decisive is the classification under which carriage is effected

However, a multimodal transport contract in which the carrier contracts to carry as opposed to procure carriage, will not make the contract a unimodal contract, even if he carries exclusively by one mode, for the CMR like the Warsaw Convention, the CIM and the Hague Rules, apply only to contracts of carriage in their particular modes. The important element is the fact of the contract of carriage, thus the multimodal transport, which is carried using a single unimodal mode, does not change its status.

A corollary to this is the fact that a unimodal transport which is performed multimodally or by a different mode of transport does not make the contract multimodal and subjects it to the appropriate rules of either the multimodal regime or the other transport regime. When this happens, it brings into focus rules as to deviation from the original mode found in the contract.

1.5.3.1 DEVIATION BY MODE IN UNIMODAL TRANSPORT

The lack of adequate judicial opinion on modal diversion in unimodal transport as opposed to geographical diversion is down to the fact that it does not affect the applicability of the particular unimodal convention.
For instance a contract envisages the application of Art 2 of the CMR under which the goods should not be un-loaded from the vehicle for carriage by another mode, but the

[109] (1977) 1 Lloyds Report 346 (CA)

carrier unloads the vehicle. In this case, the CMR would be inapplicable per se because the goods were unloaded from the vehicle, and the carrier is in breach of his contract to carry without unloading. However, it would be right to hold him liable under the CMR because

The CMR by Art 41 is non-derogatory to the detriment of the claimant and

The carrier is in breach of his contract of carriage.

The parties did not enter into a contract with a liberty clause, but one under the CMR, which the claimant expects, will regulate their relationship.[110]

In a German case, the contract was for the carriage by road, but the carrier used rail to effect carriage.[111] It was held that the law applicable as between carrier and consignor was the road convention, despite rail carriage, on the basis that a carrier by his breach cannot be allowed to be in a better position than he would have been had he performed the contract correctly.

Similarly in O.L.G. Bremen[112] it was held that the Warsaw Convention continued to apply even though no air carriage was actually used, as the contract was for the carriage of goods by air. If it was held that the Warsaw Convention did not apply, we will find ourselves in a situation in which no transport convention will apply, because the CMR expressly states that it applies only to contracts of carriage by road, and this was not one for the carriage of goods by road, and thus fell outside the ambit of application of the CMR.

The position of the claimant under the road regime was more favourable than under the air regime. The court allowed the claimant to recover under the road regime, on the grounds that the carrier should not be put in a better position, because of the breach. Lord Atkin in *Hain S.S.Co Ltd V. Tate &Lyle* expressed a similar point of view.[113]

It is submitted here that, this is the right approach, for to endorse the implication of the German Supreme Court case would lead to unpredictability of the applicable legal regime when the contract is being concluded, because this will depend ultimately on the decision of the carrier and not by the law that was envisaged by both parties.

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[110] See also Art 18 of The Montreal Convention 1999

[111] Bundesgerichtohof BGH Vers R 13 Oct 1983, 1984 680. Transport R, 1984, 17, MDR 1985 125

[112] OL G Hamburg, 2nd May 1985. Transport R, 1985, 425-428.

[113] (1936) 55 Lloyds Law Report 159 (HL)

It can however be argued that the decision in that case was meant as a deterrent to carriers for arbitrarily changing the modes envisaged and should not be taken as an indication of a trend in transportation.

Additionally, it is doubtful if any international convention would apply in such a case. For neither the CMR, the Hague-Visby Rules, nor the CIM/COTIF would apply to the fact of carriage without the appropriate contract and documentary formality, this leads us to the inevitable conclusion that in such cases no convention would be applicable, leaving the determination of the applicable law to the law of the forum.

1.5.4.2 DEVIATION BY MODE IN MULTIMODAL TRANSPORT

While the liberty to choose modes adversely affects unimodal transport, it is the basis on which multimodal transport is built. It is "the distinguishing character" of multimodal transport and all existing contracts contain it. Even the Multimodal Transport Convention emphasises this liberty to choose and to change modes, in addition to stating that the parties have a right to choose between unimodal and multimodal transport.

Because of the liberty to choose modes the problems faced in unimodal transport due to deviation by mode does not exist in multimodal transport. This liberty is "all important" and is an off-spin of the flexibility of multimodal transport in which the MTO contracts to carry goods to their destination without specifying how the goods will be carried.

There are however cases in which the modes are specified and the question here is whether a deviation from the specified mode would lead to a penalty. The answer however is no! The freedom makes it possible for such a liberty to be exercised with utmost care, so that an MTO who uses a mode of transport which is so incompatible with the article carried should be liable for any loss or damage occasioned to the goods, as that will exhibit negligence thereby affecting his right to exceptions.

Such a contention would only be relevant in cases in which the claimants, sole contention is that the damage or loss was caused only as a result of a wrong choice of mode, in which case the burden of proof will be on him. An example of such a case would be a case in which the MTO has an option, for example, air or road, and he chooses road in a situation in which the terrain is so rough that any reasonable carrier would have known that loss would likely occur, and had he chosen air carriage no

such loss might have been sustained. The liberty must thus be exercised with utmost care, but not to the point of defeating the purpose of the contract.[40]

This liberty to choose and change modes makes the multimodal contract different from unimodal contracts and makes Unimodal Conventions inapplicable to them per se. If the alternative were true and the Unimodal Convention were applicable to the Multimodal contract ex priopro vigore, we will be in a situation in which all these conventions would be potentially applicable, only waiting for the claim to be initiated to be triggered. This situation is however clarified by the Convention, which by stating their scope of application excludes the multimodal transport contract implicitly.

1.6 Conclusion

Although multimodal transport is invariably performed using unimodal transport, multimodal transport is basically different from unimodal transport. The use of unimodal solutions and concepts to solve multimodal transport is predicated on the fact that multimodal transport is viewed as made up of unimodal modes. This chapter has shown that the very nature of multimodal transport disconnects it from any notions that are unimodal.

Multimodal transport is increasingly being viewed as a new "species" of the transport contract, because it entails much more than carriage. It unites under a single contract of carriage the entire spate of ancillary contracts needed to carry goods from one place to another. In this light the solutions and constructs of unimodal transport cannot cater for this new and enlarged transport mode.

Similarly, the unimodal transport conventions per se exclude this new carriage species from their scope of application. This fact also dictates that the unimodal concept cannot be used to govern multimodal transport.

In conclusion, it must be admitted that recognising the limitations of the unimodal transport solutions to solve multimodal transport problems calls for new ways of looking at multimodal transport and proposing new solutions.

Multimodal transport in this light should be defined as the carriage of goods from one place to another under a single contract of carriage and document. The aspect of

multiple modes should be discarded to allow, the liability regime used in unimodal transport also to be discarded as it too will be shown to be inadequate in chapter two.

Intermodal transport in this sense is defined as the transportation of goods by several modes of transport where one carrier organises the whole transport from one point or port of origin via one or more interface points with a final destination. Depending on how responsibility for the entire transport is shared, different documents are used. This definition reflects the concept of through transport in which the carrier can assume responsibility only for the mode actually carrier by him. And multimodal transport is defined as where the carrier organising the transport assumes the responsibility for the entire door-to-door transport and issues a multimodal transport document.

On the above definitions what stands out is the fact that all the terms are used to define a situation in which goods are carried by more than one mode of carriage; their difference lies more in the aetiology of the terms than in any practical reality. The appellation Combined transport is based on the 1973/1975 ICC Rules for combined carriage, while multimodal transport was officially used in the 1980 Multimodal transport Convention and later given legal recognition by the 1992 ICC/UNCTAD Rules for multimodal transport. In this thesis the term favoured is Multimodal transport in imitation of the 1980 convention.

Because of the lack of uniformity as to the terms used, to describe multimodal transport it is imperative that Multimodal transport is sufficiently differentiated from other like transport contracts such as successive and through transport concepts, where either numerous carriers engage in the same mode effect carriage under one contract, or where one carrier contracts to carry goods over parts of the transport contract while contracting with other carriers for other parts of the carriage as agents for the shipper. In both the above cases, carriage is not multimodal because the carriers involve assume responsibility for their parts of the transport.

In the case of through transport, the carrier acting as agent, enters into transport contracts with other carriers on behalf of the cargo interest, making the latter a party to these contracts.[114] In such a case when loss or damage occurs, the cargo concern

[114] D Faber, " The Problems arising from multimodal transport " [1996] LMCLQ pg 503

has to identify the carrier who is legally liable. If the goods are containerised it might be difficult to identify the carrier under whose charge loss or damage occurred. However, even when the cargo concern can so localise, he might find himself faced with an unknown carrier in another country facing unfamiliar laws. On the other hand, if loss is unidentified, the cargo concern finds himself in the unenviable situation of having to sue all carriers concern at enormous financial cost.

CHAPTER 2

THE PARTIES IN MULTIMODAL TRANSPORT

From the definition of multimodal transport, one of the central tenets of this mode is the factor of its single carrier liability.[115] The nature of this transport mode which dictates that carriage could be carried under different modes, brings into play the different potential carriers and transport specialist involved in a transport contract.[116] Multimodal transport is attractive as it offers the shipper the possibility to rely on a single party, the multimodal transport operator who is the architect of the transport and the only one responsible for the pickup and delivery of the goods; rather than having to deal with every modal carrier or transport specialist involved in the transport in case of loss, damage or delay to goods carried.

The identification of the party liable in multimodal transport is therefore of particular importance. It allows an identification of who has obligations under the contract and on whom an action for loss lies. This identification prevents inappropriate claims against parties not liable.[117]

A good deal of time is spent both at national and international levels identifying who the carrier is. At times the contractual carrier is said to be the shipowner, at others it is the charterers. Additionally, time is also spent pursuing other performing parties both in contract and tort because of the parts they play in the carriage contract. This is a corollary of the fact that at times the transport document fails to identify the true carrier.[118]

In multimodal transport, this identification is important because more parties are potentially implicated in the carriage of goods. A typical scenario would be one in which goods carried under a multimodal transport contract are lost or damaged

[115] See Chapter 1 dealing with the definition of multimodal transport

[116] The implication of this is that the MTO may contract out all or parts of the contract to other carriers, who may in turn also contract certain parts out. Identifying the liable party in this case is imperative especially in this field.

[117] This normally has implications on the time limitation of claims, as this might lead to a time bar.

[118] This account for the presence of identity of carrier and demise clauses in most contracts for the carriage of goods by sea

during carriage, and the multimodal transport document has an illegible signature of an unknown person signing as agent.[119] In such a case if the carrier who delivered the goods insists that he is not the MTO, how does the cargo concern find the contracting MTO who is liable? This problem is indeed a thorny issue in the carriage of goods by sea and even more so in multimodal transport when multiple carriers are involved.

In this chapter we will seek to answer the question of who the carrier(s) is under a multimodal transport contract, by examining the legal status of the parties involved in a multimodal transport contract in an attempt to highlight the particular problems faced by them.

The reality of modern transportation dictates that the carrier is flexible enough by the presence of liberty to contract clauses or special clauses in which the parties are allowed to use different permutations of modes and carriers to offer the type of services that their client requires.[120] In doing this, the modern carrier offers to carry goods to a stated destination and often reserves the right to use other modes and parties as deem appropriate, which brings into play the performing party. Initially this was the multimodal transport reality, presently it obtains in unimodal transport as well,[121] which is proof of the importance of this 'new way' of performing the carriage contract.

The absence of a mandatory convention in multimodal transport implies that each stage of the multimodal transport might be determined by different unimodal transport conventions. Before considering the provisions of the multimodal transport convention and other relevant multimodal transport instruments on the parties in any

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[119] Michael F Sturley, "Phantom Carriers and the UNCITRAL's Proposed Transport Law Convention" [2006] LMCLQ, 427 at p.427

[120] The Multimodal transport contract contains liberty to contract clauses to allow the MTO contract out all or parts of the contract of carriage which he cannot carry. Increasingly, a similar liberty exists in the different modes of transport. An example is the case of the IATA Standard waybill IATA RP 1601 CSC(9) in which clause 8.1 states that "...the carrier may use alternative carriers or aircraft and may, without notice and with due regard to the interest of the shipper use other means of transportation. Carrier is authorised to select the routing and all intermediate stopping places that it deems appropriate or to change or deviate from the routing shown on the face thereof..."

[121] In most unimodal transport conventions, it is normal to find the definition of actual and successive carriers. See Article 1 (2) and (3) of the Warsaw Convention systems Convention and Montreal convention 1999

detail, it is thus appropriate to examine the concept of carrier in the other transport conventions .This is to provide a baseline for comparison and interpretation.

The first part of this chapter will thus focus on the different definitions and concepts that inform the concept of carrier in the different transport conventions, and the second part will examine the concept of the carrier in multimodal transport; this will include the MTO as the contracting carrier, the performing carrier and the other parties that the MTO makes use of in the course of a multimodal transport contract. Of particular concern is the impart on multimodal transport of the new trend in transportation in which focus has moved from the single carrier to calls for joint carrier liability, especially in the light of the House of Lords decision in *The Starsin,*[122] and the on-going deliberations of the UNCITRAL Draft Instrument on Transport Law.

2.1 THE CARRIERS IN TRANSPORTATION CONVENTIONS

Under the different transport regimes, the concept of carrier is important and central to the liability for loss or damage to goods, however, some regimes more than others contain the definition of carriers and even rules as to their interpretation, while in others the status and definition of the carrier is assumed to be obvious and does not need any definition or explanation.[123]

2.1.1 The Carrier in the Carriage of Goods by Sea

Normally under the carriage of goods by sea, the contracting carrier assumes the responsibility of carrying goods to their destination and is usually the party liable for loss or damage to goods. Consequently, he is defined in the Carriage Conventions; Art 1 (a) of the Hague Visby Rules (HVR) defines the carrier as including

[122] *The Starsin,* [122] Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin), [2003] I Lloyd's Rep. 571, [2003] 2 All ER 785 (House of Lords; Lord Bingham of Cornhill, Lord Steyn, Lord Hoffman, Lord Hobhouse, of Woodborough, Lord Millett). Homburg Houtimport B.V. v. Agrosin Private Ltd. and others (The Starsin) [2001] 1 Lloyd's Rep. 437, Court of Appeal, Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin) [200] 1 Lloyd's Rep. 85 QBD (Com Ct.) (Colman J)

[123] An example of this is the CMR which contains no definition of the carrier.

"...the owner or the charterer who enters into a contract of carriage with the shipper"

This definition is not very instructive and has given rise to 2 interpretations. There is firstly the suggestion that there can only be one carrier under the bill of lading, and secondly there is the assertion that there is room for joint or plural carriers under the rules definition. The first suggestion rely on the words "who enters" and insists that this suggests that only one carrier is acceptable for one contract. The second assertion,[124] relies on the word "includes" as pointing to the possibility of plural carriers, which could include not only owners and charterers but also others taking part in the carriage.[125] This second suggestion is commonly referred to as Tetley third alternative,[126] which regards carriage of goods as a joint venture between the shipowner and the charterer, because they share the responsibility of the carrier under the HVR.; responsibilities that cannot be contracted out of by virtue of Art 3 (8), of the Rules. Consequently, the shipowner and the charterer should be held jointly and severally responsible as carriers.[127]

The Hamburg Rules to avoid this conflict defines the carrier in Art. 1, as "*any person by whom or in whose name a contract of carriage of goods by sea has been concluded with the shipper*". This contract is wide enough to include the potential parties and allows for situations where the contract is either concluded by the carrier or an agent.

The carrier is thus considered to be the party under the contract who undertakes to carry the goods from one place to another. However, in the case of the carriage of goods by sea, there are cases in which the identity of the carrier is not obvious from reading the bill of lading. In such cases the "demise" and the "identity of carrier" clauses have the effect either of identifying the contractual carrier or contradicting the appearance of the carriers name on the bill of lading; and raise the question of who the real carrier is. This has an implication on the liability position of the parties. The question here is who is the carrier(s)?

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[124] Tetley, W. Marine Cargo Claim, 4th ed., Chap 10 see http:/Tetley.law.mcgill.ca/

[125] *Midland Silicones Ltd. v. Scruttons Ltd. [1961] 2 Lloyd's Rep. 365*

[126] Tetley, W. Marine Cargo Claim, 4th ed., Chap 10 see http:/Tetley.law.mcgill.ca/

[127] The concept of joint responsibility for the carrier has not been accepted in English law.

2.1.1.1 The Demise and Identity of Carrier Clauses. [128]

In English law, the identity of carrier and the demise clauses have been used to allow a party not considered as "the carrier" to free himself from responsibility under the contract of carriage. These clauses have been explained in two ways; the first argument is that the clause confirms the common law rule that the contract is between the shipper and the shipowner, indicating that the bills of lading are owners' bills and therefore define who the carrier is.[129]

The second approach is that such clauses are non-responsibility clauses violating Art 3, rule 8 of the Hague-Visby Rules.

While American Courts and some Canadian decisions adhere to the second approach thereby making all performing carriers parties to the contract, the English courts have held demise clauses to be valid. The leading case under English law is *The Berkshire*,[130] In this case the Shipowner and not the chatterer was sued under the bill of lading that also contained a demise clause. Brandon J., found that the owners alone were responsible because

"...the contract contained in or evidenced by the bill of lading purports to be a contract between the shipper and the shipowner and not one between the shipper and the charterers."[131]

This pronouncement was obviously obiter as the charterers were not party to the suit. The proper ratio decidendi was pronounced by Brandon, J. as,

"...the bill of lading contained a contract between the shipper and the shipowners and it follows that the receivers are entitled by virtue of the Bills of Lading Act 1855 to sue the shipowners upon such a contract"

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[128] This clause was first introduced to curb the practice of suing charterers as opposed to ship owners in an attempt to recover the full value of the loss or damage sustained. This was a result of the unamended Merchant Shipping Act 1894, Section 503 not extending the benefit of the limitation of liability to charterers. The limitation was finally extended to demise charterers by Section 71 of the Merchant Shipping Act 1906, and to other charterers by Art 6 of the 1957 Limitation Act.

The main purpose of the clause has now been achieved in the UK by means of legislation; The Contract(Rights of third Parties) Act 1999, but the clause still features strongly in bills of lading to cater for cases in which the parties do not adhere to such legislation

[129] Reynolds, F. "The Demise Clause; The Jalamahon" [1988] LMCLQ 285, Stating the position in English Law as upholding the clause on the basis that it merely identifies the carrier

[130] The Berkshire [1974] 1 Lloyd's Rep 185

[131] ibid, at p.188

The logo on the bill of lading was clearly Ocean Wide Shipping Co. Ltd, but the contract had a demise clause and the master signed as agents for the ship owner. It was held that despite the logo of the Ocean Wide Shipping Company, the carriage contract by a combination of the demise clause and the signature was in fact between the ship owners as carriers and the cargo owners. Since the charterers were not party to the action, the question whether they could have been sued as the party whose name appeared on the bill of lading was not answered. Arguably, the charterers could also be sued if the consignee could establish the role played by them under the bill of lading and The Hague Rules in the loading and discharging of the goods.

The discussion in *The Berkshire* has been followed in *The Jalamohan,*[132] where likewise the charterers were not party to the suit. More recently in *The Ines*[133], the shipper sued the shipowner and the time charterers for misdelivery. The bill of lading contained an identity of carrier clause stating that the charterers signed the bill of lading only as agents for the carrier, although the bill of lading had the charterers name in large print on both sides of the bill of lading. The shipowners denied liability claiming that the time charterers were the contracting carriers. Clark, J., following *The Berkshire,* gave effect to the identity of carrier clause, finding that the contract was between the shipper and the shipowners, the charterers being merely agents. The shippers claim in contract thus succeeded against the shipowners, while his claim in bailment against the charterers failed. However, in *The Hector,*[134] the commercial court decided against giving effect to an identity of carrier clause in a bill of lading. The shipowners sued for a declaration that they were not bound towards the voyage sub-charterers to deliver the goods under the bill of lading issued by an associate company of the sub-charterers. The bill of lading included an identity of carrier clause. The owners nevertheless argued that the bill was in fact a charterer's bill of an intermediate time charter, as the bills issuance had not been authorised by them as owners, and particularly as it did not conform to the mates receipt, and was antedated contrary to the requirements of the applicable charterparty and letter of authority from the master.

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[132] *(Ngo Chew Edible Oil Pte. Ltd. V. Scindia Steam Navigator Co. Ltd.[1988] 1 Lloyd's Rep 443 See The Henrik Sif [1982] 2 Lloyd's Rep.456 at p.458. where the demise clause was accepted as valid without discussion*

[133] *(Pyramid Sound N.V. v. Brisse Schiffarts GmbH [1995] 2 Lloyd's Rep. 144*

[134] *[1998]2 Lloyd's Rep. 287*

The bill of lading also contained a typed stipulation on its face that the carrier was "US Express Line". Thus although the signature of the bill of lading for the master and the identity of the carrier clause could normally have engaged the responsibility of the owners, holding them as carriers and bound by the contract of carriage, Rix, J. held that the contract was with the charterers not the owners. *The Hector* is interesting because it represents one of the first English cases to decide that a bill of lading containing an identity of carrier clause can be a charterer's bill of lading, making the charterer liable as the carrier.

The signature normally acts as an identification symbol, revealing who the carrier is either because he has personally signed and is therefore bound by the contract, or because it has been signed by one of his agents.[135] It is however, imperative that if the master intends to sign as agent it should be made abundantly clear in the document to avoid any confusion as to the status of the person signing.[136] However in cases where the signature is unclear, attention should be focused on the stamp accompanying the signature. The signature and definition of the carrier in the contract are still not determinative of the carrier's identity, if all the other facts or clauses in the contract point overwhelmingly to another as carrier.[137]

The clause then seeks to identify the ship owner as the carrier who is liable under the contract and to remove the liability of any other person who is not the ship owner, usually the chatterer. This clause has thus been criticised as falling foul of Art III rule 8 as it seeks to reduce the liability of the charterer or other party below the level set by the rules.[138]

In multimodal transport the carrier is specifically defined with powers under the contract to sub-contract, while still retaining all responsibility for the goods. If the reasoning in *The Berkshire* was used to interpret a multimodal transport case, it would distort the spirit of the contract which points to one carrier irrespective of

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[135] Universal Steam Navigation v McKelvie (1923) AC 492.

[136] The Okehampton (1913) 29 TLR 438, 18 Com Cas 320.

[137] The Rewia [1991] 2 Lloyd's Rep 325. Sec Nawchow Chemical Industries Co Ltd v Botany Bay Shipping Co (Aus) Pty Ltd (1982) 2 NSWLR 523 for a contrasting view.

[138] *Tetley, W. « The Demise of the Demise Clause" (1999) 44 Mcgill L.J 807 at p.812 " in particular,article 3(8) of the Hague and Hague Visby Rules prohibit non-responsibility clauses. Identity of-of-carrier and demise clauses are not-too-subtle non-responsibility clauses"*

how the carriage is performed. In the sense that the shipowner might be held responsible for loss occurring during land carriage because the multimodal transport document is issued by him. The question thus is if the MTO were to charter a ship, what will be his status? Will he be considered as the carrier or will the identity of carrier clause operate to make a shipowner liable as carrier? But, authority apart, even if such a demise clause was included it will be impotent, in the sense that the interpretation would still lead to the fact that the MTO is the carrier, following cases like *The Venezuela*,[139] *The Okehampton*,[140] and *The Rewia*.[141] In *The Venezuela*, the bill of lading stated that the sub-charterers (C.A.U.N.) or their associated company F.M.G., were to be carriers; Sheen J, held that the sub-carriers if they did not wish to be seen as carriers, should have made it clear who the carriers were. The bill of lading was thus construed as a contract between the sub-charterers and the cargo owners, as the former could be regarded as operating the vessel. There was nothing in the bill of lading to indicate that a time charter was involved, and in *The Okehampton,* the plaintiff through charterers, had signed the bills of lading in their own names as principal. The contract was therefore with them as carriers, as there was nothing in their conduct to show that they acted as agent. In *The Rewia* it was finally settled that although, the legal position is that bills of lading signed by the master binds the ship owner, if it can be proved that the contract was made with the signer on behalf of charterers and not owners, then the charterers will be regarded as carriers.[142] The above 3 cases go to show that the clause will have no real effect if included in a multimodal transport document provided the document makes it abundantly clear who the carrier is. Thus ascertaining the identity of the MTO will have to be by definition and signature on the contract.

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[139] *[1980]1 Lloyd's Rep 393. See also Harrison v Huddersfield Steamship Co (1903) 19 TLR 386.*

[140] *(1913) 29 TLR 438, 18 Com Cas 320*

[141] *[1991] 2 Lloyd's Rep 325.*

[142] Ibid Leggith L J at p 333.

2.1.1.2 The Demise and Identity of Carrier Clause in Other Jurisdictions

Many jurisdictions have rejected the concept of the demise and identity of carrier clause, in rejecting these clauses some of these jurisdictions have accepted the concept of the multiple carriers comprising mostly of the shipowner and the charterer.

1. The United States

In the United States, two main approaches have been used to reject the identity of carrier and demise clauses; one requiring privity the other not requiring it.

In *The M/V Gloria,*[143] the 5th Circuit Court of Appeal found that the time charterer and the shipowner were joint carriers; the time charterer by issuing bills of lading and the shipowner by authorising the charterer to sign bills of lading for the master. It was stated that "*generally, when a bill of lading is signed by the charterer or its agent 'for the master' with the authority of the shipowner, this binds the shipowner and places him within the provision of COGSA.*"[144] Similarly in *The Unibulkfir,*[145] the question before the court was whether the charterers or shipowners were the carriers.

It was stated that,

"The statutory language of the COGSA itself supports a broad definition of the term 'carrier",

The statute it was opined had been drawn so as not to limit the terms to a party to a bill of lading or the contract of carriage, noting also that there can be more than one COGSA carrier in a given shipment. The courts did not hesitate to impose liability on the charterers or owners who are non-signatories to the bill of lading and who cannot in any way be said to have issued the bill of lading. The same stance seems to have been held in Japan.[146]

2. Canada

Canadian cases portray a mixture of both stances holding the shipowner and charterer jointly liable and also following the English position of one contract one carrier.

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[143] *Pacific Employers Insurance Co.v. The M/V Gloria 767- F. 2d.229 (5 Cir. 1985), 236-237*
[144] Ibid, at p.237
[145] *Joo Seng Hong Kong v. S.S.Unibulfir, 483 F Supp.43. (S.D.N.Y. 1979) at p. 46*
[146] Satori, K. "The Demise Clause in Japan" [1998] LMCLQ 489, at p. 496

In *The Lara S,*[147] Reed J, held that a shipowner and charterer were both liable where the bill of lading was on the charterers form but signed on behalf of the owners. Reed, J. reasoned that the,

"...logic of holding both the shipowner and the charterer liable as carriers seems entirely reasonable under a charter such as that which exists in the case. The master will have knowledge of the vessels and any particularities which must be taken into account when stowing good thereon. He supervises the stowage; he has responsibility for the conduct of the voyage and presumably also has knowledge of the weather conditions it would be usual to encounter. In such a case, it seems entirely appropriate to fine the master and therefore his employer, the shipper jointly liable with the charterers for the damage arising out of the inadequate stowage"

Reed, J. by so doing sanctioned the principle of joint carriers under a single contract of carriage. However, later decisions in Canada reverted to the single carrier approach favoured by the English Courts; initially in *Union Carbide v. Fedenav Ltd.*,[148] and later in Jian *Shang Co v. Great Tempo. SA*,[149]

3) Civilian Jurisdictions

The demise and identity of carrier clauses are rejected in civil law jurisdictions. In France, the Cour d'Appel d'Aix, September 8th, 1994 (*The Jessica J), DMF 1995, 52* held that both the time charterer and the voyage charterers were carriers,
"ont la qualité de transporteur". Also in Cour d'Appel de Rouen,[150] the time and voyage charterers were held liable as carriers.
Similarly, in Belgium, the shipowner has been held jointly and severally liable as carriers for cargo damage.[151]

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[147] *Canastrand Industries v. Lara S [1993] 2 F.C. 553(Fed. Ct. Can.)*
[148] [1997] 131 F.T.R. 241 (fed. Ct. Can) at p.265,

[149] [1998] 3 F.C. 418 (Fed. C.A. Can.) and *Voest-Alpine Starl Linz v. Federal Pacific Ltd. (1999) 174 F.T.R. 69 (Fed. Ct. Can.)*
[150] June 14,1984 DMF 1985, 351 at p. 358,
[151] Hof Van Bereop Te Brussels March 3, 1972; [1972] E.T.L. 992. See also Tetley, W. "Identity of the Carrier-The Hague Rules, Visby Rules, UNCITRAL" [1977] LMCLQ 519 at p. 522

2.1.1.3 The Landmark decision in *The Starsin* Case[152]

The foregoing paragraphs attest to the confusion that abounds in the carriage of goods by sea when it comes to identifying the carrier, especially in the presence of the usual identity of carrier and demise clauses which have come to be regarded as part of the standard from contracts in this domain.[153]

The decision of the House of Lords in *The Starsin* case has for now settled the law concerning the carrier. The question is if this decision will meet the reasonable expectation of the transportation fraternity.

In the case, *The Starsin,* owned by Agrosin Private Ltd. was demise chartered by Ovendale Shipping Ltd. In Oct 1995, Continental Shipping Ltd. (CPS), time chartered the Starsin from their owners Agrosin. In December 1995 the ship loaded plywood from 3 different ports in Malaysia for discharge in Antwerp and Avondale in the UK. On arrival damage was found which was attributed to the damp conditions during loading and to negligent stowage. The bill of lading was on the CPS forms and signed as agents on behalf of CPS 'as carriers'.

The bill of lading contained an identity of carrier clause in its clause 33, and a demise clause in its clause 35. The claimants claimed against the time charterers, but as CPS had become bankrupt at the time, the shipowners took their place in the cargo claim.

The initial action against the shipowners was based on the demise clause after failing in tort. The shipowners contended that they were contractual carriers. The issue within the House of Lords was "*whether CPS or the shipowners were the carriers under the bill of lading.*"

The House of Lords held that, the printed identity of carrier and demise clauses on the reverse of the bill of lading were over-ridden by the words which had been added in

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[152] Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin), [2003] I Lloyd's Rep. 571, [2003] 2 All ER 785 (House of Lords; Lord Bingham of Cornhill, Lord Steyn, Lord Hoffman, Lord Hobhouse, of Woodborough, Lord Millett). Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin) [2001] 1 Lloyd's Rep. 437, Court of Appeal, Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The Starsin) [200] 1 Lloyd's Rep. 85 QBD (Com Ct.) (Colman J)

[153] The erosion of the effects of the identity of carrier and demise clauses can also be traced through the trilogy of cases, starting with *The Hector*, [198] 2 Lloyd's Rep 287, *The Fletcha*, [1999] 1 Lloyd's Rep. and The Starsin supra note 151,

the signature box on the front. This it was stated to indicate to the shipper or transferee of the fact that CPS the charterers were in fact the contractual carriers.

Lord Hobhouse stated that, the typed or stamped words in the signature box, *"demonstrate a special agreement by which the parties have agreed that inconsistent clauses will be over-ridden."*

The House of Lords rejected the idea that the holder of the bill should have to read all the conditions on the back of the bill to discover with whom the contract of carriage was made, especially where the front of the bill clearly identified the carrier. In reaching this conclusion, the House of Lords sought to enforce common business sense within transportation. Lord Bingham stating that

"...business sense will be given to business documents" and that courts must seek to effect the contracts as intended, so as not to frustrate the reasonable expectations of businessmen.[154] The House of Lords thus place more importance on the face of the bill of lading than to the small printed clauses at the back of the bill of lading, bringing it in line with international banking practices. [155] The House of Lords concluded that the bills were charterers' bills and the shipowners could not be liable for any breach of the contract of carriage.

The Lords in *The Starsin,* did not invalidate the 2 clauses, they simply declined to give it effect, based on the construction of the particular bill of lading which was in line with the commercial practice and expectations especially within banking circles.

2.1.1.4 Implications of the Starsin Case in the transportation Law

The House of Lords held in the case that the charterers were the carriers having signed the front of the bills of lading through agents as 'carriers', rather than the shipowners who were identified on the back of the bill of lading. The decision in all three courts circled around the question of the front and the back of the bill of lading which contained the identity and demise clauses.

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[154] *The Starsin, [2003] 1 Lloyd's Rep 571 at p. 577*

[155] *British Imex Industries Ltd v. Midland Bank Ltd. [1958] 1 QB 542*, where it was held that the general practice of the bank is not to examine the small print on the back of the bill. "It is of course true, as Mr Millingan pointed out, that the provisions govern relationships between issuing bank and beneficiary, not shipper or consignee and carrier. But it would be surprising and also unsatisfactory if a practice accepted in one field were not accepted in another so closely related"

The House of Lords while striving to conform to commercial practices in interpreting the identity of carrier failed to hold on another commercial practice; that of recognising the validity of joint and several carriers.

In modern transport practices, it is becoming increasingly impossible for carriers to perform all the different facets of the transport contract; loading, stowage, further carriage, stevedoring , custody, discharging by contracting with specialist parties who also form part of the overall transport.[156] This modern transport practice is seen from the fact that the different jurisdictions are all interpreting the clauses as permitting the concept of joint carriers.

This concept of the joint carrier was explored by Rix L.J in the Court of Appeal, referring to it as *"Another possibility: Owners liable as well as charterers?"* noting

"Nevertheless, I raise in argument the possibility that there does not have to be a black and white choice between owners' bills and charterers' bill and that the true analysis in such a case may well be that the owners as well as the charterers are liable under the bills". Unfortunately he further went on to state that *"In the circumstances, where the point was never discussed below, it is not a part of the formal appeal, has arisen merely from an enquiry from the bench, and has had no real opportunity for debate, I would for myself be reluctant to make or take a decision based upon it"*[157] This suggestion was rejected by the House of Lords, Lord Hoffman, stating that,

"I do not think that any reasonable merchant or banker who might be assumed to be the national reader of this bill of lading would imagine that there was more than one carrier or that the carrier was anyone other than CPS"[158] On the contrary in this modern times any merchant would expect that the contractual carrier would use other carriers to perform the carriage contract.

Rix L.J, in this case relied on the agency theory to support the joint carrier principle, although in the cases in the other jurisdictions where this has been sanctioned, it has been based on the joint liability of the carrier and the shipowner and the policy considerations under the Hague Visby Rules as seen in Art 3 (8).

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[156] Karan, H. The Carrier Liability under the International Maritime Conventions,; The Hague, Hague Visby,and the Hamburg Rules (2004) Edwin Mellen Press Lewiston , N.Y.p.85

[157] The Starsin [2001] 1 Lloyd's Rep. 451, at p.452

[158] The Starsin, [2003] 1 Lloyd's Rep. 571 at p.590

This stance has been clearly elucidated by Tetley,[159] and has come to be referred to as Tetley's 'Third Alternative', which is to the effect that the shipowner and the charterers share the responsibility of the carriage contract under The Hague Rules Arts. 2, 3 and 4 and any attempt to disclaim them by identity of carrier or demise clauses will be invalid under Art3 (8). This concept was accepted and expounded in *The Lara S*[160].

Apart form violating The Hague Rules, Tetley also expounded on the unfairness of burdening the third party with any agreements between the shipowner and charterer as to the apportionment of liability between them.

At this point, one can argue that rejecting the joint and several liabilities of the parties involved in carriage was greatly misguided for 3 reasons.

1- It is obviously the trend in modern transport for multiple carriers to take part in the carriage contract. Rejecting the concept results in action outside the mandatory rules, this could not have been the intention of the HVS.
2- Other jurisdictions have rejected this single approach; this point was not put forward in argument by counsel as noted by Rix L.J. This stance has been taken in the different jurisdictions as noted because it is seen as equitable to all the parties concerned, the claimants, the charterers and the shipowners.
3- An examination of the "travaux preparatoire" of The Hague Rules does not show any evidence that the single carrier option was the preferred one for the rules.[161]

It is arguable if the acceptance of the 'joint and several' liability of the parties involved in carriage would have greatly simplified this area of the law, especially in the case of third party actions and the Himalayan clause.

It is regrettable that English Law lost a great opportunity to settle this issue once and bring it in line with other jurisdictions. The law would have been rendered more in line with commercial realities if the joint and several liability of the parties as expounded by Rix L.J was accepted and the Lords had answered the question "who is the carrier' not in the singular but in the plural.

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[159] Tetley, W. Marine Cargo claims Ch. 10 Whom to Sue? (4th ed.) http:/Tetley.law.mcgill.ca/

[160] *[1993] 2 F.C. 553 (Fed. Ct. Can.)*

[161] Sturley, M "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1 at p.10 see Also Vanessa Rochester, "The Starsin-Tetley's Third Alternative" Paper on Carriage of goods by Sea, unpublished.

2.1.2 The Carrier under the UNCITRAL Draft Convention

The lack of uniformity within the carriage of goods was seen as an impediment within UNCITRAL, which in 1996 called for proposals for the uniformity of the law relating to the carriage of goods by sea. The Draft Instrument on the Carriage of Goods (wholly and partly) by Sea, hereinafter the Instrument, is meant to eventually provide a modern successor to the existing international conventions on the carriage of goods by sea; The Hague, Hague Visby and The Hamburg Rules.[162]

Art 1.1 of the Instrument, defines the carrier as a person

"...who enters into a contract of carriage with the shipper?"

The draft in this respect follows the HVR's where the carrier is a contractual person who enters into the contract either in its own name of through the agency of others.

The Instrument also included within the ranks of carrier, the "performing party", on whom is imputed the carriers liabilities. He is defined as ,

" a person other than the carrier that physically performs or undertakes physically to perform any of the carriers responsibilities under a contract, including the carriage, handling, custody or storage of the goods to the extent that that person acts, either directly or indirectly, at the carriers request or under the carriers supervision or control. The term 'performing carrier' does not include any person who is retained by the shipper or consignee or is an employee, agent, contractor or sub-contractor of a person (other than the carrier) who is retained by the shipper."

The phrase *"undertakes physically to perform"* in the definition broadens the definition and brings within the scope of the Instrument all persons who could possibly take part in the carriage, such as loading, stowing, discharge etc.. This covers all persons who could be sued under the contract in tort or bailment, therefore bringing greater uniformity and reducing the number of potential actions outside the Instrument.

A practical example will be a contract of carriage in which the carriage is for carriage from America to England with transhipment in Germany. The sea carrier performs the sea carriage to Germany where he contracts with a local sea carrier to

[162] Revised Draft Instrument- UNCITRAL Instrument Document, A/CN.9/WG.III/WP.32, A/CN.9/WG.III/WP.36, www.uncitral.org (Working Group Transport)

perform another part of the carriage. Damage occurs during the local carriage. In this case the local carrier will be the performing party and liable to direct action. Additionally, even in the event that the local carrier uses a chartered vessel, he and the vessel owner will be considered as performing parties and liable under the contract. [163]

The question of the identity of the carrier and the demise clause has not yet been settled in the draft Instrument. Presently Article 40(3) seeks to provide an answer to the problem of identifying the carrier. The Article though still in squared brackets reads as follows,

"[If the contract particulars fails to identify the carrier but indicate that the goods will be loaded on board a ship, then the registered owner of the ship is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage that transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer.[If the registered owner defeats this presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be."]][164]

It was noted in the final report of the Uniformity sub-Committee that the final decision on the identity of carrier clause was by consensus[165] although there were initially alternative objection and suggestions.[166] Alcantara of Spain objected to imposing liability on a shipowner who was not the contracting carrier, while Prof Philip, contended that the shipowner was the person most likely to know the contracting carrier's identity.[167]

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[163] Obviously, the phrase « undertakes physically to perform" brings the shipowners within the scope of the instrument.

[164] This Article was drafted by the CMI's Sub-Committee on Uniformity of the Law of Carriage of goods by Sea; this constitutes part of their final report in May 1999. See also M.F. Sturley, " Phantom carriers and UNCITRAL's proposed transport law Convention" [2006] LMCLQ 426 at p.428

[165] 1999 CMI Year Book, 115

[166] 1995 CMI Year book 237, Where Prof. Berlingieri raise the identity of the carrier clause inviting debate on it.

[167] 1996 CMI Year book 375

At the moment the consensus among the working group is that the shipowner is presumed to be the carrier until be rebuts that presumption by identifying the contractual carrier.
The question that arose in the sphere of multimodal transport is in the case where no shipowner is identified in the transport document. What would that presumption be based on, who would be the carrier? The opinion expressed here was that in case of multimodal transport, the shipowner should still be presumed to be the carrier, as the MTO is likely to be an entity who does not own any means of transport. However, the presumption would be limited to carriage within of goods by sea excluding damage before and after loading. The problem with this stance is the assumption that the different performing carriers would also be considered to be carriers and this will lead to problems when loss occurs during interface periods.[168] This provision it was noted was unsatisfactory, it is hoped that it will be resolved within the draft.[169]

The main objection to Article 40(3) is the imposition of liability on a party who is not a party to the contract, especially in multimodal transport. A practical example clearly explains this problem. Suppose, a multimodal transport operator contracts to carry goods from Chad via Cameroon to the US. It issues a bill of lading for this carriage without properly identifying himself in the contract. If the trailer carrying goods within the US has an accident leading to loss, it is indeed difficult to find a reason for imposing liability on the sea carrier when the MTO contracted with all the carriers separately meaning that the sea carrier had no connection with the road carrier.
The problem now lies between a choice of protecting the innocent public who would have taken the documents and the shipowner.

It is contended here that the issue of the shipowner been presumed to be the carrier will be adopted on the basis that he might be the only one in the position to know who the MTO is. His main duty would be to identify the MTO who is liable. The alternative would be to demand that the original consignor provide the information as to who the MTO is.

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[168] 2001 CMI Year book 577
[169] UN doc A/CN9/WGIII/WP70 (31 January 2006), Para 32

During the 13th Session of the working party, the working group also explored the possibility of differentiating the "Maritime and non-maritime performing parties".[170] The Maritime performing party was defined as one who performs any of the carrier's responsibilities under the carriage contract during the maritime part of the carriage. The intention here was to ensure that all aspects of the maritime carriage fall within the Instrument, subjecting the maritime performing party to direct action under the Instrument as the carrier. While the inland carrier in his capacity as non-maritime performing party cannot be sued under the instrument. The multimodal approach of the Instrument must dictate that the definition of the performing parties is not limited to maritime carriers only. The clear intention of the Instrument dictates that all modes are inclusive; therefore such a restrictive definition will not be acceptable within multimodal transport. The group had to decide whether to remove from the definition the concept of the non-maritime performing party.[171]

2.1.3 The Warsaw Convention Carrier

The main Warsaw Convention of 1929 contained no definition of who the carrier was. The first definition of the carrier is found in the Guadalajara Convention of 1961 supplementing the Warsaw Convention. It differentiates between the contracting carrier and the actual carrier.

It defines the contracting carrier as the person who "*as principal makes an agreement for the carriage*" governed by the international air convention with the consignor or with a person acting on his behalf.[172] The Actual carrier is defined as the person who "*performs the whole or part of the carriage*" contemplated by the agreement between the contracting carrier and the consignor by virtue of authority from the contracting carrier. Such authority shall be presumed in the absence of authority to the contrary.

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[170] Para 28-33 A/CN.9/544

[171] The fact that this work is still in the stages of discussions means that there are as yet no firm definitions

[172] Art I (1) of the Guadalajara Convention, Art. 39 of the Montreal Convention 1999.

The Guadalajara Convention by defining both the contracting and actual carrier clarifies the responsibilities of both, thereby eliminating the problem of who the carrier is. The actual carrier is not generally a party to the contract. However, in case of loss or damage during carriage performed by him, the convention extends the rights and liabilities of the carrier to all sub-contracting carriers. Article 11 of the Guadalajara Convention states that both the actual and contracting carriers are liable for loss caused when goods are in the charge of the actual carrier for carriage; the actual carrier is liable for the part of the carriage performed by him and the contracting carriage for the entire carriage contemplated by the contract.[173] If loss occurs during carriage by the actual carrier, the shipper has an option to either sue the actual carrier, the contracting carrier or both; jointly or severally. If only one carrier is sued, he has the right to require that the other be joined in the proceedings.[174] The Montreal Convention 1999 like the 1929 convention does not define the term 'carrier' or any other person who ought to be governed by the Convention. Thus under this convention any one who performs the functions of the carrier in international air transport is deemed to be the carrier.

2.1.4 The CMR and the COTIF/CIM Carrier

While the CMR does not define the carrier, the CIM defines both the contracting and actual carriers. Art 3(a) defines the contracting carrier *as* the *"carrier who enters into a contract of carriage with the consignor pursuant to these uniform rules, or a subsequent carrier who is liable on the basis of this contract."*

Art 3(b) goes on to define the substitute carrier as, *"a carrier who has not concluded the contract of carriage with the consignor, but to whom the carrier referred to in letter (a), has entrusted the whole or part the performance of the carriage by rail."*

Both conventions deal with the position of the successive carrier. Art 34 of the CMR and Art 26 of the CIM, both make the successive carrier party to the contract of carriage under the terms of the contract by virtue of their acceptance of the goods

[173] Art 40, Montreal Convention 1999

[174] Art 111 Guadalajara 1961, Art 45 Montreal Convention 1999. As between the actual and contracting carrier, they could decide as to the rights and obligations including recourse action or indemnification. (Art X Guadalajara Convention 1961, Art 48 Montreal Convention 1999.)

and the consignment note. Both conventions make the actual and contracting carriers jointly and severally liable for loss or damage occurring during carriage.[175] Thus, successive transport by different carriers whether or not performed by road is possible under the CMR, when it is covered by a single contract of carriage. The first carrier, the last carrier and all actual carriers, under whom damage occurred, may be liable for damage, loss or delay of the goods under the Conventions.

2.1.5 The CMNI Carrier

The CMNI which is a more recent convention also defines both the contractual and actual carriers. Art 1(2) defines the contracting carrier as "*Any person by whom or in whose name the contract of carriage has been concluded with a shipper*".
While Art 1 (3) defines the *'Actual carrier'* as *"any person other than the servant or agent of the carrier to whom the performance of the carriage or of part of such carriage has been entrusted by the carrier"*
Under the CMNI, both the carriers are covered by the convention and both share in the responsibilities and obligations of the contract under the convention. Both are thus jointly and severally liable for the loss or damage to goods during carriage.[176]

2.2 THE MULTIMODAL TRANSPORT OPERATOR (MTO)[177]

The Contractual carrier in multimodal transport is commonly referred to as the multimodal transport operator (MTO) or the combined transport operator (CTO).

He is defined in Rule 2b of the ICC Rules for a Combined Transport Document as

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[175] The CIM and the CMR have a historical legal relationship which allows the interpretation of one to apply to the other.
[176] Art 4(5) of the CMNI
[177] The term [MTO] was first used in a Report of the International Sub-committee of the CMI (General Draft) published May 1967, to describe a person who enters into a contract involving two or more modes of transport.

"a person (including any corporation, company or legal entity) issuing a combined transport document"

And a more authoritative definition in The United Nations Convention on Multimodal Transport defines the MTO in Art 1(2) as;

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

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

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

The definition in the ICC rules lays emphasis on the issuance of the document to acquire the status of a multimodal transport operator, while The United Nations convention and the UNCTAD definitions stress the fact that the MTO is one who concludes a multimodal transport contract and assumes the responsibility for the goods as principal. What stands out from the definitions is the fact that the MTO must assume the responsibility of the goods as principal making him personally liable for any loss or damage to the goods.

This difference in criteria stems from the fact that theoretically, there were no business entities that could be called "multimodal *transport operators*"; sea carriers owned ships, road carrier's trailers, air carrier's planes and rail carrier's trains. The question is what the distinguishing feature of the multimodal transport carrier is.

Multimodal transport for the most part is offered by carriers in all modes of transport, although it seems to be prevalent within carriage by sea. Given the fact that some of the carriers involved in multimodal transport owned their conveyance while others did not, we see the multimodal transport convention depending on a different criterion, the contract for the multimodal transport of goods from one place to another in which the multimodal operator assumes the responsibility for the

goods. The distinguishing factor for the MTO is thus the voluntary assumption of the responsibility for carriage through-out the transport to the final destination. This stance reflects the custom in carriage cases which makes an international convention turn on the type of service performed.[178]

The MTO however as principal is given the added liberty of deciding how to effect carriage. He might choose to:

(1) Effect the whole carriage personally

(2) Sub-contract the whole to other carriers or

(3) To personally carry some parts while contracting out other parts of the contract[179]

This responsibility assumed by the MTO dictates that he possesses the ability and expertise to move goods from one place to another irrespective of the logistical arrangements required. Despite the fact that it is a pivotal fact that the multimodal transport operator uses other carriers, there is no definition of the actual carrier in the multimodal transport convention, the UNCTAD/ICC rules however, includes actual carriers in the definition of "carriers" qualifying in Rule 2.3 the concept of carrier found under Rule 2.2, this rule defines the carrier as

"...the person who actually performs or undertakes to perform the carriage, or parts thereof, whether he is identical with the multimodal transport operator or not"

This additional definition of the carrier reflects the reality in multimodal transport, and brings to the forefront the real issue in multimodal transport; the question of who the carrier(s) is. Is there a possibility of joint carriers in multimodal transport?

The question here is the status not only of the multimodal transport operator but that of the 'actual' or performing carrier.

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[178] *The Hague Visby Rules apply only to contracts covered by a bill of lading, while the Hamburg rules turns on the contract of carriage.*

[179] *The question of who becomes an MTO was discussed during the CMI drafting committee (1967) and delegates case to the conclusion, he must be one who assumes responsibility for the goods throughout carriage irrespective of mode.*

2.2.1 The Identity of the MTO

As stated, the legal status of the Multimodal Transport Operator depends on the voluntary assumption of responsibility and liability for goods carried under a contract, evidenced by a multimodal transport document.
Also, the criteria for acquiring the status of MTO mean that one would find among its ranks not only individual unimodal carriers but freight-forwarders and transport contractors. This might raise questions as to the real identity of the multimodal carrier; thus it is imperative that the MTO is identified for purposes of liability.

The normal way of determining who the Carrier is who has assumed such responsibility is by looking at the document evidencing the contract of carriage between the parties, paying particular attention to the definition of the MTO, the signature and any other clauses which might throw light as to the correct identity of the MTO.
The problem faced here is the fact that the transport document, usually a bill of lading which evidences the contract does not usually identify who the carrier is, especially in the presence of identity of carrier clauses and demise clauses, and therefore suffers from the same problems faced in the carriage of goods by sea as to the identity of the carrier[180].

2.2.2 The Multimodal transport Carrier and Third Party Carriers

Under the principle of Privity of contract, third parties are not parties to any contract and cannot be bound by the terms of that contract. However, in the field of multimodal transport, the third party carrier though not a party to the contract is an integral part of the contract, and is implicated in the overall performance of the contract. He therefore finds himself in certain instances called upon to rely on the multimodal transport contract, when he is sued.
One of the main tenets of multimodalism is the fact that although multiple parties can be involved in effecting the contractual carriage, only the MTO is the contractual party who assumes the responsibility for carriage.

[180] See part infra, the problem of the identity of the carrier under the HVR

The Multimodal Convention defines him as *'any person'*, the ICC rules as *'a person'* and the ICC/UNCTAD Rules as *'any person'*. This statements obviously point to a single carrier option in the case of multimodal transport.

The single carrier option in multimodal transport was imperative in the development of multimodal transport as it solved the long standing problem of the claimant's non-recovery in case of unlocalised damage. Under the through bill of lading for the carriage of goods, recovery for loss or damage was dependent on the claimant localising loss and bringing an action against the carrier responsible. In cases of non-localised loss or damage, the whole loss was borne by the claimant who had no recourse.[181]

Multimodal transport, by offering the claimant the possibility of claiming against someone in case of loss or damage irrespective of localisation was one of the advantages of multimodal transport which led to its popularity.

By the very nature of multimodal transport, the multimodal transport operator is given the option to choose how to effect the contract. He can choose to carry or sub-contract the carriage to other carriers. In instances where he also carries he assumes the dual capacity of both the MTO and the carrier, in the instances where he does not carry, he keeps the position of contracting carrier and the status of actual carrier resides in who ever performs the physical carriage. The question here is what the status of both carriers is; can action be brought against both?

This brings into play the concept of the "actual carrier" in multimodal transport. Can the claimant bring an action against the actual carrier or the contracting carrier or both?

2.2.2.1 The "'Actual Carrier' Performing Carrier".

The Multimodal transport convention does not define who the "actual" carrier is, although it is obvious that the nature of multimodal transport dictates that he is identified and defines in order to determine his status. The identities of the "Actual

[181] Through carriage which preceded multimodal carriage dictated that each carrier bear responsibility for his own part of the transport

carrier" or performing parties are unclear, who are these persons and what is their role in multimodal transport?

The actual carrier is usually a party to whom the MTO has contracted with to perform all or part of the contract. The nature of the multimodal transport does not restrict this to one actual or performing carrier as the MTO might contract with different carriers within different modes to perform parts of the contract.

The issue here is how many counterparties will the claimant have? The answer to this remains one. The actual carrier is not usually a part of the contract and should not be sued.[182] The performing carrier in this case is acting as the carriers' servant and his fault does not exonerate the MTO who remains liable for any loss or damage caused by him.

Normally, in case of loss or damage to the goods the claimant should claim against the contracting carrier. In the case of multimodal transport, the MTO would like to simplify the claims process by ensuring that all action is brought against him rather than the other contracting parties.[183] However, when loss or damage is identified, the claimant can also claim against the party who caused the loss or damage. The claimant might bring such an action to avoid the obligations under the contract of carriage by suing the actual carrier who is usually not a party to the contract.

The reality in multimodal transport therefore is that once loss is localised, the claimant has the option of suing more than one person in the sense that the actual carrier can also be sued. Predictability of suit therefore exists only when the loss is unlocalised, when the only person liable is the contractual carrier.

Suit against the actual carrier in this context is usually an action in tort as the actual carrier is not a party to the contract. This brings about unpredictability as to the law which will be applicable to the contract as the claimant possesses the option of suing one other than the contracting carrier the MTO, and thereby avoids the contractual provisions under the contract.

The question is if the actual carrier can be brought under the contract of carriage to avoid such suit in tort in that he is made a carrier under the contract.

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[182] C.W.H Goldie, "The Carrier and the Parties to the Contract of Carriage", 81 Dir. Mar. 616 p.620

[183] The reason for this might be to save administrative cost or simply to prevent the claimant from bringing an action against the sub-contractors.

The ICC/UNCTAD Rules sought to solve this problem, in Art. 2(3) which by including the actual carrier in the definition of carrier. It defines the actual carrier;

"... means any person who actually performs or undertakes to perform the carriage, or part thereof, whether identical with the multimodal transport operator or not"

The ICC/UNCTAD Rules, by defining the actual carrier in terms of physical and non-physical carriage broadens the definition of actual carriers to also include non-carrying parties. This definition of actual carrier therefore brings him within the confines of the contract. He is therefore a party to the contract who can be sued under the contract terms and claim benefits under the contract. It must be noted however, that the rules are private and voluntary and would not have the same impact as mandatory law.

2.3 The concept of the Joint Carrier

In the light of *The Starsin,*[184] it is doubtful if the concept of joint or several carrier will be accepted in multimodal transport. The reality of multimodal transport dictates that more than one carrier is involved in the carriage. The definition of actual carrier in the ICC/UNCTAD rules tries to address this reality by making the actual carrier a party under the contract and subjecting them to the contract. By making the actual carrier a party, both become jointly liable for the contract. This joint responsibility for the carriage is the essence of Tetley's 'third alternative', [185] which is to the effect that both the contractual carrier and the shipowner are carriers as each carries out the responsibility under the HVR, making them jointly responsible for the loading, carrying, caring for and discharging of the cargo. They should both be responsible in respect of the third party.

To remedy this situation, Art 7(2) of the Hamburg Rules includes independent contractors within this provision and entitles them to benefit from the contractual provisions.

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[184] [2003] 1 Lloyd's Rep,. 571

[185] Tetley, W. "Case note; The Starsin" (2004) 35 JMLC 121

However, the rejection of the concept joint carrier and the acceptance of the concept of the single carrier in *The Starsin,*[186] is likely to be used in the interpretation of multimodal transport and thus enforce the notion that single carrier liability should be encouraged.

The enforcement of this single carrier responsibility in carriage cases also has the implication of allowing-in attempts to protect the 'performing' carrier from action by the claimant who seeks to avoid the contractual obligations.

2.4 Protection of the "Third Party Carrier" under the Contract of Carriage

As noted, the third parties and sub-contractors used by the MTO are usually open to suit from the claimants, once loss is localised to the potion of carriage for which they were responsible. In this light MTO's usually seeks to protect the sub-contractor from suit by the claimant for cargo loss or damage by inserting into the contract, terms meant for their protection. The doctrine of Privity of contract in English law usually poses a problem for sub-contractors who seek to rely on these contractual provisions in the contract. These are mostly in the form of the "Himalaya Clause', the "Circular Indemnity Clause" and the doctrine of "Sub-bailment on Terms'.[187]

2.4.1 The Protection Clauses

These clauses are included in the Multimodal transport contract to protect the sub-contractor or anyone whose services the MTO uses in the performance of the contract. These clauses are a logical follow up of the liberty to sub-contract clause; after exercising that liberty, the MTO has to maintain the ideals of Multimodal transport, that he is the only one against who suit should be brought, by including clauses which protect the sub-contractor and deter the consignee or cargo interest from bringing suit against him. In this

[186] The concept of the joint carrier had also been rejected in cases like *Scruttons Ltd. v. Midland Silicones Ltd.[1962] A.C. 446*

[187] The doctrine of privity of contract, allows only a party to a contract to seek its benefits. See Also, Gaskell et al: N Gaskell, Regina Asariotis, and Y Baatz, Bills of Ladings: Law and Contracts (2000)

respect the two popular clauses are the Himalaya and the Circular Indemnity Clauses.

2.4.1.1 The Himalaya Clause

A typical Himalaya clause can be found in the P& O Nedlloyd Bill cl.4(2) and reads as follows;

" The Merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage is performed or undertaken (including all sub-contractors of the carrier), other than the carrier, which imposes upon any such Person, or any vessel owned by such Person, any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of such Person and, if any such claim or allegation should nevertheless be made, the Merchant will indemnify the carrier against the consequences thereof. Without prejudice to the foregoing every such Person or vessel shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the carrier (including but not limited to clause 24 hereof) as if such provision were for his benefit; and in entering into this contract, the carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such person or vessel."

As seen from the clause, the clause is used to extend the benefit of the contract to third parties.

The Himalayan Clause which was made famous by *New Zealand Shipping Co. Ltd.* v. *A.M. Satterwaite & Co. Ltd*[188] *(The Eurymedon)* is to the effect that, the sub-contractor if sued benefits from the same defences as the carrier. The Himalayan Clause in The Eurymedon, stated that;

> *"It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances*

[188] *The Eurymedon, (1974)* 1 Lloyd's Rep 534. See also K. Chatterjee 'The UN Convention on the Liability of Transport terminals in International trade. The end of the Himalaya clause?' (1994] JBL 109

whatsoever, be under any liability whatsoever to the shipper, consignee, or owner of the goods or to any holder of the bill of lading, for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly
from any neglect or default on his part, while acting in the course of or in connection with his employment, ... every exemption, limitation (etc. to which the carrier is entitled) shall also be available and shall extend to protect every such servant or agent of the carrier as aforesaid..."[189]

In the case, during unloading, the stevedore's negligence caused the drill to slip and was damaged, three years later the consignees sued the stevedores for the price of repairing the drill. At first instance Beattie LJ found for the stevedores which decision was affirmed by the Privy Council?

Thus by relying on the

"Commercial character, involving service on one side and rates of payment on the other and qualifying stipulations."[190]

The Stevedores who were third parties and thus not privy to the contract were allowed the benefits of the contract.

This clause was thus used to circumvent the popular legal theory of privity of contract by allowing a third party to benefit from some of the terms of the contract. This clause however does not demand anything from the stevedore, although it inures for his benefits.

This clause has been criticised as allowing the negligent stevedores to escape liability for their act, at a time when the carrier assumes no responsibility for the goods, after discharge which is when the stevedores or terminal operator benefits, meaning that the cargo owners in all such cases bears the loss.

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[189] This clause derived its name from *Adler v Dickson [1954] 2* Lloyd's Rep *267.*
[190] Ibid at p 548

These and the many other criticisms thrown at the clause, cease to become effective in case of multimodal transport. Under a Multimodal transport contract, the fact that only the MTO can be sued does not mean that the other parties can cause loss or damage negligently. It does not mean that the claim of the consignee is negated, but that the sub-contractor will enjoy the same benefits enjoyed by the carrier. The stevedores will not be able to benefit from the clauses in the bill of lading, if he has been negligent. Clause 1 b (2) states that

> *"... if it is proved that the loss or damage resulted from an act or omission of this person, done with intent to cause damage or recklessly and with knowledge that damage would probably result, such person shall not be entitled to the benefit of limitation of liability provided for....."*[191]

Since the carrier cannot escape liability if negligent, so Stevedores cannot also escape liability or limit it in case of negligence. The carrier cannot give to the stevedore that which he does not have. The second criticism of the clause that the stevedores is exempted from liability when the carrier has also ceased to be liable, because loss or damage to the goods occurs after the contract has come to an end, is not relevant in Multimodal transport because responsibility for the goods extends and transcends the different modal boundaries so much, so that the MTO stays responsible for the goods until the goods are delivered. This fact however was clarified in the *Port Jackson Stevedoring Pty Ltd. v Salmond and Spraggon*[192] *(New York Star).*

In the case Razor Blades which were discharged by the Stevedores, were negligently delivered to the wrong person. One year after, the consignees sought to sue the stevedores for negligent handling of the goods, and contended that the stevedores could not rely on a contract that had ended on discharge as per clause 5 which stated that the responsibility for the goods terminate on the

[191] The Combicom bill for combined transport contains such a clause.
[192] *The New York Star [1981] 3* All ER 252.

goods leaving the ship tackle. This point was quashed by Lord Wilberforce, who held that since the carrier did not insist on the consignees taking delivery at the ships rail, they were liable for the goods themselves, thus the contract did not end on discharge, but on actual delivery. This case was sought to be differentiated from *The Eurymedon* on the ground, that while in the latter the damage had occurred on boarding, which is within the contract period, in the New York Star, it occurred on the wharf after the contract had ended.

This decision was followed in *Godina v Patrick Operations*,[193] where it was affirmed that delivery to the wharf did not suffice to extinguish the contract, it has to be delivery to the consignees. The obstacle placed on the path of the third party by the Privity doctrine, and cases such as *Alder v Dickson*[194] and *Scrutton v Midland Silicones* Ltd.[195] (where the House of Lords denied Stevedores the protection of the limitation in the Hague Rules) has been eroded bit by bit. Firstly by Art IV bis 2 of The Hague Visby Rules, which states that an agent or servant not being an independent contractor can rely on the defences of the rules if sued. With the coming into force of The Contracts (Rights of third Parties) Act 1999 third parties are increasingly allowed the benefit of clauses made for their benefit.
By an Act of Parliament, the 1999 Act made the principle of *ius quessitium tertio* a part of English law, allowing an identifiable third party the right to enforce the terms of contracts purportedly made for it's benefit.[196] Although this Act was of general application, it is increasingly being used within the transport industry, in cases of charterparties, and towage contracts.

In the context of multimodal transport, the Himalaya clause will continue to be used so long as unimodal solutions are used in solving multimodal transport problems. Here there is the added problem of the applicability of this clause extending the protection usually found in the carriage by sea to carriage which is not sea carriage. In the USA, the courts were prepared to extent the benefits of the Himalaya clause to rail

[193] [1984], 1 Lloyd's Rep 333.
[194] [1954] 2 Lloyd's Rep 267.
[195] [1962] AC 446.
[196] Art 1 of The Contract (Rights Third Parties) Act 1999

carriage. In *Norfolk Southern Railway Co. v. James Kirby, Pty Ltd,*[197] the rail carrier sought to rely on a Himalaya clause when the train de-railed causing USD 1.5 million worth of damage goods. The Supreme Court in their decision allowed the rail carrier to claim the protection of the Himalaya clause, basing this decision on the customs and practices worldwide where third parties are allowed to benefit from this clause if it was intended for their benefit.

In *The Starsin,*[198] the status of the clause was examined by the House of Lord. The issue before their Lordships was the determination of the legitimacy of the clause in protecting shipowners against liability to cargo owners. The shipowners were held to be able to benefit from the clause as they had performed part of the carriage. The majority of their Lordships signal their reluctance in applying Himalayan clauses. Basing their arguments on a legal technicality, they held that the clause was ineffective. Lord Bingham whilst holding that decisions in *The Eurymedon and The New York Star were* a commercially inspired response to the technical rules of English law governing consideration and privity of contract criticized it for its artificiality.[199] Lord Hobhouse on his part based his rejection on policy, stating that the acceptance of this clause will place English law at odds with other jurisdictions were privity of contract is not applied.[200] Lord Millet relied on the "*contra preferentem rule*", that the clause as it stood did not make sense, holding that it was obvious that some words had been omitted.[201] If *The Starsin* signals the current judicial attitude towards Himalaya clauses, then carriers will have to pay particular attention to the drafting of these clauses.

2.4.1.2 The Circular Indemnity Clause

The uncertainty as to the Himalayan clause has led carriers to insert into their contracts circular indemnity clauses, which are clauses stating that the cargo

[197] 125 S. Ct. 385 [2004] A.M.C 2705. This decision was indeed a landmark case as in the earlier case of *CaterpillarOverseas S.A.v. Maritime Inc,900 F. 2d 714; [1991]AMC 75* it was held that a Himalaya clause could not extend to inland carriage.

[198] [2003] 1 Lloyd's Rep. 571
[199] Ibid Para 34
[200] Ibid Para 140
[201] Ibid Para 192-193

interests will not bring an action against the sub-contractors, and in the event of such a claim being brought to indemnify the carrier against any loss likely to be incurred by him. This clause is of particular importance to Multimodal transport, for unlike the Himalayan clause, which grants to the sub-contractor the same rights as the carrier, this clause seeks to ensure that the sub-contractor is not sued and if sued, the cargo owner will indemnify the MTO as a deterrent against suit.

A typical clause can be found in *The Elbe Maru*[202]

> *"The merchant undertakes that no claim or allegation shall be made against any servant, agent of the sub-contractor of the carrier, "*

In the case the carrier sought to bring proceedings under Sect. 41 of the Judicature Act 1925, to prevent the cargo owners from continuing a claim against the sub-contractors. Ackner, J held that the carrier was entitled to an indemnity against cost incurred in dealing with the claims against the sub-contractor by cargo owners.

This case was followed in Australia, in *Hapag-Lloyd Aktiengesellschaft.*[203] Here, like the *Elbe Maru,* the carrier sought to bring proceedings on the grounds of a circular indemnity clause. Yeldham, J. held that commercial considerations, like the freight rate, were influenced by the knowledge of an indemnity clause. The consignee should be held to his part of the bargain not to sue. Yeldham then went on to hold that, such cases were necessary to prevent protracted litigation: (The consignee first sues the stevedores, then the carrier seeks to sue the consignee to prevent his suit, and the stevedores if there is such a clause, sues the carrier for breach of promise)

In another case in New South Wales, *Sidney Cook Ltd. v Hapag-Lloyd Aktiengesellschaft,*[204] on similar facts as the foregoing case, the consignee contended that the clause was a contravention of Article 3, Rule 8 of the Hague

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[202] Nippon Yuson Kaisha v International Import and Export Co Ltd [1978] 1 Lloyd's Rep 206.
[203] *(1980) 2* NSWR *p 572,* and *Sidney Cooke Ltd v Hapag-Lloyd*
[204] *(1980) 2* NSWLR *587.*

Visby Rules. This contention was quashed by Feldham LJ on the grounds that the carrier of the sea leg of the combined transport operation was not a party to the contract covered by the bill of lading, and therefore not a carrier under the rules for the application of Article3 Rule 8 to affect him.
The above criticism together with the criticism, that by the clause the carrier seeks to do

> *"...indirectly what by the rules mandate cannot be done directly"*[205]

This does not directly apply to multimodal transport. This criticism of the clause is predicated on the fact that they tend to contravene Art 3 rule 8, which renders void

> *"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligation provided in the article or lessening such liability than as provided."*[206]

The operative part of the article is "*relieving the carrier or the ship*", the carrier in multimodal carriage is the MTO and he is the only one that can be stated as being liable especially in the light of *The Starsin,* the focus is on the front of the document as opposed to examining the back of the document.

By this it becomes clear that the so long as the carrier in Multimodal transport is stated on the face of the document, the problem of the "identity" of the carrier should not exist following on the Starsin. If this be the case, there can be no lessening of his liability under Art 111 rule 8, because he does not by the

[205] Tetley, Marine Cargo Claims, (Blais 3rd Ed, 1988) p. 760.
[206] The Hague Visby Rules 1968.

clause seek to deprive the consignee of any remedy but to say, he alone should be sued for that loss.

As a matter of interest, most of the multimodal transport documents contain liability clauses which state that although only the MTO is liable, his liability is based on the extent or criteria under which the party at fault would have been liable. Thus as in the Sydney Cooke case, if it could be determinable that the loss had occurred at the sea stage, then the MTO's liability will be liability found in sea carriage, as if it was originally one for the carriage by sea. In this case it is hard to see a contravention of Art 3 Rule 8; instead it seems to be more in line with the *"giving effect to the clear intention of a commercial document".*

2.4.1.3 Sub-Bailment on Terms Clause

Another way in which the performing party or the sub-contractor can benefit from the terms of the contract is through the doctrine of Sub-bailment on terms. Under this doctrine, the bailee who has possession of goods passes that possession to a third person who then becomes the sub-bailee. The question is if the bailee will be bound by the terms of the sub-bailment. In *The Pioneer Container,*[207] It was held that a performing carrier could be liable as sub-bailee and that the cargo owner could also be subject to the sub-bailment, if it consented to them. Consent in this case can be seen from authorisation which can be expressed or implied. The liberty to sub-contract clause is usually taken to be enough. This clause is very attractive to the third party as it allows him to rely on its terms; it is not reliant on the contractual carrier.

This fact was confirmed in *Singer Co. (UK) Ltd. v. Rees and Hartleport Authority,*[208] where it was shown that, the local authority was able to establish that they could create a sub-bailment on terms which included that authority's standard trading conditions.

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[207] [1994] 2 A. C. 324
[208] [1988]2 Lloyd's Rep. 164

2.4.1.4 The Contracts (Rights of Third Parties) Act 1999

The Contracts (Rights of Third Parties) Act 1999, recognised the right of third parties to rely on terms expressed to be for their benefit in contract to which they are not parties. The Act gives third parties the rights in circumstances set out under section.1 to enforce the terms of such contracts. In the case of carriage of goods, section 6(5) and (7) states that, these rights are not available in the case of carriage of goods, the main reason for this is to ensure that this does not conflict or overlap with the Carriage of Goods by Sea Act 1992. This therefore excludes the cases of the rights of suit against the carrier by the cargo concerns in the case of holders of bills of lading or other transport documents.

However, there is an exception to this exclusion which will permit third parties on the carrying side to benefit from this Act. This is found under the proviso to section 6(5) which is expressly designed to cater for the Himalaya clauses. Third parties are thus able to rely on this Act to enforce a Himalaya clause; in such cases the operation of the privity doctrine will be inapplicable. For the third parties to benefit from this Act, they must show that the particular clause in the contract was meant to "confer a benefit" on them. In *The Starsin,*[209], it was held that the first part of the clause was not for the benefit of the third party and they could not therefore rely on it

Although the 1999 Act overcame to a great extent, the limitation of third party rights in contracts for the carriage of goods by sea covered by the COGSA 1992, the current accommodation of third party rights in the two acts might give rise to inconsistencies, potential gaps and unnecessary confusion for third parties.

2.5 Conclusion

The very nature of multimodal transport dictates that more than one party is usually involved in the carriage of the goods. As seen from the above, the parties include the contracting carrier, the MTO, the performing carriers, transport sub-contractors and the agents and servants of the carrier.

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[209] [2001] 1 Lloyd's Rep. 437

This scenario obviously calls for the identification of the MTO, who has assumed the responsibility of the transport and is the party to be sued. This identification is important as it allows cargo claimants to sue the appropriate party without the risk of being time barred in their quest for identifying the right claimant.

At the moment we see that the status of MTO is fluid and includes within its ranks all who chose to carry and assume the obligations of multimodal transport. Carriers previously within unimodal transport and freight forwarders are thus the main group of persons carrying out multimodal transport.
However, other third parties who are considered as ancillary to the transport are also at times regarded as the carrier for purposes of suing them. This highlights the problems of other protection clauses within the contracts to prevent suit against these parties.

However, the absence of a mandatory international convention within Multimodal transport ushers in the applicability of all potentially international and national mandatory laws which means that unpredictability exists.

A uniform convention would have been able to secure the fact that only the MTO could be sued, however, with the nature of the transport, once loss or damage is identified, we find the possibility of suit against the different parties or performing carriers under whose charge goods were when the loss or damage occurred.

The position taken by *The Starsin* goes a long way to support the present concept within multimodal transport, that only the carrier identified on the face of the document should be considered to be the carrier. This is of particular importance as the realities of multimodal transport shows a strong tendency to "pierce the veil" to reveal the performing party responsible, thereby bringing action not based on the contract against him. This makes for uncertainty and unpredictability as to the applicable law.
This fact ushers in the problem of protection clauses within the contract and their interpretations.
The way forward within multimodal transport might be to make it obligatory that the carrier be identified in the contract by a specific notation, failing such

identification it should be presumed that the last carrier is the carrier. This clause it should be made clear will be for the purpose of leading to the identification of the MTO, as it would be assumed that the last carrier would know the identity of the MTO.

Multimodal transport, by offering the claimant the possibility of claiming against one party in case of loss or damage irrespective of localisation was one of the advantages of multimodal transport which led to its popularity. This advantage can only be preserved if the practice is encouraged of suing only the MTO.

In the absence of a mandatory liability regime in multimodal transport it will be difficult to enforce such a rule. The hope in this instance is that when such a regime becomes applicable it should lay down clear rules for the identification of the MTO and strict rules to deter suit against the other performing parties involved in multimodal carriage.

In continuation of this theme, the next chapter looks at the liability regime applicable in Multimodal transport.

CHAPTER 3

3.1 THE LEGAL FRAMEWORK OF LIABILITY IN MULTIMODAL TRANSPORT

The Hague Visby Rules governs liability for the international carriage of goods by Sea, The Warsaw Convention, The CMR, CIM/COTIF and The CMNI all govern liability for the international carriage of goods by air, road, rail and inland waterways respectively. In multimodal carriage, there is no such liability regime governing liability. Following on from chapter one in which the regime is interpreted in terms of the 'chained contract,' the liability regime in multimodal transport is made up of the potential liability regimes used to effect the multimodal transport contract.

This leads to uncertainty and unpredictability as to the liability regime applicable in any given case. Attempts have been made within unimodal transport to extend their applicability beyond their respective regimes to accommodate certain aspects of multimodal transport within their different modes. Nevertheless, none of these attempts could logically provide a full and adequate liability regime in multimodal transport. The United Nations Multimodal Transport Convention 1980 failed to obtain the requisite signatories to bring it into force.

In view of the absence of a mandatory regime in multimodal transport, a proliferation of potentially liability regimes apply to multimodal transport leading to uncertainty and unpredictability as to the applicable laws at any given time. This chapter seeks to discuss the multimodal transport problem through the illustration of a consignment of goods carried under a multimodal transport contract from Texas to Frondenburg in Germany. Under the contract, Flour Co a bakery chain contracts with Multico, carriers for the carriage of 1000 kgs, of flour in 10 packages of 100 kgs, to be carried in a container, evidenced by a multimodal transport document. Multico using its liberty to choose modes decides to use the following modes:

(1) From Exporter's premises to rail depot - local road firm.

(2) From Texas rail depot to Quebec in Canada - Canada Rail.

(3) From Canada to Paris - B.K.O. Ltd- Sea carriers.

4) From Paris to Germany - Road Runner Road carriers

On delivery inGermany, 8 packages are delivered to the consignee.

Through this hypothetical case, we will examine the Multimodal transport problem of the proliferation of liability regimes depending on the loss or damage history. Specifically, to show that the liability regime in Multimodal transport is uncertain and unpredictable, and has led to a confusing legal situation especially when two or more mandatory regimes become applicable to the same loss or damage.

This chapter seeks to examine the problem of the liability regime available in multimodal transport for compensating cargo owners for loss, damage or delay to goods. The present legal framework in multimodal transport is complex and modally based, consisting of numerous international unimodal transport conventions, regional and sub-regional agreements, and national laws. The legal regime applicable varies from case to case depending on the particular facts of each case leading to uncertainty and unpredictability.

The purpose of this chapter is therefore to examine and analyse in detail the multimodal liability problem of an unpredictable and uncertain liability regime which obtains as a result of the diversity and gaps in the laws governing multimodal transport. This problem viewed in doctrinal terms, presents extraordinary problems which have troubled legal scholars and constituted the work of many international bodies.[210]

The thesis will then discuss the different liability provisions in the main mandatory transport conventions especially their basis of liability and their exceptions. It will be argued that although the different basis of liability within the different conventions are couched in varying legal terms their interpretations

[210] Diamond, A, "The UN Convention on Multimodal Transport, Legal Aspects of the Convention", Southampton Seminar on Multimodal Transport, University of Southampton 12 September 1980. Faber, D, "The Problem arising from Multimodal Transport" (1996) LMCLQ 503. Driscol, W J, "The Convention on International Multimodal Transport: A Status Report" (1978) 4 JMLC 441.

are quite similar, their basic differences lie in their exceptions and limits of liability.

This chapter concludes that given the unpredictability found within multimodal transport liability, there is necessity for international rules to govern liability in multimodal transport.

3.2 THEORITICAL LIABILITY FOR LOSS, DAMAGE, OR DELAY

The absence of an international liability convention governing liability in multimodal transport means that, when ever loss or damage occurs, the determination of what specific law applies is problematic, because of the possibility that different modes are used. When loss is localised to a particular mode, the common practice has been to apply the mandatory international or national law that would have applied to that particular mode of transport. However, even in cases in which loss has been localised to a particular mode, it is not always obvious which liability regime will be applicable, because the chosen liability regime might point to another regime on the facts of the case. [211] Another problem that arises is that of loss or damage occurring during interface areas between modes where no liability regime, international or national applies, here the applicable regime has to be that of the contract. This lack of a liability regime is also exacerbated in the case of unlocalised loss or damage, especially when the goods have been carried in a container. In this case it is difficult to ascertain what liability regime will apply, in which case the liability regime of the contract will be applicable? This means that there will always be a lack of certainty as to the applicable terms as the absence of a liability regime regulating this mode means that each contract might be different.

The lack of an applicable international convention within Multimodal transport has however, seen the rise of standard contracts in this area. Fortunately, most of these standard contracts are similar as there are based on model rules formulated within the industry, notable the ICC rules for a combined transport document

[211] See Art 2 of the CMR which under which the CMR will abdicate in favour of a mode in which loss or damage can be exclusively attributed to in cases of 'mode –on-mode transport within the CMR

1975 and the UNCTAD/ICC Rules for Multimodal transport documents1992.[212] The contractual nature of the rules by definition subjects them to the different applicable mandatory conventions and laws applicable in unimodal transport. Thus the different transport regimes currently govern liability for cargo damage, loss or delay in multimodal transport once loss or damage is localised or as a matter of contract.[213] A difficulty here is the unpredictability and uncertainty that exists in a system which is inclusive of all unimodal mandatory conventions and mandatory national laws.[214]

3.2.1 International Conventions Potentially Applicable to Multimodal Transport

A true picture of the problem of unpredictable liability in multimodal liability can be seen from the variety of applicable regimes in multimodal transport once loss, damage or delay occurs. The result is that the parties cannot contract on any predictable terms as it is impossible to predict where loss or damage will occur. Even in cases where loss or damage can be localised, there is always the added problem of the applicability of the unimodal transport convention or national law to the multimodal transport contract. In the case of unlocalised loss the terms of the contract will dictate the liability regime applicable; the liability regime can thus only be determined ex post facto.

At this point we need to identify the International Unimodal Conventions potentially applicable in multimodal transport.

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[212] The Fiata Bill of Lading for Combined transport, '92', Multidoc '95', Combicombill etc.

[213] Princes Buitoni Ltd v. Hapag [1991] 2 Lloyd's Rep. 383, where under the contract CMR was to govern road liability in Europe.

[214] This absence encourages different national, regional and intergovernmental bodies to enact solutions to regulate this mode, this has led to a further proliferation of liability regimes with potential applicability in this area;

3.2.2 TABLE OF INTERNATIONAL TRANSPORT CONVENTIONS

3.2.2.1 CARRIAGE BY SEA

	Hague/Visby Rules	Hamburg Rules
Date	1924 Amended by Brussels Protocol 1968	1978
Period of application	From loading of goods until discharge from vessel. Special responsibilities before the start of the voyage	From period when carrier is in charge of goods at loading port to port of discharge
Contract of carriage	Evidence a by a bill of loading or other similar document	Bill of loading serves only as evidence of contract
Basis of liability	For loss or damage	Liability for presumed fault or neglect for loss or damage and delay in delivery
Limitation of liability	1. SDR/Kg 666.67 SDR/Package	2.5 SDR/Kg 835 SDR/Package 2.54. the freight Payable for delay
High limits of liability	By agreement increase or reduction shall be include in the bill of loading	Carrier may assume a greater liability
Notice of claim	Before or at the time of renewal of guide writing non-apparent loss : 3 days	Apparent loss or damage : 1 day Non apparent loss or damage : 15 days

3.2.2.2 CARRIAGE BY AIR

	Warsaw	Montreal
Date	1929	1999
Period of application	From acceptance through delivery	Period when cargo is in the charge of the carrier
Contract of carriage	Air waybill – 12 minimum particulars	Air waybill – 3 essential particulars
Basis of liability	Presumed fault of carrier for loss, damage, delay	Presumed fault for damage to or loss of cargo, for claims over 100.000SDR,and Strict liability for claims under 100.000SDRs
Delay	-	-
Consequential or economic loss	No restriction on damage caused by delay	No restriction on damage caused by delay
Limitation of liability	17 SDR/Kg	
High limits of liability	Specific declaration of value by shipper + payment of supplement	Special declaration of interest, subject to the payment of supplementary sum
Notice of claim	Damage – 7 days from reception of goods Delay within 14 days	Damage : 14 days Delay : 21 days

3.2.2.3 CARRIAGE BY ROAD

	CMR
Date	1956
Period of application	From taking over to delivery
Contract of carriage	Confirmation by consignment note
Basis of liability	Presumed fault of the carrier for loss, damage, delay
Liability for indirect and consequential loss	Carriage charges custom duties
Limits of liability	8.33 SDR/Kg

	for delay 1 x value of freight
Higher limits	Against payment of surcharge
Notice of claim	Damage – 7 days Delay – 21 days after good placed at carrier disposal

3.2.2.4 CARRIAGE BY INLAND WATER WAYS

	CMNI
Date	1999
Period of application	From taking to delivery
Contract of carriage	Consignment not required if requested
Basis of liability	Liability fir loss, damage and delay
Limitation for consequential loss	Cost of preventing damage
Limit of liability	8.33 SDR/Kg Delay 3 x value of freight
High limits by liability	-
Notice of claim	Apparent loss, damage or delivery Non apparent loss – 7 days after delivery Delay – 21 days after delivery

3.2.2.5 RAIL CARRIAGE

	CIM/COT IF	**Protocol**
Date	1980	1999
Period of application	From time of acceptance for carriage over entire route up to delivery	The cargo is in the charge of the carrier
Contract of carriage	Consignment note	Consignment note
Basis of liability	Strict liability for loss or damage resulting from transit period	Strict liability for loss or damage resulting from total or partial loss or damage to goods Presumed liability for loss or

		damage to the vehicle or to its removable parts and for delay. Restricted liability : for wastage in transit only if wastage exceeds specific allowance
Delay	Not within transit time agree	Not within agreed transit time
Liability of inconsequential loss	Absence, insufficiency if irregularity in documents	In case of interest in delivery
Limitation of liability	17 SDR/Kg 4 x the carriage charges for delay	17 SDR/Kg 4 x carriage charges for delay
High limits by liability		Carrier may assume a greater liability in case of declaration of interest
Notice of claim	Non-apparent loss : 7 days	Non apparent loss or damage : 7 days

3.2.2.6 MULTIMODAL TRANSPORT MODELS RULES

	FIATA Model Rules	UNCTAD/III Rules
Date	1996	1992
Period of application	From taking the goods in charge until delivery	From taking the goods until delivery
Contract of carriage	Bill of loading	MT document
Basis of liability	Presumed liability for loss or damage	Presumed liability for loss, damage and delay
Liability for consequential loss		Consequential loss or damage other than loss of or damage to goods
Limitation of liability	2 SDR/Kg Delay - remuneration relating to the service giving	2 SDR/Kg 666.67 SDR/Package 8.33 SDR/Kg if no carriage by sea

	use to delay	Delay and consequential loss – 1 x amount of freight limit of unimodal convention of loss/damage localised
Higher limits		By agreement fixed in MT document
Notice of claim	Non-apparent loss : 6 days	Non apparent loss or damage : 6 days after 90 days treatment of goods as loss

Diversity of approach within these Conventions on key issues, such as the basis of liability, time bar, delay and limitation of liability means that the applicable law will be different in each case depending on the determination of;

-The applicable regime

-Localised loss

-Unlocalised loss, and

-Cause of loss or damage

The problem can be further complicated if loss occurs gradually all through carriage thereby transcending modes and bringing into play different liability regimes.

The question of the applicable liability regime in multimodal transport is of tremendous importance because of the increasing importance of this mode. However, given the plurality of legal regimes and the variation in their treatment in different jurisdictions, multimodal liability often changes

"...like the colour of a chameleon as the transport progresses by various means of conveyance".[215]

This fact clearly limits the ease with which the outcome of any claim is determined before the actual loss or damage. On a close scrutiny of the

[215] Ramberg, J, "Harmonisation of the Law of Carriage of Goods" [1973] *Scandinavian Law Review* 245.

practicalities, however, the choice usually leads to the application of one of the international unimodal transport conventions, either because they are mandatory or because they are the 'choice of law' of the contract. The unpredictability in this case also lies in the fact that these different forums vary especially in their interpretation of legal rules.[216]

3.3 THE PRACTICAL BASIS OF LIABILITY IN MULTIMODAL TRANSPORT

The absence of a mandatory international convention applicable to multimodal transport means that the legal liability is purely contractual, with the implication that any number of regimes can be applicable depending on the contract entered into between the parties. This has obvious implications for multimodal transport as the absence of statutory cover implies that the contract is often overridden by mandatory transport conventions and laws. Further, these laws are given varied interpretations in the different jurisdictions leading to a situation in which the parties cannot predict what rules will obtain until after loss or damage has occurred.

So far the two main ones are the ICC "Uniform Rules for a Combined Transport Document"[217], and the UNCTAD/ICC Rules for multimodal transport.[218]

These rules are important as they attempt to unify the multimodal transport contract; however, as private contracts they have no mandatory force and cannot establish a mandatory regime.

Before model rules were adopted, the prevailing situation involved the use of through contracts of carriage. The main purpose of these through contracts of carriage was the provision of continuous documentary cover for goods, without necessarily a concomitant liability cover for the goods during carriage. Thus,

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[216] Haak, "The Harmonisation of intermodal liability arrangements" 5th IVR Colloquim-Vienna-27 and 28 January 2005

[217] The ICC Rules were first issued in 1973; Publication No. 273 and in 1975 issued ICC Publication No 298

[218] Also Found in ICC Publication 481

under through contracts several carriers could be liable to the cargo owner for the portion of the carriage performed by each.[219]

This type of contract did not relieve the shipper of the anxieties suffered prior to the introduction of the through contract, because in case of loss or damage, he still had to sue the individual carrier who effectively caused the loss or damage. In some instances he would not have known about the particular carrier's terms and conditions.[220] The through carriage contract differentiated between the period of liability and documentary cover, as the carrier issued a document which covered the whole transit, but accepted responsibility only for a limited period.[221] This led to the demand for a document to be issued which covered both the period of responsibility and documentary cover. On this basis model rules were formulated by the different international organisations. At present the main model rules being used are the ICC Rules of 1975 and the UNCTAD/ICC Rules of 1992.

3.3.1 The International Chamber of Commerce (ICC); Uniform Rules for a Combined Transport Document.[222]

These rules consisting of 19 rules were first published in 1973 as the International Chamber of Commerce rules for a combined transport document; and amended in 1975.[223] These rules were for incorporation into the multimodal transport contract and mostly concerned the documentation and liability problems of multimodal transport, leaving issues such as freight, liens, general average and jurisdiction to be determined by the individual parties. [224]

The ICC Rules become applicable by the issue of a combined transport document which incorporates these rules, and by the issue of these documents, the carrier accepts responsibility for the performance of multimodal transport and liability

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[219] Ramberg, J, "Harmonisation of the Law of Carriage of Goods" [1973] *Scandinavian* Law Review 245.Stafford Allen & Sons Ltd v Pacific Steam Navigation Comp [1956] 1 Lloyd's Rep 495 Also Crawford and Ano v Allen Line [1912] AC 130.

[220] Stafford Allen, ibid pp 499

[221] Evling Selvig, "Through Carriage of Goods by Sea" (1979) 27 AJCL, p 369

[222] These Rules where first published in 1973, ICC Pub. 273, and modified in 1975 to cater for the problems of liability in delay.

[223] 1975 ICC Uniform Rules for a combined transport document .Publication No 298. These rules where based on the Tokyo Rules and the TCM draft.

[224] F D D Cadwallader, "Uniformity: the Regulation of Combined Transport" (1974) J BL 193. Wheble, B S, "The International Chamber of Commerce Uniform Rules for a Combined Transport Document" [1976] LMCLQ 145.

throughout the entire transport. The rules however differentiate between liability rules when loss is localised and when it is concealed. The ICC Rules have adopted the network system of liability, making the carrier liable as per the mandatory applicable regime when loss is localised and lays down its own rules when loss is concealed. The first generation Multimodal transport documents like the COMBIDOC, Multimodal transport Document and the FIATA Bill of Lading for Combined Transport bills of lading were all based on these rules.

3.3.1.1 Liability for unlocalised loss

In our hypothetical case if the contract was on one of the ICC formats and the loss is unlocalised, then as per Rule 11 of the Rules the compensation would be provided for. Once the claimant can prove that the bags of flour were delivered short as in our hypothetical case, the MTO's liability is engaged. This is because liability for concealed loss is not based on any fault or lack of fault on his part or those for whom he is responsible; i.e. his servants and agents, it is based on a general rule in transportation law which makes him liable for any loss or damage to the goods under his care for which he can offer no explanation.[225]

Under the rules, the MTO will be liable for unlocalised loss to the consignee, because these rules invoke a presumption of fault as the basis of liability, although with slight variations as to the basis of exoneration.

By Rule 5(3) of the ICC Rules, the carrier is liable on a presumed fault basis, if loss is concealed, meaning that he benefits from certain exceptions to liability, which are stated in Rule 12. The grounds for exoneration, which the MTO has to show to escape liability, are:

(1) The fault of the shipper

(2) Defective packing or marking

(3) Inherent vice of the goods

(4) An unavoidable work stoppage

(5) A nuclear incident

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[225] The general rule is that he is liable in case of unexplained loss or damage. *Transatlantic Marine Claims Agency Inc V. OOCL Inspiration(The OOCL Inspiration)* 1998 AMC 1327 1327 (USCA 2nd Cir),1330. Where it was stated poignantly and with respect to the US Carriage of Goods by Sea Act 1936 the "COGSA's framework thus places the risk of non-explanation of mysterious maritime damage squarely on the [carrier]" see also The Torennia [1983] 2 Lloyds Rep. 210, The Rhesa Shipping Company Co; SA V. Edmund (The Popi M) [1985] 1 WLR 948

(6) Any other cause which could not be avoided and whose consequences could not be prevented by the exercise of reasonable diligence.
These exceptions are normal exceptions found within the different transport conventions and would be interpreted in the same way.
While the basis of liability is similar and likely to result in similar results, the limits of liability vary to a considerable extent.

ICC Rules: Rule 11(c)

Under the ICC Rules, the Limit of liability for lost cargo is 30 Poincarré gold francs per kilogram (one Poincarré gold franc as set at 65.5 milligrams of gold of millesimal fineness 900 in 1928). Largely this standard has now being replaced by the (SDR) Special Drawing Rights of the International Monetary Fund, and 30 Poincarré is equivalent to 2 S.D.R. per kilogram.

3.3.1.2 Liability for localised loss

As seen in the preceding section, the outcome of any multimodal transport contract in which loss or damage is concealed is dependent on the particular choice of law chosen by the parties. However, the practice has led invariably to a situation in which the standard of liability is presumed fault in imitation of the standard applicable in unimodal transport, with a variation only in the limitation of liability.

In the case of localised loss or damage, the liability regime applicable is that applicable where loss or damage took place. This means that there is the possibility of two or more regimes applying if loss or damage is gradual throughout several modes or if it can be proven that different types of loss occurred during different modes. This intermix of different mandatory international and national liability regimes leads invariably to different results, even on the same facts.
If hypothetically, it was discovered that the loss actually occurred during the carriage by sea, or by road or even by rail, then the different rules applicable under the conventions sited above will become applicable.

By Rule 13

"The [CTO] is liable to pay compensation in respect of loss or damage to the goods; and the stage of transport where the loss or damage occurred is known, the liability of the CTO in respect of such loss or damage shall be determined:

(a) By the provisions contained in any international convention or national law which provisions

(i) cannot be departed from by private contract, to the detriment of the claimant, and

(ii) would have applied if the claimant had made a separate and direct contract with the [CTO] in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable; or

(b) By the provisions contained in any international convention relating to the carriage of goods by the mode of transport used to carry the goods at the time when loss or damage occurred...."

Under this Rules, all unimodal conventions and national legislations are potentially applicable to the carriage, to be triggered by localisation of loss or damage. In this case our hypothetical case may be subject to at least 2 different international conventions.

The Hague Visby Rules will apply to the sea leg, by virtue of the Canadian Carriage of Goods by Order Act SC 1993. Although Canada is not party to either the 1924 convention or its protocol in 1968, it adopted both by statute, and the Road section from Paris to Germany will be subject to the CMR. And in the case of rail carriage from Texas to Canada, the US Federal law will be applicable; the carriage inside the USA is strictly subject to national or federal law.

The above states the reality when the ICC rules are used, that many different legal regimes are potentially applicable even to such a simple MT contract.

3.3.1.3 Liability for delay

The issue of liability for delay in multimodal transport is not as easy as in unimodal transport.[226] The question here is what law will be applicable in case of delay in a container or in case of delays under different modes during the same contract. In the case of the ICC rules liability is triggered in case of delay only when loss or damage is localised, and to the extent that it is actionable under the appropriate liability regime applicable. The rule then follows the concept of the fictitious contract. The amount payable is in this case shall not exceed the freight for the stage to which the loss or damage occurred, provided that the limitation is not contrary to any applicable international convention or national law. Rule 14.

3.3.1.4 THE LEGAL FICTION

The main purpose of this clause is to provide back-to-back liability, so that the [carrier] MTO is liable to the extent of the actual carriers or sub-carrier's liability to him. The MTO thereby ensures that he does not suffer more loss than that occasioned during carriage by a performing party. The purport of this provision is thus all-encompassing as it extends the liability of the MTO to cover all liability regimes under which the MTO may be sued. The clause thus includes all national and international law.

(1) Clauses

Clause 11(a) (i):

> "... Which provisions cannot be departed from by private contract to the detriment of the claimant?"

[226] Gronfors K., " Liability for Delay in Combined Transport" (1974) (JMLC 483 at p.485

This provision reflects the non-derogatory provisions in unimodal transport convention and prevents the carrier from derogating from the convention, thereby granting to the claimant the same level of protection.

The problem with this provision is that it is essentially based on transport conventions which are modally subjective, and automatically falls within the ambit of mandatory unimodal conventions. Therefore there is no marked clarity in ascertaining any provisions that seek to derogate from the convention to the detriment of the claimant, i.e. in *The Morviken*;[227] the contract was for the shipment of machinery from Leith to the Dutch Antilles, under a bill of lading which included a Dutch choice of law clause. The machinery was damaged, and the shippers commenced proceedings in rem in the Admiralty Courts. The carrier sought to stay proceedings on the basis of the exclusive jurisdiction clause.

Under Dutch law the applicable law was the Hague Rules with limits amounting to £250, while under The Hague Visby Rules as applicable in the UK the shipper could have claimed £11,000.

Their Lordships were of the opinion that the "clause paramount" of the Hague rules had been displaced by the Hague Visby Rules, which had the force of law, so that it must be treated as if "*they were part of directly enacted legislation*". The Hague Visby Rules were therefore applicable to the bill of lading since it fell within Art X (a) (b), having been issued in a contracting state, for carriage to a contracting state. The opinion thus was that to give effect to the choice of law would have amounted to derogating from the provisions, contrary to Art 111 rule 8.

In such unimodal transport it is indeed easy to state as their Lordships did, that one cannot derogate from the provision by inserting in the bill of lading, a jurisdiction clause which is detrimental to the claimant.

In multimodal transport, ascertaining such a device is not so easy. First of all there is no requirement that the MTO undertake to carry the goods using particular

[227] [1983] 1 Lloyd's Rep 1.

mode(s). Thus the fact that a provision might be taken to be derogatory, does not necessarily mean that it was intended to be. Will the fact that the 'Combidoc' bill states that only the Hague Rules are applicable to sea carriage derogatory, in a case in which the Hague Visby Rules would have been applicable?

The contention here is that it is not, because the Hague Rules in this case are applied only by contract and not ex proprio vigore. The effect of the clause in the context of multimodal transport is that it places the claimant in the same situation in which other claimants under the mode to which loss is localised would find themselves. And whether a clause would be construed as non-derogatory or not will at the final analysis be seen only after localisation.

(b) Clause 11 a (ii)

> *"which provision would have applied if the claimant had made a separate and direct contract with the [CTO] in respect of the particular stage of transport where loss or damage occurred".*

This brings into play a "hypothetical contract", asking the parties to determine liability on a hypothetical contract which might have existed, between the cargo claimant and the sub-carrier. The question that suggests itself here is the accuracy of the determination of such a hypothetical contract. How can we predict the particular contract that would have been concluded?

The answer to such a question in French and Belgian law was that the hypothetical contract between the carrier and the sub-contractor would be similar to that before them so that if that contract is subject to mandatory rules, it will be assumed that the "hypothetical contract" that would have been made between the claimant and the sub-carrier would also be subject to such mandatory rules.[228]

What then is the hypothetical contract?

(i) Is it the contract that would have applied to the relationship between the MTO and the carrier or

(ii) That which would have applied had a direct contract been made?

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[228] See Chapter 2. See also Jan Theunis, International Carriage of Goods by Road CMR (1987).

Alternatively, the contract concluded between the MTO and the performing carrier could be taken as the "hypothetical contract" because

(i) On the doctrine of agency ratification, the cargo claimant can be said to have ratified that contract. For the multimodal transport contract which contains a liberty to sub-contract can be taken to be the authority given to the MTO to contract on terms suitable to the claimant.[229]

(ii) The MTO is a specialist in this field, and it can be assumed that any contract into which he enters with any such performing carriers would be on terms that are beneficial to him, thus also the cargo claimant. It is unlikely that the claimant would have entered into a contract with more beneficial terms.[230]

Unfortunately, the above can only be an assumption as there is as yet no judicial certainty to throw light on the interpretation of this clause in multimodal transport.

The decision in *The Princes Buitoni Ltd v Hapag Lloyd*,[231] although containing such a contract was decided on the grounds that there was a clause paramount effective to trigger the CMR.
The contract had a clause applying the CMR to road carriage in Europe and a catch-all provision which contained the "hypothetical contract" when no legal provision was applicable. The loss occurred during carriage within England, and the defendant carrier contended that the CMR was inapplicable because it failed to meet the substantive requirements of the CMR, and was thus within the catch all provision.

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[229] Spectra International PLC v Hayesock Ltd [1997] 1 Lloyd's Rep 153

[230] Glass and Cashmore, Introduction to the law of Carriage of Goods (1989) para 3.13 contend that the ability to negotiate better terms will vary from contract to contract. See also Glass, Freight Forwarding and Multimodal Transport Contracts,(2005), 254

[231] *(1991) 2 Lloyd's Rep 383*

The courts holding that the words were plain to warrant the application of the CMR, held that, if no such incorporation was present, the hypothetical contract would have been triggered and the outcome different, although their lordships did not touch on this issue.

Lord Justice Leggatt's advice was that if the parties intend a particular result they should use words to that effect, as courts can only go by the language chosen by the parties.

In contrast, in a Belgian case,[232] the bill of lading for combined transport had a choice of law clause which was rejected in favour of the reality of the transport; Holding that the CMR had "de jure" application since the place of taking over and the place of delivery were in contracting states.

Thus while in *The Buitoni*, the particular clause was construed to give it effect, in the Belgian case, the important question was the reality of the contract, showing a marked uncertainty as to the basis on which such contracts are construed.

The hypothetical problem might however be more profound if there is a clear advantage to be gained by using one law over the other.
If in our hypothetical case of carriage between Canada and Paris, goods were lost at sea, the French courts would apply the Hague Visby Rules, so would the courts in Canada. However, if one of the countries had to apply the Hamburg Rules, for example Cameroon: a tempting situation for forum shopping would arise. The cargo owner would have a choice of either the Hague Visby Rules or the Hamburg Rules, depending on the desired results; does he seek the higher limits of the Hamburg Rules,[233] or the unlimited liability for unauthorised deck cargo under the Hague Visby Rules?[234] The claimant clearly has a choice, so it is difficult to predict

[232] (1976) 11 ETL 276 (District Court of Antwerp)

[233] Art 6. 2.5 SDR per kg as opposed to 2 SDR of the Hague Visby Rules Art IV(5)
[234] Art 1(c) of the Hague Visby Rules. See *The Chanda [1989] 2 Lloyd's Rep 494 (Wibau Maschinenfabrik Hartman S.A. v. Mackinnon Mackenzie)*

which contract would have been concluded, subject however to the assumption that with hindsight he is likely to choose the contract that would benefit him most.[235]

There is however a plethora of academic opinion and limited judicial precedence in cases which contains a similar clause. Within the CMR, leading commentators allude to this hypothetical contract as a "fiction".[236] Such a clause is also found in Art 2(i) where it states that the liability of the road carrier in a situation where combined transport is involved would be determined by the

"...conditions prescribed by law for the carriage"

as if the contract of carriage had been concluded between the cargo owner and the carrier by that other means of transport.

It is in the elucidation of this provision that commentators have held that it is "fictitious". Ramberg[237] is of the opinion that this can only mean mandatory provisions applicable to the other mode. This was not followed in *Thermo Engineers Ltd. v Ferrymaster,*[238] where Neill, J. held that conditions prescribed by law are those that permit no variation. And The Hague Rules were thus rejected based on Art 5 under which the parties are permitted to increase their liability. Neill, J. held that since the contract could have been entered on terms different from those contained in the Rules, the rules could not be taken to be prescribed by law. Such an interpretation would render the section meaningless as most conventions allow slight variations depending on the wishes of the parties for example, ad valorem declarations.[239] The only way this would make sense is if the question refers to

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[235] The Captain Gregos [1990] 1 Lloyd's Rep 310, here if the claimant had such a clause he would have opted for the Hamburg Rules to Circumvent Art 111 (6) of the Hague Visby Rules, and benefiting from the 2 years limitation period under the Hamburg Rules.

[236] Hill, CMR, Contracts for the International Carriage of Goods by Road, (Lloyd's of London Press, 1995) at 50. Haak, Liability of the Carrier under the CMR , The Hague, Stiching Verweradres, (1986) pg 98.

[237] Ramberg, J, Harmonisation of New transport Technologies (1980) 15 ETL p119

[238] [1981] 1 Lloyd's Rep 200.

[239] The Warsaw System Conventions allow this Article 22 allows the shipper to make a special declaration , although the CMR does not allow such a variation

conditions which would ordinarily cover that particular mode of transport. If the answer is yes, then they should apply without need to construe a factual hypothetical contract.

3.3.2 UNCTAD/ICC Rules (1992)[240]

The UNCTAD/ICC Rules was the result of a joint effort between UNCTAD and ICC to produce a commercially acceptable document based on current realities. These rules like the ICC rules are meant only as a model contract, dealing mostly with documentary and liability issues. They are standard contractual terms for incorporation into private contracts. By virtue of the fact that these rules are contractual, they are subject to applicable mandatory laws. These rules have been incorporated in widely used multimodal transport documents such as the FIATA Multimodal transport bill of lading and the "MULTIDOC 95" of the Baltic and Maritime Council (BIMCO), and the FIATA Bill of lading for combined transport.

Rule 5 lays down its liability provision.

These rules do not differentiate between liability for localised and concealed damage, and therefore can be said to be based on the uniform basis of liability, although they have special provision for localised loss in the case of limitation of liability; Rule 6.4. In the case of delay, the rules become applicable only if there was a declaration of interest in timely delivery. Thus in cases in which the shipper fails to signal timely delivery recovery for delay will be compromised and he might not be able to recover for any such loss or damage.

Since the rules are private, they are still subject to international conventions.[241] This results in continuing uncertainty as to the liability regime applicable, as their

[240] ICC Publication No 481 This replaces the previous ICC rules 1973 as modified in 1975.

[241] Incorporation of The Rules into the contract of carriage can be made in writing, orally or otherwise, by reference to the 'UNCTAD/ICC Rules for multimodal transport Document'. It must be noted that these rules only cover some parts of the traditional carriage contract, mostly liability and documentary issues. It is therefore imperative for MTO's using this Rules to add clauses dealing with matters such as Jurisdiction, arbitration etc.

application like that of the ICC Rules leads invariably to the implementation of the network system of liability.
Rule 5(I) of the UNCTAD/ICC Rules will only exonerate the carrier if he can prove that loss occurred with

"...no fault or neglect ... was caused or contributed"

By his acts or those of his servants or agents

Although the different rules, provide different exoneration grounds, the spirit of the rules are all similar. The carriers are exonerated once they can proof that the loss was not their fault; Exercising "reasonable diligence" of the ICC rules and "no fault or neglect" of the UNCTAD/ICC Rules may lead to dissimilar results depending on the interpretation they receive from different jurisdictions. It is however arguable if acting without

"...fault or neglect" used by the UNCTAD/ICC rules is more onerous.

This is because under the ICC rules the carrier can still escape liability even if he is at fault if he could show that he acted reasonably or with reasonable diligence, while under the UNCTAD/ICC once damage cannot be localised to any particular mode of transport, the rebuttable presumption of Liability becomes irrebuttable and the MTO finds himself strictly liable for the loss irrespective of a lack of negligence on his part or that of those for whom he is vicariously liable.

Once the carrier cannot state the cause of the loss, it will be extremely difficult for him to establish that he either took "reasonable" care, or took "all measures that could reasonably be required. In the case of our hypothetical case the carrier will be liable for the loss of 2 containers if he cannot establish how loss or damage occurred.
The Limit is set at 666.67 SDR per package or 2 SDR per kilo, unless there is no sea carriage in which case the limit is 8.33 SDR per kilo.

3.4 THE NETWORK SYSTEM OF LIABILITY

The system of liability used by the model rules is what has been referred to as a network liability system, under which when loss is localised, liability is determined by the mandatory rules which would have otherwise applied to the contract, and when loss is unlocalised the rules themselves lay down the liability regime which will become applicable.

Under a pure network system, the laws applicable are those that would apply to the different stages of the transport just as in unimodal transport. This creates a network of existing rules for whenever, loss or damage is localised. If an international convention is applicable it will apply to the loss or damage, when none is available, national laws will apply to determine liability.

The rules are to the effect that, the respective conventions relating to the specific mode of transport are incorporated into the multimodal transport contract whenever loss or damage can be localised to that particular mode. By so doing, the claimant is placed in the same position he would have been in, had he contracted for carriage in the mode to which loss or damage is localised. The multimodal transport contract in this case relies on the network of rules governing the different modes of transport. This means that when there is an applicable mandatory international or national liability regime, it will be applicable to that part of the multimodal transport contract. Thus a typical multimodal contract in which sea, rail, road, air, or island waterways are use is potentially governed successively by the Hague Rules, the Hague Visby Rules, the Hamburg Rules, the CMR, the COTIF/CIM, and the Warsaw Conventions together with all necessary amendments and protocols thereto. This proliferation of liability rules in the sphere of multimodalism is what has been its most unattractive feature.

The pure network system must be differentiated from the modified network system. Under the modified system, the liability is still based on the different international conventions or national laws applicable to the different parts of the contract. But the parties are allowed by statute or contract to modify the provisions of the applicable laws.

This modified system cures some of the defects of the pure network system such as applying a liability regime in the gaps left by the pure network system where no liability regime would have otherwise applied.

This system of liability was first given legal sanction by the draft convention for the combined transport of goods [TCM],[242] a draft drawn by the CMI [Comite Maritime International] the UNIDROIT [International Institute for the unification of private law] and ECE, [the Economic Commission for Europe]. After necessary amendments this draft was submitted to the preparatory Committee of the UN/IMCO Container Conference in 1972, where it failed to gain approval. The ICC Rules for a combined transport document 1973 and 1975 incorporated much of the TCM, with its liability system which was the Network system. Most of the MT contracts in existence today incorporate the rules or imitates its form; The COMBIDOC, the COMBICONBILL, the FIATA combined transport Bill of lading for multimodal transport, the P&O Containers Negotiable Transport bill of lading for multimodal transport etc.

The application of this system is based on easy localisation of loss or damage to a particular mode of the transport to which a mandatory applicable International or National law applies. There are instances in which the loss or damage is so obvious that it is self explanatory, and leaves no room for doubt i.e., loss by salt water. The difficulty arises when the loss or damage is one that could have occurred anywhere i.e., theft or damage in a sealed container.

3.4.1 DEFECTS OF THE NETWORK SYSTEM

One defect of this system as seen above is the problem of localisation of damage or loss, especially when the damage or loss is one common to the different modes to the extent that it could have occurred in any of them. The prevalence of the container in this mode also exacerbates this problem as it makes it difficult to determine where damage or loss occurred.

[242] Transport Combiné International de Merchandises, draft Convention by ECE/IMCO, EVR 1972, p. 680

3.4.1.1 Gradual Loss:

Another defect of the system also involves situations in which goods carried are susceptible to gradual loss e.g. perishable goods that depreciate, or goods which due to spillage are delivered at out turn in a quantity which is greatly less than that originally carried.

Here the difficulty is ascertaining what portion of loss occurred at what stage of the transport. This again brings into play the applicability of the various conventions and legal gymnastics as to the regime applicable to the loss; it is the one in which greatest loss occurred, or the one which would ordinarily govern the MTO's liability if he performed part of the contract. A more appropriate solution in this case may be one in which this loss is regarded as unlocalised and the appropriate contract rule made applicable.

3.4.1.2 Recourse Action:

An off-spin of the above defect is that, the absence of localisation means that, the MTO might lose his right to a recourse action against the person who caused the loss or damage. For example a container develops a gash at an indeterminate point, and the goods were carried over, sea, land and rail, where will the loss be localised to? In such a case the MTO will be liable as per the rules laid down for unlocalised loss or damage in the contract.

3.4.1.3 Applicable Law:

Whether or not the loss can be localised or not, the most frustrating problem is the unpredictability of the applicable law; A typical network clause, normally states that the applicable law is one that

> *"Would have applied if the claimant had made a direct contract with the [CTO] in respect of the particular mode"*
>
> ICC Rule 13 (a)(ii)

When more than one law could be made applicable, this provision ceases to be easily applicable, i.e. if loss can be traced to the sea leg of the journey, which of the Rules on carriage by sea would be applicable? The Hague Rules, The Hague Visby Rule, or the Hamburg Rules, if the loss falls under Art 2 of the CMR a third mode might be made applicable. In such a case we find ourselves faced with the interpretation and application of three different laws. The Network contract localises loss to the road carriage, on application of the road carriage, Art 2 of the CMR, might point to a third liability regime which should be applicable.

3.4.2 ADVANTAGES OF THE NETWORK SYSTEM

Conflict avoidance with other liability regimes seems to be the most voiced praise of the network system. The co-existence of different liability systems in one contract, while attractive in that it ensures that loss or damage under the same mode is compensated on the same basis, minimises the importance of multimodal transport, as a contract of carriage independent of unimodal transport, by allowing a proliferation of an indeterminate number of laws for the purpose of conflict avoidance. This view of multimodal transport as a chain contract made up of different modes seeks to benefit from established rules in unimodal transport. But in practice these established Rules which are responsible for the certainty and predictability in unimodal transport, turns into a series of alternatives which exacerbates the difficulties and leads to unpredictably and uncertainty in multimodal transport.

3.4.2.1 **Fairness**:

Fairness has been advanced as one of the advantages of the system, as it allows all claimants suffering from loss or damage in the same mode to benefit from the same basis of liability. This, it is argued here should not be taken as a motivation to promote this system of liability. The contracts are basically different, one party enters into a unimodal contract and expects to reap benefits due him under that contract, while the other enters into multimodal contract and instead of reaping the benefits that would accrued to him under that contract, reaps those under the unimodal contract.

3.4.2.2 Recourse Action

Carriers regard the system to be fair, because by equating liability to unimodal liability, they are assured that what they pay out in exactly what they can recover from other performing carriers or contractors responsible for the damage or loss for which they were sued.

As seen above, the regime of liability under the network system is fragmentary, because it is the sum total of all potential regimes of liability in transportation. This system is unnatural in the sphere of transport, because while liability in unimodal transport is usually specified, the regime of liability in multimodal transport is only specified in the contract when loss is unlocalised. Once the loss, is localised the regime of liability then follows the localisation.

3.5 THE BASIS OF THE CARRIERS LIABILITY IN MULTIMODAL TRANSPORT

The network system used by the current multimodal transport documents states the liability regime as being that which will obtain in mandatory transport conventions when loss is localised and the regime stated in the multimodal transport document when loss is not localised.

This means that the MTO's basis of liability is found in all the international transport conventions and the particular standard contract used. These provisions determine the carrier's liability not only for himself but also for his servants and agents, and the exceptions available to them.

This section seeks to examine the basis of liability of the MTO, the exceptions available to him, and his burden of proof to adduce evidence, and concludes that this basis of liability is at the heart of the unpredictability and uncertainty in the liability regime in multimodal transport.

3.5.1 THE OBLIGATIONS AND EXCEPTIONS OF THE CARRIER

One of the findings of the previous section was that the different conventions that potentially apply to multimodal transport portray a diversity of approach on some of the key issues such as the basis of liability, limits of liability, exceptions and time bar. The outcome of this fact is that liability then depends on the applicable regime which becomes applicable when loss is localised, since these regimes have different principles, liability is bound to change according to regime even on similar facts. In this section, we will examine the provisions of the carrier's obligations and the liability for breach of these provisions in the different conventions, the contention here is that the MTO is by default also subject to each of these conventions and their interpretations. While this is within normality in unimodal transport, in multimodal transport it obviously is a daunting responsibility for any Carrier to assume.

3.5.1.1 CARRIAGE OF GOODS BY SEA

The liability of the carrier under the carriage of goods by sea is covered by 3 main conventions,[243] however this work will concentrate on the provisions of The Hague Rules as amended by the Brussels protocol 1968; the carrier's liability under this convention will be identified and compared and the conditions of exemption for liability assessed.

1. The Relevant Provisions; The Hague Visby Rules

Article 111, (1) and (2) of the Hague Visby Rules sets out the carriers main obligations under the rules as being one to exercise due diligence to provide a seaworthy vessel at the beginning of the voyage and subject to Article IV, to take care of the cargo during the transportation from loading to discharge.

[243] The Hague rules of 1929, The Hague-Visby Rules of 1968 and The Hamburg Rules of 1978

Article 111 (1) and (2) lays down the obligations of the carrier; his duty to provide a seaworthy vessel at the beginning and throughout voyage (1) and the duty to carry out the loading, stowing and discharging of the cargo (2). When ever loss, damage or delay results from the above, it is for the carrier to show that he has exercised due diligence. The carrier thus bears the burden of proving that due diligence was exercised in making the vessel seaworthy.

This provision had been taken to mean that the carrier had a duty to perform all these tasks properly and carefully.[244] The question which arose in under this Article is if reliance on the exceptions depends on him meeting fully the obligations imposed by Art III (1) and (2). One view was that failure to meet the obligations of seaworthiness deprived the carrier of the contractual exceptions while failure to meet the obligations to provide a cargoworthy ship will not so deprive the carrier form the defences. This was based on the fact seaworthiness was regarded as an "overriding obligation".[245] In *The Maxine Footwear case,* [246] Lord Somervell explained the relationship between Articles. III and IV as follows;

Art III rule 1 is an overriding obligation. If it is *not fulfilled and the non-fulfilment causes the damage, the immunities of Art IV cannot be relied on. This is the natural construction apart from the opening words of Art III r.2. The fact that the rule is made subject to the provisions of Article .IV and Rule 1 is not so conditioned makes the point clear without argument"*

This case has been authority for the fact that once unseaworthiness is the cause of the loss the carrier could no longer rely on any of the exceptions.[247]

However in *Pyrene v. Scindia*[248], Devlin J proposed an alternative interpretation of this provision; stating,

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[244] Scrutton: S.C.Boyd, A.S. Burrows, and D.Foxton, *Scrutton on Charterparties and Bills of Lading,(* 20th ed., 1996)

[245] *Maxime Footwear, [1959] 2 Lloyd's Report 105*

[246] ibid

[247] *The Apostolis (A. Meredith Jones v. Vangemar Shipping Co) [1996]1 Lloyd's Rep.475 at p.483. Carver 2001 p.478*

[248] *Pyrene Co Ltd v. Scindia Navigation Co Ltd [1954] 2 QB 402, at p. 418*

"It is difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the rules should not leave the party's free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carriers obligations is left to the parties themselves to decide"

The above reasoning formed part of the decision in *The Renton*[249] holding that the parties can modify the duty of cargo worthiness under Art, 111. r.2, by agreeing that the duty of loading and unloading would be on the shipper. The issue here involved a clause in the bill of lading permitting goods to be discharged at an alternative port in case of strike. The bill of lading had specified London as the port of discharge, but due to strike action, the goods were discharged in Hamburg. It was held by their lordships that the shipowners could rely on this clause and were not liable for the cost of transhipping goods to London. It was held that this clause was not contrary to Art 111 r. 8, since the clause operated to define the scope of the carrier's liability and could not therefore amount *to*

"a clause, covenant or agreement in the contract relieving the carrier or the ship from liability for loss or damage to, or in connection with the goods from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in the Rules"

In a recent case, the above interpretation was used in determining the correct interpretation of Article 111, r.2. In *Iron and Steel Co Ltd v. Islamic Solidarity Shipping Company Inc (The* Jordan 11),[250] Lord Steyn following the reasoning in the Renton case concluded that the duty of care under Article 111, r.2 was less

[249] G.H. Renton & Co Ltd v.Palmyra Trading Corporation of Panama (The Caspiana) [1957] AC 149
[250] [2005] 1 Lloyds Rep 57 (HL), See also Simon Baughen, "Defining the Limits of the Carrier's Responsibilities" (2006) LMCLQ 153

fundamental than that under Article 111, r. 1 which comprises the carriers duty to provide a seaworthy vessel. This case concerned carriage of coiled steel from Mumbai in India to Motril in Spain, the contract contained a FIOST clause (free in, out, stowed and trimmed). The point at issue was damage due to stowage and the manner in which the goods were discharged. The Bill of lading incorporate the terms of the charter party Clauses 3 and 17 which provided that stowage would be undertaken by the shipper and discharge by the receiver. At first instance, Nigel Teare Q.C. held that as the clause contained an undertaking for cargo both at the port of loading and discharge they were not null under Art111 r.8. If the claim was brought by the receiver, the carriers defence will be based on Art IV r.2 (i) *"act or omission of the shipper..."* to exonerate himself. And if it was shipper, his defence will be under Art IV r. 2 (q) *"...any other clause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier"*. On appeal, the carriers raised a new argument, that the clauses had the effect of transferring the responsibility of loading and discharge away from them to the cargo concern. Consequently, when the receiver claimed for defective stowage, there was no need to rely on any defence, as there was no breach of the obligations under Art III, r. 2. The Court of Appeal accepted this argument.[251]
In the House of Lords, their Lordships dismissed the appeal of the cargo concern.

However in another case, *Mitsubishi Corporation v Eastwind Transport Ltd and Ors*[252] the cargo owners alleged breach of duty to provide a cargo worthy vessel leading to loss of chicken parts shipped. The contract which was not under The Hague Visby Rules contained a clause that excluded all loss or damage to or in connection with the goods, including deterioration, delay or loss of market whether caused by unseaworthiness or uncargoworthiness, or by faults or error in navigation. The court held that the carriers were within their contractual rights to so limit. As the contract was not under The Hague rules it was construed according to the principles of the common law. This case illustrates the

[251] [2004] EWCA Civ 144, [2003] Lloyd's Rep.87, Tuckey L.J. expressed doubt as to whether the carrier would have been able to rely on these defences if he had been in breach of Art III r.2
[252] (The Irbenkiy Proliv) English Commercial Court Judgement 15 December 2004 cited in [2005 11 JIML 8)

importance of harmony and mandatory conventions which apply notwithstanding. Although the claimants' contention was that the clause was so wide as to be repugnant, I believe they had hoped that the same standard as applied to cases under The Hague rules will be made applicable to the case.
The parties were in this regard allowed to re-allocate these duties to the shipper. Lord Steyn supporting the position of Devlin J in the Renton case stressed the need to take into account different contractual arrangements. This brings the reasoning in carriage of goods by sea in line with that under road carriage in which loading is done by the shipper or his agents.[253]

The claimants in the case however sought to rely not only on Article 111, r.8 of the Rules to defeat the reversal of the duty but also on cases from both America[254] and South Africa,[255] to show that the position there is different. This contention was dismissed as His Lordship could find no authority or academic objection to the stance under the Renton case, if anything he found support amongst academia as to the position of the reversibility of Article 111, r.2.[256]

Article IV states instances in which the carrier will not be liable. Article IV, 1 states that the carrier shall be exempted from liability for the loss or damage arising from unseaworthiness and cargoworthiness provided he can show that he exercised due diligence in making the vessel seaworthy and cargoworthy. [257] Article IV further provides a list of exempted clauses modelled after bills of lading clauses. These exception clauses exonerate the carrier from the responsibility for loss or damage arising or resulting from the list.

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[253] The Jordan II [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep.87

[254] Associated Metals and minerals Corp v. M/V The Artis Sky 978 F 2d 47 (2n Cir, 1992) and Tubacex Inc. v. M/V Risan 45 F 3d 951 (5th Cir,1995)where the US second Circuit and Fifth Court of Appeal held that cargo, loading, stowing and discharging constitute 'non-delegable duties of the carrier.

[255] The Sea Joy (1998) (1) SA 487, 504)

[256] See also Simon Baughen, "Defining the Limits of the Carrier's Responsibilities" [2006] LMCLQ 153 at p. 155

[257] The question that arises here is if the carrier can successfully invoke any of the exceptions if he has not fulfilled his obligations. The prevailing view is that failure to meet the obligations set out in Art III r. I will deprive the carrier from the exceptions as this Article contains an overriding obligation. On the contrary, failure to meet the obligations of Art III r.2 does not deprive him of the exceptions as the latter art cannot be considered as an 'over-riding obligation.

This list shows an interesting split and can be divided into 3;

1 Exemption from liability for negligence; Article IV (a) and (b), under these two sections, the carrier is exempt from liability where negligence in the navigation or management of the ship or fire gives rise to the loss or damage, unless such loss or damage was caused by the carriers 'Actual fault or privity'.
2 The Carrier is also exempt from liability where the loss results from one of a number of events listed in Articles IV, r.2 (c) –(p)
3 The final exemption is found in Article IV, r. 2 (q), exempting the carrier from liability due to loss or damage from any other cause arising "without the actual fault or neglect" on the part of the carrier or his servants or agents and expressly states that the burden of disproving such fault shall be on the carrier.

In the first exemption, negligence is what is been exempted, (a) exempts negligence in the navigation or management of the ship and (b) exempts damage caused by fire , irrespective of negligence (other than the actual privity of the carrier). At the other extreme is Article IV, r.2 (q) which has been variously referred to as the 'Catch all exception', placing the burden of disproving negligence on the carrier. Who has the duty of showing that the loss or damage occurred without his actual fault or privity or that of his agents and servants. Therefore for any cause of damage that falls within (q), the carrier is presumed to be liable and has the burden of proving that no negligence on his part or that of his agents is responsible for the loss, or contributed to the damage.

The carrier undoubtedly has the burden of proof as to negligence under (q), and complete exoneration even in the presence of negligence under (a) and (b), what is still unclear is the allocation of the burden of proof for exceptions (C-P). The travaux Préparatoires to the Hague Rules indicates that there was debate on this issue at the time of the drafting. The question as to if the carrier needs to proof lack of negligence to benefit from these exceptions remains a controversial one, with 2 main schools of thoughts emerging. One school of thought believes that the items C-

P are nothing other than examples of what might constitute negligence. This view requires the carrier to establish that he used due diligence to make the vessel seaworthy to be able to rely on any exemption under C-P; While the other school of thought goes *a contrario,* and takes the view that once the carrier has established a defence the onus of proof shifts to the cargo claimant to defeat that plea by proving his negligence. This view seems to represent the prevailing English view which is still viewed as controversial in other jurisdictions.[258] Within this view, if the cargo claimant wishes to rely on the seaworthiness of the vessel as a contributing factor to the damage, he needs to proof both unseaworthiness and causality. When these matters have been established, the carrier is then required to prove the exercise of due diligence.

The burden of the carrier in this section seems to be light, all he needs to do is adduce evidence to show that an excepted peril was responsible for the loss and it is presumed to be so; as this raises the presumption that the loss was so caused and the carrier is relieved from liability.

A close examination of the specific exemptions shows a close resemblance to the classical theory of force majeure which allows for exceptions for unexpected and insurmountable events. This classical theory has been mitigated by a modification that does not require absolute impossibility of performance and that the performance must be practical or humanly impossible.[259] Beyond this objective theory of force majeure, a subjective theory has also developed which has come to be regarded as the "negligence theory". According to this theory, liability does not exist if the carrier has done everything that a diligent person would have done under the particular circumstances. This position was summarised by De Wit as "vis maior arises where fault or neglect ends".

All the exemption clauses found under Article IV C-P, will fall easily within both of these theories, as they do meet the requirements of both force majuere theories. From perils of the sea, to strikes to quarantines, we see incidents over which the carrier has no control and cannot rationally be blamed for.

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[258] Chinyere Ezeoke, Allocating onus of proof in sea carriage claims: The contest of conflicting principles [2001]LMCLQ 260,274), See also Hendrikse, M.L. and Margetson N.J. "Division of the burden of proof under the Hague-Visby Rules", [2006] 12 JIML

[259] Ralph de Wit, Multimodal Transport (1995) para 2.13

The question is if these exceptions could not easily be included within Article IV 2 (q).
This exempts the carrier from liability for;

"any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage"

This Article clearly places the burden of proof on the carrier who needs to prove lack of negligence to be able to benefit. The phrase "*...but the burden of proof shall be on the person claiming such benefit"* might be the differentiating element between this Article and Articles C-P. As stated earlier the trust of opinion within English law lends in favour of interpreting the latter articles as shifting the burden of proof on to the claimants. But in this case the carrier would have to proof that he was not negligent. If this stance is the correct one, then another interpretation of the catalogue of exceptions found in Articles C-P would be that they are but a list of circumstances in which the carrier is presumed not to be liable as opposed to one in which he is presumed liable and can exonerate himself. A corollary of this will be that the list will be interpreted as rules of burden of proof. In which case it will constitute sufficient evidence for the carrier to proof that the weather was particularly onerous to be able to benefit from the exception in Article IV, r.2 (c) perils of the sea. This assertion then turns the burden on to the cargo claimant who now has the burden of proving negligence to reverse the burden of proof back to the carrier.

These arguments are quite convincing when interpreted within the spirit of the Rules, however they do impose a stringent burden on the cargo claimant, one which he might be unable to discharge. The management of the ship is usually the exclusive domain of the carrier and the crew is his, how then does the cargo claimant adduce enough evidence to disprove any of the exception on the list.

One must however concede that the nature of the exceptions are such that they invoke the basic principle of force majeure; instances in which the carrier could not prevent the loss or damage even with all the good intentions in the world. But merely proving the existence of one of the excepted perils should not suffice to shift the burden of proof to the claimant, the carrier is the only one able to adduce further evidence to show that there was no negligence on his part or that of his servants or agents. This particular provision is thus favourable to the carrier but not so great for the cargo owner.

What must be noted however is the general acceptance within commercial circles as to the working of this provision, so commercial probity dictates that this is acceptable to all and understood by all.

The uncertainty as to who bears what burden of proof does not end there. So far we have seen instances in which Article IV, 2 has been interpreted as placing the burden of proof on the claimant, even though the Rules lays down no such rules as to where the burden of proof lies. There are a plethora of cases which have treated the rules as laying down the rules on the burden of proof. These cases are consistent with the pre-rule case of *The Gledarroch*[260], This case lays down the common law position on the burden of proof for carriage of goods by sea. In the Court of Appeal Lord Esher stated that, as the carriers' exception preceded the liabilities for due care and seaworthiness, the proviso must be read as "not caused by negligence" after the exception of perils of the sea. Thus construed, negligence then becomes an "exception upon an exception".[261] His Lordship then stated the order of proof as follows;

The plaintiffs would have to proof the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendant's answer is, yes; but the case was brought within the exception –within its ordinary meaning". That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiff to make out that second exception.

[260] [1894]P.226

[261] Chinyere Ezeoke, Allocating onus of proof in sea carriage claims: The contest of conflicting principles [2001]LMCLQ 260,274), See also Hendrikse, M.L. and Margetson N.J. "Division of the burden of proof under the Hague-Visby Rules", [2006] 12 JIML

Since then there have been other cases which have followed the line of reasoning set out in *The Glendarroch.*[262]

These cases have the effect of laying at the claimant's feet the legal burden of proof which following the nature of carriage is difficult to discharge as the carrier has all the relevant information. This line of reasoning is obviously at odds with Article IV, r.1

Which imposes the legal burden of due diligence on the carrier, as the same rules cannot then purport to impose the legal burden of proving unseaworthiness on the cargo owner. Moore- Bick J., in *The Fjord Wind*[263], went the other way, asserting that the carrier had a duty to proof due diligence to make the ship seaworthy, which they did not discharge as they could not identify the particular latent defect that caused the engine failure.

The carrier thus has the legal burden of proof to proof due diligence under Article IV, but that burden is only triggered when the claimant puts it in issue. *In Dunlop Holdings Ltd's Application*[264], the Court of Appeal held that it was incumbent on the claimant to trigger the imposition of the legal burden on the carrier by first putting the relevant facts in issue. Buckley, L.J., observed;

If the secrecy of the prior use is not put in issue either in the pleadings (If I may call the opponent's statement and the applicant's counter statement in opposition proceedings) or in the written evidence placed before the court , it is not in my judgement incumbent upon the opponents to come armed with evidence directed to establish an aspect of the case which has not been put in issue; in other words, if prior use is established, but secrecy of that prior use is not raised in issue the opponent should be taken to have discharged the burden resting upon them without having to prove that the prior use was non-secret.

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[262] In *Minister of Food v. Reardon Smith Line([1951] 2 Lloyd's Rep. 265,272)* McNair, J held that the case was covered by the common law exceptions under the Glendarroch, accepting the shipowners' argument that, once exemption is asserted, the onus is shifted to the charterer to establish that unseawothiness was the cause of the lost. Similarly in The Kriti Rex [1996] 2 Lloyd's Rep. 171) Moore-Bick J., decided that the cargo claimant must satisfy on a balance of probabilities that the damage was caused by unseaworthiness, stressing that they had to point to the specific defect which caused the damage.

[263] [1999] 1lloyd's Rep. 307

[264] [1979] R.P.C 523)

The above line of reasoning has been followed in many other cases, in *Gosse Millerd* v. *Canadian Government Merchant Marine Ltd*[265], the carrier sought to claim the benefit of the exception of negligent management under Article IV, r.2 (a) of the Hague Rules. The cargo owner claimed that Article 111, r.2 had been breached, that the loss was caused by the negligence in the care of the cargo. Wright, J., at first instance held:

...the carrier's failure to so deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of the Art. I, r.1, which deals with unseawothiness and provides that, in case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy and... I think that by implication, as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the prima facie breach of contract in not delivering from the ship the goods in condition as received. I do not think that the terms of Art. 111 put the preliminary onus on the owner of goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and to bring himself, if there be loss or damage, within the specified immunities.

The above two cases are based on the principle of bailment, equating the sea carrier to other bailees, requiring them to prove due diligence and care in respect of seaworthiness.

In Canada, the trust of legal opinion leans towards the bailment principle. This approach is exemplified by Blair's J., decision in *The Federal St Clair*[266], similarly, *Cargill Grain Co. v. N.M. Paterson § Sons*,[267] In this case the cargo owner adduced

[265] [1927] 2 K.B 432, [1929] A.C.223 (H.L)
[266] Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd (1999) 174 F.T.R.69
[267] [1966] Ex. C.R. 22; Kaufman Ltd. v.Cunard SS. Co. Ltd. [1965] 2 Lloyd's Rep. 564,566)

sufficient evidence to prove a prima facie case against the carrier. The carriers contended, stating that the loss could have occurred at a point during which they were not in charge of the goods. Blair J. held that the carrier's contention failed as they had failed to show how and under what conditions the cargo might have been damaged. Professor Tetley in Marine Cargo Claims[268] states that three principles of proof can be found under the Hague Rules;

1- the claimant must first proof the loss
2- the carrier must then prove a) the cause of the loss ,b) that due diligence to make the vessel seaworthy in respect of the loss was taken and c) that he is not responsible by virtue of at least one of the exculpatory exceptions of the rules;
3- then various arguments are available to the claimant and
4- Finally, there is a middle ground where both parties may make various additional proofs.[269]

Unlike The Hague Visby Rules, the Hamburg rules contain a clear and concise provision for the burden of proof and allocation of liability. Art 5.1 lays down a broad presumption of fault on the carrier. The carrier is liable for loss, damage or delay, unless he can disprove negligence. This generally is complemented by Article 5.7 which deals with loss or damage caused by a combination of causes. In this event the carrier while presumed to be at fault has the possibility of adducing evidence to show absence of fault. The carrier thus has a legal burden to disprove fault. Failure to discharge this burden for whatever reason renders him liable for the whole loss.

While The Hague and the Hamburg rules are based on the principle of presumed fault of the carrier, there are inherently different in terms of drafting. The Hamburg rules provide a clear and concise provision for allocating liability, The Hague rules

[268] 3rd ed., (Montreal, 1988),133-147) See also at http:/tetley.law.mcgill.ca/)
[269] This view has also been followed in Australia(Shipping Corp. of India Ltd. V. Gamlen Chemical Co Pty. Ltd, (1980) 147 C.L.R. 142,153)

do not, instead there are "*organised in the form of a 'ping-pong' match between two parties with conflicting interest*"[270]

The draft instrument on transport law which is expected to replace the 3 main conventions on carriage of goods by sea is also not as clear as one would have hope for. It states in Art.5.4 that;

" *the carrier shall be bound, before, at the beginning of (and during) the voyage by sea, to exercise due diligence to (a) make (and) keep the ship seaworthy, (b) properly man, equip and supply the ship, (c) make (and) keep the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, or upon which the goods are carried fit and safe for the reception, carriage and preservation*"

This Article mirrors Article 111 r.1 of the Hague Visby Rules, with a slight difference. One wonders the impact of the addition *'during'* the voyage by sea to exercise due diligence. Under the HVR's the duty is one which ends at the beginning of the voyage. Read literally, this addition might mean that the carrier has a duty to ensure that the vessel is seaworthy during the whole voyage. Thus, occurrences during the voyage which might render the vessel unseaworthy would trigger this obligation. This might be regarded among shipping circles as too stringent a duty.

Art 6.1.1 lays down the general liability rule that the carrier shall be liable for
Loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss ...took place during the period of the carriers responsibility as defined in Art 4, unless the carrier proves that neither its fault nor that of any person referred to in Art 6.3.2(a) caused or contributed to the loss

This provision seems to represent a hybrid between the Hamburg Rules and the Hague Visby Rules. Overall its effects seems to be quite similar to the Hamburg rules, however, the last part is quite similar to the catch all provision of Art IV, r. 2 (q). The Hamburg Rules require the carrier to prove that he, his servant or agents

[270] Regina Asariotis, Allocation of liability and the burden of proof in the draft instrument on transport law. 2002 LMCLQ 382, p.388

took all measures that could reasonably be required to avoid the occurrence and the loss, while the Hague Rules requires the carrier to show that neither he nor his servants contributed to the loss.

As a logical first step, the claimant will have to prove loss or damage occurring during the carrier's period of carriage. Once the claimant has established such a claim the burden passes on to the carrier to disprove negligence as a factor in the loss. And like the Hague Visby Rules Art.6.1.2(a) and Art.6.1.2 (b) contain exceptions from liability for loss, damage or delay due to (a) negligence of the master, pilot of crew in the navigation or management of the ship and (b) fire, unless caused by the fault or privity of the carrier. These correspond to The Hague Visby Rules exception and truly portray a veritable exception to the rule in Art 6.1.1. This allows the carrier to rely on exceptions even in case of negligence in the cases of navigation, management and fire.

Equally, Article 6.1.3 sets out further exceptions, it states,

Notwithstanding the provisions of Art 6.1.1, if the carrier proves that loss has been caused by one of the following events it shall be presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss. By and large the list is similar to that found in Art. IV. r.2 c-p, although it also contains new phrases meant to cover other aspects of the carriage. The 2 exceptions found in 6.1.3 (ix) and (x) however concerns the right of the carrier to sacrifice goods when they have become a danger to the voyage.

Art 6.1.3 acts as a further exception to Art 6.1.1 it allows the carrier escape liability by proving one of the listed events. "Notwithstanding" at the beginning of the article is proof that the carrier need not disprove negligence as causing or contributing to the loss or damage. To rebut this presumption the cargo claimant bears the burden of proving negligence. This Article if adopted will go a long way in bringing certainty as to the burden of proof, as there is no doubt as exists in the Hague Rules that once the carrier raises a causative event, the burden of proof is shifted. This is because the drafting style is unequivocal and does not allow contracting viewpoints. Most cases under English law have this position as the position under the Hague rules, this is not so in all jurisdictions notably Canada in which this is disputed. More importantly the broad scope of the Draft Rules means that its provisions will be applicable to multimodal transport. In this sphere however, the carrier might find it

difficult to rely on Art.6.1.2 or 6.1.3, especially in cases where the loss is not localised. Where there is no clear reason for the loss or damage, it is assumed that the carrier is liable, and there is a presumption that the loss was due to a breach of one of the carriers obligations, either of care of the cargo or lack of due diligence in providing a seaworthy vessel. If the carrier cannot show due diligence of those he uses to undertake the carriage, he may need to prove that the defect was one that could not be discovered even if due diligence was used. Failing this as well triggers Art. 6.1.1 Which demands that the carrier disprove negligence, including that of his crew and the cargo worthiness of his vessel? This burden is a particular hard one to bear in multimodal transport due to the concept of performing carriers. The position under the draft as seen is similar to The Hague and Hamburg Rules positions.

3.5.1.2 CARRIAGE OF GOODS BY ROAD

In the sphere of the carriage of goods by road, we will examine the CMR which is a regional convention covering Europe and some of the North African states. The nature of road carriage does not lend itself to the type of international conventions found in the carriage of goods by sea which is of a global nature. The CMR has been chosen as it obtains in Europe; in The Americas they have national and regional conventions applicable to road carriage notably in South America.

The basis of the carrier's liability is set out in article 17 (1) under which he is liable for damage to or loss of the goods during the time he has them in his charge for transportation. However, there are certain exceptions to this liability set out in article 17 (2). The carrier shall not be liable for damage to or loss of the goods arising from;

1) The wrongful act or neglect of the claimant;

2) The instructions given by the claimant otherwise than as a result of a wrongful act or neglect on the part of the carrier;

3) The inherent vice of the goods; or

4) Circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Under article 18 (1), the carrier has the burden of proving that in the particular case the loss or damage was due to one of these specified causes.

Article 17 (3), contains the provision that the carrier can never be exculpated for having used a defective vehicle or for the mistakes of one from whom he hired the vehicle.

Article 17 (4) and article 18 (2) to (5) are of special interest. In article 17 (4), there are a number of "special risks" enumerated which provide an exculpation for the carrier in case of loss or damage to the cargo. Some of these exceptions to the carrier's liability are modified by article 18 (3) to (5). In article 18 (2), it is provided that when the carrier can show that the loss or damage could be attributable to one of the special risks in article 17 (4), it shall be presumed that it was so caused, unless the claimant can show that this presumption is not applicable.

The special risks enumerated in article 17 (4), as modified by article 18 (3) to (5), are as follows:

(a) Use of open unsheeted vehicles, if this use has been expressly agreed and specified in the consignment note. As per article 18 (3), this shall not be regarded as a special risk entitled to the benefit of article 18 (2), if there has been an abnormal shortage or loss of any package.

(b) The lack or defective condition of packing concerning goods that needs to be packed.

(c) Handling, loading, stowage or unloading done by the sender or consignee or persons acting on their behalf.

(d) The sensitive nature of the goods. As per article 18 (4), the carrier shall not benefit from the provision of article 18 (2), if equipment especially designed to protect the goods from certain outside effects was used and the carrier cannot show that he did all that was incumbent on him with respect to the choice, maintenance and use of such equipment and that he followed all instructions he received.

(e) The carriage of livestock. This provision is of benefit to the carrier only if he can show that he did everything normally incumbent on him and that he followed all instructions he received.

Article 17 and article 18 lay down the basis of liability and allocate the burden of proof;

a) The carrier is strictly liable for condition of the vehicle he uses.

b) He is presumed liable when the goods have been damaged; with the possibility of pleading one of the exception clauses to show that the loss or damage was due to certain circumstances.

c) Yet in other cases he does not need to prove fully the cause of the loss or damage, but it suffices that he shows that they could have been the cause of the loss or damage. In such a situation, the carrier will avoid liability, unless the claimant disproves the carrier's contention of possible cause.

The basis of liability as set out in article 17 (1) is quite similar to strict. Between the time of taking over the goods and the time of delivery, the carrier is liable for every loss of or damage to the cargo. He can only avoid liability by showing that the occurrence of the loss or damage was due to one of the circumstances enumerated in article 17 (2). That it is indeed the carrier who has to prove this is provided in article 18 (1). The result of these provisions is not easy to label, and the courts of the various Member States of the CMR have termed this kind of liability differently.[271] The sum of it is obviously not a strict liability, as in certain circumstances the carrier may be able to exonerate himself. Neither is it a liability excluding only *force majeure* in the classical sense, since there are exceptions that fall outside the class of insurmountable obstacles excluded under the classical doctrine of force *majeure.*

It seems inevitable to define the basis of liability in the light of the exceptions to the carrier's liability, as the basis of liability in itself does not say much about the extent to which the carrier is liable.[272] The label must be set according to the most important defence found in article 17 para 2: "... *through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.*"[273] Legal writers now agree that this exception to the carrier's liability is not limited to external causes, as would otherwise follow from the continental doctrine of *force majeure.*[274] There are many fine theoretical distinctions between the various national

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[271] *D.J. Hill & Andrew Messent*, CMR: Contracts for the International Carriage of Goods by Road [hereinafter *Hill & Messent*, CMR], 2nd edition, Lloyd's of London Press, 1995, pp. 102 et seq. Also *Malcolm A. Clarke*, International Carriage of Goods by Road: CMR [hereinafter *Malcolm A. Clarke*, International carriage], 3rd edition, Sweet & Maxwell, London 1997, pp. 214 et seq.

[272] *Malcolm A. Clarke*, International Carriage, p. 216.

[273] *K.F. Haak*, The Liability of the Carrier under the CMR [hereinafter *Haak*, Carrier Liability], Stichting Vervoeradres, Den Haag, 1986, p.143.

[274] *Haak*, Carrier Liability, § 5.2.3.1.; *Hill & Messent*, CMR, p. 113. This implies that the carrier is liable for *culpa*, not, as may be thought, for every chain of events within his sphere of control (the latter standard is the standard of the Swedish Sale of Goods Act). The question, which will presently be answered, is how strict the standard of care according to which the carrier's negligence is judged shall be.

concepts of this negligent liability. But it appears that the factual difference between these national concepts is minimal.[275] *J.J. Silber Ltd. and others v. Islander Trucking Ltd.*[276] is authority for the proposition that the standard of liability is presumed. In this case, a lorry driver was robbed, in the subsequent action the carrier relied on the defence. Mustill J. concluded that, the concept is best expressed by treating the words"could not avoid" as comprising the rider"even with the utmost care".[277]

As per Mustill J.'s opinion, the carrier has a duty to exercise utmost care in order to avoid damage during transport. If he does not do so, he will be liable for any damage or loss that may ensue.

Added to this basis of liability, expressed by article 17 (1) is article 17 (2) *"... circumstances which the carrier could not avoid and the consequences of which he was unable to prevent"*, there are a number of general exceptions also contained in article 17 (2). These are 1) the wrongful act or neglect of the claimant, 2) the instructions of the claimant given otherwise than as a result of a wrongful act or neglect on the part of the carrier; and 3) the inherent vice of the goods.

Under the first exceptions ("the wrongful act or neglect of the claimant"), it should be realised that it is easier for the carrier to exonerate himself by claiming the specific exceptions in article 17 (4), as many of the latter are due to the "wrongful act or neglect of the claimant".[278] This general exception is therefore rarely pleaded.[279] The term "wrongful" is usually interpreted as meaning that the claimant must have been at fault in some way or another.[280] This exception thus concerns fault on the part of either the sender or the consignee, and if and when it applies, the carrier will be relieved from liability.

The term "instruction" in the second of the exceptions discussed here is very wide. It comprises virtually every instruction concerning goods.[281] The carrier, in other words, must follow this instructions to the letter; if the carrier's fault has cause the goods to get into a dangerous situation and the carrier then asks for instructions how to react he can not rely on this exception. However, this defence is not available when the instructions are the result of a wrongful act or neglect on the part of the

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[275] *Haak*, Carrier Liability, supra note --- p. 127.
[276] [1985] 2 Lloyd's law Reports, 243.
[277] [1985] 2 Lloyd's law Reports, 243, 245.
[278] Cf. *Haak*, Carrier Liability, p. 140; *Malcolm A. Clarke*, International Carriage, pp. 259 and 260
[279] *Haak*, Carrier Liability, p. 140.
[280] *Malcolm A. Clarke*, International Carriage, p. 261
[281] *Malcolm A. Clarke*, International Carriage of Goods by Road: CMR (4th ed., 2003), p. 261 and 262.

carrier. Since "wrongful" above has been interpreted as meaning fault, the carrier will not be able to rely on this exception in cases where he has already been guilty of fault (*e.g.* has been involved in an accident as a consequence of his own fault) and then receives instructions from the cargo owner. If the instructions given in such a situation lead to new damage, the carrier, according to the clear wording of article 17 (2), will not be able to exonerate himself.[282] However, in certain cases, it may be argued that liability should be divided between the carrier and the claimant

"Inherent vice" is a rather difficult concept and has often been confused with the concept of "sensitive goods" in article 17 (4) (d).[283] The difference basically lies in the fact that sensitivity is a quality in all samples of the goods in question, whereas inherent vice only affects certain items of a particular kind of goods.

In summary, the carrier's liability is based on "utmost care" for the goods during transport. He can exonerate himself by showing that the damage was due to a wrongful act or neglect of the claimant, to the instructions given by the claimant or to the inherent vice of the goods. The carrier's liability is heavier in respect of the vehicle he uses. According to article 17 (3), the carrier is never excused for defects in the vehicle or for the wrongful act or neglect of any person from whom he hires the vehicle.

Article 18 (2) provides that, if the carrier can establish that in the particular case the damage could be attributed to one or more of the risks enumerated in article 17 (4), it shall be presumed that that risk did in fact cause the damage, thereby relieving the carrier from liability. However, the claimant is free to introduce counterproof to the effect that the damage was not, in fact, so caused.

This provision, as can be readily perceived, concerns the burden of proof.[284] First, the carrier has to show that the special risk materially existed, *e.g.* that the loading was indeed done by the sender. Then he benefits from the relief of a burden of proof: he does not need to show that the risk actually *did* cause the damage, for it suffices that he shows that the damage *could* have been caused by the special risk.

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[282] *Malcolm A. Clarke*, International Carriage, ibid p. 262
[283] *Malcolm A. Clarke*, International Carriage, ibid p.332
[284] *Malcolm A. Clarke*, International Carriage, ibid p. 296.

If he succeeds in doing so, the claimant has the possibility of showing that the damage was, in fact, not caused by the special risk, *i.e.* he may show that there is no chain of causation between the special risk and the damage. If he is successful in this respect, he once again turns the burden of proof on the carrier.

3.5.1.3 CARRIAGE OF GOODS BY RAIL

The CIM convention which governs the carriage of goods by rail like the CMR is a regional convention, applicable mostly in Europe and some North African countries.

As will be perceived, the basis of liability in the CIM is very similar indeed to the basis of liability in the CMR,[285] this is based on the fact that the CMR derives from the CIM[286], so the similarities between the two conventions is no coincidence. I will therefore not delve in all aspects of the CIM's liability system but concentrate on the aspects that differ from the CMR. This stance is dictated by the limited case law and doctrinal stance found in the CIM.

The basis of liability of the CIM is like the system in the CMR. Article 36, § 1, lays down the general basis of liability. It is then modified in a general way in Art.36 § 2; by stating the exceptions for the fault of the person entitled, for instructions given to the railway, for inherent vice and for unavoidable circumstances. This exception is quite similar to that found under the CMR and should be treated as such, rendering the Carrier not liable for force majeure type occurrences in which no fault can be found on his part or that of his servants, agents and those he makes use of in the transportation of goods.

According to article 37, § 1, the carrier has the burden of proof for any exception which he wishes to rely on under Art.36. However under the CIM there is no strict liability for the condition of the trains used as found under the CMR, which makes the carrier strictly liable for any damage or loss caused by the condition of the vehicle?

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[285] *David A. Glass & Chris Cashmore*, Introduction to the Law of Carriage of Goods, Sweet and Maxwell London 1989 [hereinafter *Glass & Cashmore*, Introduction], p. 147

[286] *Malcolm A. Clarke*, International Carriage, p. 346.

In article 36, § 3, special risks are enumerated which, according to article 37, § 2, lighten the railway's burden of proof for non-negligence; For one of the special risks enumerated in article 36, § 3, namely, the carriage of goods in open unsheeted wagons, there is a modification in article 37, § 2, which provides that the railway is not entitled to a lowered level of proof when there has been an abnormal wastage or any package has been lost, this exception is the same as that found under the CMR.

Although the CIM is quite similar to the CMR, there are some differences worth examining. The main difference between the CMR and the CIM seems to be the fact that article 37, §2 CIM makes fewer counter-exceptions to the special risks than its corresponding article 18 of the CMR. The only exception contained in article 37, § 2 CIM is exactly parallel to article 18 (3) of the CMR, and it has already been shown during the discussion of the CMR, especially that of carriage in an open wagon. But as there are no exceptions or modifications to the other special risks, it is not possible to reduce the catalogue in any decisive way, and therefore, the railway benefits from a lighter burden of proof in many respects than the road carrier.

There are basically eight exceptions left that also entitle the railway to benefit from the lowering of the required standard of evidence;

b) absence or inadequacy of packing,
c) loading by the consignor or unloading by the consignee,
d) defective loading by the consignor,
e) completion by the consignor or the consignee of customs formalities,
f) sensitive goods,
g) irregular, incorrect or incomplete description of goods,
h) carriage of livestock,
i) Carriage accompanied by an attendant, if the damage is such as the attendant was intended to prevent.

These exceptions are quite identical to the exceptions found under Article 17, (4) of the CMR. This is an interesting point in that the CIM - contrary to the CMR - does not grant the railway an exception for the consignor's or consignee's handling of the goods. Handling of the goods may occur during various stages of the transport, such as loading, re-stowing during the transport or unloading. As handling during loading

and unloading are covered by the exceptions for loading and unloading (art. 36, § 3, items (c) and (d)), such an exception could only refer to handling during the transport. The reason for such an exception not being granted may once again lie in the fact that railways in Europe are traditionally state owned and that it is therefore improbable - not to say unthinkable - that the cargo during the transport is handled by one of the parties to the contract of sale. Railway stations and railway warehouses are usually not accessible to the public - the risk that one of the parties gets its hands on the cargo during the transport is therefore almost non-existent.

Thus, the railway has to show three things: 1) that the cargo was loaded and stowed by the sender or unloaded by the consignee; 2) that this was agreed upon between the relevant party and the railway and, in the case of the sender, referred to in the consignment note, or alternatively that this was done under the relevant provisions; and 3) that the damage could have arisen from these circumstances.

In summary, of the special risks of the CIM, the striking feature in the catalogue is that most of the special risks concern circumstances under the exclusive or partial control of the consignor or consignee. This applies to the exceptions contained in article 36, § 3. (b), (c), (e) and (g). All these exceptions concern risks that lie outside the actual contract of carriage, and it is therefore not surprising that the railway benefits from a lighter burden of proof in such circumstances.

Exception (f) and (h) concern goods that are inherently subject to damage, which must be seen as a concession to the railway that it does not have to assume responsibility for goods that, are particularly difficult to transport. These exceptions are not really surprising either.

The only exceptions that concern the transport as such are exceptions (a) and (h). However, the carriage in open wagons is a particularly dangerous way to transport goods. Exception (h) concerns goods that need an attendant - otherwise, an attendant would not be required

Thus there remain two general types of special risks of the catalogue of special risks in the CIM: the special risks concern either duties of the consignor or the consignee or the special risks that the goods are particularly difficult to transport.

The general system of liability is thus the following: The railway is presumed liable for damage (article 36, § 1, and article 37, § 1). It may, however,

exculpate itself by showing it has exercised utmost care (article 36, § 2) during the transport. In a number of specified cases, the railway is relieved from the normally required standard of proof (article 36, § 3, and article 37, § 2). These specified cases may be summarised as being cases in which the consignor/consignee has to retain some responsibility for his own sphere of control, alternatively as cases in which the goods are particularly difficult to transport. It is this system of liability which will be compared to the other relevant systems.

3.5.1.4 CARRIAGE OF GOODS BY AIR

The Warsaw Convention and all its relevant amendments and supplements represent the International Air Conventions which apply mandatorily in air carriage and cannot be modified for the benefit of the carrier.

Under the Warsaw convention, the carrier is liable for damage caused during the carriage by air, unless he proves that he and his agents have taken all necessary steps to avoid the damage, or that it was impossible for him or them to take such measures. This is *prima facie* a liability for negligence with a reversed burden of proof, *i.e.* a presumed liability.[287] Thus the claimant whose goods are lost or damaged needs to prove only the extent of the loss or damage during air carriage; he does not need to prove that the carrier was at fault.

There is, however, an immediate problem in the interpretation of Art 20, that the carrier must prove that he and his agents have taken all measures "necessary" to avoid the damage. The operative word here is taken "all necessary measures". The phrase "all necessary measures have been interpreted by the courts to mean "all reasonably necessary measures"[288] This interpretation is similar to the wordings of the Montreal Convention 1999,which replaces the words "all necessary measures" with the words "all measures that can reasonably be required to avoid damage"

The word "necessary" is, however, not to be taken literally.[289]Basically, this is liability for negligence. In *Grein v. Imperial Airways, Ltd.*[290], Lord Justice

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[287] *I.H.Ph. Diederiks-Verschoor*, An Introduction to Air law, Fourth revised edition, Kluver law and Taxation Publishers, Deventer-Boston 1991 [hereinafter *Diederiks-Verschoor*, Introduction], p. 64.
[288] Swiss Bank Corp, and others v. Brink's-Mat Ltd and Others, [1986]2 Lloyds Rep. 79, 97-97)
[289] *Lord McNair*, The law of the Air, Third edition, Edited by Michael R.E. Kerr and Anthony H.M. Evans, Stevens & Sons, London 1964 [hereinafter *McNair*, law of the Air], pp. 184 and 185.

Greer held that, the effect of this clause was to put on the carrier, the obligation of disproving negligence, leaving them liable for negligence if they fail to disprove it.[291]

The same argument holds well in American law.[292] The carrier has thus to disprove negligence; otherwise he is presumed liable. The carrier in the event that he cannot prove "*all necessary measures*" is allowed to prove that it was impossible for him to take such measures. This can be used in cases of natural disasters where the carrier can prove that it was impossible for him to take any measures to prevent the event.[293]
Carriage by air is further complicated by the fact that the Warsaw Convention and the Warsaw- Hague Conventions allow the carrier to use the defence of "all necessary measures in case of loss or damage to cargo, while the Montreal Protocol No 4 and the Montreal Convention 1999, allows this defence only in cases of damage caused by delay.[294] To compensate for this exclusion, the above cited conventions provide 4 exceptions in respect to cargo loss:

"-inherent defect, quality or vice of that cargo;

-defective packing of that cargo performed by a person other than the carrier or [his] servants or agents;

-act of war or an armed conflict;

-act of public authority carried out in connection with the entry, exit, or transit of the cargo".

Under the new convention, the defence of all necessary measures has been replaced by the above 4 exceptions. The defences are standard defences found in most transport conventions, thus one would expect their interpretation to follow the set pattern in carriage cases.[295] This liability system clearly mirrors a civil law drafting style allowing courts to interpret it according to the particular needs at the time. It therefore rests heavily on case law after a certain period of time. In many aspects,

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[290] Grein v. Imperial Airways Ltd., Lloyd's law Reports (1936) Vol. 55, 318.
[291] Grein v. Imperial Airways Ltd., Lloyd's law Reports (1936) Vol. 55, 318, at p. 332. Lord Justice Greer was analysing and interpreting liability for personal injuries sustained by passengers, but due to the structure of the Warsaw Convention, the argument is valid for damage to goods as well.
[292] *Diederiks-Verschoor*, Introduction, pp. 64 and 65; *McNair*, law of the Air, p. 185.
[293] DE Vera v. Japan Airlines, 24 Avi 18, 317 (SDNY, 1994))

[294] Art. 20 Montreal Protocol no 4, Art. 19 Montreal convention 1999)

[295] Clarke & Yates, Contracts of Carriage by Land and Air, (LLP, 2004) para. 3.250)

case law will not be less complicated than an explicit catalogue on what is to be accepted as exception and what is not. On the other hand, case law is flexible, and it is easier for the courts to answer new questions than it is for international convention drafters to agree on answers to the same questions. A system for presumed negligence is thus judicially and technically easier to handle than a system with detailed exceptions and counter exceptions - the answer to the question what is negligence and what is not depends on the individual case and the particular interpretation the judge will put on it.

It would be interesting to delve in the distinctions made by case law and to analyse the rules and exceptions provided by the courts within the Warsaw system.

3.6 A Comparison of the Transport Conventions

As stated above the need for the examination of the different liability regimes was meant to give us a good idea of what the different liability regimes are to better understand the difficulties potentially applicable in the field of multimodal transport.

In summary, the Hague Rules, The CMR, the CIM and The Warsaw Conventions provide a presumption of liability for either negligence of the carrier or utmost care for the goods. With respect to the general system of liability, all the modes base their liability system on presumed fault, the difference lies more in the exceptions afforded the carrier under each convention and the interpretation of the different jurisdictions. Within the different modes, this operate well, the problem arises when all of them become potentially applicable to multimodal carriage, where the MTO finding himself excluding his liability for the perils of the sea and also for a defective vehicle. However, it is interesting to see the differences between a liability for negligence in most of the conventions and the CMR's liability for having exercised utmost care. Let's assume that in our Hypothetical case the goods where lost through theft. When goods are stolen while in transit, no carrier can excuse himself by showing that the goods were stolen due to circumstances beyond his control, if he cannot adduce evidence of lack of fault, he will be held liable.

In the carriage of goods by sea, the carrier is liable unless he can show that the theft occurred without the fault or privity of the carrier or his agents or servants. This is a straightforward liability for negligence. This is the same standard of liability that occurs in the other modes.

In road transport, theft is seldom accepted as exoneration.[296] The carrier has to show that he has done all he possibly can to safeguard the goods, such as parking the vehicle in guarded areas and equipping the vehicle with security devices.[297] The requirement of utmost care in this case is therefore very much alike to a requirement of being duly diligent; it is reasonable to park the lorry in a guarded area, but is not reasonable - and rather absurd - to arm the driver. Legally speaking, it is difficult to see the real difference between "reasonable care" and "utmost care", when "utmost care" is defined as being an obligation to take all reasonable measures short of the absurd. In reality, it seems, the difference between reasonable and utmost care is not necessarily mirrored by a difference in the kind of measures the carrier has to take to prevent theft.

In air transport, the system is straightforward. The carrier is liable for negligence. The content of this rule is the same as in other kinds of transport conventions.

In the case of multimodal transport, the carrier is also liable for his negligence. When taking a closer look at the factual requirements on the carrier, we find that there is not much difference between the modes.

If so, it seems as if there may be a common general basis of liability in transport law. Carriers in all kinds of transport are liable for negligence, being the exercise of all reasonable measures required to prevent damage.

The different liability systems of the various laws of transport diverge when it comes to the exclusion of liability. In sea transport, the carrier has two specific excuses: He is excused for faults in the navigation or in the management of the ship, and he is excused for fire, unless caused by his own actual fault or privity. In road transport, the carrier benefits from a reduction in the required standard of evidence when the

[296] *Haak*, Carrier Liability, supra note 272 p. 144 et seq.

[297] Levi Strauss & Co v. Tropical Shipping Constriction Ltd, [2003] A.M.C. 283, (S.D. Fla. (West Palm Beach) 2002), where the court had to consider the application of the Q clause in the case of loss during an Inland leg of a multimodal transport contract.

damage was due to the lack or defectiveness of packing, the handling of the goods by the sender/consignee and the insufficiency or inadequacy of marks or numbers. In railway transport, the relief from liability to the carrier's benefit is the most extensive of the systems here discussed. The railway carrier is exempted from liability for a large number of circumstances in which the risk for the goods either pertains to the sphere of control of the consignor/consignee or is due to the nature of the goods making them particularly difficult to transport. The air carrier, on the other hand, works under a system in which there are no specific exceptions to his liability for negligence.

We see a wide variety of solutions, stretching from absolute exemptions for certain kinds of causes of damage, to no specific exceptions at all. It is here that the difference between the different conventions lies. In the case of multimodal transport it shows the extent to which each case is exposed.

Additionally, in sea transport, the carrier has to exercise due diligence to make the vessel seaworthy and a duty to care for the cargo; he is liable for negligence in this respect. The concept of due diligence has at times been given a very rigid interpretation. In the *Muncaster Castle* case[298], the shipowner was held liable for water damage due to the insufficient tightening of nuts on inspection covers. The mistake had been made by a worker at the yard where the ship had been repaired, but nevertheless the fault was attributed to the shipowner with the argument that he had failed to make the ship seaworthy. The duty of making the ship seaworthy is said to be non-delegable, which means that the shipowner cannot blame the unseaworthiness of the ship on a yard or a classification society - he is himself responsible for making the ship seaworthy. In case the UNCITRAL draft transport law is adopted in its present form, the Art.5.4 will place on the carrier an even heavier burden as the duty is extended to cover the whole voyage.

In road transport, the carrier is strictly liable for the roadworthiness and cargoworthiness of the vehicle. There is no excuse at all available to him, should the vehicle prove not to be road- and cargoworthy. This duty is perceivably even heavier than in sea transport, as in the sea mode the carrier may at least be excused when he has been duly diligent.

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[298] *Riverstone Meat Co. Pty. v. Lancashire Shipping Co. Ltd.* [1961] 1 Lloyd's law Reports 57

In railway and air transport, there is no specific provision on the strict liability for the means of transport. Therefore, one must assume that in this respect the carrier's liability is governed by the general basis of liability, *i.e.* presumed liability for negligence. As negligence can be rephrased as the absence of due diligence, the liability of the railway and air carrier for their respective means of transport is the same as in sea carriage, that is, a liability for negligence.

It might be thought that in railway and air transport the courts would take a similar strict attitude towards the carrier's negligence concerning the means of transport as they do in sea transport; after all, it is the carrier who has exclusive control of the state of his means of transport. If that should prove to be true, the level of duty required of the carrier would be very high indeed, and it may happen to be nearly as high as in road transport. In the light of *The Muncaster Castle* case, it is very difficult for the carrier to get away from liability, should his means of transport prove to be defective. It may therefore be said that the carrier's duty of exercising due diligence in providing a suitable means of transport employed is rather heavy. This can be stated to be a general principle of transport law, with the modification that the road carrier can never be excused for having used a defective vehicle.

3.7 THE BASIS OF LIABILITY IN MULTIMODAL TRANSPORT

The basis of liability in transportation law generally is presumed fault. In all the modes of carriage, once goods are delivered either short or damaged the carrier is prima facie liable to the cargo owner for that loss.[299] It is clear now that the carrier has the duty to adduce evidence once a claim has been made for short or damaged delivery to show that the loss or damaged is covered by an exception clause.[300] It is this system of liability that also applies to multimodal transport either by default or by incorporation.

Generally, the burden of proof of this basis is on the carrier, this principle however is not without problems; in certain instances this burden of proof reverts to the

[299] This principle applies to all modes of transport with slight variations which reflects the particular mode of transport. These variations are usually in the form of exclusion clauses.
[300] Tetley, W. *The Burden of proof, Chap 6. http/Tetley.law.Mcgill.ca.maritime/chap6.pdf.*

cargo owner who has to prove that the carrier was negligent.[301] Thus when the cargo interest adduces evidence to show that goods are lost or damaged under a contract of carriage, and the carrier pleads an excepted peril, the allocation of proof might still be uncertain. This then raises the question of the burden of proof in transportation, where does it lie? Normally, the substantive law dictates the legal burden although the courts must decide which issues attract an evidential burden and who bears it.[302]

In the carriage of goods by sea, two main principles are predominant. Some cases are based on bailment under which the carrier as bailee bears the burden of proof, while in other cases the cargo owner has the legal burden of proving that the carrier is at fault.[303]
In the other modes of carriage, notably, carriage by air and road, this is not the case. Once the cargo owner adduces evidence of loss or damage, the burden of proof is on the carrier and does not at any time revert to the cargo owner. In these cases the burden of proof is based on bailment in which case the carrier bears the burden of proof exclusively.

This raises the question under which circumstances these principles also apply to multimodal transport.[304] Because the liability in multimodal transport depends on the law applicable to where loss is localised, the burden of prove will also depend on the particular regime that would apply to that mode. The implication of which is that the burden of proof in multimodal transport is always uncertain which is disadvantageous to the shipper.

Another problem with presumed fault as a basis of liability in multimodal transport lies in the nature of the mode. The principle of presumed fault demands that the carrier adduces evidence to show either that he is not at fault or that the damage is covered by an excepted peril.[305] The burden is thus a personal one. In multimodal

[301] This is the case in the carriage of good s by sea under The Hague Visby Rules
[302] Tapper, Colin (ed.), Cross & Tapper on Evidence, 9th ed. (London, 1999)
[303] Chinyere Ezeoke, 'Allocating onus of proof in sea cargo claims: the contest of conflicting principles.' [2001] LMCLQ p. 261, what she refers to as the bills of lading position.
[304] All the contracts on Multimodal transport and Art. 16 of the 1980 Multimodal transport convention all state that the basis of liability is presumed fault.
[305] The Theodegmon [1990] 1 Lloyd's Rep.52, The Antigoni [1991] 1 Lloyd's Rep. 636

transport, the MTO as carrier assumes all liability for loss or damage irrespective of where loss occurred. By so doing he assumes the duty of adducing evidence to show that a particular carrier under whom damage or loss occurred was not negligent. This means that the carrier as MTO has a wider burden than envisaged in unimodal transport cases. The Carriers contractual liability for his servants is liability without fault. In this case liability does not lie with the fact of negligence, but vicarious. This vicarious liability for the acts of servants is again exacerbated in multimodal transport as in involves not only the servants and agents of the MTO, but also those of the performing parties.

This section seeks to argue that this basis of liability in multimodal transport exacerbates the problem. It will also be contended that this principle when it was propounded could not envisage the pleadings involved in a multimodal transport liability case for two main reasons;
(1) First, this concept presumes localisation of loss not when loss is concealed,[306] and the majority of loss or damage in multimodal transport is carried in containers thus concealed. Thus, although it is used as a basis of liability its incidence of use is very limited.
(2) Secondly, the implementation of this concept to multimodal transport is allegedly based on its use in unimodal transport, as a medium of conflict avoidance with the already existing mandatory conventions.

The stance taken in this section is that the assimilation of the presumed fault concept into multimodal transport as found in unimodal transport was inevitable; in the absence of a mandatory applicable convention on multimodal transport, carriers adopted a basis of liability familiar to them and further clarified by judicial pronouncements. Thus, when looked at from the viewpoint of the carrier, it is theoretically possible to state that this concept represents by far the most cogent basis for multimodal liability, but such an approach has its flaws. Firstly, multimodal transport is not the same as unimodal transport, and although it can be

[306] Once loss or damage is concealed the carrier cannot adduce evidence to support a claim that an excepted peril is the cause of loss.

regarded as embodying normal transport tendencies, it embodies a wider scope than is usual in unimodal transport.[307]

These two factors explain why the concept of presumed fault might not do for multimodal transport what it does for unimodal transport; ensuring a certain and predictable liability regime.
Diamond QC cautioned that an application of unimodally structured liability to multimodal transport would at best

"...introduce an irrelevant anomaly into what without statute is at best an unpredictable aspect of legal liability and at worst a muddle".[308]

Any new law on multimodal transport which hopes to eradicate the problem of the proliferation of liability regimes must then depart from concepts that were introduced into multimodal transport by default; because there was no mandatory liability regime applicable per se to it.

3.7.1 PRINCIPLE OF THE PRESUMPTION OF LIABILTY IN MULTIMODAL TRANSPORT

The legal status of this principle in international transport law comprises of the different unimodal conventions operational which govern the carrier's liability. As noted above the main liability regimes, The Hague Rules, the CMR, CMNI, the CIM and the Warsaw Conventions together with their different amendments exhibit the traits of a fault based liability standard in varying degrees. Their differences lie more in the fact that they reflect different problems associated with each individual mode than any real substantive difference, although in some instances the burden of

[307] The implications of the coming into force of the Hamburg Rules and the Multimodal transport Conventions TD/MT/CONF- p 15 See also Hans Carl., "The spread of multimodal transport legislation." IMMTA Bullentin, December 199 p.6 Where it is stated that the majority of goods carried in containers suffer from concealed loss with little proof as to where loss or damage occurred.

[308] Schmitthoff and Goode, International carriage of goods; Some legal problems and possible solutions, 1988 London

proof is more onerous.[309] The shifting of the burden of proof is particularly important in carriage cases especially when loss or damage occurs because of the heavy burden on the plaintiff to establish the cause of such loss or damage. If the law did not impose such a shifting of the burden of proof, plaintiffs will often be compromised in pursuing their claims.[310]The imposition of the legal burden on bailees has also been done to protect bailors when loss or damage has occurred. Sachs L.J. clearing stated this rationale in *B.R.S. Ltd. v. Arthur Crutchley*,[311] that,

> *The common law has always been vigilant in the interest of bailors whose goods are not returned for a number of reasons: in so far as that negligence relates to the onus of proof, one of the reasons stems from the fact that normally it is only the bailee who knows what care was being taken of the goods, and an another from the number of temptations to which the bailee may succumb. Those temptations may vary in each generation according to the nature of the transactions and in these days of rising cost include that of the bailee wishing to pay as little for security as he can get away with, and the complacency that can arise from the feeling that after all, we are insured. This is the general rule for the liability of the carrier.*[312]

Presumption of liability here presupposes a set of facts recognised in law as peculiar to carriage cases, by which the burden of proof is shifted from the plaintiff[313] to the defendant who is considered to be in a better position to ascertain the facts leading to the cause of suit in our case loss or damage.[314]

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[309] See the liability Regime introduced into the carriage of goods by Air, by the Montreal Protocol of 1999.

[310] The clearest cases of presumption of liability are found in the four main TransportConventions/1) The Hague /Visby and the Hamburg rules 2) Thee Warsaw Convention3) The CMR,4) The CIM/COTIF.

[311] [1968] 1 All. E. R. 81, 822.

[312] In this regard see also the Comments of Hakan Karan. Supra note 125 at p.82

[313] Contrary to the common law principle that he who alleges must proof, see Aktieselskabet de Danske Sukkerrfabriker v. Bajamar Compania Naviera SA (The Torenia) [1983] 2 Llyods's Rep. 120, 215. per Hobhouse J "The legal burden of proof arises from the principle: He who alleges must prove. The incidence of the legal burden of proof can therefore be tested by answering the question: What does each party need to allege?"

[314] This principle is considered to be a matter of public policy which prevents the parties to derogate from, in this regard see, The Hong kong Producer, [1969] 2 Lloyd's Rep. 536

As already stated, the carrier is liable for loss or damage to goods received by him in good order and condition and delivered in a damaged state or short. The Carrier is Prima facie liable for loss which is presumed to have occurred when the goods were under his custody for carriage.[315] Prima facie; so the carrier has the opportunity to adduce evidence to overturn the claimant's proof of loss, which he discharges by proving that the damage was caused by one of the excepted perils laid down in the contract.[316] The burden of proof on the carrier is based on the principles that he who alleges must proof,[317] and 'he who seeks to rely upon an exception in his contract must first bring himself within it'[318]

When the loss is concealed especially in multimodal transport, the carrier cannot rebut this presumption by showing that he took reasonable care of the goods, he must explain the cause of the loss. This principle was forcefully stated in *Quaker Oats Co. v. M/V Tovanger*,[319] that

> *"to rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than his negligence . Once the shipper establishes a prima facie case, under the 'policy of the law' the carrier must explain what took place or suffer the consequences. ... [T]he law casts upon [the carrier] the burden of loss which it cannot explain or, explaining bring within the exception"*

Wright J, in *The Gosse Millerd* case,[320] affirmed this by stating that, the prima facie case which is established once goods are loss or damaged can only be rebutted by actually showing how the loss or damage actually occurred.

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[315] Based on Article 3 (4) of the Hague Visby Rules, that the bill of lading acts as evidence of receipt of goods by the carrier. See also in this regard The Tolmidis [1983] I Lloyds Rep; 530 at p. 534
[316] Article 4(2) (a)-(q) of the Hague Visby Rules.See also The Theodegmon [1990] 1 Llloyd's Report.52, The TNT [191] 2 Lloyd's Rep. 636 at p 642 (NSWSC)
[317] See The Torenia (1983] 1 Lloyd's Rep.
[318] Per Staughton L.J. (CA) in The Antigoni [1991] 1 Lloyd's Rep. 209 at p. 212. For the earlier cases on this see The Glendarock,[1894] p. 228 at 231(CA) Gosse Millerd , Ltd. v. Canadian Government Marine Ltd. [1929] AC 223 at p. 234, (1928) 32 Li.l. Rep. 91 at p.95 (H.L)
[319] 743 F 2d. 238 at p. 243, 1984 AMC at p. 2943 (5th Cir. 19cert. denied 469 U.S. 1189, 1985 AMC 2398.
[320] [1929] A.C. 223.

3.7.2 THE ORDER OF PROOF[321]

The order of proof is generally the sequence used by both parties in a cargo claim. The cargo claimant must first prove his loss, by proving that the loss or damage occurred to the goods while in the custody of the carrier. This he can do by proving the condition of the goods on receipt and on delivery with the aid of the transport document.

The Carrier must then prove the cause of the loss or damage, and that the loss or damage falls within one of the excepted perils, or that he used due diligence to make the vessel [sea] worthy at the beginning and during the carriage.[322]

Once the carrier has proven that the loss is covered by an excepted peril, the onus shifts back to the claimant to proof that the actual loss was caused by the negligence of the carrier, either in the loading, stowing, or during discharge of the cargo [323]

The above shows two distinct positions, one in which the bailee is held to disprove fault and one in which the bailor is held to disprove fault once an excepted peril is adduced.[324]

3.7.3 THE PRESUMPTIONS OF PRESUMED FAULT

The effective working of the presumed fault system is grounded on the existence of certain facts. The fact that loss or damage occurred is localised, and the existence or possibility to adduce adequate proof to rebut the presumption.

3.7.3.1 *Localisation*

The effective working of presumed fault is closely linked to the possibility of localisation. In unimodal transport this problem does not exist, once the cargo

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[321] This has been treated in pp

[322] F.C.Bradley & Sons, Ltd v. Federal Steam Navigation Company, Ltd. (1927) Li L. Rep. 395 at 396 (H.L.), Phillips v.Clan Line (1943) 76 Li. L. Rep. 58 at p.61, Svenska Tractor Aktiebolaget v. Maritime Agencies (Southhampton) , Ltd. [1953] 2 Lloyd's Rep. 123 at p.133, see also Albacora S.R.L. v. Westcott & Lawrence Lines Ltd. [1966] 2 Lloyd's Rep. 53

[323] In this regard see the Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad (The Bunga Seroja). [1999] 1 Lloyd's Rep. 512, and the earlier case of Finucane v. Small (1795) 1 Esp. 315

[324] Both positions have been treated in pp - above

claimant adduces sufficient evidence of loss or damage, it is presumed that the loss occurred during carriage by that particular mode of carriage. There is no question of where the loss or damage could have occurred; the carrier then goes on to rebut the presumption of fault triggered by that proof.

In multimodal transport, adducing sufficient evidence of loss or damage having occurred during carriage, triggers the presumption that loss occurred during the carriage period, what it can not do is pinpoint where lost or damage occurred, because the goods would have been carried using different modes of carriage. It is down to the carrier apart from the obvious cases to adduce evidence to show where loss occurred to enable him to rebut that presumption, if he cannot localise the loss or damage, the rebuttable presumption of fault becomes irrebuttable. This is based on the fact that the carrier needs to prove specific events to be able to rely on any of the exemption clauses, he must positively prove the particular event that he seeks to rely on.

3.7.3.2 Exoneration

The principle of presumed fault presupposed that the carrier can exonerate himself by negating fault. In cases in which the carrier cannot adduce evidence to negate such loss or damage, he is held liable because he should be in control of the goods and should know of any causes of loss or damage to the goods. On these bases he is liable for unknown causes of loss or damage. In general, the carrier is usually able to show how loss or damage occurred and therefore can adduce adequate evidence to show that he was not negligent. In multimodal transport however, exoneration is only possible when loss is localised. In this case the carrier can adduce evidence to show where such loss or damage occurred.

Once loss is concealed, the principle loses its importance in multimodal transport. In such cases the carrier cannot adduce evidence to rebut the presumption of fault, and is therefore held liable with only the benefit of limitation clauses where appropriate. Unlike unimodal transport in which inability to explain loss can be taken to be negligence, in multimodal transport inability to adduce evidence to rebut the

presumption of fault is due to the nature of the transport, and not in any way linked to negligence.

The presumption of fault principle in the context of multimodal transport is likely to lead to a situation of multiple liabilities. As seen above the carrier is liable to a fault basis when loss is localised and a strict basis where loss is concealed. However, even when loss or damage is localised, the carrier might find himself subject to different liability regimes than that to which his loss was originally located to.

The major criticism of the presumed fault in the sphere of multimodalism is the fact that the calibre of proof necessary to rebut this presumption is higher than in unimodal transport and leads to a 2 tier liability system.
Additionally the increasing use of containers in multimodal transport also exacerbates the problems of concealed loss; because of the difficulty of adducing evidence of loss in goods carried in container, this poses a particular problem because of the fact that multiple carriers might be involved.
Another problem that has come to the fore is the problem of gaps and loopholes especially those caused by loss or damage occurring at terminal interfaces especially in the wake of the failed International Convention on the liability of terminal operators.

A fact which is not obvious is the cost of adducing evidence in multimodal transport in case of loss or damage. The carrier will incur cost in trying to adduce evidence from the different carriers and possibly their servants to show lack of negligence or that one of the exception clauses apply.
These criticisms have not gone unchallenged, although its basic challenge has been based on the cost of administering this system in MT. Critics have maintained that the fault is inherently expensive to operate due to the legal intricacies involved in adducing evidence to maintain or rebut such a presumption.

The MTO within the realms of containerised Multimodal Transport finds himself held to a fault liability standard, with often no means of exoneration, which is tantamount to strict liability. There is however the problem of trying to adduce

evidence especially if it will lead to benefit for the party claiming a higher limit of liability.

The different legal commentators, i.e. De Wit,[325] while agreeing that more needs to be done, offer solutions which reflect the dogmatic attachment to unimodal transport, in that he proposes that the carrier be held to a negligent and vicarious liability standard to alleviate this unpredictability.

3.7.4 Rebutting the Presumption of liability in multimodal transport

The exceptions vary according to the type of contract used; as a consequence we will concentrate on those found in ICC document as representative of the type of perils likely to be excepted. The UN MT convention 1980, does not lay down any specific exceptions, this it leaves to the individual parties, this same stance is followed by the UNCTAD/ICC rules with the exception of the excepted perils found in the Hague/Visby Rules Art IV rule 2 (a) and (b) of Negligence in Navigation or Management and fire.
By rule 12 of the ICC rules, the carrier shall not be liable for loss, damage or delay in delivery in the goods, *if* the loss or damage was caused by;

An act or omission of the consignor or consignee, or person other than the CTO acting on behalf of the consignor or consignee or from whom the CTO took the goods in charge

This defence does not mean wrongful act, all it means is that an act or omission of the consignor or those acting under him is responsible for the loss or damage and as such the carrier is not liable for the loss. In *Ismail v Polish Ocean Lines*,[326] potatoes were stored in a particular mariner following the instructions *of* the claimant, as a result they were damaged and it was held that he could not claim as the loss was as a result of his instruction. Insufficiency or defective condition of the packing or marks; this defence would only work, if by the contract, it is the consignors duty to

[325] De Wit, supra pg 314.

[326] [1977] 2 Lloyds Rep, 134.

pack the goods and state the appropriate marks. Failure to do so would exonerate the ship-owner from loss or damage attributable to such defective conditions, and when such defective parking damages other goods, the carrier would still be exculpated from liability.

Strike, lockout, stoppage or restraint of labour; the consequences of which the CTO could not avoid by the exercise of reasonable diligence. The MTO is not liable and can plead this exception, if he can show that the strike or lock out was not his fault.

Inherent vice of the goods;

Inherent vice is a defect in the goods that make them unfit to withstand the rigours of the carriage. The carrier however has a duty to use care proportionate to the state, condition and type of goods involved. If a reasonable examination has been conducted and the goods are discovered to have a defect, any carrier who fails to use diligent care equal to the defect, might be held liable.

Any cause or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence

The exception is quite similar to Art 17(2) of the CMR, taken from Art 27(2) of the early CIM convention before the 1952 convention eliminated "reasonable" in favour of "unavoidable circumstances". The defence as it stands resembles the defence of "force majeure", which is an event which cannot be avoided by the use of care and which by its very nature makes it difficult for preventive measures to be taken to avoid damage, must be differentiated from the defence of "*unavoidable circumstances*". Unforeseeability is a requirement of the former but not of the latter, making the former a stricter standard to attain. The standard required by the defence of "*unavoidable circumstances*" is that laid down by Mustill J, in *Silber v Islander Trucking*[327] as

"a standard which is somewhere between, on the one hand a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on

69 [1985] 2 Lloyd's Rep. 348

the other hand a duty to do no more than act reasonably in accordance with current practice."

The duty thus can be said to be one to use all available means to avoid incidents leading to loss or damage coupled with mitigating the effects of such loss or damage. This defence is so wide and can be compared to Art IV 2(q) of the Hague/Visby Rules, exculpating the carrier for loss or damage when it can be proved that it was caused without

"...actual fault or privity of the carrier".

The factor common to the road carrier under Art 17(2) of the CMR, rule 12(e) for the MTO and Art IV 2(q) of the Hague Visby Rules is the fact that, all of them must prove that no negligence was involved, or put another way, there was no fault or privity.

Failure to show how the loss or damage might have occurred means that the carrier cannot rely on this exception as he will be unable to discharge the burden of proof required under the various Articles.

The road and sea carrier can rely on this exception with relatively more ease than the MTO as they have all the facts available to them to explain the cause of the loss or damage. In MT or as per the ICC Rule 12, this defence operates only when the loss cannot be localised, how then will the MTO be able to adduce enough evidence to show how the loss or damage occurred to benefit from this rule? Atkinson J, stated in *Phillip & Co v Clan Shine Steams Ltd*,[328] that

"...it is necessary for the defendant to establish exactly why and how damage occurred, provided that they can disprove negligence, but of course, it is not easy to do that unless they can establish some reasonable possible alternative explanation. If the damage is entirely unexplained, it is difficult to see how the onus can be discharged."

[328] (1943) 76 LiL Rep. 58

Would it suffice to prove that "*due diligence*" was used or that the MTO did all he could by employing reputable firms for the defence to be triggered?

Short of such a standard it is difficult to see how often this defence will be successfully relied on. For if the MTO can explain how the loss occurred, he would at the same time be either localising it which makes the network system operate to deal with the loss or be bringing it under one of the already seen exception e.g. inherent vice of the goods. But so long as the MTO cannot explain how the loss or damage occurred to prove that he was not in any way negligent he cannot rely on a defence which demands of him to show that which he

"...could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence".

In the event that the 1980 UN Convention comes into force the MTO would be exculpated from liability if he can show that he

"...took all measures that could reasonably be required to avoid the occurrence and its consequences".
The above exception of "all measures" is quite similar to both Art 5 of the Hamburg Rules and Art 20 of the Warsaw Convention. "All" necessary measures was held in *Goldman v Thai Airways*_International Ltd[329] to mean

"...all measures necessary in the eyes of a reasonable man".

There is as yet no judicial pronouncement on "all necessary measures" under the Hamburg Rules, but one feels that the deliberate ignoring of the words as found in the Hague-Visby Rules in preference to "reasonable" as found in the Warsaw Convention seems to be a clear indication that the drafters intended that the Article should have the same effect as Art 20 of the Warsaw Convention.

[329] [1983] 3 All E R 693

The UNCTAD/ICC Rules like the convention does not lay down exceptions apart from the exceptions of Art IV (2) (a) and (b) of the Hague/Visby rules for loss or damage caused during carriage by sea or inland water way. The rationale for the inclusion of this exception is to make the rules compatible with the Hague/Visby rules, in the event of the applicable convention being the Hamburg rules, which has done away with the exception of the fire and negligent management and navigation. The other exceptions are not included as they would add nothing to the notion of presumed fault which is the basis of liability under the rules. Although the parties are free to incorporate whatever exceptions they choose, subject however to the rules of construction.

The cargo owner or claimant now has a duty to adduce further evidence showing that the loss or damage was not so caused or does not fall under one of the exceptions because of negligence or unseaworthiness (carriage by sea) of the MTO.

3.8 LIMITATION OF LIABILITY

One of the pivotal elements of any liability regime is its limits of liability. The different international conventions provide different limits of liability and this has implications for the limits in multimodal transport as the current network liability system means that the limits will also vary as to the particular law which eventually becomes applicable.
The different levels of limitation of liability within the international conventions, shows the varying levels of limits that the parties are subjected to. This obviously exacerbates the liability issue. What is needed is a liability limit that is predictable. The fact is that different interest will advocate for different levels of liability. At present under the UNCTAD/ICC Rules, the Hague Visby Rules apply to non-localised damage where sea carriage was part of the carriage contract while the CMR limits apply for all other contracts in which a sea leg is not included.. Limitation of liability must relate to the particular regime that eventually emerges; mandatory or not and uniform or not.

The reality of multimodal transport which shows that a stricter liability is more compatible will also favour a limitation of liability which supports this suggestion. A system in which claimants are compensated in full will not change the existing status-quo between the parties as insurance is usually where the reality of limits exists.

3.9 LIABILITY IN TORT

Most multimodal contracts state that suit in tort is acceptable, alongside international and national mandatory laws. While such choice of law clauses, which either incorporate international conventions or other national laws, might lead to the conclusion that they would be the sole basis of liability, the acceptance and recognition by the law of a concurrence of liability in carriage cases points to the possibility of other basis of liability being used.[330] This thrust in the law means that English pleadings in carriage cases are no longer based only on a breach of the particular convention or contract, but a pleading that would invoke bailment and negligence in addition to any contractual or statutory breach. The rationale for such concurrence of liabilities was held by Lord Diplock to be based on the fact that a contract of carriage of goods by sea was a combined contract of bailment and transportation.[331]

A concurrent action exists if the tort in the absence of the contract could have been actionable, although only one action can be entertained. It was expressed in Henderson v. Merrett Syndicates Ltd that a,[332]

> *"A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual*

[330] Most legal systems allow an action in contract and tort, between contracting parties. Wier, T, "Complex liabilities" in *International Encyclopaedia of Comparative Law* XII, Torts, Tuna (ed) Tubingin, J C B Muhr (1983) Chap 12 (The Eras) EIL Action (Société Commerciale de Reassurance v Eras International Ltd [199211 Lloyd's Rep 570 (CA). Referred to here as parallel liability.

[331] *Barclays Bank Ltd v Custom and Excise [1963] 1 Lloyd Rep 81 at 89*

[332] [1994] 3 All ER 506 at 522

exclusion or limitation of liability for an act or omission that would constitute a tort. Subject to this qualification, where concurrent liability in tort exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence."

Although earlier English law required that the action in contract be pursued in such cases, it allowed such concurrent actions in the common callings, and thus recognised it to common carriers.[333]

In *Henderson v, Merrett Syndicates Ltd*,[334] The House of Lords confirmed generally that in English law there may be concurrent liabilities in contract and tort, where a duty of care was owed, even though the defendant owed an identical contractual duty to the same plaintiff, expounding the attractiveness of such concurrent action and affirming that one does not preclude the other. And in *Sonicare v. EAFT,*[335] in an action for loss of cargo the plaintiffs and defendants sought to rely on 5 different causes of action to forge a contract between the plaintiff and the defendants ranging from:

(1) Contract
(2) Simple bailment
(3) Bailment by attornment
(4) Brandt v. Liverpool contract
(5) Breach of a duty of care.

3.9.1 CONCURRENT ACTIONS

Concurrent actions are important in transportation because a typical English cargo claim may be framed in a combination of contract, bailment, tort, with a number of

[333] Jane Swanton and Barbara McDonald; "Concurrent Liability in Tort and Contract under the Hedley Bryne Principle" (1995) 3 Torts Law Journal 131 at p 135
[334] [1995] 2 A.C. 145
[335] [1997] 2 Lloyd's Rep 48 at p 52

mandatory conventions.[336] Such claims are normally predicated on the fact that a novel situation might have arisen which does not fit in well with the particular contractual framework. To be able to entertain a suit, it is usually imperative that such concurrent heads are available.

However a claimant wishing to circumvent the contract of carriage from applying its exceptions and limitation clauses will find that his position does not improve,[337] the existence of the contract between the parties means that the claimant cannot sue the carrier in tort to circumvent the contract, since the parties will both be able to rely on a contract between them, thus the carrier will be able to rely on the exception clauses.[338] Viscount Finlay dissenting *in Elder Dempster Ltd v. Paterson Zochonis*, [339]held that where a contract subsisted between parties no action in tort may be brought by the injured party as against the other, where the cause of action proceeds from conduct which is in breach of such a contract, it might be a tort if no such contract where in existence, unless the tort so alleged can be considered independent of the contract.
And in *Bigot v. Stevens, Scanlan & Co Ltd,*[340] claims in tort were rejected, when there were good reasons to restrict the plaintiff to his contractual remedy against the defendant.[341]

The suit is normally useful when the identity of the carrier is in doubt, and the claimant has thus mistakenly sued the wrong person, and the time limit for suit against the proper person has expired.[342] This was the case as early as 1949 where it was held in *Hiram & Sons v. Dover Navigation*,[343] that

> *"Both the shipowners and the charterers could be sued as both were considered to be actual carriers. The court then considered the tort action*

[336] Palmer, N, "Sub bailment on Terms" [1989] LMCLQ 466

[337] Rowlands v Collow (1992) 1 NZLR 178 at p 190
[338] Todd, *P, Modern Bills of Lading,* (Oxford, Blackwell Law 1990) at 96.

[339] [1924] AC 522 at p 548
[340] [1966] 1 QB 197

[341] Ibid pp 200

[342] The Pioneer Container [1994] 2 All ER 250. The INES [1995] 2 Lloyd's Rep 144

[343] (1949) 83 LiL Rep 84 at p 91

against the owners at the same time as a contractual action against the charterers."

And in *Grace Kennedy & Co v. Canada Jamaica line*,[344] a demise clause was upheld to enable the defendant who had no contractual liability responsible in tort under the civil law of the place where the case was tried, while in *The Golden Lake*,[345] the carrier though not a party to the bill of lading contract was found liable in tort since the goods were damaged while in his custody.

3.10 CONCLUSION

Despite the rapidity of growth in this mode, there is still no predictable liability regime in Multimodal transport. There is scant judicial opinion as to what the liability regime in multimodal transport ought to be. The unpredictability of the liability regime will continue to be a problem until a multimodal convention becomes applicable in MT, which lays down the basic liability regime and Limits appropriate to it.

Part of the unpredictability stems from the fact that multimodal transport has for a long time and almost universally being viewed as a patchwork of unimodal modes.

All the transport regimes examined here are based on the principle of presumed fault. This chapter has tried to show how confusing this principle is to multimodal transport.

The concept of presumed fault is not a concept that is at ease in multimodal transport. It was used in multimodal transport as a conflict avoidance tool with already existing international mandatory transport conventions. To truly reflect multimodal ideals, this basis ought to be changed into one which is more suited to the nature of multimodal transport. The question is if a change in the basis of liability in transportation will be accepted by the stakeholders in the transport field. Increasingly, higher standards of liability are being introduced in the transport field in the cases of the COTIF and the Montreal Protocol, the trend is now to increase the standards of liability and limits of liability. In this light it is most appropriate that there are increasing calls for strict liability with limit.

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[344] [1967] 1 Lloyd's Rep 336.

[345] [1982] 2 Lloyd's Rep 632 and The President Monroe [1972] 1 Lloyd's Rep 385.

Chapter 4

THE MULTIMODAL TRANSPORT CONVENTION 1980

For a long time now and on going the debate rages, as to what the liability regime should be in multimodal transport, should it be based on the network system of liability or on the uniform system, should it be based on the presumed liability of the unimodal transport conventions or should it be based on a strict liability?
It is now generally accepted that the liability regime in multimodal transport is uncertain and unpredictable because of the potential liability regimes applicable to it.
The incorporation of the UNCTAD/ICC rules into the different multimodal transport contracts brought about a level of harmonisation and certainty into multimodal transport. But such provisions apply only when they are incorporated into the contract and are often subject to mandatory laws. The ideal situation would clearly be one in which a mandatory regime applies. Given this consensus, the international community has still been unable to produce an internationally acceptable set of rules to govern the liability of the parties to this mode of transport.

The success of such a liability regime for multimodal transport has been elusive because any attempt must take into consideration the complex landscape of varying liability regimes applicable to multimodal transport, especially the different unimodal transport regimes applicable when loss or damage is localised.

This chapter seeks to examine the attempts made by UNCTAD to solve the multimodal transport problem by drafting an international transport convention on multimodal transport. In this respect, the 1980 United Nations Multimodal Transport Convention will be examined, and an assessment will be made as to its viability as an appropriate convention in this area.
This chapter is preoccupied with the effect this convention would have had on multimodal transport if adopted. Would it have solved the problems of an uncertain liability regime, and would it have brought certainty into the multimodal liability landscape?

This chapter argues that this convention would not have drastically changed the multimodal transport liability landscape. It was doomed to failure from its inception because it was based on the flawed premise that unimodal principles can be used unmodified to solve multimodal transport problems. It will be argued further that the fear of conflict with other regimes and changes as to the applicable regime prevented the convention from attaining its goals of a predictable and certain liability regime.
This chapter constitutes an attempt to analyse the International Multimodal Transport Convention of 1980, the only international convention on multimodal transport, which though not in force has helped to shape the landscape of multimodal transport.
The analyse will focus primarily on the liability regime of the convention while a Cursory explanation is given for the reasons of failure of this regime.

4.1 THE BACKGROUND OF THE CONVENTION

Modelled on the Hamburg Rules 1978, the United Nations Convention on Multimodal transport was adopted under the auspices of the United Nations Commission on Trade and Development (UNCTAD) to regulate all contracts for the International multimodal transport of goods, by creating a minimum liability regime for multimodal transport. With this adoption came the hope that the gaps which existed between and within modes in the case of multimodal transport would be filled, and the hitherto piecemeal solutions provided by provisions of national law, standard clauses and model rules will be replaced by uniform mandatory rules. Additionally it was hoped that the problems faced by courts in ascertaining the liability regime in multimodal transport and the [346]corresponding basis, extent, limits and defences would be at an end.
Sadly, however, after nearly 30 years, the Convention has not yet come into force and is unlikely to do so.[347]
The reality in multimodal transport portrays a situation in which different legal regimes apply to different parts of the contract; (the network liability system).[348]

[346] Driscoll, W. and Larsen P.B 'The Convention on International Multimodal Transport of Goods' (1982) Tul. L.R. 193.
[347] The requirement of 30 ratifications before it comes into force is too high a number to achieve. Art 36(1) states that, [t]he convention shall enter into force 12 months after the governments of 30 states have either signed it not subject to ratification, acceptance or approval or have deposited instruments of ratification, acceptance approval or accession with the depository"
[348] See chapter 3 on a discussion of the network system of liability

Under this system, the different liability regimes allow the parties to limit and exclude their liabilities using different parameters found under the different mandatory national laws, international conventions or standard contracts.

For the first time in multimodal transport a uniform liability regime was proposed to cover all damage, loss or delay to goods carried by the multimodal transport irrespective of where the loss or damage took place.

4.1.1 THE HISTORY OF THE CONVENTION

Prior to the work carried out in preparation of the convention, other attempts had been made to solve this problem, but failed because of inadequate support from the different interest groups.[349] Alternatively, it might be that at the time there was no compelling need for a multimodal transport convention. This stance was summarised by Diamond QC, when he stated that,

"There can be said to be a need for the general adoption of a new sea convention but there is no comparable need for a multimodal transport convention."[350]

This view might have been correct at the time as the 1980 convention failed to secure the requisite number of ratifications, however, the message is now clear, there is a compelling need for a multimodal transport law.[351]

4.2 ATTEMPTS SUBSEQUENT TO THE CONVENTIONS

Technically, multimodal transport is not a 21st century problem. It did not arise prior to this time because the volume carried multimodally did not warrant regulation.[352] Technically speaking multimodal transport is as old as transportation using single modes, as nothing could stop parties from entering into agreements in which more than one mode of carriage was used. However, the advent of containerisation,[353] simplified the transference of goods from one mode to another, thereby encouraging

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[349] De Wit R, Multimodal Transport (1995) Para 2.190

[350] Presentation at the University of Southampton on Multimodal transport.

[351] Indira Carr, "International Multimodal transport - United Kingdom" [1998] 4 Int T.L.R. 99-110,

[352] Diamond ,

[353] Seymour Simon, `Container law: A recent Reappraisal' (1976-77) 8 JMLC 489.
Sean Harrington, `Legal Problems Arising from Containerisation and Intermodal Transport' (1982) 17 ETL p 3. See also Chapter 1 p.

the widespread use of multimodal transport. With this use, came problems of the appropriate liability regimes applicable.

Multimodal transport contracts were made subject to carrier liability rules already in existence. The question was if these rules were appropriate for multimodal transport given its nature and focus?[354] This question was not as simple as stated, because while on the one hand multimodal transport was not a single mode and technically could not fall within the scope of the existing unimodal convention, on the other hand, any attempt to depart from unimodal rules would conflict with the rules which would govern the different elements of the multimodal transport, because no matter the way the contract was executed, it would still be by different unimodal modes.[355] The decisive issue to be decided within the debate as to the appropriate liability regime in multimodal transport was the type of regime and the basis of liability to be used.

4.2.1 The Comité Maritime International (CMI)

The CMI is one of the bodies that have devoted time, expense and tenacity in trying to find a solution for the multimodal transport problem. As far back as 1911 and 1913,[356] in the Paris and Copenhagen Conferences of the CMI, multimodal transport was considered albeit in the sphere of the carriage of goods by sea.[357] The conference was devoted to discussions leading to a code for international carriage by sea, thus multimodal transport was not specifically addressed, reference being made only to the fact that the last carrier in a multimodal transport contract would be liable for the whole carriage.[358] This proposal was turned down at the

[354] De Wit, `Multimodal Transport: Carrier liability and Documentation' (London: LLP: 1995) pg 138.Nasseri, K `The Multimodal Transport Convention' (1988) JMLC p 231.

[355] Glass, D A, « Meddling in multimodal muddle ?—a network of conflict in the UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly] [by sea] [2006] LMCLQ 307

[356] Quoted in De Wit, supra, pg 147. Quoting the work of Scheer W, Die Haftung des Befürderes im gemischten Überseevekehr Hamburg, verlag Commerciam, 1969, 90 ref, also. Richter-Hannes, D, Die UN-Konvention über die Internationale Multimodie Güterbeförderung, Wien, GOFVerlag 1982, 23.

[357] Richter-Hannes, ibid pg 23.

[358] Hamburg Draft 1911, Art 20

Copenhagen and Genoa conferences of the CMI,[359] as ineffective in promoting through transport, as no carrier would ever consent to be the last carrier.
By 1927,[360] the view had emerged within the CMI that it was too early for a law to be created dealing with multimodal transport, because commercial practice was not widespread enough to warrant legislative concern.[361]

At the Antwerp conference in 1948, a draft presented by the Swedish Judge, Algit Bagge was discussed.[362] The draft proposed that multimodal transport should be limited to parties who had registered themselves as multimodal transport operators.[363]

By 1966, the CMI started looking at the multimodal transport problem afresh in the light of the growing use of containers, and the need to draw a convention on multimodal transport was now a necessity. This led to the distribution of questionnaires to the different member organisations and states to gauge their reactions and opinions as to the developments in containerisation.[364]

Under the chairmanship of Kaj Pineus, five drafts were presented to the CMI subcommittee in 1966, each containing a different liability system.[365]

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[359] Sheer, J, supra note 355, quoted in De Wit pg 91.
[360] 1927 Amsterdam Conférence of the CMI. Sheer, J, op cit, pg 41.

[361] De Wit, supra note 353, p. 148, the ICC had also reached a similar conclusion by 1927 in their Stockholm Conférence.
[362] Richner-Hannes, supra note 355, pg 24..

[363] This system was then to be used in COTIF (Art 3) for combined transport operation.

[364] Bureau Permanent of the CMI passed the following resolution on 18th Sept 1965 to "Mettre à l'étude la question des containers pour voir, si étude opportune ce que peut être fait et s'il y a lieu d'étendre le sujet". Sec Pineus K, CMI Documentation 1967 Containers 1, DOC CR-1.: Report and Questionnaire 3, CMI documentation 1967. Container 2, DO CR 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16.

[365] Driscoll, W and Larsen, P B, 'The Convention on International Multimodal Transport of Goods' (1982) 57 Tul L Rev 193 at 196.

4.2.1.1 The CMI Drafts

Under Art 5 of Draft 1, the carrier would be liable according to the maritime legislation applicable under the special conditions as would have applied if the carrier had made a contract of carriage with the shipper. This draft was based on the fact that the original carriage[s] in multimodal transport invariably involved sea carriage and the MTO's were thereby sea carriers.
The carrier by sea therefore assumed responsibility according to the Hague Rules in cases where loss or damage occurred during the sea mode and for unlocalised loss, for damage or loss during carriage by other modes, the carrier's liability was that which would have applied to the sub carrier.[366]
The second draft was based on presumed fault. The carrier was liable for loss or damage during carriage, unless he proved that the loss or damage arose without his fault or the fault of his agent. This draft went a bit further than the first draft and specifically stated that the basis of liability was presumed fault.

In case of localised loss, subject to certain exceptions as specified in Art 5, the carrier's liability was to be dependent on the rules applicable to that particular leg. While draft 1 allowed recourse action by the carrier, this draft did not, thus the carrier was liable without the benefit of recourse even in cases where another carrier was at fault.[367] The part of the Article regulating recourse action was removed as it was thought to be superfluous; presuming to regulate the unimodal contract under which the performing carrier would have contracted with the MTO to carry for part of the multimodal transport contract.
This draft was based on the uniform liability system, but it was similar to the CIM and CMR conventions.[368] This liability was also quite similar to the common carrier's liability with exceptions for inherent vice of the goods, fault of the shipper and contributory negligence.

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[366] CMI documentation, 1967, Containers 3, DOC CR-17. International Subcommittee - Report October 1966, 24-26. See Comments, 26-29.
[367] CMI Documentation, 1967, Containers 3. International Subcommittee, Report 1966, pg 29-31. Comments 31-33.
[368] CMR 1956, see Pineus, K, Comment to Art 4 and 5 of the draft in CMI Documentation, op cit at pg 37-38.

The fourth draft which was called the Oxford draft was a modified version of the third draft, the only difference being that liability for delay was included.[369]This was based on the different existing unimodal conventions. This draft provided for liability in cases of localised and unlocalised loss or damage. In case of unlocalised loss, the carrier would be liable under the Hague Rules unless he proved that the loss or damage had arisen in circumstances excluding any wrongful act or default on his part or that of his agents and servants.[370]

4.2.1.2 The Genoa Draft

This draft attempted to strike a compromise that would be adequate, to minimise the differences and confusion likely to arise after five drafts.[371] The scope of the draft was limited to carriage in which an international element was involved. The draft was based on the uniform system but with strict liability.[372] Under this draft the MTO was liable for the damage, loss or delay to the goods regardless of the where such loss or damage occurred.

4.2.1.3 The Tokyo Rules

Because of the shortcomings of the above six drafts, a last one was presented to the CMI Conference in Tokyo in 1968.[373] The draft introduced the concept of the multimodal transport document (MTD), under which the multimodal transport operator (MTO) undertook liability for the whole carriage. The rules were based on a mixed liability system, as a compromise between absolute uniform liability and network liability, with a number of exception clauses (Art VI(I)). To exonerate himself under these rules, the MTO had to adduce enough evidence to prove that

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[369] CMI Doc [1967]. Container 4, DOC CR-18, 1967, 6-7.

[370] Ibid. pg 7.

[371] ibid, pg 7-8 and 9-14.

[372] The draft was criticised by the Germans and Dutch, as introducing a new and unwanted type of liability to co-exist with already existing liability. See Manca, P `A legal outline of containers' (1968) ETL 491 at 529.

[373] Massey, E A, `Prospects for a new intermodal legal regime: A look at the TCM' (1972) 3 JMLC 725, at 727, Moore, J C, `The Tokyo Convention on Multimodal Transport (Tokyo Rules)' (1969) 1 JMLC 85-91.

damage was due to one of the exceptions. The problem with the rules was that it allowed the parties to choose another rule that could have applied, and in case of concealed loss or damage, the rules presumed that it was caused during the sea stage, thereby protecting shipping interest and importing sea carriage rules onto land carriage.

4.2.2 UNIDROIT: International Institute for the Unification of Private Law

Following the proliferation of the use of containers, UNIDROIT in 1961, introduced a new Draft Multimodal Convention modelled on the CMR rules,[374] in the light of the interest of parties to the CMR in creating a multimodal convention in the future.[375]

The main aim of the draft was to provide uniformity in the liability rules.

The notion of the "principal carrier" was introduced; as one who was responsible for the goods irrespective of who actually carried the goods and who was at fault. The draft was based on a pure network liability principle, and was criticised because it did not provide a complete solution to the problems of the carrier's liability. The draft by proposing a network liability regime in which regulation of loss was determined by localisation of loss, left many gaps between regimes when no convention would have been applicable.[376]

4.2.3 The United Nations Economic Commission for Europe

Shortly after, The United Nations ECE convened a Round Table conference to reconcile the differences of the two private law organisation's drafts. At this time it was thought that governmental involvement would be welcome so that the rules could be made mandatory. From the round table conference, the Rome Draft was concluded.[377]

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[374] De Wit, supra, note 353 pg 149.

[375] DOC E/ECE/Trans/480; Richter-Hannes, supra note 355 pp 25 at 27.

[376] Wijffels, R, `Legal Aspects of Carriage in Containers' [1967] ETL 331 at 341.

[377] The Rome Draft [1970] ETL 1321. See Driscoll, W and Larsen, P B, `The Convention on Multimodal Transport of Goods' [1982] Tu. L Rev (193) at 196.

Recommendations were then made for a diplomatic conference to create a binding convention.

4.2.4 The TCM Draft Convention[378]

The IMCO (International Maritime Consultative Organisation) and the ECE, met a couple of times to amend the Tokyo Draft, resulting in the TCM Convention.[379] This convention had two different basis of liability, the network system and an alternative one based on a uniform system. This convention was further handicapped because it did not contain mandatory provisions: it was purely contractual.

4.2.5 The International Preparatory Group Draft

By resolution 1734, ECOSOL requested that the UNCTAD Trade and Development Board create an international preparatory group to draft a convention on multimodal transport.[380]

This body started work in 1973 and produced a draft convention in March 1979.[381] The problem faced by this group was reconciling the different views of the different groups:
The Group of 77 - developing countries
Group B - developed countries
Group D - socialist countries.

Wheble, B S, Combined Transport - The 'Rome Draft' TCM Convention [1970] ETL 1307.
[378] Transport Combines des Marchandises.
[379] See Massey, supra at note 372, p.725.

[380] Preparation and adoption, UNDOL TD/MT/CONF/6 (1979) 15.
[381] Chrispeels, I E, 'The United Nations Convention on International Multimodal Transport of Goods: A Background Note' [1980] ETL 355.
United Nations Conférence on a Convention on International Multimodal Transport. Report of the Intergovernmental Preparatory Group, Part one - UN DOC TD/MT/CONF/1, TD/B/AC 15/56, 1979 and Part 2 report UN DOC TD/MT/CONF/A/Add 1, TD/B/AC 15/56 Add 1.

The main conflict areas were the basis of liability and the question of a public international law convention as opposed to a private international law one.[382]
On the 24th of May 1980, the Convention was formally adopted by a resolution approving of the text of the Convention. The Convention would come into force 12 months after the 30th instrument of signature is deposited.[383]

4.3 THE MULTIMODAL TRANSPORT CONVENTION[384]

4.3.1 STATED OBJECTIVES

The multimodal transport convention was meant to regulate multimodal transport, by introducing a minimum liability regime. Existing scholarship had noted the inadequacies and limitations of the means available of resolving liability issues in multimodal transport.[385] This limitation did not encourage the effective utilisation of this mode. The need therefore arose for the creation of a structure to provide appropriate and effective rules for its regulation. To ensure that the convention met these goals, it set out the objectives of the convention:

(a) That international multimodal transport is one means of facilitating the orderly expansion of the world trade.
(b) The need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned.
(c) To ensure the development of multimodal transport in all countries and to consider the problem of transit states.
(d) To determine adequate rules for multimodal contracts and the liability of MTO's.

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[382] See Chrispeel, supra at note 380g 363 and Nasseri, K, supra at note 353 236.

[383] Art 36 of the Convention, which states that "This Convention shall enter into force 12 months after the governments of 30 states have either signed it not subject to ratification, acceptance or approval or accession with the depository".

[384] UN DOC TD/MT/CONF/ 17 (1981)
UN DOC TD/MT/CONF/16 4 of 10 June 1980. See also W Driscoll & Larsen P "The Convention of International Multimodal Transport of Goods" (1982) Tu. L Rev 193.

[385] Regina Asariotis, "Towards Improved Intermodal Freight in Europe and the United States: Next Steps, Report by the Eno Transportation Foundation, Policy Forum held November 12-20 1998.pg 42

(e) The desire not to affect other unimodal transport conventions. The right of each state to control its multimodal industry.

(f) The need to address the problems of developing countries.

(g) To balance the interest between suppliers and users of multimodal transport services.

(h) And the facilitation of custom procedures.

In this work however, we will limit most of our comments to (d), the determination of adequate rules for the Multimodal Transport contract and the liability of the MTO.

4.3.1.1 THE APPLICABILITY OF THE CONVENTION TO MULTIMODAL REALITIES.

The very basic requirement for the success of this convention would be it's ability to solve the problems of unpredictability and uncertainty in multimodal transport. In this light this section will examine the basis reasons of unpredictability and analysis the adequacy of the convention in dealing with it.

4.3.1.2 LIABILITY REGIME OF THE CONVENTION

The different drafts in multimodal transport like the ICC drafts of the 1970's and the 1992 UNCTAD/ICC draft, proposed measures aimed at regulating this mode and safeguarding it from problems likely to arise due to its nature. In the main, the measures proposed were substantive, usually in the nature of private rules to be voluntarily adhered to by all parties concerned.

Some of the rules took the form of proposals for multilateral conventions providing different regimes of liability dependent on localisation of loss or damage what came to be known as the network liability solution. Such measures were initiated and promoted by the international private sector. The measures taken were attempts to codify substantive rules deemed applicable in this area. Such substantive rules and principles as already existed were not only incomplete, but also unclear and not

surprisingly, full of controversy.[386] As a result, there was a need to search for rules which would effectively deal with these problems.

4.3.2 THE BASIS OF LIABILITY OF THE CONVENTION

The determination of the basis of liability to be used in multimodal transport emerged after a protracted debate to determine the nature of the convention. The question was if the contract was sui generis. Some nations especially the developing ones regarded it as sui generis with the implication thus its legal regime should be completely separate from unimodal transport, while others viewed it as not sui generis in that its execution invariably involved two or more other modes which were regulated by mandatory conventions.[387] It was finally resolved in favour of sui generis and it was held that the liability regime should be separate.[388] In deciding this there was the presumption that liability would be uniform throughout carriage. This was in contrast to the network system of liability that operated in multimodal transport under the currently used multimodal transport contracts.[389] The liability regime adopted therefore in the convention was the uniform system of liability.

4.4 THE UNIFORM SYSTEM OF LIABILITY

The difficulty of applying different liability regimes to the same contract was one of the reasons why the network system was deemed unacceptable. As far back as 1972, during the meetings to consider the TCM draft;[390] alternatives were being suggested. The French proposed a strict liability system for concealed damage to co-exist with the network liability system, their reason was conflict avoidance.[391]

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[386] See Chapter 2 for a treatment of the network system of liability
[387] UN DOC TD/B/AC 15.14. Part Two

[388] Art 1, 30(4) and 38 resolved this issue.
[389] See Chapter 2 in which the principle of a network liability system is discussed. BIFA has also made a major contribution in standardising the terms of its standard trading conditions used by its members in multimodal transport.
[390] Massey, "Prospects for a new Intermodal legal regime: a critical look at the TCM" (1972) JMLC p. 744-745.
[391] Ibid, p.740

Australia, Canada, Norway and Sweden, proposed that the basic network system be abolished and in its place, a stricter liability regime be initiated,[392] preferably an elimination of the negligence and due diligence standard to be replaced by a more stringent standard; *"circumstances which the CTO could not avoid and the consequences of which he was unable to prevent".*[393]

The United States also strongly objected to the network system because it was thought to be unpredictable, and proposed a uniform strict liability system in [combined] transport.[394] All these objections were ignored together with those made by some of the independent[395] delegates attending the deliberations culminating into the United Nations Convention 1980. And a compromise had to be reached on the one hand between advocates of a network system of liability, and those for a uniform system of liability.[396]

At the end of the deliberation the uniform system of liability was the chosen system. By Art 16, the multimodal transport operator is liable for loss or damage to a uniform standard, this liability was based on a principle of presumed fault or neglect, whereby the MTO could exculpate himself from liability if he could prove that he and his servants and agents did all they could to avoid the occurrence leading to the loss or damage.
Article 16 stated,

" 1.*The multimodal transport operator shall be liable for loss resulting from the 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 as defined by article 14, unless the multimodal transport operator proves that he, his servants and agents or any other person referred to in article 15 took all*

[392] Austria, Canada, Norway and Sweden proposed an Alternative System. TD/MT/AC 15 pg 9.
[393] Massey, supra note 389 at p 391

[394] TD/B/C 4 Supp 7 of 21 April 1972. Consultation Machinery TD/A/AC/13/28 of 20th Sept 1977.
[395] Driscoll, W. « The Convention on International Multimodal Transport : A Status Report », (1978) 9 JMLC. 441. Report of the United Nations/ IMCO Conference on International Container Traffic, UN. Doc E/5250 (1973)
[396] Group B, plus the group of 77 and Group D TD/B/315/Rev 1.

measures that could reasonably be required to avoid the occurrence and its consequences

2 Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require a diligent multimodal transport operator, having regards to the circumstances of the case."

By the proposed uniform system of liability, the liability of the MTO was uniform throughout the carriage, no matter where loss or damage occurred. This system was a marked departure from the network system which was complex and gave no indication of the applicable liability regime. In this uniform system of liability, a single set of rules would govern the multimodal transport contract. In academia, it is agreed that this system is the ideal one for multimodal transport.[397] Under this system, the liability of the MTO is certain regardless of the modes used. The cargo concern can hold the MTO liable for damage on agreed terms. Unfortunately, the agreed terms in this case are as per article 16 based on presumed liability with reversed burden of proof as found under unimodal transport conventions. Thus although the uniform liability regime allows for clarity and predictability it also bears the failings of the presumed liability within multimodal realities.

4.4.1 ADVANTAGES OF THE NETWORK SYSTEM

The main advantage of this system is that it eliminates most of the criticisms of the network system of liability.[398] The problem of localisation disappears as liability is uniform throughout carriage. The problems of liability gaps and uncertainty as to applicable liability regimes are minimised as do the problems of gradually occurring loss or damage, because the MTO is made liable on a uniform basis throughout carriage. Of particular note is the fact that the problem of delay in the network system is eliminated by the uniform system which also covers delay in multimodal transport.[399]

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[397] De Wit, R. Multimodal transport, Para 2.158 p. 143

[398] Glass, D, Freight Forwarding and Multimodal Transport Contracts (LLP London, Singapore 2004) p.280

[399] See Chapter 3

4.4.2 DISADVANTAGES OF THE NETWORK SYSTEM

The main disadvantage of the uniform system is the fact that the MTO's recourse action against any carriers who performed under the contract of carriage will be subject to a different liability regime. This action would be governed by the rules of the particular mode of transport not the rules under which he is liable to the claimant.[400] This shifts the unpredictability on to the MTO, who is left to recover from the different performing parties under different carriage or service contracts.

In the case of unlocalised damage or loss, the MTO would have to sue all the different carriers leading to additional cost to him. In addition the MTO will not be able to claim for damages or loss occurring during gaps in liability.

Another disadvantage of this system is the likelihood to create discrepancies between multimodal and unimodal transport;[401] the argument here is the unfairness of applying two different liability regimes to the same loss or damage. This argument is not limited to multimodal transport because the different unimodal transport conventions are faced with the same problem. A convention might have different interpretations under different jurisdictions, leading to the same loss or damage under the same mode of transport being treated differently under different jurisdictions.[402] This is not a problem specific to multimodal transport, but one that exists in transportation today.

Further, the fear of conflict between conventions has been one of the objections to the uniform system of liability. The argument is that the uniform system of liability will invariably lead to a conflict of conventions between the Multimodal Transport Convention and the different Unimodal Conventions. This is obvious in cases in which the carriage is performed in such a way that both conventions might be applicable to it.

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[400] De Wit, supra at Para 2.164

[401] Racine, J, "International Multimodal Transport, A Legal Labyrinth" (1982) Il Diritto Aereo, p 126.

[402] See the problem of the Art 2 of the CMR which is interpreted differently in Germany and England, see additionally T*he Quantum Case*

4.4.3 The Extent of Liability

The next issue to be resolved was the extent of the liability. It was thought to be a prerequisite of any convention on multimodal transport, that the MTO should assume liability throughout the carriage, thereby taking care of any gaps in liability at the start, finish and interface points during the transport. (Article 14) The next issue to be decided was the appropriate basis of liability to be used to effectively regulate multimodal transport. The choice seemed to be between strict or negligence liability.[403] After lengthy deliberations, it was decided that fault liability would be more appropriate, as it was felt that both bases of liability would lead to the same interpretation depending on the emphases placed on them. A liberal interpretation of strict liability and a rigid interpretation of negligence liability would lead to the same result.[404] Additionally the fact that the existing unimodal transport convention had moved from the strict liability of the common law to negligence liability was a big influence with the IPG. Especially in view of the Hamburg Rules which were being prepared at the time by UNCITRAL.

As a result Art 16 of the Convention stated that the MTO

> *"shall be liable for loss resulting from loss of or damage to the goods, as well as delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in Art 15 took all measures that could reasonably be required to avoid the occurrence and its consequences."*

In spite of the fact that this clause is almost identical to Article 5 of the Hamburg Rules, in which the liability of the carrier is based on presumed fault, the convention wished to emphasise this aspect, by additionally stating in its preamble (d) that

[403] UN DOC TD/B/AC 15/24 at Para 85.

[404] UN DOC TD/B/AC 15/14 Para 38.

"The liability of the multimodal transport operator under this convention shall be based on the principle of presumed fault or neglect."[405]
The basis of the MTO's liability is based on negligence and vicarious liability for acts of his servants or agents. The burden of rebutting that presumption is on him, and he has to prove that he has taken all measures that could reasonably be required to avoid the occurrence and its consequences.

4.5 REBUTTING THE PRESUMPTION OF LIABILITY

To rebut the presumption of liability, the MTO had to prove that he was not liable, by showing that no fault actually existed which might have lead to the loss or damage.[406]

The problem with the basis of liability within this regime is the fact that it is wider in multimodal transport, than in unimodal transport which it imitates.[407] In case of loss or damage, the MTO would need to adduce evidence to show that neither he nor his agents or servants were negligent. Such a defence is easily ascertainable when loss is localised. When loss is not localised, the MTO would be liable because he will not be able to adduce enough evidence to rebut that presumption. In unimodal transport, it is easy to adduce evidence as the journey is usually on one mode with one carrier and a finite number of agents and servants. In multimodal transport, the carrier will find it difficult to trace the carriage through the different modes of transport and layers of agents to adduce specific proof. In this regard the basis in multimodal transport is more onerous than it is in unimodal transport. The advantage here is that unlike the network system of liability in which all the possible exceptions of liability in the different potentially applicable conventions apply, there is only one rule: prove that he has done all he could to avoid the loss.

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[405] See Report of the IPG on a convention on International Multimodal Transport on the second part of its third session, January 1977 (TD/13/AC 12/23 Annex 1) on the common understanding between all Groups as regards the scope of the draft Convention.

[406] See chapter 2 on presumed liability in which the intricacies of this principle are discussed.
[407] See chapter 4 on the principles of the presumption of liability in transportation law

4.6 LIABILITY LIMITATION

The multimodal convention, contrary to its basis of liability which is uniform, institutes limits which are varied depending on localisation. According to Article 18(2), the limit of liability is 920 SDR per package or 2.75 SDR per kilo if a sea leg is involved, and 8.33 SDR per kilo if no sea leg is involved. This makes the limits higher that the limits that obtain under the Hamburg Rules and the Hague-Visby rules. This higher limit it is argued here was inevitable and necessary in a case of multimodal transport where the loss might have taken place during a non-sea segment. This higher limit is said to reflect the possibility that damage might occur in a stage other than by sea.[408]

While under Art 19, if an otherwise applicable mandatory convention would have applied and utilised a higher limit, that limit would apply to the contract. This Article introduces a modified network solution albeit to limits. This Article has been criticised as reintroducing the concept of network liability in a situation in which liability is based on uniformity.[409] This means that the parties would spend time and money trying to adduce evidence to show that a higher limit would otherwise apply to benefit from that limit, while the carrier would then need to adduce evidence to rebut it to maintain the limits of the convention.

The effect is that the burden of proof is shifted on to the cargo owner. In transportation law, the burden of proof as shown by the predominance of the concept of presumed fault is on the carrier as the one who possesses information as to events likely to have happened during carriage. Art 19, by shifting this burden, departs from the normal trend of transport law.

It must, however, be noted that this burden is stated to apply to limits and not the basis of liability, but the practical effects of adducing evidence to show that a particular convention would have otherwise applied is quite similar to the process of localisation and its ramifications. This places a heavy burden on the carrier

[408] Glass, D. " Freight forwarding and Multimodal Transport Contracts (LLP 2004) p. 282
[409] Driscoll, W and Larsen, P B, International Multimodal Transport of Goods, supra note , pg 235-6, and Diamond, A, Legal Aspects of the Convention, supra at .24.

which is difficult to discharge. The effectiveness of this provision however depends on localisation.[410]The rationale for this Article 19, has been said to be the desire to place the cargo owner in the same position in which he would have been had he concluded a contract under the appropriate unimodal regime, especially in cases in which a sea leg is included in which the limits would have been smaller.[411]

By doing this, this convention departs from its original stance of a carriage mode which is sui generis. Article 19 reiterates the problem of stages in multimodal transport discussed in chapter I, and requires the court to determine what a stage is, and to then ascertain the relevant convention applicable. This means that the problem of liability which ought to be resolved by Article 16's uniform liability regime is undermined. Additionally it allows a wider scope of liability regimes than was originally allowed by the ICC Rules; by allowing all applicable liability regimes with no restrictions, while the Rules by allowing only mandatory regimes greatly reduced the number of regimes that could apply.

It is argued that the minimum requirements of a convention are not met by the multimodal transport convention as it fails to provide a predictable limit of liability.[412] Art 19 also creates confusion over the system of law applicable to determine whether an international convention or national law will become applicable. Is it the law of the contract or the law of the place where loss or damage occurred?

There might be difficulties in determining whether an international convention or national law applies to the Multimodal transport contract in such circumstances. For instance, will the Hague Visby Rules apply to such a case?

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[410] There is at present no agreement as to the precise place of localisation in multimodal transport. Some academic writers hold that there is a high degree of localisation, notably Pinenz I L, CMI Documentation 1967, Containers 3 DOC CR-17, pg 17, where he states that localisation is high in multimodal transport. While others contend that localisation is uncommon in cases of multimodal transport: Lord Diplock `A Combined transport Document. The Genoa Seminar' [1972] JBL 369 at 273, and Selvig E, The Background to the Convention in Multimodal Transport. The 1980 UN Convention Papers - One day seminar, University of Southampton, Sept 12 1980 at A14, a high percentage of cargo damage is unlocalised.

[411] Racine, `Multimodal Transport, a legal Labyrinth' [1982] Il Diritto Aereo. 126.

[412] Faber et al: "Practical Guide Multimodal transport – Avoiding Legal Problems

4.7 THE RESULTS OF THE CONVENTION

The convention which took more than 12 years to deliberate solicited very little support from stakeholders, thereby retiring this convention into the archives of failed conventions. Many views have been propounded as to the reasons why this convention failed, some of which we will discuss here.

One of the main hindrances to the adoption of this convention is based on the time factor; this convention came closely behind the Hamburg Rules of 1978, imitating it in important details. The Hamburg Convention at the time was regarded as too drastic and failed to gain the support of most shipping nations. The multimodal convention was thus not ratified because;

-The fact that the basis of liability was modelled after the Hamburg rules as opposed to the ever popular Hague/Visby Rules, made the convention unpopular to shipping nations.

-The monetary limits of liability was considered to be too high, although technically speaking it was only 10% higher that the Hamburg Rules and 20%higher than the Hague- Visby rules, but that was enough to ensure that it was ignored by shipping interest, and thirdly ,

- The principle of uniform liability which had implications for both the principle of recourse action and conflict with other otherwise applicable conventions was not easy to accept within the carrying fraternity.

The convention had limits of liability whose interpretation lead to the same results as were achieved under the network liability regime.

However on a wider interpretation the convention failed for a variety of reasons in addition to the fact that the convention did not receive the requisite support from the different countries to enable it come into force. There is the contention that there was insufficient information and awareness among the shippers who would have

been affected by this convention. [413] Additionally, the nature of the convention was such that the benefits were not obvious.

The maritime community did not lend its support to this convention because of its limits which were higher than those offered by the carriage by sea conventions, this fact meant that there was adverse lobbying by this group. The influence wielded by this group prevented some developed countries from lending support to such a convention. This was because these nations did not want to go against the interest of such a powerful group.

In summary, the MT convention failed to adequately address problem of unpredictability in the liability regime of the mode.

4.7.1 The Applicable Regime

The Convention, while adopting a uniform liability regime as stated in Art 16 of the convention, also adopted strains of the network system of liability in Art 19 which had created so much uncertainty into the liability regime in multimodal transport. By abdicating in favour of another convention with a higher limit the convention shifted the unpredictability from the cargo concern to the carriers. In addition, this article also brings into play the applicability of other conventions. In summary, article 18(3) of the convention stated that, if the contract did not include carriage by sea or inland waterways, the higher limit of 8.33 SDR as applied under the CMR would apply.

The convention however does not sufficiently clarify when this article 18 will be triggered. Will it suffice that the contract does not include carriage by sea even if the execution involves carriage by sea by the clause 'according to the contract'? or must the contract and the performance exclude carriage by sea? Article 19 further makes this convention unacceptable as a convention meant to bring about certainty within multimodal transport. By stating that

"When the loss of or damage to goods occurred during one particular stage of the transport, in respect of which an applicable international convention or national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limits of the multimodal

[413] Multimodal transport: The feasibility of an international legal instrument. UNCTAD/SDTE/TLB/2003/1 p. 12

transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or national law."

Thus there is a uniform limit when loss is unlocalised or when the convention would apply a higher limit. Once another convention would apply another limit the multimodal transport convention abdicates in its favour. This is basically the same approach taken as the network system of liability, thus it is strange that the convention would achieve the same results as the network system of liability.

More distressing is the fact that the article re-introduces the concept of stages into multimodal transport, although it failed to define what constituted a stage. The courts will thus have to decide the demarcation line between modes.[414] This also invokes the problem of the determination of;

a) The convention or mandatory national law applicable to the contract

b) The convention which would have applied to the contract if the consignee had made a separate contract with subcontractor, or

c) Would have applied if the consignee had made a contract with the MTO for that stage of the transport.

This convention thus exhibits the same problems that multimodal transport faced under the network system.

4.7.2 The basis of liability

The convention had been modelled after the 1978 Hamburg Rules. This was unacceptable to a sector that was conversant with the basis as laid down by the Hague and Hague Visby Rules. The basis of liability under the convention of presumed fault with a reversed burden of proof, fails in multimodal transport to provide the same level of immunity for lack of negligence. The result of the working of the basis in multimodal transport is likely to lead to a stricter liability for the MTO especially hen loss is unlocalised. Therefore the uniformity of basis sought is unachievable.

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[414] Glass, D , Freight forwarding and Multimodal Transport Contracts,(LLP London Singapore 2004) pg 283

4.7.3 The Monetary Limits of liability.

Art 18 laid down the liability limits under the convention which become applicable when damage or loss is not localised. This article as been described as "difficult, unsatisfactory and somewhat complex"[415] This is because the calculations for limiting liability are based on the inclusion or exclusion of a sea leg in the contract. Having laid down such a criteria, the article does not specify how such a difference is made. Is it based on the actual contract or the performance of the contract? This might open the way for disputes and proof to determine which contract include a sea leg and those which do not have.

The monetary limits were considered to be too high. This was not acceptable to carriage interest as it meant that the pay more. With the leverage they possess it was obvious that such high limits will not be acceptable to them. This matter is further complicated because the uniform system is diluted by the network system where loss and damage can be identified.

4.7.4 Conflict with other Conventions

The obvious difficulty of this convention if it came into force would be the potential conflict with other international transport conventions. This would be for two main reasons:

-Some of the existing transport conventions contain multimodal transport provisions, and the compulsory nature of the convention.

The convention however seeks to avoid these problems under its article 38;

Article 38 of the Convention states;

"*...If according to Art. 26 or 27, judicial or arbitral proceedings are brought in a contracting state in a case relating to international Multimodal transport subject to this convention which takes place between two states of which only one is a contracting state, and if both of these states are at that time of entry into force of this convention equally bound by another International convention, the court or arbitral tribunal may, in accordance under such a convention, give effect to the provisions thereof*"[416]

[415] Faber et al, "Practical Guide Multimodal transport – Avoiding Legal Problems p. 57

[416] See in this regard The Vienna Convention on the Law of Treaties 1969

The convention attempts to solve some of the difficulties which might arise where two different regimes become applicable to the same contract, by abdicating in favour of the other convention provided both parties are bound by it. This article is quite unsatisfactory as it fails to specify the rules to be used to determine why one convention will apply over the other. It leaves that determination to the courts or the arbitrators with the implication that the criteria will differ depending on the forum and background of the case.[417] This will destroy uniformity.

Art 30(4) of the convention also abdicates in favour of the CMR, it states;

"*Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne convention of 7 February 1970on the carriage of goods by Rail, article 2, shall not for states parties to conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this convention, in so far as such states are bound to apply the provisions of such conventions to the carriage of goods.*"

The multimodal transport convention will not therefore apply to instances in which art 2 of the CMR and the CIM apply to certain types of carriage. This creates uncertainty as to the applicable regime at the time of contracting.

4.8 CONCLUSION

The multimodal transport convention was meant to regulate multimodal transport liability and its documentary problems. The failure of previous attempts had led to the belief that an approach based on an international convention with mandatory application would go a long way than previous attempts, to avoid the difficulties arising from trying to establish substantive rules on the subject.

According to eminent existing scholarship,[418] a solution based on a convention would be more appropriate than any other approach at eliminating the problems in

[417] See Faber et al: "Practical Guide Multimodal transport – Avoiding Legal Problems. 65

[418] Indira Carr, International Multimodal Transport - United Kingdom (1998) 4 Int TL pg 99 at 109.

multimodal transport. This view was taken, because it was believed to be more easily achievable and also due to the precedence in the field of transport in implementing mandatory conventions.

However, the resulting convention is one which has not gained the required support.[419]

In the main the Convention is far from satisfactory, as there are too many issues in which the interpretation leads to uncertainty. In its quest to emulate other international Conventions, it discards its links with sea carriage, which had hitherto constituted the mainstay of multimodal transport. This link was based on the fact that the proliferation of multimodal transport corresponded with the increase use of containers which also was originally a sea concept. The problems in multimodal transport began as problems with a sea link; this can be seen from the fact that a typical multimodal transport document is called a bill of lading not an airway bill or a consignment note, the existing document in operation such as the combidoc and the combiconbill adopt the Hague Rules as their choice of law rules in case of concealed loss or damage.

Shipping interest which performs a large part of multimodal transport were bound to reject this convention, especially through the loss of the defence of Article iv (2) of the Hague Rules will have an impact on the sea carriers liability in multimodal transport, as the carrier under the Convention will be liable for loss or damage caused by the negligence of the master, mariner, pilot or servant. This will have implications for recourse actions, in that the carrier while being liable under the multimodal transport contract will not be able to claim from any on-carrier.

Having taken the bold step of breaking ranks with the carriage of goods by sea, this convention should have gone the whole way and introduced laws reflective of its

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E A Massey, supra, Selvig, supra, and "The influence of the Hamburg Rules in the work for a Convention on International Multimodal Transport" in Speakers Paper for the bill of lading Conférence: Lloyd's of London Press.

[419] Indira Carr, supra pg 109, believes that with the coming into force of the Hamburg Rules, more states would ratify this convention.

basic nature. By so doing, this convention failed to find its place within transportation conventions; it was neither a unimodal convention nor a truly multimodal transport convention. Starting off by defining itself in terms of modes to adopting unimodal solutions. If it had started off by sufficiently defining itself as a mode not dependent on modes, that freedom would have also allowed it to introduce appropriate liability rules.

The Convention failed to adequately address the problems it was mean to address. And it was accurately described as lacking in precision and uncertain.[420] This was due to the fact that its drafting left a lot to be desired where it failed to provide clear determinative criteria for establishing the appropriate regimes. This is particularly true of Art 38 which although meant as a compromise, has a very wide scope of application. In any case in which both parties are not signatories to the multimodal transport convention, it would be incumbent on the judge to decide.

In addition it abdicated in favour of other conventions, meaning that it was difficult to be able to say with any certainty when and if the convention will apply, under Art 30 and 38.

This convention was based on the different compromises being made by the different groups of interest. The result was a convention which did not satisfy quite fully any group. Thus there is a strong lack of support especially among the developed nations, none of which to date has signed this convention. This fact and the shortcomings of the convention, especially its limits of liability and the onerous burden imposed on the parties means that this convention is unlikely to come into effect any time soon.

At the rate at which it is going, by the time this convention achieves the appropriate signatures it would have lagged far behind in taking account of the necessary technological advances.[421]

The time has now come for calls for this convention to come into force to be stopped. Calls for innovation in multimodal transport should now take the form

[420] Faber et al, Practical Guides-Multimodal Transport : Avoiding Legal Problems (1997) LLP limited. p 66

[421] The Convention requires 30 Ratifications; so far only 6 have been achieved.

of a new liability theory which reflects the advances in technology and the nature of multimodal transport.

An immediate solution would be for the multimodal industry as a whole to improve its procedures and formalise contractual relationships between the various parties involved. In this way relationships will be concretised and the parties will be aware of their rights and liabilities, any inadequacies of the Convention will be informally corrected without the expense in time and money required to amend it.

CHAPTER 5

SOLUTIONS FROM ALTERNATIVE GROUPS

The lack of a mandatory international legislation in multimodal transport led different International Organisations, Regional Associations and National Governments to enact different legislations to cater for multimodal transport. This has further increased the number of applicable regimes already in existence in this field. It is therefore imperative that the experiences and solutions proposed and used by the different regional and national legislations are examined and taken into account, in any work that proposes to treat the problems of multimodal transport.

This chapter will therefore discuss the different attempts that have been made internationally, regionally and nationally to put in place a liability regime in multimodal transport. Starting with the attempts made at international level and finishing with an examination of some of the national legislative texts, this chapter will show that all these attempts have been inadequate because, they have invariably been based on unimodal ideals.

At the end, it will conclude that although there is a burning need for a private international multimodal transport instrument or convention, the way forward lies in further work in which all the ideals of multimodal transport will be taken into account.

5.1 ATTEMPTS BY INTERNATIONAL ORGANISATIONS

The lack of uniformity and the proliferation of liability regimes in this area prompted International Organisations to carry out work aimed at establishing solutions to these problems. The volume of work and committees being convened both at international level, regional and national level is enormous, and this work will limit itself to the most pertinent ones.

5.1.1 Organisation for Economic Co-operation and Development (OECD)

The maritime transport committee of the Organisation for Economic Co-operation and Development (OECD) had as remit the task of finding a workable solution to the multimodal transport problem.[422] The main objective of the OECD was to examine existing carriage regimes to identify the areas of contention and discord and to find a solution acceptable to all parties. It was believed that in so doing the basis of a common solution would be found which will act as the base of any discussion in this area. In the light of this, a workshop on cargo liability regimes was organised to establish the elements that could provide guidance for future work.[423]

5.1.2 UNCTAD/ICC[424] Initiative

While awaiting the coming into force of the multimodal transport convention, the UNCTAD and ICC working together and in collaboration with different commercial parties and international bodies, elaborated model rules for multimodal transport based primarily on the Hague/Visby Rules, the FIATA bill of lading and the ICC Uniform rules for a combined transport document. After a couple of meetings between the two groups, the UNCTAD/ICC Rules for a Multimodal Transport Document was drawn up in 1999. The Rules came into force on the 1st of January 1992. At the moment these rules are undoubtedly the most used rules on multimodal transport, and have been adopted by FIATA,[425] and the Baltic and International Maritime Council (BIMCO) MULTIDOC 1995. Although these rules do not have the force of law and are private they fill a need for guidance: Their only requirement is incorporation, once incorporated into a contract, they become binding to both parties, and override all conflicting provisions in the contract. These Rules only take effect to

[422] See DSTI/DOT/MTC (99) 19TH Oct.1999.
[423] Workshop on Cargo Liability Regimes: http://www.oecd.org/dsti/sti/transpor/sea/index.htm
[424] United Nations Commission for trade and Development and the International Chamber of Commerce, See Chap 3 where this instrument is discussed.
[425] The Law of Freight Forwarding and the 1992 FIATA Multimodal Bill of Lading, FIATA Publication 1993

the extent that they are not contrary to any mandatory provision otherwise applicable.[426]

The rules are based on the "network system",[427] and as with the multimodal transport convention, the rules are based on presumed fault or neglect. Thus the MTO is liable for loss or damage to goods if goods are lost while in his custody unless he can prove that there was no fault on his part or on the part of anyone whose services he made use of. Unlike the 1980 Multimodal Transport Convention, the rules have retained the '*error in navigation and management*' exceptions as found under the Hague/Visby Rules.[428]

Other important provisions include;

-Period of responsibility; the MTO under the rules is responsible for the goods from when he takes charge of them until he delivers them.

-Limits of liability; the limits of liability under the rules are based on the 1979 Protocol amending the Hague Visby Rules. Thus the limit of liability is 666.67 SDR per package or 2 SDR per kilo of gross weight which ever is higher provided the value of the goods has not been declared. The limits of the rules are therefore lower than that of the convention.[429]

However, like the convention limits are also pegged in cases of localisation to the particular mode of transport under which loss or damage occurred. The difference being that under the convention, the alternative limits apply only if they are higher, while under the rules they apply regardless. (Rule 6.4)

5.1.3 UNCITRAL'S Initiative

The limited success of the Hamburg Rules brought renewed pressure from cargo interest to revise The Hague-Visby Rules. This challenge was assumed by UNCITRAL who commissioned the CMI to do the initial work on the feasibility of

[426] Rule 13, similar to Art 14 of the Multimodal Transport Convention
[427] Rule 6.4 of the UNCTAD/ICC Rules 1992
[428] These too like the Hague Visby Rules is subject to the overriding requirement of using due diligence to make the ship seaworthy at the beginning of the voyage.
[429] The convention puts the Limits at 2.75 SDR in case carriage includes sea Carriage and 8.33 SDR when sea carriage is not included. Article 18

such an instrument. The CMI formed an International subcommittee on Issues of Transport Law, which produced a draft of a proposed Sea Convention.[430]
This draft extended the coverage to multimodal transport, albeit multimodal transport with a sea leg.[431] In 2000 UNCITRAL in collaboration with CMI prepared a report identifying the main areas in which future work on multimodal transport should be.[432]
A draft text of an on-line document had been previously drafted by the CMI on transport law issues notably issues covering liability for loss of, or damage to, cargo

This section seeks to examine the multimodal aspect of the UNCITRAL draft; to assess the feasibility of this instrument to apply to multimodal transport. In this light, the provisions of the draft purporting to extend its applicability to multimodal transport will be examined. Other aspects of the draft, which have significance for multimodal transport, will also, be examined such as the provisions on the performing carrier and the proposed liability scheme.

5.1.3.1 THE UNCITRAL DRAFT INSTRUMENT ON TRANSPORT LAW IMPACT ON MULTIMODAL TRANSPORT

The desirability of a modern and uniform international liability regime in the Carriage of Goods by Sea, led the UNCITRAL to commence work on a project aimed at replacing The Hague Visby Rules and the Hamburg Rules.
At UNCITRAL's twenty- ninth session in 1996 in which the UNCITRAL's Model Law on Electronic Commerce was adopted, the session considered a proposal to include in UNCITRAL's work programme;

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[430] The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea], UNCITRAL Doc. A/CN/.9/WG.III/WP.29 January 2003, "Transportation Law: Preparation of a draft instrument on the carriage of goods [by sea]. General remarks on the sphere of application of the draft Instrument", see also (www.uncitral.org/english/workinggroup/wg_3/WP-29-e.pdf)
[431] Official Records of the General Assembly, fifty-Sixth Session, Supplement No17 (A/56/17), para.224; Draft Instrument Article 1(a)
[432] Report of the commission at its thirty-third session,2 June -7 June 2000, Supplement No. 17(A/55/17) During the 37th CMI conference, what were considered as the transport issues needing more discussions where noted to include; the period of the carrier's responsibility, the nature and extent of the carrier's liability, liability of the performing carrier, responsibility of the shipper, liability for delay and electronic commerce

"...A review of current practices and laws in the area of international carriage of goods by sea, with the view to establishing the need for uniform rules where no such rules existed and with a view to achieving uniformity laws"[433]
During the session, it was stated that the "*review of the liability regime was not the main objective of the suggested work, rather what was necessary was to provide some modern solutions to issues that were not adequately dealt with or were not dealt with in the treaties"*[434]

The commission appointed UNCITRAL's secretariat to act as the focal point in gathering information, ideas and opinions from different groups as to the problems that arose in practice and the possible solutions to these problems. These views were to be analysed to allow the commission to consider an appropriate course of action for a possible new regime to replace the current regimes in the carriage of goods by sea; The Hague Rule, The Hague Visby Rules and the Hamburg Rules.

The International Maritime Committee (CMI) was requested to assist and corporate with the secretariat at its thirty- first session in 1998. At the time The CMI had already commenced work on the uniformity of legal regimes for the carriage of goods by sea.[435] The CMI then set up a committee that elaborated a draft convention that was transmitted to the UNCITRAL Secretariat.[436] This draft was presented as a 'Preliminary Draft on the carriage of goods by sea'.[437]

Contrary to the original terms of reference of the project as one for the carriage of goods by Sea, the UNCITRAL Draft contained not only rules covering carriage of goods by sea, but also dealt with the liability of a carrier who undertakes to carry only partly by sea.
The commission had concluded that,

"...Since a great and increasing number of contracts of carriage by sea, in particular in the liner trade of containerized cargo included land carriage before and

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[433] UNCITRAL Doc. A/CN.9/497 « Possible future work on transport law", Report of the Secretary General, para.1-2
[434] Ibid,. para.5
[435] Beare, S. "Liability Regimes/ where we are, how we got there and where we are going" [2002] LMCLQ 307
[436] General Assembly 51st Session, Supplement No. 17 (A/51/17), Para. 210-215
[437] A/CN.9/WGIII/WP.21)

after the sea leg, it was desirable to make provision in the draft instrument governing inland transport."[438]

This addition, which concerns multimodal transport was criticised during the working group session in April 2002,[439] on the grounds that the mandate was for port-to-port transport operations. There were calls to remove the multimodal provisions as an element likely to compromise the acceptability of the convention, especially in the light of the failed attempts to promulgate an instrument to cover multimodal transport. Another objection was that it was inappropriate to elaborate multimodal rules in a maritime context, thereby extending the regime to land segments prior and subsequent to the sea carriage. The Working Group at that session decided that the scope of application would have to be considered further before a final decision could be taken.[440]

At its thirty-fifth session in June 2002, UNCITRAL approved the multimodal aspect of the instrument, subject again to further considerations, while requesting the working group to also consider the problems likely to occur from the extension of maritime rules into land transport. The working group was thus requested when further developing the draft to take into consideration the specific needs of land transport.[441] In October 2003, the working group again examined the scope of application of the draft based on the revised draft of 2002which was called "Draft Instrument on the carriage of goods [wholly or partly] [by sea].[442] On the basis of that session, the UNCITRAL Secretariat elaborated a 'provisional redraft of the articles of the draft instrument.[443] It was then stated that for the purpose of the discussions, the title of the draft would continue to be the same. [444] (With the square brackets)

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[438] Draft Instrument on carriage of goods [wholly or partly] [by sea], www.comitemaritime .org/draft/draft.html.
[439] New York 15-26 April 2002, (A/CN.9/510 para 27
[440] Ibid,. para 32
[441] General Assembly Fifty-fifth Session Supplement No 17 (A/56/17), Para 319-345
[442] A/CN.9/WGIII/WP 32
[443] A/CN.9/544
[444] A/CN.9/WG.III/WP.36 (New-York 3-14 May 2004) This section will deal mostly with the provisions of the UNCITRAL 2003 and 2004 drafts, to assess the suitability of the draft to govern Multimodal transport and bring a measure of predictability and certainty. It needs to be pointed out that discussions within UNCITRAL's working groups continue, thus the text of the provisions in the 2003 and 2004 drafts might change.

5.1.3.2 The Scope of Application

Art. 1(a), of the draft defined the scope of application of the instrument to cover *"...A contracts of carriage under which a carrier, against the payment of freight, undertakes to carry goods [wholly or partly] [by sea] from one place to another.*[445]

The extension of the scope of the instrument from the tackle-to-tackle provisions of the Hague Rules and the port-to-port provisions of the Hamburg Rules to the door-to-door concept reflects the multimodal scope of the instrument. By this provision, the UNCITRAL decided that the instrument should not only cover sea carriage but should be extended to multimodal transport. This draft instrument is thus intended to apply to all international contracts of carriage. This definition was modified in October 2003 and now reads;

"...Contract of carriage means a contract under which the carrier against the payment of freight undertakes to carry goods by sea from one place [port] in one state to a place [port] in another state; such contract may include an undertaking by such carrier to carry goods by other modes prior to or after the carriage by sea"

The second definition was thought to be more in line with an instrument that originally started as one for the carriage of goods by sea. Thus emphasis should be on the fact that carriage should be by sea; carriage by any other mode is incidental. Thus it is necessary that a part of the contract of carriage is performed by sea.[446] Contrary to the scope of application of The Hague Visby Rules and the Hamburg Rules,[447] the scope of the draft convention is two-fold: it is unimodal if the contract is limited to sea carriage exclusively and multimodal when a land based carriage is included.[448] This brings all multimodal transport contracts that are

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[445] Revised CMI Draft Outline Instrument, Art.1.1: Provisional redraft of Art 1. (a) In UNCITRAL Doc. A/CN.9/W.G III. W.P. 36 , March 23 2004, " Transport Law: Preparation of a draft instrument on the carriage of goods [by sea] – Provisional redraft of the articles of the draft considered in the report of the working Group III at its twelve session (A/CN.9/544 (http://www.uncitral.org/eg-index.htm)

[446] UNCITRAL Document A/CN.9/WG III/WP 21

[447] A similar provision is found in the US Senate Draft COGSA 1999 S. 2 (a) (5) (A)

[448] Theodora,Nikika " The UNCITRAL Draft Instrument on the Carriage of goods [Wholly or partly] [by sea] : Multimodal at last or still at Sea? [2005] JBL 647 p.651

partly performed by sea under the instrument. The working group during this session stressed the necessity of specifying that the transport needs to be performed partly by sea. There was the feeling that it would be inappropriate to exclude from the scope of application contracts that did not imply that sea carriage would be performed.[449] It was then decided to include into the definition of a contract of carriage the clause that:

"...A contract that contains an option to carry goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea."

Such a provision reflects the multimodal nature of the instrument and a desperate need to provide a legal regime for such carriage by stipulating that in cases of unspecified modes, once carriage is performed by sea, the instrument will apply. The result is that most international multimodal carriage contract with a sea leg would potentially become subject to the instrument, which is essentially maritime based and drawn by maritime specialists without the participation of the other modes. This instrument is essentially maritime, it emphasises the fact that it does not cover any other types of multimodal contracts.

This limitation of the scope of the draft convention makes it another attempt at solving the multimodal transport problem, but this time within sea transport. In this sense the instrument can be seen as solving the problems likely to apply when a multimodal transport carriage involves sea carriage as opposed to promoting uniformity in international multimodal transport.[450]

This provision would be very unsatisfactory if loss or damage occurred during the land segment where part of the carriage was by sea, as the instrument might determine the liability of the carrier, alternatively if no sea segment was used, the liability will be based on another liability regime.[451] In this way the carrier might

[449] Report of the Working Group III A/CN.9/544 Para. 62

[450] Theodora Nikika, " The Uncitral Draft Instrument on the Carriage of goods [Wholly or partly] [by sea] : Multimodal at last or still at Sea? [2005] JBL 647 p.652

[451] There was some discussion as to the importance of the other modes of transport as compared to the sea segment, but it was decided that the instrument « should contain provisions applying to the full scope of the carriage, irrespective of whether or not the movement on land may be deemed to be subsidiary to that by sea provided carriage by sea is contemplated at some stage. CMI Document "Singapore Door-to-Door Transport" para 3.2 at http//www.comitemaritime.org/Singapore/issue/issue-door.html

be able to determine his liability by the choice of modes he uses while the cargo concerns will not be able to determine what regimes will be applicable.

A pivotal part of the definition is the fact that the carrier undertakes to carry by sea; this undertaking usually comprises of a promise made by the carrier that he will carry and deliver the goods. This is reflected in Art 10 (2003 draft) that states that,

"...The carrier shall subject to this instrument and in accordance with the terms of the contract [properly and carefully] carry the goods to the place of destination and deliver them to the consignee,"

Yet by Art 9 the parties may expressly agree in the contract of carriage that in respect of specific parts or parts of parts of the contract of carriage, the carrier acting as agent will arrange carriage by another carrier. This brings into play the mixed contract of carriage and the forwarding contract. By this provision, the instrument includes into its scope of application not only the carriage contract but also the forwarding contract. Art 9 thus allows a carrier merely to promise to arrange carriage as opposed to performing it. This will allow the forwarding contract to be covered by the instrument. This broadens the scope of the instrument to even exceed the confines of the multimodal transport contract, which specifically calls for the contract to be one of carriage and not one of arranging carriage. The broadening of the scope was criticised and requested that it be deleted.[452]

This provision is however still open. This article reflects article 11 (1) of the Hamburg Rules which allows a carrier to contract part of the carriage to other carriers, provided such parts are contracted to a named person and included in the contract of carriage.[453] Under such an arrangement, the carrier is not liable for loss, damage or delay occurring during the contracted-out part of the contract.[454] The draft instrument is different from the Hamburg rules in that the freight

[452] Report of the Working Group on Transport Law, Ninth session at 41

[453] United Nations Convention on he Carriage of goods by Sea, U.N Comm'n of Int'l Trade Law, 12th Sess, (1978) art 11.1, available at http:/www.uncitral.org/english/texts/transport/hamburg.htm.

[454] Theodora Nikika, « The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]: the Treatment of "Through Transport" Contracts"(2004) 31 Transportation Law journal 193 at p. 200

forwarder arranged carriage by another carrier and provides for its obligations while the Hamburg Rules carrier does not take such a responsibility.[455] This article has been argued to be a useful addition in such an Instrument as it regulates the customary practice of mixed contracts of carriage and freight forwarding, and strikes a fair balance between carriers' interest and shippers' interest.[456] It is however contended that this article within multimodal transport will not further the cause of predictability as it will allow the MTO to contract parts of the contract out as agent, obviously the main aim within multimodal transport is the liability of a single party when multiple modes are used.

5.1.3.3 Applicable Law

The main remit of the UNCITRAL draft was to offer practical solutions to the problems arising due to a lack of uniformity in the liability regime covering the carriage of goods by sea and by extension of this remit multimodal transport. The draft therefore contains substantive rules and the conditions under which these rules apply to contracts of carriage. The scope covered by the draft makes it imperative that there are different rules for localised loss and different rules for non-localised loss. The liability provision used is therefore the network system of liability which presently applies to contractual multimodal transport in cases of localised loss, damage or delay. This provision has already given rise to many uncertainties in multimodal transport, as its applicability also depends on the identification of the stage where loss or damage occurred and determining if the given jurisdiction would apply mandatorily or not to the contract.

i) Localised loss

Art 8 of the 2003 draft lays down the rules applicable when loss is localised. It covers the following situations;

[455] Id. 201
[456] Id. 203,

1) The loss, damage or delay in delivery occurred during the maritime transport i.e. the part of the transport which starts at the time of loading of the goods on the vessel and ends during the time of the discharge of the goods from the vessel.
2) The loss, damage or the delay in delivery occurred during the transport period ancillary to maritime transport. i.e. the part of the transport that ends before the time of loading on the vessel or the part of the transport which starts after the time of the discharge of the goods from the vessel, and non-mandatory law applies to the carriers activities during that period.
3) Eventually, if so decided by the working group, the loss, damage or the delay in delivering occurred during the transport period ancillary to the maritime transport and a mandatory international and national law applies according to its terms to the carrier's activities during that period.

In the above cases loss or damage is localised and the legal regime of the draft will apply to 1 & 2. In the case of 3 when it is proven that the loss, damage or delay occurred during carriage other than by sea, an international or national mandatory regime will be applicable. The applicability of these regimes is predicated on the fact that according to their own terms they would have applied to the carrier's activities under the contract and for the relevant period. It must however be one of the non-derogatory conventions, which cannot be modified to the detriment of the cargo concern.

During the 12th session of the working group, it was suggested that the Article should be further refined from the phrase "international and national" to "international or national" to lessen the proliferation of potentially applicable laws under the same contract.[457] Another international convention will only apply when the loss damage or delay occurs exclusively and undoubtedly during the carriage other than by sea.

However, even when another international convention is made applicable by the rules, it does not apply in its entirety. It will only apply to certain issues relating to

[457] A/CN.9/544 para.46

the carrier's liability, limit and the time of suit. In any other respect the draft instrument will apply to the contract. By this provision, the mandatory liability regime applies only in part and the instrument applies in the instances not covered by the mandatory law. This will only serve to bring about unpredictability in the sense that different provisions from different laws will be applicable to the same loss or damage.

The implication of the phrase "according to its own terms applies to the carriers activities" has not yet been discussed, but it poses the question if this does not refer to all the provisions of the international mandatory convention. For example which law will determine the applicable regime when say Rail carriage is part of the carriage, under the CIM?[458] Would the CIM apply even when the carrier has issued no consignment note? By the wordings of the draft, the CIM might not be applicable since Art 1 of the CIM would not have been fulfilled.

This also brings into play the question of the Hypothetical contract. The application of the hypothetical contract as first illustrated by Art 2 of the CMR is still unsettled in its interpretation. Which is why it is surprising that the draft instrument would choose such a provision.

The problems encountered in the interpretation of the clause within the CMR were due to the fact that the provision used to interpret the hypothetical contract between the carrier and the other mode carrier was unclear. Art 2 of the CMR covers what is referred to in road carriage as ro-ro transport or piggy back transport in which one mode is carried on to another mode in what might be termed "mode on mode".

Art 2(1) CMR states that;

"Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of Art 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by an act or

[458] International Carriage of Goods by Rail 1980 (CIM- Appendix B to COTIF)

omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention,, but by the manner in which the liability of the carrier by the other means of transport would have been determined if a contract of carriage of goods had been made by the sender with the carrier by the other means of transport in accordance with the(conditions prescribed by law for the carriage of goods by that other means of transport). If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention"

The three main elements of Art 8 of the draft instrument also apply to this article:

1- The CMR governs the relationship between shipper and the road carrier during the non-road segment of the carriage, extending the scope of the rules to other modes,
2- The CMR abdicates in favour of an applicable regime which would have governed the hypothetical contract if it was entered into between the shipper and the other modal carrier,
3- When it cannot be proved that damage or loss occurred during non-road carriage, or an event that could only have occurred during such non-road carriage, or the other regime cannot be regarded as prescribed by law, the CMR will apply.

The interpretation of the hypothetical contract has been very problematic. The problem is the interpretation that is given to the hypothetical contract between the road carrier and the non-road carrier. In Thermo Engineers Ltd v. Ferry Masters,[459] a case concerning Art 2 (1) of the CMR, Neill J held that conditions prescribe by law are conditions which permit no variations thereby excluding the application of the Hague Rules.[460] The implication of this decision would be that whenever any variation is allowed the law will not apply. Following this decision, the Hague Rules will never apply in Art 2 CMR situations.

[459] [1981] 1 Lloyd's Rep. 200
[460] See Chapter 3 on the treatment of the hypothetical contract

However, in three recent decisions in the Netherlands, the Dutch Courts attempted to interpret this provision. In *The Baltic Ferry,*[461] goods where transported by road under the CMR from Germany to the UK. At Rotterdam, the trailer including the pallet where carried on board the vessel The Baltic Ferry. During unloading in Felixstowe, the trailer upturned due to a sharp rotation by the lift truck. The shipper sued the road carrier under the CMR. The road carrier sought to protect himself by invoking the provisions of The Hague Rules as per Art 2 (1). The sea carriage had been performed under a sea waybill. The Court had to decide 3 issues; if the damage was caused exclusively by sea, the liability regime applicable; (CMR or Hague) and the regime that governs the period of limitation. At first instance, the argument of the shipper that the event was not exclusive to sea carriage was rejected on the grounds that it was a concrete fact that happened. On the issue of the Sea waybill not being a bill of lading or similar document of title, the courts also held that to so confirm would exclude the application of the CMR within short sea journeys in which seaway bills are mostly used. However, the incorporation of the rules into the contract was enough. On the basis of the above findings, The Hague Rules were allowed to determine the limitation period. On appeal, all three positions were overturned, the Court of Appeal considered that the overturning was not an event exclusive to sea carriage, thus the question of the alternative legal regime remained unanswered. On these bases, the CMR was applied. It was however stressed that even if the Hague Rules were held to be applicable, the CMR should still have been used to determine the limitation period.

In a later case *The Gabriele Wehr,*[462] the position of *The Baltic Ferry* was not followed. In that case, goods were transported under the CMR from Sweden to Holland. During the sea segment the goods were shipped on board the Gabriele Wehr under non-negotiable bill of ladings incorporating The Hague Visby Rules. Damage was pinpointed to the sea leg and the carrier was sued under the CMR. The carrier sought to rely on the defence of perils of the sea under The Hague Visby Rules. The courts considered the sea waybill insufficient to trigger the applicability of the Hague-Visby Rules, as the "conditions prescribed by law"

[461] District court of Amsterdam (1990)
[462] (18 November1987) District Court Amsterdam [1990] ETL 251

referred to mandatory law. The incorporation of the rules in the sea waybill was held to be voluntary between the road carrier and the non-road carrier and could have no effect on the shipper. Thus the CMR was made applicable to the case.
We thus see two different interpretations of the Art. 2 CMR. On appeal to the Dutch Supreme Court, two issues had to be decided;

a) The interpretation of the term "conditions prescribed by law", and
b) The interpretation of the hypothetical contract.

It was held that "conditions prescribed by law" should be taken as a reference to an objective legal transport system, and the "hypothetical contract" was in line with the objectives of the convention which was to provide uniformity with regard to the CMR carrier's liability. At the time of the realisation of the CMR, the other transport modes already in place were taken into consideration as they too were considered to be compulsory law. It was then observed that the Hague Rules themselves leave room for escape from the mandatory principle of the Rules; Art 1(C) on deck carriage, Rule V on increasing the carrier's liability, and rule 6 on particular goods under a non-negotiable document, in exchange for the freedom of contract between the parties. This cannot mean that the Hague Rules will never apply to the short sea transport envisaged by the CMR. The opposite of this view will mean that the CMR will govern all the relationship between the shipper and the carrier even in cases in which the damage occurred by sea, which is not reasonable.
Their answer to question one was thus that "conditions prescribed by law" refer in principle to other unimodal regimes. But for their applicability one should keep in mind how the mode of the ro-ro carrier relates to the scope rules envisaged by the convention. It was remarked that the French wordings "disposition imperatives" was in line with the above interpretation in the light of Art 33.4 of the Vienna Convention on the Law of Treaties 1969, which provides that, if a comparison of the two text discloses a difference in meaning which the application of Art 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted. It was further added that one should ignore the possible arrangements to escape the mandatory character of the convention as well as the particularities (e.g. such as the provisions on deck

carriage and the bill of lading) in the contract between the road carrier and the ro-ro carrier.

On the second question, it was held that once the applicable liability regime had been chosen, the next question to be determined would be if the contract between the ro-ro carrier and the road carrier should also apply to the hypothetical contract between the shipper and the ro-ro carrier. It was held that the shipper was not a party to the contract between the road and ro-ro carriers and that contract should not therefore apply to his contract with the ro-ro carrier.

The decision of the Supreme Court was that the Hague Rules were applicable to the damage, and their applicability did not depend on the actual contract between the sea carriers and the road carriers. It was stressed that any particular agreements regarding the issue of the bill of lading could not prevent the applicability of the liability provisions of the Hague Rules applying to the road carrier to safeguard the interest of the shipper and consequently to generate legal security and uniformity of the road carrier.

This solution is quite unique in the area and at odds with the recent French case of *Anna-Oden*[463] in which the Cour De Cassation refused to apply The Hague Rules, which had been incorporated by means of a paramount clause in the contract.

This is to show the uncertainty that exists in the concept of the hypothetical case. It normally leads to enquiries as to the applicable law and the interpretation under different conventions.

Of particular concern here is also the fact that the burden of proof for such localisation would fall on the party seeking the application of another convention, as the draft instrument does not lay down clear rules for the uniform and general application of the burden of proof.[464] The determination of the burden of proof is thus subject to national laws leading to diverse results, such could lead to forum shopping as parties seek out more favourable jurisdictions.

In the case of localised loss or damage, the instrument has failed to provide a predictable law.

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[463] (5 July 1998) Cour de Cassation [1989] ETL 49

[464] Alcàntara, J.M "The New Regime and Multimodal Transport" [2002] LMCLQ 399 at p. 404

ii) Non-Localised loss

Under Art. 8 of the draft, it is clear that when there is no localisation, the damage, loss or delay will be determined by rules of the draft Instrument. Thus in the case of non-localised loss the rules will apply to all contracts. The question here is the feasibility of rules which are drafted for maritime carriage based on The Hague Visby and the Hamburg Rules to govern loss, damage or delay which might have taken place by land or air.

The liability of the carrier is based on Art 14, under which the carrier is liable for loss, damage or delay caused during the carrier's period of responsibility unless he can prove that neither his fault nor the fault of his servants or agents contributed to the loss, damage or delay. A list of exceptions is then provided which is a catalogue of exceptions similar to The Hague Visby Rules art. IV 2(c-q).

-The Limits of Liability for non-localised loss

In the case of limits of liability for unlocalised loss, the burden of proving the place of damage might fall on the carrier. Article 18(2) (which is still in brackets) states that;

["*2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged by sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international or national mandatory provisions that govern the different parts of the transport shall apply]*"[465]

This provision if unchanged will place the onus on the carrier to localise loss, as non-localisation will also lead to a more onerous limit. This provision is quite similar to that of the Netherlands Civil code dealing with multimodal transport.[466]

[465] A/CN.9/544, para 47 and 50, It was suggested that this article be kept in square brackets until art 18(1) on the limits of liability for localised loss had been decided. See also UN Doc. A/CN.9/WGIII/WP.26 p.5

[466] Book 8. Title 2, Chapter 2, Section 43 of the Dutch Civil Code

5.1.3.4 Basis of Liability Provisions

The draft instrument has been described as a complex amalgamation of the provisions of The Hague Visby Rules and the Hamburg Rules with substantial modifications in terms of substance, text and structure.[467] The fact that the draft is based on two rules with different styles of drafting creates confusion. The Hamburg Rules contain a simple provision allocating the burden of proof while the Hague Visby Rules creates a system where the burden is shifted form one party to another together with an elaborate list of exception clauses. The Hamburg Rules when drafted were considered a vast improvement on the Hague Visby Rules, making liability within carriage by sea similar to liability provisions found in the other unimodal transport conventions.[468] The effect of the combination of these two conventions in one instrument is an alteration of the original substance and text; thus the certainty associated with the different provisions within the different rules will be lost.[469]

Art. 5 lay's down the main obligations of the carrier under the contract as one in which he promises to carry goods to their destination, setting out the fundamental obligation of seaworthiness and cargo worthiness.

Art 6 contains the liability provision of the carrier; the carrier is liable for loss or damage unless he proves that no fault of his or that of any persons under him is responsible or caused the loss.

Art 14 sets down the points concerning the burden of proof. This consists of 4 main elements;

-The claimant needs to establish a prima facie case by showing that loss or damage was caused while the goods were in the charge of the carrier

-The carrier then has a chance at rebutting the presumption and showing that there was no fault, or that the loss or damage is covered by an exception clause

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[467] « Draft instrument on transport Law: Comments submitted by the UNCTAD Secretariat. Http//www.comitemaritime.org/draft/draft.html, see also A/CN.9/WG.III/W.21/add.1.

[468] Clarke, M "A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on your Doorstep" (2003) 9 The Journal of International Maritime Law, 34

[469] The UNCTAD comment on the draft, UNCTAD/SDTE/ TLB/4, 13th March 2002

-The cargo concern may then adduce evidence to show that the excepted peril was not the cause of the loss or damage, and

-In the cause of concurrent causes the liability must be apportioned.

The first three steps are similar to the steps in the HVR the fourth one on concurring causes was only included in the Hamburg Rules.

The instrument also chooses to expressly mention the exception clauses in a more intensive manner than the two conventions it derives from.[470] It would have been easier if the instrument had used the shorter version as found in the Hamburg Rules, thereby permitting the courts to interpret and evaluate evidence based on the substantive provisions of the instrument.

The burden of proof is retained in the carrier, and the claimant has the possibility of rebuttals.[471]

A problem under Art 14 (4) might be apportioning concurrent causes between the carrier and any other person liable. The provision leaves the determination of this on the courts or the arbitrator with the result that the determination will differ according to the jurisdiction. Also in cases where it is difficult to ascertain, the provision allows apportionment at 50/50. This will lead obviously to a disincentive for the carrier to adduce evidence to aid this, as it might be advantageous to him to be liable only for 50% of the damage or loss. This lack of clarity covering the allocation of liability for concurrent causes has implications for the burden of proof. The cargo concern might bear the burden of proof in such cases. This is a departure from the current practice in carriage of goods by sea and reflects an unacceptable shift from established principles of risk allocation as between cargo and carriers.

In addition, in most international conventions, the liability provisions are mandatory and cannot be derogated from. The draft allows opting outs, which reduces the carrier's liability. Art 9, which allows the carrier to act as agent of the shipper in certain instances reduces the carrier's liability. Additionally Art 7 of the draft (Old Art 4.1.2) also allows for a modification of the period of responsibility

[470] The exceptions of error in navigation and fire are still unclear under the instrument. While there is pressure to delete the error in navigation provision as under the Hamburg Rules, the fire provision will probably survive.

[471] Art 14 (3) puts the burden of proof for unseaworthiness on the cargo claimant.

to tackle-to-tackle, thereby also restricting the carriers liability.[472] Art 9 on its part allows the carrier to act as an agent for the shipper in contracting parts of the contract, which it does not carry.

These provisions are not usually found in transport conventions that normally do not allow parties to derogate from its provisions. The carrier under the draft can contract out of functions such as stowage, loading and discharge by the stipulation that these activities are carried out by or on behalf of the shipper. This is allowed under Art 11 of the Draft. The result is that the carrier becomes the agent of the shipper who may then be liable for loss or damage arising out of such activities.

The above provisions greatly lessen the contractual responsibility under the instrument as the carrier by opting out of certain clauses becomes responsible only for parts of the contracts and only for certain functions of the carrier.

By allowing the carrier to depart from the main tenets of multimodal transport such as responsibility throughout carriage, opting out of door-to-door carriage in favour of tackle-to tackle carriage and lessening its responsibility for the goods, it is doubtful if this instrument was meant to cover multimodal transport.

The question here is the effect of the above three provisions on Art 84 of the instrument. This provision states that any contractual provision, which directly or indirectly, excludes or reduces liability of the carrier, performing shipper, the controlling party or the consignee is void. It is submitted here that those three provisions if kept will derogate Art 84. It is hoped that it will eventually be modified or better still deleted.

Additionally in the case of multimodal transport the idea of one carrier which is the mainstay of this mode is compromised by the opting outs bringing into play the concept of the multiple carriers liability for the contract of carriage.

5.1.3.5 The Limits of Liability

One of the main tenets of any liability regime is the traditional right to limit liability given to the carrier. Art 18 (1) & (3), lays down the provisions for

[472] A/CN.9/510, Para 40,

limitation of liability of the carrier. This is based in part on Art 4 (5) of The Hague Visby Rules and Art 6.1 (a) of the Hamburg Rules.[473]

The limit for the Hague Rules stands at 2 SDR per kilo as opposed to 8.33 SDR per kilo under the CMR and 17 SDR per kilo under the Montreal Convention. The proposed limits in the instruments will thus fall well below that found in land carriage. There seems to be the argument that in this case these limits should not apply to the land segment of a Multimodal transport contract.[474]

However the final amounts have not yet been determined. Another problem likely to be faced by the Instrument as expressed above is the fact that each of the unimodal conventions has different limits. The question then is the feasibility of applying a maritime convention to non-maritime carriage. A cogent example will be the Instruments 'perils of the sea' defence to a truck. Another problem would be the basis of liability used in the different conventions, the draft uses due diligence to make the ship seaworthy, the CMR uses utmost diligence, while the Montreal convention holds the carrier to a strict duty.[475] The draft might therefore apply a different duty of care to non-maritime transport. However, the network system might not apply here because the article 8 limits the importation of other conventions provisions to issues of liability, limits and time of suit.[476]

The wordings of the Article are very peculiar and might lead to diverse interpretations within different jurisdictions, i.e. what will be the meaning of "liability for loss or damage to or in "connection with goods", the words "in connection to" might be taken to mean damage other than for physical loss or damage such as for wrongful delivery or misrepresentation. This might impede the acceptability of this provision as it involves documentary liability, which is different from physical liability for the loss or damage.

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[473] Huybrechts, M. "Limitation of liability and of Actions" [2002] LMCLQ 377, a contrary view is expressed by Tetley W (Prof) who believes that the limits proposed might be inappropriate, Tetley, W. " Reform of Carriage of Goods- the UNCITRAL draft and the Senate COGSA '99'" (2003) 28 Tulane Maritime Law Journal 10

[474] Clarke M, "Conflict of Conventions:The UNCITRAL/CMI draft transport Instument on your doorstep" (2003) JIML 39

[475] Preparation of the Draft Instrument on the Carriage of goods [by sea] –Genneral Remarks on the sphere of Application of the Draft Instrument, U. N. comm'n on Int'l Trade Law, 11th Sess., para 122, U.N. Doc, A/CN.9)WGIII/WP.29) (2003). Available at http:/uncitral.org/English/workinggroups/wg_3/WP-29-e.pdf.

[476] Article 8 (1) (b) (ii)

Normally, limits in transportation law have been known to cause problems, in the field of multimodal transport the problems are even more. The recurring question here would be the limits for unlocalised loss, would the limits set for maritime transport also be used for land based damage or loss? The inappropriateness of applying maritime limits to land based damage is responsible for the proposal in Art 18 (2) that the limit for liability for unlocalised loss or damage should be the highest possible limit of liability in the international or national mandatory provision that govern the different parts of the transport. This is a clear advantage for cargo concerns, while it is a disadvantage for the carrier who will find he pays more than he hoped for. It is doubtful if this would be acceptable to carriers. At this point it must be pointed out that one of the impediments to accepting the multimodal transport convention was the fact that its limits of liability was thought to be too high.[477]

5.1.3.6 The performing Party

Modern transportation of goods no longer requires the carrier to perform during all aspects of the carriage, thus he subcontracts different aspects of the carriage to specialists; stevedores, other carriers, loader etc.[478] Taking note of this trend, the instrument has provisions for such third parties.

The preparatory text of the draft first introduced the concept of the "performing carrier": Criticisms that it was too narrow led to a change to "performing party", which was thought to include all parties involved in the carriage.[479]

Art 1 (e) defines the performing carrier as,

"... a person other than the carrier that physically performs or undertakes to physically perform any of the carrier's responsibilities under a contract of carriage including the carriage, handling, custody and storage of the goods, to the extent that that person acts, either directly or indirectly, at the carriers request or under the carrier's supervision or control. The term 'performing party' does not

[477] A.Kiantou-Pampouki, " The General Report in the XVth International Congress of Comparative Law, Bristol 1998" published in Multimodal Transport: Carrier Liability and Issues Related to the Bill of Lading (E.E.B., 2000) Para 1.5.1.1

[478] See Chapter 2. on The Parties

[479] Sturley, M, "Scope of Coverage under the UNCITRAL Draft Instrument" (2004) 10 The Journal of International Maritime Law 148

include ant person who is retained by the shipper or consignee, or is an employee, agent, contractor, or sub-contractor of a person (other than the carrier) who is retained by a shipper or consignee."[480]

The advantage of such a wide definition was said to lie in the fact that a uniform regime would govern all those involved in the carriage.[481] Yet in certain respects, this definition cannot be considered to be the "catch all" provision meant to cover all those who are involved in the carriage. The definition covers those involved in carriage, handling, custody, or storage but have not been retained by the shipper or the consignee. The draft has no provision for the liability of those performing other duties under the contract of carriage. These persons are therefore not subject to the liability rules of the instrument in any action concerning the goods, but are entitled to benefit from the defences and limitations of liability available to the carrier under the instrument. An example given in the explanatory note of the instrument[482] sited the security firm in charge of a container yard who is not covered. Cargo concern will then have different remedies under different arrangements depending on who was responsible for the loss or damage.[483]
Additionally, intermediate sub-contracting carriers are also excluded, limiting the concept of "performing party" to those who present front line services to the carrier, but not those that carry out or procure parts of the contractual obligations. Thus a sub-contracting carrier who also sub-contracts his obligations under the contract will not be considered to be a performing party. His status will depend on whether the sub-contracted mode was international or if the regime was incorporated into the contract.

Yet, his sub-contractors would be considered a "performing party" under the instrument who can be sued by cargo concerns. The cargo concern may however, not easily ascertain who such sub-sub-contractors are or what their liability is for the loss or damage to the goods. However, such a sub-sub-contractor when sued

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[480] A/CN.9/544 para 41
[481] The FIATA were however concerned that this provision is to wide and would include heir members who wanted to act only as agents. See Sturley M, "Scope of Coverage under the UNCITRAL draft Instrument" (2004) 10 The Journal of International Maritime Law p.150
[482] A/CN.9/WG.III/WP 21.
[483] UNCTAD/SDTE/TLB4 , Commentary by the UNCTAD Secretariat on the Draft Instrument on Transport Law

will be able to claim protective clauses in his contract with the sub-contractor who is not a "performing party" and therefore has no obligations towards the cargo concern.
This in addition to the opting out provisions of Art 7 and Art 9 on mixed contracts and contracting on the tackle-to-tackle basis respectively ensures that the identification of the "performing party" will be difficult at times and at other times impossible to determine.

The liability of the performing carrier must be separate from that of the carrier, although naturally only the carrier should be liable even for the parts of the contract performed by the performing carrier. However, once loss or damage is localised, the liability of the performing carrier comes into play as cargo concern can sue him for the loss or damage; thus his liability needs to be addressed.
Under Art 15 of the draft, the performing party may be liable in the same way as the carrier. It states;

"... A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage"

During the negotiations, doubts were expressed as to the appropriateness of such a provision including all performing parties. It was thus suggested that this liability should be limited to the maritime performing carrier defined in Art 1 (f) as one who performs the carrier's responsibilities during the carriage by sea.[484] The non-maritime performing carrier should be excluded from the liability provisions of the instrument. It was argued that it would be unfair to base the performing parties' liability on the draft when he might not even know that he is carrying as part of a multimodal transport contract. This fact is exacerbated when the performing carrier in a non-sea carrier.

[484] A/CN.9/544 para 31

To address this problem, the working group excluded the non-maritime performing carrier. Art 15 of the draft therefore applies only to the maritime performing carrier. If damage occurs under such a contract, the shipper can raise a claim against the contracting carrier on the basis of the instrument. However, if the loss is localised, he can also bring an action against the performing party. This action will be on the basis of another international or national mandatory law. This again highlights the problem of the lack of uniformity and predictability as to the applicable regime.

Another issue that remains to be resolved within the rights of third parties is the Himalayan Clause; its inclusion within this instrument shows the determination of the drafters to ensure uniform treatment of all parties in a multimodal transport carriage.[485]

5.1.3.7 Conflict of Conventions.

The network system of liability adopted by the instrument was meant to avoid any conflicts of conventions within this carriage. However, as seen from the provisions on the liability regime and the possibility of opting outs it is obvious that the problem of conflict with other conventions continues.

In addition to this is the fact that some of the international conventions have multimodal provisions, which might also lead to a conflict situation in cases where both rules will apply. For instance, Art 2(1) of the CMR states that the CMR will apply to carriage involving other modes of transport if the truck carrying the goods are carried on the other mode of transport unloaded. From the deliberations of the working groups it was clear that the Role of the CMR as Europe's leading international convention influenced the choice of the network system.[486] This was based in part on the hope that it will avoid conflict with other conventions. The stance that the contract covered by the instrument being door-to-door will not

[485] Sturley M, "Scope of Coverage under the UNCITRAL draft Instrument" (2004) 10 The Journal of International Maritime Law p 152

[486] Ckarke, M "A Conflict of Conventions: The UNCITRAL/CMI draft transport instrument on your doorstep" (2003) 9 The Journal of International Maritime Law 33, see also, Sturley, M "Scope of Coverage under UNCITRAL DRAFT INSTUMENT" (2004) 10 The Journal of International Maritime Law 147

trigger the applicability of the CMR has been expressed within academia.[487] The decision in *Quantum Ltd. v Plain Trucking Ltd,*[488] rejected this stance, and held that where carriage takes place by various modes of transport, the land leg of that carriage will be subject to the CMR, reading art 1 (1) of the CMR as making the convention applicable to the road carriage from the beginning of the road leg.[489]
In that case the contract was for the carriage of a consignment of hard disc from Singapore to Dublin. The waybill on its face stated that the goods might be carried by other means including road unless specifically excluded by the carrier. The waybill then specified that the goods would be carried by Air France from Singapore to Charles De Gaulle Airport and by road from Charles de Gaulle Airport to Dublin airport.

From Charles de Gaulle, the goods were loaded on a trailer operated by Air France's sub-contractors to Ireland. The trailer was shipped across the channel to England, unfortunately during the road carriage to Holyhead; the goods were lost in a 'hi-jacking'.
Air France admitted liability for the loss, but argued that the carriage was subject to their terms and condition and not on the Warsaw Convention, which had ended at Charles de Gaulle airport.
The claimants on their part contended that the contract was for the carriage of goods by air and by road and that the CMR therefore governed the road leg of the carriage. The Commercial Court held that the CMR did not apply to the road part of the journey. Stating that the CMR could not apply to a part of a contract, it had to apply to the whole carriage.

On appeal, the Court concluded that the CMR applies to a road part of a mixed carriage or a multimodal contract even though a consignment note was not issued. The court of Appeal therefore decided that the CMR applied to the road leg of the transport.

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[487] Clarke, M A Conflict of Conventions: The UNCITRAL/CMI draft transport instrument on your doorstep" (2003) 9 The Journal of International Maritime Law 33,
[488] [2001] 2 Lloyd's Rep. 133
[489] See also Chap 1

This implies that the current provision of the instrument as it is, will lead to conflict with the CMR in that both will apply to the same set of loss or damage.

The Swedish Delegation in this regard proposed that to avoid conflict, the instrument should only apply to instances in which the goods are taken off the trailer for carriage.[490]

Likewise Art 18(4) of the Montreal Convention on the carriage of goods by Air also stipulates that if carriage is by air and another mode under an air waybill covered by the convention, the whole carriage will be subject to the convention. In both cases, the draft instrument will also be applicable thereby causing a conflict situation.

To address the issues of conflict, Art 83 and 84 of the Instrument states that, contracting States may grant priority to another International Convention already in force at the time the UNCITRAL Convention enters into force, provided the instrument applies mandatorily to the contract of carriage of goods by a mode of transport other than by sea. This article however is still within bracket and might be modified.

The International Road Transport Union [491] expressed the view that the draft as it was conflicted with the CMR. Stating that Arts 27, 89 and 90 led to conflict with the CMR, on the grounds that the combination of the 3 articles exposed contracting states party to the CMR to violations of art.5 of the convention and the provisions of Art 41 (1) of the Vienna Convention on the interpretation of treaties. Holding that the provisions of the draft will break the unity of the land transport law, as two regimes will potentially apply to land transport, they called on the drafters to limit their draft to door-to-door. Or delete Art 90.

The UNCITRAL draft instrument is intended to provide a modern regime to replace the two main liability regimes in the area of carriage of goods by sea.

Overall, it appears that most of the criticisms on the draft as an appropriate liability regime for multimodal transport have been greatly based on the fact that it

[490] A/CN.9/WG III/WP.26 p.2-3

[491] Document presented by the IRTU, to UNCITRAL on the draft Instrument "Infringement of the contract for the International Carriage of goods by Road (CMR)

is based solely on a maritime instrument. Determined to reform the Maritime conventions and bring them in line with commercial realities, the instrument at a later date included multimodal transport. This fact accounts for one of the main criticisms of the draft; the fact that it covers only what is termed "wet multimodal transport" or "transmaritime multimodal."[492] This stance has been variously criticised, especially within academia.[493]

Tetley has questioned the feasibility of a convention that attempts to incorporate so many different and independent components under one regime, and advocates what he calls a two-track approach; The fast track under which the CMI or UNCITRAL will modify the maritime conventions and the slow track which will allow the more detailed work on the draft to deal with other relevant issues such as door-to-door carriage.[494]

Rosaeg, also points out that this liability regime should not be extended to circumstances for which it was not intended, such as for road carriage and periods of storage, as maritime rules and the reasons for it exception and limits do not necessarily apply during this stages.[495]

UNCTAD, on their part has also criticised this draft, as over-extending its remit which it should limit to door-to-door. It warns that this draft as a result of extending to non-sea carriage is in conflict with other unimodal conventions.[496]

UNECE also raises it voice to call for this draft to limit itself to maritime carriage only. It states that the desirability of a multimodal convention cannot be denied but a maritime convention is not the right instrument.[497] The UNECE believes that an acceptable multimodal convention would be better achieved by consultations among all stakeholders interested in multimodal transport especially those outside of maritime transport.

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[492] P. Delebecque, " The UNCITRAL Draft Instrument on the Carriage of Goods by Sea" [2003] CMI Yearbook 208 at p.227

[493] Beare, " Report of the third meeting of the International Sub-committee on issues of Transport Law" New York 7-8 July 2000, CMI Yearbook 2000 234

[494] Tetley , Reform of Carriage of goods- The UNCITRAL Draft and Senate COGSA, (2003) 28 Tul.Mar. L.J, 1-144

[495] Rosaeg, E, « The Applicability of Conventions for the Carriage of Goods and for Multimodal Transport » [2002] LMCLQ 236

[496] Commentary by the UNCTAD Secretariat on the Draft Instrument on Transport Law, UNCTAD/SDTE/TLB4- 13th March 2004, UNCITRAL Document A/CN.9/WG. III/ WP21, Annex

[497] "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on transport law" prepared by the UNECE Secretariat. www.comoitemaritime/draft/draft.html., A/CN.9/WG III/W.21 add1

The extension of a maritime regime to land based carriages may not be a prudent move in the light of the criticisms levied against maritime regime, and the fact that this regime is visibly more different from the other unimodal regimes can be taken as an indication that a sea regime might not provide a strong and acceptable basis for multimodal transport.[498]

It is asserted here that the draft instrument in its present format is inappropriate in multimodal transport; it leaves many key questions unanswered. The submission here is that the draft instrument in its present setting will not change in any significant manner the unpredictability and uncertainties in the liability regime in multimodal transport. Unfortunately, as seen above, many of the relevant provisions are rather complex and contain ambiguous wordings, which leave much scope for different interpretations within different jurisdictions. This will greatly affect the appeal of this instrument as an international uniform liability regime in the field of multimodal transport.

Of particular concern in MT is the lack of clarity in a number of key issues pertinent in MT, notably the applicable liability regime, the burden of proof, allocation of liability especially for concurrent causes, the party liable and the limits of liability under the instrument.

While it is hoped that an international regime would be enacted for multimodal transport, it is clear that the UNCITRAL draft instrument does not provide a solution to the MT problems.

The main reasons for this conclusion can be summarised as follows:

1) The applicable law

The adoption of the network system of liability chosen by this instrument leads to uncertainty in ascertaining the applicable law. The working of the network system in multimodal transport has brought about a lot of uncertainty, and the drafts choice of the network system means that nothing will change; the same problems

[498] Tetley, on the contrary, advocates that the Hague Visby Rules should be used as the basis for multimodal transport as 75% of trade is performed under these rules. With the Hamburg Rules coming in as second choice for the basis of multimodal transport, Tetley, W. Reform of Carriage of goods- The UNCITRAL Draft and Senate COGSA, (2003) 28 Tul.Mar. L.J,

will be faced. The calls now are centred on pulling efforts to bring about uniform liability within multimodal transport.[499]

The draft does not seem to offer any clear liability regime as compared to what already obtains in multimodal transport. The complexity of the regime can be said to add to the complexity of this regime without providing any added benefits to the parties. The draft does not provide a uniform liability regime throughout all stages of the transport, instead it abdicated in favour of mandatory international conventions in cases of unlocalised loss and imposes a maritime regime to the whole transport when loss cannot be localised: Thereby extending exclusively maritime provisions to land based carriage.

2) The basis of liability

Although the basis of liability is based on the principle of presumed fault, it is made up of a combination of both The Hague Visby and the Hamburg Rules with extensive modifications. This means that the advantages gained under this rules from judicial interpretation and certainty are lost. Of particular concern are the exceptions to liability laid down in Art 14 (2) which have added two new exceptions in addition to the exceptions found under Art IV I – (q), Exceptions which go to erode the liability of the carrier. Art 14 (4) on concurrent causes is also unclear; the provision of 50/50 liability between the shipper and the carrier for concurrent causes obviously shifts the burden of proof on to the cargo concern. This is a clear departure from the current system of liability within maritime carriage and reflects a shift from the established principle of risk allocation between cargo and carrier. It is not yet known how this provision will interact with Art 14 1-3 on the burden of proof. This issue will have to be further debated to establish if loss due to concurrent loss should follow the maritime regimes or change to a new approach.

The uncertainty will be exacerbated in the case of multimodal transport.

3) The drafting style

The complexity and style of drafting is one of the issues that have been raised and criticised about the instrument. The provision on exceptions has been criticised as

[499] Haak, " The Harmonization of intermodal liability arrangements" 5th IVR Colloquium-Vienna -27 and 28th January 2005

marking a return to the old style of drafting, in an era in which increasingly the style of drafting is less detailed and mostly entails general provisions. This was the stance adopted for the Hamburg Rules and in the recent COTIF and Montreal Conventions; their drafting style is less detailed than their predecessors.[500]

Despite the criticisms of the draft as an appropriate liability instrument for multimodal transport, it still represents at present the most realistic hope for a regime that will cover multimodal transport. Hope is placed on the work currently being done within the working groups; with the continuous consultations and deliberations there is hope that the different provisions will be adjusted and amended to adequately deal with the current problems. If however, this new attempt fails again, the ball will pass on to national legislators who will draft new national laws to cover multimodal transport. This will lead to more proliferation of laws and will render the harmonisation process more difficult.

Another option however, may be to start again with a clean slate this time inviting all stakeholders in multimodal transport.

In response to Tetley's comment;

"...will anyone explain when this convention will apply or will not apply?"[501]

I can answer with certainty when it will not apply, when a sea leg is not included under the contract. This can be said to be the main criticism of the instrument in governing multimodal transport; its own limits.[502] The fact that it limits itself to only "wet" multimodal transport implies that another law has to be found for "complete" multimodal transport including "wet" and "dry" multimodal transport. This will further increase the liability regimes and create further uncertainty and unpredictability in multimodal transport.

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[500] Carriage of Goods by Air: A Guide to the International LEGAL Framework Report by the UNCTAD Secretariat UNCTAD/SDTE/TLB/2006/1

[501] Tetley, W " Reform of Carriage of Goods- The UNCITRAL Draft and the Senate COGSA "99" (2003) 28 Tulane Maritime Law Journal, 10

[502] Tetley W " ibid

In conclusion, it has been shown that the instrument is laudable as it seeks to modernise the liability regime in sea carriage but it will not specifically solve the current problems of multimodal transport.

5.1.4 The UNECE initiative[503]

The United Nations Economic Commission for Europe's (UNECE) Inland committee and party for combined transport convened two meetings to consider the possibilities for the reconciliation and harmonisation of civil liabilities in multimodal transport; here the views of experts and relevant International Organisations were examined.[504] The work, which is presented as the ISIC draft was presented to the Commission in the later parts of 2005 and is later examined.

This Commission also sponsored a seminar, which brought together specialists in the field of multimodal transport to discuss the issue of the problem of "intermodal transportation and carrier liability."[505] The main aim of the work of this group was to study the problems associated with multimodal transport liability and propose possible solutions for the future. Although the work of this group was mostly to affect Europe, its problems were shown to be truly international. It was strongly re-iterated that the absence of uniform liability in multimodal transport led to uncertainty and increased the cost of handling claims.

5.1.4.1 The UNECE ISIC Draft [506]

The first draft of a non-mandatory European alternative for the regulation of multimodal transport was submitted to the Economic Commission for Europe by a panel of experts in 2006.[507] This draft is intended to be the basis of further deliberations and discussions to find a satisfactory solution for the current multimodal transport problems.

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[503] The UNECE started its work on multimodal transport as far back as the 1960's. It was responsible for The Rome Draft of 1970, and contributed significantly in the TCM drafts

[504] See Trans/WP.24/2000/3 held on the 12-13th of July 1999 and the 24-25th of January 2000

[505] ECE/TRANS/136 Com (97) 243.

[506] Integrated Services in the intermodal chain (ISIC)

[507] Prof. M.A.Clarke (S. Johns College-Cambridge) Prof. R Herber (University of Hamburg), Dr R. Lorenzon (Institute of Maritime Law Southampton), Prof Ramberg (University of Stockholm)

In cognisant of the importance of multimodal transport globally and the impact the lack of predictable rules was having in Europe, the Economic Commission has prioritised 'intermodal' transport and commissioned different working groups to deal with the different aspects.[508] The overall aim of the commission in this area is to improve the quality, efficiency and transparency of intermodal transport chains.

The United Nations Economic Council for Europe which is responsible for the CMR has since 2000 been considering the issue of an appropriate civil liability regime for multimodal transport operations.[509] Following two working sessions with the industry on the subject, the UNECE mandated a working party on Intermodal transport and logistics to consider the establishment of a civil liability regime applicable to European intermodal transport covering, road, rail, inland waterways and short sea shipping. Additionally, it also had the duty to monitor the field of multimodal transport and propose solutions at the Pan-European level.

On deliberations with the relevant stakeholders, among who were road carriers, rail carriers, multimodal transport operators and shippers, the consensus was reached that the existing liability regime was in need of urgent harmonisation to provide a reliable, predictable, and cost effective civil liability system, especially in the light of the recent proliferation among national legislations of multimodal transport laws.
It was thus felt that if a global mandatory regime was not immediately feasible; a regional approach should be taken to aim at a solution in due course.

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[508] The directorate of Energy and Transport (DG TREN) of the European Commission launched a study for the implementation of an action plan "The Freight Integrator Plan". This plan is aimed at improving the quality, efficiency and transparency of the [intermodal] transport chain. The project, which is called integrated services for Intermodal chain, therefore seeks to provide the Commission with the necessary information to successfully implement an action plan for multimodal transport. The project has a road map for this action, which consists of different relevant tasks; of which improving intermodal liability and documentation is one of seven.

[509] "Reconciliation and Harmonisation of Civil Liability Regimes in Intermodal transport, Note by the Secretariat" Joint ECMT/UNECE Working Party /Group on Intermodal Logistics, forty sixth session, Paris, 4th Oct 2006, ECE/Trans/WP24/2006/5

Taking into considerations the various developments internationally to achieve a solution on multimodal transport and the urgent need of transport users and providers, it was thought prudent to focus on developing a civil liability regime for multimodal transport based on land based regimes including short sea shipping, one which will take into consideration the objectives of European transport policy.

In this light, the UNECE Working Party reviewed the work of the UNCITRAL draft document for the carriage of goods [wholly or partly] [by sea], and concluded that the draft instrument would only establish

"Yet another layer of international Maritime based transport law"

That did not adequately address the concerns of the European transport operators and their clients and would lead to a conflict with existing land transport conventions in Europe.

Therefore, during the 30th session of the Commission of the UNECE, the view was expressed that the first draft of a non-mandatory European alternative for the regulating of multimodal transport should be prepared. The purpose of the draft would be to provide a;

"Simple, transparent, uniform and strict liability framework placing liability on the multimodal transport operator."[510]

In this section we will examine the provisions of the draft to assess its impact on the multimodal transport liability problem. In this light only provisions dealing with the Multimodal liability will be examined.

5.1.4.2 The ISIC Non-Mandatory Draft of Uniform Liability Rules for Intermodal Transport[511]

Unlike the UNCITRAL draft convention which limits its multimodalism to multimodal transport with a sea leg, and the provisions in the different unimodal transport conventions which limit multimodal transport to their

[510] Integrated Services in the Intermodal Chain (ISIC) Final Report Task B; Intermodal Liability and Documentation. European Commission- DG TREN, TREN/04/MD/S07.38573, Southampton, 28th October 2005.

[511] Integrated Services in the Intermodal Chain (ISIC) Final Report Task B; Intermodal Liability and Documentation. European Commission- DG TREN, TREN/04/MD/S07.38573, Southampton, 28th October 2005.

respective modes, this draft aims at covering total multimodal transport regardless of the combination of modes chosen.[512]

In answer to the myriad of problems found in multimodal transport and in the light of all the failed and failing solutions, the draft proposes a strict liability regime for the multimodal transport within a non-mandatory instrument.[513]

1) **The Liability of the MTO**

The essence of the strict liability is found in Part 3 "Liability of the Transport Integrator"[514] Art 8 of the draft and it states that,

> *"1 The transport integrator shall be liable for the total or partial loss of the goods or damage to the goods occurring between the time he takes over the goods and the time of delivery, as well as for any delay in delivery.*
>
> *2 Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon by the parties to the contract of transport, or in the absence of such agreement, within a reasonable time having regard to the circumstances of the case.*
>
> *3 If the goods have not been delivered within 90 days following the date of delivery determined according to paragraph 2, the claimants may treat the goods as lost*
>
> *4 The transport integrator shall not be liable for any total or partial loss of the goods, or damage to the goods, or delay in delivery of the goods to the extent that it was caused by circumstances beyond the control of the transport integrator."*

The first point of note is the fact that a draft on multimodal transport departs totally from the network system of liability embracing total uniformity of law. The [integrator] MTO is held strictly liable with his only defence being that found under Art 8.4 *"circumstances beyond the control of the transport integrator"*.

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[512] Although the original remit of this group was to cover all modes of transport including short sea carriage but excluding sea carriage, the draft that was produced was inclusive of all possible liability regimes

[513] See chapter 6 for a discussion of the concept of strict liability within multimodal transport.

[514] The term 'integrator' is used in place of the multimodal transport operator to provide constitency between the draft and the title of the initiative which is ISIC

This standard is not new in the transport field in the sense that it resembles the strict liability of the common carrier and it appears to be stricter than the liability of utmost care found within the CMR.
Practically, this standard can be found under every transport regime that exonerates the carrier for acts beyond his control. A typical example will be the defences of inherent vice of the goods and acts of the consignee; acts over which the carrier has no control.
Of particular importance in this case is the fact that the catalogue of exceptions found in the unimodal conventions has been replaced with such a simple standard, which will be simple to use and understand.

This draft hereby lays down a uniform liability regime, which is certain and predictable, applicable irrespective of the geographical location, of the loss or damage, the modes used or even the carriers. This draft is therefore free from the criticisms which have plagued the network system of liability, under which different liability regimes become applicable when loss or damage is localised, or the criticism of the UNCITRAL draft that in addition to the applicability of different laws, clauses meant for maritime transport are superimposed on land based transport in case of unlocalised loss or damage. This is avoided in this draft, which does not originate from one particular mode of transport but the product of consultations between the different stakeholders interested in transportation. This is likely to provide a balance draft in which the different interests of the different groups are addressed.
The delay in suit experienced from the network system in which time and money is spent in adducing evidence to localise loss or plead numerous exceptions is avoided. This would also reduce the legal burden of establishing the relevant regime, thereby also reducing the need to adduce factual evidence to clarify the party liable.

The question that has to be answered is the acceptability of this system of liability within the carrying fraternity. It is submitted here that there will be some initial

resistance as they come to terms with this draft, but the simplicity of the draft will eventually prevail.[515]

2) **The Limitation**

One of the criticisms that run through most of the conventions is the low limit of liability. Some of these limits were established in the 1920's and the 1930's under considerably different conditions from those existing today. Increasingly, there have been different calls for an increase in these limits within the different modes notably within the carriage of goods by air.

Reflecting this trend the draft chooses the highest limit applicable in any transport convention, 17 SDR per kilogramme of gross weight. This choice provides an adequate monetary limit whenever loss or damage occurs during multimodal transport. While there is no change when the carriage concerns air and rail carriage as this figure represents the figure within their respective regimes, there is a great change in the case of carriage by sea from 2 SDR and in road carriage from 8.33 SDR to 17 SDR respectively.

Such a limit should ensure a fall in litigation especially in cases in which the parties seek to break the limits by proving wilful misconduct or gross negligence in a quest to gain unlimited liability.

The draft also allows the parties to agree on a higher limit than provided in the draft, thereby effectively allowing for freedom of contract.

Although the limits are unbreakable, this does not present a problem to the parties as they are allowed to opt-out of the provisions.

3) **A Non-Mandatory Regime**

On the whole, a mandatory regime would be more effective as it ensures that the same law applies to all similar cases.

The choice of a non-mandatory regime lies in the fact that it will allow a certain freedom of contract. The parties would be free to opt out of the whole convention. If they fail to opt out the whole convention will be applicable.[516] By opting for

[515] See Chapter 6

[516] Similar to the provisions of the 1980 United Nations Convention on the International Sale of Goods.

such a non-mandatory instrument, the draft endorses the concept of model laws, the advantage of which lies in the fact that these laws apply only when the parties agree to make it applicable to their contract, so it is hardly resisted.
This is obviously an incentive, as the opting out does not prevent parties to incorporate the provisions into their contract and thereby gain through contractual means the benefits of the draft.
A non-mandatory instrument would not conflicts with the other international conventions, which have established their individual rules for liability, thus it will be more acceptable to the transport industry. Such "soft law" however, lacks the kind of legal status needed for true uniformity.

4) Conflict of Conventions

Of prime importance is the potential of substantial conflict with other international unimodal transport conventions. The draft seeks to provide a uniform liability regime applicable throughout carriage irrespective of localisation. The draft does not allow the parties to invoke the liability provisions of any other transport convention; neither does it abdicate in favour of another as under TheUNCITRAL Draft. The question here is if this will not lead to a conflict of conventions in certain instances in which the draft and another unimodal convention might be applicable.

By the provisions of The Hague Visby rules, this will not cause a problem as the rules is triggered by the issue of a bill of lading or similar transport document evidencing a contract for the carriage of goods by sea. In the case of the CMR, it is not so straightforward. We have seen in the different jurisdictions that the provision of Art 1 of the CMR is interpreted differently. While in Germany, such a multimodal transport contract will not be considered to be a CMR contract as it fails to be one for the exclusive carriage by road, in England the Quantum case has finally settled the law on that point, holding that the CMR applies to a part of a multimodal transport contract.[517]

[517] Quantum Corp Ltd v. Plane Trucking Ltd [2001] 2 Lloyd's Rep.133, reversed [2002] EWCA Civ 350

Under the CIM a conflict situation might occur as it extends its scope of application to lines complementary to rail carriage and included in the list. In this case the solution might be to ensure that multimodal lines are not included in the list.
In the event that loss or damage occurs during carriage by air, it is unlikely that any conflict will take place.

Art 38.1 of the Warsaw Convention states that the convention will apply to the air leg of a multimodal transport contract provided the contract falls within the ambit of Art 1.1 which limits the convention to carriage of good by air. Since this contract is not a contract for the carriage of goods by air this convention will not apply to it.

5) **Parties Liable**

The draft seeks to avoid the problem of whom to sue by ensuring that only the MTO is liable. In Art 1 in which the different parties are defined, the draft defines the transport 'intergrator'1 (f), the consignee, 1(C), and the consignor 1(b) as the parties that fall within the ambit of the draft. The draft does not define the performing party inspite of the acknowledgment that in multimodal transport, the 'integrator' can contract the whole carriage to other carriers.
This exclusion might be to ensure that it is clear who the liable party is by avoiding the ambiguity of the exact status of the performing carrier. In this sense the draft is made simple and any other action falls outside its parameters.
The question here is the practicality of this omission. It is clear that the claimants in some instances would sue the "performing carrier". When this happens, another law will be applicable to the localised loss or damage.
This omission also brings into focus the concept of the Himalaya and circular indemnity clauses which the transport 'integrator' will have to rely on to extend the benefit of the rules and to protect performing parties. This might discourage actions against the performing parties.

The proposed regime is seen here as a great leap forward in the quest for a liability regime for multimodal transport.

By providing a simple and transparent strict liability for the MTO it eliminates most of the problems that have plagued multimodal transport so far. It seeks to ensure that there is a uniform liability regime irrespective of where loss or damage occurred, irrespective of the jurisdiction in which this case is brought.
It deals in a simple fashion with the problem of the liable party, and the status of the contract thereby ensuring that no conflict exists between this draft and unimodal conventions.
It increases the limits of liability to appease some factions and discourage others from lawsuits.
And finally it completely eradicates the problem of the sum total of all unimodal exceptions applying in multimodal transport and will succeed in avoiding the resistance of the strong transport lobby as it states its obvious non-mandatory status.

This draft as a whole holds a lot of promise. It's potential to act as the focal point in the discussions of a multimodal convention or directive is strong. It is hoped that this would form the basis of the discussions leading to the international convention that multimodal transport has been waiting for.

5.2 REGIONAL LAWS AND REGULATIONS

Numerous regional organisations have established laws and regulations to regulate multimodal transport in their respective regions, thereby acknowledging the tremendous importance placed on this mode of transport. Model laws on the lines of the UNCTAD/ICC rules are no longer considered to be sufficient in this field. However, these different rules only go to exacerbate the problem of a proliferation of liability regimes and applicable laws in this field. Within the different Regional Multimodal transport laws, there is some consistency, in that they all are based on the UNCTAD/ICC rules and the Multimodal Transport Convention: The Draft ASEAN Framework agreement on Multimodal transport,[518] the ALADI Agreement on

[518] The Countries in this group are Argentina, Brazil, Paraguay and Uruguay.

International Multimodal Transport 1996,[519] The ARDEAN Decision 331 of 4th March as Modified by Decision 393 of 9 July 1996 'International Multimodal Transport,[520] and the MERCOSUR[521]Partial Agreement for the Facilitation of Multimodal Transport of Goods, 27 April 1995. It must be noted here that the fact that the some countries are members of multiple agreements is likely to lead to conflict within multimodal transport regulation in Latin American.

5.3 National Initiatives on Multimodal transport

The failure of the Multimodal Transport Convention and the absence of an applicable liability regime in multimodal transport has left national legislature with no option but to modernise their various laws taking multimodal transport into account; These accounts for the fact that currently more than 10 Countries have enacted legislation to cover multimodal transport.[522] Most of these countries have adopted the modified network system of liability either of the UNCTAD/ICC rules or as found in the Multimodal Transport Convention. The enacted laws are generally mandatory and often specifically provide that any derogation will be null and void.
In this section, we seek to examine the some of the provisions of these laws and assess their impact on the uniformity and eventual predictability of multimodal transport liability. Due to the impracticality of examining all the laws, we will limit our inquiry to the laws that are more elaborate or deviate from the more common terms under which multimodal transport operates. In this light we will examine the regimes in the Netherlands, Germany and China.

5.3.1 Multimodal Laws in the Netherlands

The Dutch New Civil Code ("Burgerlijk Wetboek"), which entered into force in 1991 in the Netherlands, contains provision for multimodal[523] transport in its Book 8, title

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[519] [519] Member States include Argentina, Bolivia, Brazil, Columbia, Chili, Ecuador, Paraguay, Peru, Uruguay and Venezuela.

[520] This is made up of Bolivia, Colombia, Ecuador, Peru and Venezuela
[521] The Countries in this group are Argentina, Brazil, Paraguay and Uruguay.
[522] Argentina; 1998, Brazil; 1998, China; 1993,1997,1999, Colombia; 1999, Ecuador; 1999, Germany; 1998, India; 1993, Mexico; 1993, Netherlands; 1991and Paraguay; 1997
[523] The Dutch Law book mostly refer to it as combined transport

2, Chapter 2- sections 40-50. The law that has been in force since 1991 contains elaborate provisions on multimodal transport.
It defines multimodal transport in its Book 8 section 40 as;

"The contract for combined transport of goods whereby the carrier (combined operator) binds himself towards the consignor in one and the same contract, to the effect that carriage will take place in part by sea, inland waterways, road, rail, air, pipeline or by means of any other mode of transport"

The multimodal transport covered by the law can be said to be complete multimodal transport, meant to apply to all modes of transport used in the carriage of goods. This definition is very wide and states the modes applicable. This stance had been previously proposed by the TCM in the 1972 attempt but rejected under the 1980 convention.[524] In that instance the definition of modes was thought to be restrictive as it enumerated the modes without the qualification similar to that in the Dutch law, "*by means of any other mode of transport*" after enumerating the stated modes. This qualification can be interpreted as allowing any future modes to be covered by the law.
The liability regime adopted by the law is the network system, which is applicable in multimodal transport especially under those contracts using the UNCTAD/ICC rules. This ensures that the law is similar to what already obtains in multimodal transport. This system ensures that the relationship between the carrier and shipper is regulated by the regimes that would have applied to the different parts of the contract.
Art 41 states that,

"In a contract of combined carriage, each part of the carriage is governed by the judicial rules applicable to that part."

This provision brings into play the problem of determining what part of the transport loss or damage occurred to establish the relevant law. The regime, which becomes applicable to the loss or damage as a result of localisation, is also used to determine the other elements of the case. Thus unlike the UNCITRAL instrument which limits the application of mandatory regimes to certain aspects of liability, the Dutch law ensures that the whole case is covered by the same law.

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[524] Transport Combiné de Marchandise,(TCM) UN Doc. Trans/370, Massey, E.A « A critical look at the TCM", (1971) 3 JMLC 725

Art 46 ensures that within the legal relationships between the parties the requirements of applicability are satisfied, particularly the documentation. It states,

Section 46

1) *"For that part of the carriage according to the contract entered into by the parties will take place as carriage by sea or inland waterways, the CT document is deemed the bill of lading.*
2) *For that part of the carriage according to the contract entered into by the parties will take place as carriage by road, the CT document is deemed to be a consignment note.*
3) *For that part of the carriage according to the contract entered into by the parties will take place as carriage by rail or air, the CT document is deemed to be a document for such carriage provided it also complies with the requirements therefore"*

The problem of the applicability of another convention is seen here. A typical case would be the applicability of the Hague Visby Rules when no Bill of lading or similar document of transport has been issued. Art 46 tries to deal with such cases, which invoke the hypothetical case and the legal fiction by providing assistance in dealing with them. This article however provides an exception in the case of rail and air carriage by providing that the multimodal transport document must satisfy the requirements set by rail and air conventions. The fact is that a normal Multimodal transport document will not satisfy these requirements with the conclusion that both of these conventions will hardly apply to multimodal transport under The Dutch Civil code. In such cases the civil code will apply.

In the case of non-localised loss or damage, Art 42 of the Civil Law will become applicable. This article states that,

"1. *If the combined transport operator does not deliver goods to destination on time and in the state in which he has received them, and if it has not been ascertained where the fact causing the loss, damage or delay has arisen he shall be liable for the damage arising there from, unless he proves that he is not liable therefore on any of the stages of the transport where loss, damage or delay may have occurred.*

2 Any stipulation derogating from this article is null"

Art 43 states;

" If the combined carrier is liable for the damage resulting from damage, total or partial loss, delay or any other damaging fact, and if it has not been ascertained where the fact leading hereto has arisen, his liability shall be determined according to the regime which applies to that stage or to those stages of the transport where this fact may have arisen and from which the highest amount of damaged result."

The liability of the carrier under article 42 is unclear, does the phrase '*he is not liable on any of the stages of the transport' mean* that he has to adduce evidence acceptable under all the modes to show that he is not liable? Or does it merely require him on a balance of probabilities to pinpoint the possible modes where damage could have occurred and seek to exonerate him? Either way his burden is still particularly onerous and likely to lead to a case in which the carrier might find he is strictly liable even in cases where neither he nor his servants may have been negligent.

Article 43 on its part imposes the highest level of liability on the carrier when he cannot localise loss or damage. This provision is very favourable to the claimant. And can be seen as a provision that will ensure that the CTO does all in his power to ensure that the loss or damage is localised.

The same stance is taken in the case of time limitation, Art 1722 (2) states;

" If in a contract of combined carriage of goods, the person instituting the action does not know where the fact given rise to the action has occurred, of all the relevant statute of limitation the most favourable one to him shall apply"

This rule allows the most favourable time limit to apply to the claimants in case of unlocalised loss or damage.

The Dutch Civil Law provisions can be said to be very favourable to the claimants especially in case of unlocalised loss where it ensures that the claimant has the advantage and the burden of proving otherwise is on the carrier. These rules apply mandatorily in Holland and cannot be derogated from.

5.3.2 Multimodal Laws in Germany

While the Dutch Civil Code covers 'total multimodal transport', the German alternative covers all the different modes of transport apart from sea carriages. The German Transport Reform Act 1998 introduced one identical law for the transportation of goods on land; road, rail, inland waterways, by so doing reformed an important part of Germany's transport law. (The Handelsgesetzbuch (HGB)).[525] Prior to this law transport law in Germany was quite fragmentary with different rules for;

- Inland transport by road of more than 75 km
- Inland transport by road under 75 km
- Carriage of household goods by road
- Transport on inland waterways
- Transport by air

Sect 407 (3) states that,

"The provisions of this subsection will apply whenever the goods are to be carried over land, on inland waterways or aircraft".

This act, which is based on the CMR 1956, applies in a uniform manner to carriage of goods over land-based and air modes and has modified slightly the basis of liability of the carrier.[526] Under the old law, the carrier was liable for loss or damage based on presumed negligence, but under the CMR the carrier has a more stringent basis of liability, which is predicated on utmost diligence or utmost good care.

This law however does not cover carriage of goods by sea. The provisions of the HGB remain unchanged for maritime carriage.

The Act also adopts the network liability system as its basis of liability in its Art 452 of the HGB. If the loss or damage is localised, the carrier will be liable according to the rules that would have applied to that mode if the parties had made a unimodal transport contract for that mode. However, the parties can

[525] This new law is found in the Handeldesetzbuch 5commercial Code) This code contains new paragraghs 407-475h.

[526] The fact that the act also covers air transport has been criticised see Johannes Trappe, "The Reform of German transport Law" [2002] LMCLQ 393 at pg 395. This provision will probably not have the chance to apply as air transport within a country is not as prevalent as road or rail carriage.

agree that even in case of localised loss or damage, the general provisions should apply. [527] The parties are also allowed to agree on different terms of liability to the extent that the applicable laws allow for such a variation.[528] When the loss or damage is not localised, the general transport rules will apply.

The limits of liability are placed on the same level as the CMR, 8.33 SDR per kilo of goods lost, although the parties are allowed to contractually vary the limits to either an amount higher or lower than the stated amount.
The time limitation provision is one year and three years in case of wilful or reckless conduct with knowledge that loss will occur.

In the case of the German law we see a case in which the law regulates multimodal transport without sea carriage. This therefore means that different laws will still apply to the multimodal transport of goods. The network system and the opting outs allowed to lower the limits also means that neither the applicable law nor the limits of liability will be predictable.

5.3.3 Multimodal laws in The Peoples Republic of China

There are 3 main laws applicable to multimodal transport in the Peoples Republic of China;

1) The Maritime code 1993 Chapter IV, Section 8
2) Regulations covering International Multimodal transport of Containers
3) The Contract Law of 1999, Chapter 17 Section 4 on contracts for Multimodal transport

Generally, the relevant provisions in The Contract law 1999 apply to all commercial contracts in China, including all contracts of carriage and multimodal transport. However, Art 123 of the law specifically states "*if there are provisions as otherwise stipulated in respect to contracts in other laws, such provisions shall be followed*". As

[527] Art 425d (2)
[528] ibid

there are two different laws specifically stipulated for multimodal transport, the Maritime code and the regulations for containers, only multimodal carriage otherwise than by sea and in containers will be governed by the Contracts Law 1999. In this respect, multimodal transport covering road, rail and air transport are covered by the Contract law 1999.
In The Peoples Republic of China thus one can state that 3 different rules apply to multimodal transport.

1) The Maritime Code 1993

Chapter IV, section 8 of the Maritime code governs multimodal transport in which a sea leg is involved. In five Articles (102-106) it caters for multimodal transport from its definition to its liability regime. On matters concerning the definitions of the multimodal transport operator, the multimodal contract and document, and period of responsibility; it follows like provisions in other multimodal transport rules notably the UNCTAD/ICC rules.
As concerns the basis of liability, the Code also uses the network system of liability in its Article 105. It states that in case of localised loss or damage, the relevant provisions will apply to the loss or damage. However, it also specifies that only the provisions concerning liability and limits will apply. Meaning that on other matters such as the time limitation, the code will apply. Provisions such as this noted above bring about fragmentary application of laws and run the risk of conflicts with other laws.
If however, damage cannot be localised, the liability of the MTO will be determined by the provision in the code governing the carrier's liability.[529] Predictably his responsibility for the goods, limits both time and money are fashioned after the Hague Visby Rules, including benefiting from the exceptions of nautical fault. Unlike the Hague Rules however, the code engages the carrier liability in cases of delay.[530]
The limits are therefore pegged at 2SDR per kilogram of gross weight of the goods lost or damaged which ever is higher unless the value of the goods have been declared by the shipper and inserted in the bill of lading or a higher limit has been agreed on

[529] The basis of liability is based on the Hague and Hague Visby Rules
[530] Art 50

between the carrier and the shipper. His liability for delay in delivery is limited to an amount equivalent to freight payable for the goods delayed.

2) Regulations Governing International Multimodal Transport of Containers 1997

This regulation applies to the international multimodal transport of goods in containers and came into force in 1997. It limits itself to the carriage of good in containers by waterways, highways and rail; it does not cover carriage by air.
This regulation governs international multimodal transport by containers; it states that this regulation apply to;

"...The international carriage of goods by containers from one place in one country at which the international containers are taken in charge by the international MTO to a designated place of delivery situated in another country"[531]

The liability of the MTO is stated in Art 27 and also contains the network system of liability making the MTO liable for loss or damage during the period in which goods are in his charge for carriage.
When loss, damage or delay can be localised, the rules and regulations governing the particular stage at which the loss or damage occurred will apply.
When loss cannot be localised, art 4 of the Regulations will apply to the whole carriage.
When the multimodal transport includes carriage by sea, the limits of liability applicable will be governed by the Maritime code of China, and when the multimodal transport does not cover carriage by sea, the liability shall be regulated by the relevant laws; In this case the Contract Law of 1999.
The question here is the feasibility of this regulation. What is the implication that a national regulation purports to regulate international carriage of goods in containers between two states. In the cases of international conventions there is always the requirement of a connection with a contracting state, in this case 'what is the link'?

[531] Art 4

This provision will conflict with other international regimes for international multimodal transport, in the sense that both this regulation and other mandatory laws will apply to the same contract. The main problem with this provision is the fact that it purports to apply to inward and outward international multimodal transport contract with China. It thus covers even those contracts made out of China. This regulation, which is a domestic one, extends out side as well.[532] The question is if this might not violate the rule of law.

3) The Contract Law, 1999

Section 4 chapters 17 of the contracts law applies to contract for multimodal transport. In its five articles, it covers the relevant provision for multimodal transport. As stated earlier, this is the residual part of multimodal transport which is covered neither by the Maritime code nor the Regulations for the international multimodal transport of containers. In this respect, it will cover exclusively land and air based multimodal transport.

The proliferation of national laws with slightly different varying provisions on multimodal transport will constitute further fragmentation of an area, which is already very fragile in terms of the proliferation of laws applicable. These laws have added to the applicable laws and could lead to resistance later from those jurisdictions when a body of jurisprudence and precedence would have grown around the laws giving them a certain value of predictability within these jurisdictions.

5.4 Conclusion

This chapter has highlighted the attempts over the years by International Organisations Regional and National bodies to solve the problem of an unpredictable liability regime; so far none has been able to provide viable solutions to the global multimodal transport problem.

[532] Most laws on carriage of goods apply only to out-ward bound carriage. However, the US COGSA "99" will apply to both out-wards and inwards carriage. This stance has been greatly criticised especially by the Canadians as supplanting their COGWA, as all trade with the US will now also be covered by the US COGSA 99. See the Submission of the Canadian Maritime Association Regarding the US COGSA , sixth draft (Sept 1999) in Tetley, W. "Reform of Carriage of goods – The UNCITRAL Draft and the Senate COGSA 1999 Lets have a two tract approach" (2003) 28 Tulane Maritime law journal 1-144

This is due primarily from the fact that they are mostly based on unimodal concepts; we have seen the network principle of liability used by nearly all the proposals apart from the draft of the UNECE which has not yet had been deliberated on.

Another aspect of this problem is the attachment to the principle of presumed liability for multimodal transport. It was asserted in chapter 3 that this is indeed a liability theory that cannot be sustained in multimodal transport.

Given the unanimous acceptance that a new liability regime is needed in multimodal transport, it is time to abandon the old ways in which unimodal conventions have been used as a base for multimodal transport.

A long-term solution would be one in which a convention is drafted for multimodal transport which takes into consideration only multimodal transport concerns. Given that within multimodal transport concerns we find unimodal transport concerns, such an instrument will be able to cover unimodal transport as well.

Such an instrument will involve a formidable task, and such a task would be viable only if a new theory of liability in multimodal transport is introduced, one which will to a great extent solve the problems of an uncertain and unpredictable liability regime in multimodal transport.

However, with the work been carried out within UNCITRAL and UNECE it can be stated that there is yet hope for multimodal transport.

CHAPTER 6

A MODERN LIABILITY REGIME FOR MULTIMODAL TRANSPORT

The liability regime for multimodal transport established within transport law has been shown to be unpredictable and outmoded.[533] Both the organisational arrangement and the current technical options on which multimodal transport is based fails to accommodate the future growing demand of this mode. UNCTAD responded to the challenge by drafting the U. N. Multimodal Transport Convention, but failed to adequately address the pertinent questions of what the liability regime should be, as it was based on unimodal ideals.[534] Thus currently, The Hague-Visby Rules, The Warsaw System Conventions, The CMR, The CIM/COTIF, The CMNI together with their numerous amendments and supplements and national mandatory laws govern liability and allocate risk within multimodal transport.

This proliferation of applicable liability regimes is exacerbated by the fact that these different liability regimes differ with regards to their basis of liability, exemptions, time limits and monetary limit. Thus the risk allocation is never certain at the formation of the contract, thereby depriving the parties of valuable information concerning their risk coverage.

Recent developments characterized mostly by The UNCITRAL Draft tend to point towards an eventual resolution that is also largely based upon the existing unimodal system of liability as it seeks to extend sea carriage to accommodate multimodal transport as well. This inclusion of multimodal transport within the discussions of sea transport convention is laudable, but as the circumstances dictates it covers only 'wet multimodal transport'; failing to include all combinations of modes in multimodal transport. The solution, it was argued in this thesis is not to extend a unimodal convention to cover multimodal transport because of the obvious bias such an extension would have vis-à-vis the other unimodal transport conventions,

[533] See Chapter 2 and 3
[534] See Chapter 4

but to have an independent convention relating to multimodal transport and also possibly unimodal transport.

Uniformity in the liability regime in multimodal transport will present considerable advantages. It will eliminate the plethora of unimodal conventions and national laws which dominate multimodal transport and promote multimodal transport by ensuring that only one applicable liability regime governs this mode, irrespective of the loss or damage history.
A uniform and predictable liability regime would reduce litigation cost, especially transaction cost involved in handling claims.[535]
The success of any such new liability regime will depend on the adequacy with which existing arrangements can address the current legal challenges. Presently the reality shows a readiness to address key issues with increasing calls within multimodal discussions to bring forth a liability regime that reflects multimodal realities; a uniform liability regime based on strict liability.[536] This basis it is contended will eliminate the possibility that numerous carriers may be held responsible and numerous laws applicable for loss under a single transport contract.

It must be acknowledged here that attempting to elaborate a long-term framework for liability in multimodal transport would be fruitful if the basis of liability is changed to reflect multimodal realities. In this light, it is proposed that the presumed liability regime that runs through the different transport conventions and applies to multimodal transport be modified or changed.
Drawing from the previous chapters, this chapter will raise the argument that, since the present allocation of liability in multimodal transport is uncertain; a new allocation of liability is needed. This chapter will then argue for a change of the liability regime to a strict liability regime with limits.
The discussions in this chapter leads to the conclusion that strict liability with limits by way of a mandatory single convention in multimodal transport will lead to the predictability and certainty that is needed in multimodal transport.

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[535] INTERMODAL Transport liability (1999) on line: http:/interpool.com/tcl/disc1/0000005.htm
[536] Regina Asariotis, "Towards Improved Intermodal Freight in Europe and the United States: Next Steps, Report of the ENO Transportation Foundation, Policy Forum held, November 1-20 1998. Here Asariotis asserted that the most cost effective solution for multimodal liability would be the full and strict liability of the contracting carrier.

Specifically, this chapter will discuss the concept of strict liability as an appropriate basis of liability in multimodal transport from a law and economic perspective. The basic principles of the economic analysis of accident law will be examined to show how from a theoretical perspective, the optimal components for the allocation of loss between the parties should take place.
Against this backdrop, the proposed strict liability of the MTO would be assessed to judge its feasibility as an appropriate liability basis in multimodal transport.

6.1 POTENTIAL SOLUTIONS

There is widespread support for the opinion that the time has come for a single uniform liability regime to be introduced in this mode of transport, to eradicate the unpredictability that acts as a hindrance to the further development in this mode.[537] The question that needs answering is what should this regime be? What should it be based on and should it be mandatory or not; this chapter thus seeks to examine the form such a regime should take.

In the search for a predictable and certain liability regime, one is bound to acknowledge the truth that,

> *"... in commercial matters it usually matters very little what law or form is adopted as long as it is adopted by everyone concerned. There are many antique documentary forms in circulation and many old rules, but they serve a purpose because there are accepted if documents and followed if rules. From this view point, there is no one best rule for liability, and arguments about a best rule, while capable of being on the level of rational debate, are just not weighty. Commerce will flow if the limit of carrier responsibility is lowered to ten pence a ton or if it is raised to ten thousand gold franc of millesimal fineness of 999*

[537] Implementation of multimodal transport rules: Report prepared by UNCTAD Sec., www.org/en/docs/po/sdte/tlbd/2.en.pdf. Hannu Honka, "The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL Draft" (2004) 46 Scandinavian Studies in Law 92 at p. 111

parts. If the liability is low, shippers will buy insurance, if the limit Is high then in a sense the shippers of valued goods are being Subsidised. The argument can be good, bad or indifferent, but all the merchant wants to know is, ***'WHAT IS THE RULE?"***[538]

The above quote epitomises the attitude of certain authors who contend that what is needed in multimodal transport today is knowledge.[539] The largest problem in multimodal transport is the lack of information as to what liability regime would apply. As stated in the quote, once it is clear what the liability exposure for each party is, parties will take appropriate measures to ensure that they are appropriately covered preferably by insurance. In the light of the unpredictability and uncertainty in multimodal transport, it has been asserted that cargo and liability insurance have become key players in maintaining a workable multimodal transport.[540]

What we need here, are not default solutions at every turn, but a uniform liability regime that would truly reflect multimodal realities, however,

"...Making the law uniform will not make it better Unless we know which solution is better?"[541]

The search for a better solution has been a transport preoccupation for such a long time dating back to the 1930's when the possibility of multimodal transport rules was first discussed.[542] In 2000,[543] the UNCTAD Secretariat sought to find the answer to a better solution by circulating a questionnaire to all governments and

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[538] Legal impediments to Intermodal transportation (The Slait Report), Maritime Transportation Research Board, 1971, Reviewed by Robert Khurash [1971] 3 JMLC, 831, at 833, See also C.E. McDowell " Containerisation: Comments on Insurance and Liability [1971] 3 JMLC 503 p. 511

[539] Nicholas de la Garza, " UNCITRAL's Proposed Instrument on the International Marine Carriage of Goods » (2004) 32 Transportation Law Journal 95 at p.98 See also Micheal F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a vacuum of Empirical Evidence" (1993) 24 JMLC 119 at p. 123

[540] William J. Coffey "Multimodalism and the American Carrier" [1989] 64 Tulane Law Rev p. 569

[541] Gordley, Comparative legal research [1995] 43 AJCL pg. 555

[542] This attempt was made by the international institute for the unification of private law UNIDRIOT, UPD1963, and ET.XL.II DOC.29

[543] Multimodal Transport: The Feasibility of an international legal instrument. UNCTAD Secretariat, UNCTAD/SDTE/TLB/2003/1

industry as well as intergovernmental and non-governmental organisations and a few experts on multimodal transport to assess the current lines on which multimodal liability should be reformed, this stance was to ensure that all sectors were taken into consideration in what ever solutions were proposed. Replies were received from all sectors; governments, non-governmental organisations, operators of transport services, freight forwarders, terminal operators, liability insurers as well as shippers and other transport users.

This was to allow UNCTAD to re-evaluate the factors that are needed to bring about an acceptable level of predictability in multimodal transport. The different proposals for an appropriate liability regime ranged from calls for a new convention to cover all transport modes, to extensions of unimodal conventions to cover multimodal transport.[544] This proposal included many possibilities; however, it must be acknowledged that any new law will only be acceptable if it brings positive and real benefits by eliminating most of the uncertainties and unpredictability in multimodal transport liability.

6.2 THEORITICAL BASIS OF STRICT LIABILITY IN MULTIMODAL TRANSPORT

The theoretical basis of liability in multimodal transport can be regarded as concerning two basic debates; the determination of which system of liability would best suit multimodal transport, a uniform or network system, and the basis on which this liability regime should rest; presumed liability as obtains in unimodal transport or strict liability.

6.2.1 Presumed or Strict liability

Liability based on fault and presumed liability has been the basis of liability used in transport law.[545] In some cases however, the law can go further, and imposes liability without fault; in which case the carrier is liable irrespective of fault. The proposition that strict liability might be the proper basis of liability in multimodal

[544] ibid
[545] Presumed liability has been discussed in chapter 3 and 4

transport might be a welcomed change. This principle was under consideration and discarded in the discussions concerning multimodal transport.[546] Strict liability has also been proposed within the scope of different transport modes[547] and within academic circles.[548]

In the carriage of goods by air there was a movement towards an absolute system of liability, away from the presumed fault concept as laid down in the 1929 Warsaw Convention.[549]

As far back as 1933 strict liability was an option in the Rome Convention and its amendment in 1952 for damage caused by aircrafts to 3rd persons on the surface.[550] In 1966 the Montreal Interim Agreement endorsed such a basis, as did the 1971 Guatemala City Protocol. The Montreal Protocol No 4 of 1975 also imposed a strict liability for the air carrier.

Additionally, the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1962 Brussels Convention on the Liabilities of Operation of Nuclear Ships both advocated for strict liability.

Following the disaster of the Torrey Canyon incident of 1967, The International Convention on Civil Liability for Oil Pollution Damage was enacted in 1969 famously referred to as the 1969 CLC. This convention imposed strict liability on the ship owner for oil pollution up to a certain limit, a requirement for compulsory insurance and liability channelled exclusively to the shipowner.[551]

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[546] UNCTAD Secretariat, International Intermodal Transport Operation, U N Doc. TD/B/AC.15/7, at 17-19, See also Maritime Administration; is it time for a Change? Proceedings of a symposium on Cargo Insurance and Transportation liability (1973): Department of transport. However this principle was rejected by the preparatory group on intergovernmental bodies involved in the preparation of the Hamburg rules, 3rd Session Report, 4-20 February, 1974, Un Doc, A/CN.9.88

[547] In Air Transport, Peter Martin, "50 Years of the Warsaw Convention and the practical Mans Guide [1979] 4 Annals of Air and Space law 233 p.236, in the case of carriage by seam see John Kimball "Shipowners Liability and the Proposed Revision of the Hague Rules" [1975] 7 JMLC 217 p.249

[548] See Regina Asariotis Supra at note 535 p. 45

[549] . Peter Martins, *"50* years of the Warsaw Convention. A Practical Man's Guide" *(1979) IV* Annals of Air and Space Law *(1979) 233*

[550] Bin Chang: "Strict And Absolute Liability: A reply to charges of having inter alia misused the terms Absolute Liability" *(1981) VI* Ann of A&S Law *3-13.* Peter Martins, *"50* years of the Warsaw Convention. A Practical Man's Guide" *(1979) IV* Annals of Air and Space Law *(1979) 233.* Werner Guldiman, "A future system of liability in air law" (1991) XVI Annals of Air and Space Law 53 at p 93.

[551] Tanikawa, H., "A Revolution in Maritime Law: a History of the Original Legal Framework on Oil spill liability and Compensation," in the IOPC Funds' 25 Years of Compensating victims of Pollution Incidents, London, The IOPC Funds, 2003.

Also in the 1970's there was a move from fault liability towards strict liability in other areas of the law, especially motor vehicle law.[552] Calabresi[553] advocated the return to an absolute system of liability from the fault theory, all based on a predetermination of who will incur the least cost, and that person made to pay for the accident. He will then know in advance that he will pay and therefore will have the incentive to reduce the risk of accidents. The question here was if the person could avoid the accident. Pearson[554] also states that there is no need to inquire into fault; rather it will be a determination of or identification of who generated the risk or who would have avoided the risk of the accident. The risk creator would then be required to insure against such a risk.[555]

Although the strict liability basis of liability is quite contrary to traditional maritime rules, its adoption under the 1969 CLC is now widely accepted, paving the way for any arguments as to the use of strict liability within (maritime) carriage.

The reason for this basis of liability was predicated on the fact that the plaintiff could not carry out any action to prevent loss and when loss occurs could not adduce evidence to prove negligence. He merely needed to prove that damage occurred and the defendant is liable, apart from cases in which the plaintiff is negligent.

Such a system will bring about simplicity into multimodal transport, because of the sheer certainty as to the liability regime, since no exception clauses are implied. This will lead to saving in time; cost and the burden of proof will cease to be a 'burden'.[556]

The rationale for advocating such a basis of liability in multimodal transport is based on the fact that the carrier is more equipped to bear the loss of any such accident. This stance was summed up by Roscoe Pound as

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[552] Ngwafor, E N, *A proposed no fault automobile insurance scheme 1980* Thesis, unpublished. Atiyah, "Accident compensation and the law", (4th ed. London.). De Percq, "In defence of the fault principle" *(1959) Uz* Minn L Rev *499* at *500.*

[553] 81 Yale LJ 1058 at 1060-64., Calabresi, G, "The cost Of accident" (1970) 75 at p. 135

[554] Pearson Report. *Vol 2.*

[555] Fletcher, "Reciprocity of risk between parties: The party who subjects the other to the greatest risk of injury must compensate" *(1972) 85* Harv LR *537.*

[556] J A Kluwun, "Analysis of criticisms of the fault system" *(1967)* Ins LJ *389* at *391.* Merryolt, "Testing the criticisms of the fault concept" *(1968)* Ins Couns J *112.*

"A strong and growing tendency where there is no blame on either side, to ask in view of the exigencies of social justice, who can best bear the loss."[557]

In the light of these developments, advocating a like system in multimodal transport is conceivable.

6.2.1.1 The Meaning of Strict Liability in Multimodal Transport

Strict liability here means that the carrier is liable for loss, damage or delay without fault. Generally in the case of carriage of goods such a liability already occurs within the conventions which make the carrier liable for the acts of his servants and agents.[558] The carriers fault is not at issue, the causal link between the servants or agents act creates the trigger for his liability.

It must be noted here that in strict liability, the usual defences remain, except that they go to show the absence of fault, for fault is no longer required. In strict liability, once the prescribed conditions are met liability arises strictly, in the sense that none of the usual defences apply to the carrier not that no exceptions are prescribed. Within strict liability theory, there is always room for certain force majeure exceptions, such as grave natural disaster and fault of the consignee. Strict liability in multimodal transport is therefore based on strict liability but with certain exceptions in cases in which the carrier could not have prevented the loss with utmost care and goodwill.

Modern carriage trends as seen in the case of multimodal transport means that the MTO does not perform the carriage contract alone. He contracts all or parts of the contract to others and assumes responsibility for the carriage door-to-door.

In multimodal transport the reality of the carriage ensures that the MTO finds he is held to a strict liable than the presumed fault under which his liability is based. The inclusion of different carriers and their servants and agents in addition to carriage in

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[557] Roscoe Pound: "The spirit of the law" (1920) at p 189.

[558] Liability for the acts of servants and agents has been a part of all the different unimodal transport conventions, it is predicated on the fact that the servant carries out the carriage on behalf of the carrier who should then bear responsibility for his acts carried out in the course of his duty. This has fuelled the use Himalaya Clauses and circular indemnity clauses to protect the servant or agent who is sued. See Norfolk Southern Railway Co v. Kirby (2004) 543 US 14, 125 S ct 385

containers conspires to ensure that when loss or damage occurs, and the place of loss is indeterminate the MTO is held to a strict liability.

This liability is similar to the contractual obligations under common law, under which the carrier was held liable as a matter of public policy to care for goods under his custody for carriage.[559]This liability was imposed without fault in addition to the warranties of seaworthiness.[560]

This strict liability of the common carrier and the negligence liability of the private carrier were the basis of liability under the common law. Here the carrier was presumed to be liable once the cargo owner could prove that the goods were lost or damaged. The exigencies of transportation dictated that this basis of liability was modified to what obtains in current international unimodal transport conventions today; Presumed liability with exceptions to suit each mode.

In this respect, the proposed strict liability would be tantamount to going back to the traditional basis of liability for the carrier but with the added advantage that improvements in technology means that the risk of loss, damage or delay is less than in the common law era. This justifies the difference which is now proposed, instead of including all the common law exceptions, we have a civil law type exception of force majeur, an act which is beyond the control of the carrier; Cases such as the fault of the consignee or consignor and inherent vice.

Multimodal transport is of enormous commercial value in international trade, but the benefits arising from it must be weighed against other factors.

Although loss and damage in multimodal transport is of enormous consequence to parties concerned because of the issue of localisation, the question that presents itself here is if strict liability will lead to a predictable liability regime in multimodal transport.

[559] Graham McBain, "Time to Abolish Common Carrier Liability [2005] JBL 553, Nugent v. Smith (1876) 1 C.P.D. 19, Forward v. Pittard (1785) 1 T R 27

[560] See Chapter 3 which treats the liability of the carrier

6.2.1.2 STRICT LIABILITY AND LOSS ALLOCATION

Support for strict liability is found in the trend that emerged during the 1960's in doing away with fault liability and introducing a system of liability irrespective of fault and linked to monetary compensation. During this period, the civil liability in tort entered a new phase effectively replacing the existing system of liability in some areas with a system of liability and insurance. Fault liability was no longer a match for the less expensive insurance-based liability. This system was thought to be equitable and above all practical to embrace legal systems that were based on unequal bargaining powers.

This system of liability was assisted along the way by three reasons, which militated against fault liability as an appropriate basis of liability.

- A tort system based on fault was thought to be too expensive to administer
- Litigation was fraught with delay
- There was unpredictability of outcome on cases based on fault

The concept of law and economics thereby laid down indicators on how loss or damage to goods within this new theory can be allocated in a way as to increase social justice. Here the question of the most efficient risk distribution and allocation to bring about equity between the parties is based on who can best manage the activity.[561]

The economic theory starts with the presumption that in a perfect world market forces will allocate liability in a most efficient way.[562] This assumption does not take into account the transaction cost which will impede the working of such a system. Failing the working of this system, the liability regime applicable plays a vital role in the allocation of risk in carriage cases.[563] The implication is that when transaction costs are considered, the optimal liability system will allocate loss to one who could avoid it cheaply, as the goal of an optimal legal liability system is to allocate liability to those parties who can most efficiently minimise the lost at the least cost.

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[561] Coase, "The Problem of Social Cost, (1960) 3 Journal of Law and Economics, 1, 7-8, A Polinsky, " An Introduction to Law and Economics (1991) 38 Wayne Law Rev. 1-113

[562] Calabresi, G, "The cost Of accident" (1970) 75 at p. 135

[563] David S. Peek, "Economic analysis of the Allocation of Liability for Cargo Damage: The Case of the Carrier or is it? [1998] 26 Transportation L.J. 73 at p. 91

Within transportation law, the capacity to do that is usually predicated on the "deep pocket" of the carrier and his capacity to pass it on as freight, so that in the end all share the loss. This is of particular relevance in the case of multimodal transport in cases in which either non of the parties is at fault or the loss or damage cannot be localise, leading to enquiries as to who is liable. In such cases the MTO is held liable although there is no proof of fault. A peculiarity of Multimodal transport is that fault is only relevant when loss or damage can be localised, once it is unlocalised, the liability of the carrier is strict. This proposed basis would only be sanctioning a practice already present in multimodal transport. This strict liability of the carrier would be based on the fact that he will be in a better position to manage the risk.

Prof Freezer also held that

> *"if there is any guiding principle as to who can best bear loss, it seems to be that it is the party who can absorb it with the least injury to himself and in such a way as will produce a minimum of consequential problems of social adjustment for himself....»*[564]

The law and economic principle states that the loss should be borne by the *'superior risk bearer"*, the one who is most able to mitigate the damage, or the one who can predict and prevent the loss or the one who can more effectively bear the damage to or the loss of the goods. In carriage cases, it is the carrier who is in a better position to bear the risk of such loss during carriage, who should take precautions.

This brings into play the option of precaution, shippers and carriers can only take precautions as to risk if they have the necessary information, and precautions is about cost. Thus the question arises as to who is the better cost avoider. These transaction costs usually take the form of packing, loading, stowing etc. The question is who is better placed to minimise such cost? In order to minimise transaction cost, thus, liability should be allocated to the party who can most cheaply avoid loss. The MTO stands in a better position to take precautions to minimise lost as he has stronger control over goods during carriage.

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[564] Freezer, "Capacity to bear loss as a factor in the Decision of Certain Types of Tort Cases" (1930) 78 UPL Rev 805 at 809.

The problem is exacerbated in the case of multimodal transport in which many different basis of liability will fall to be applicable following localisation. In such cases, it becomes complicated to ascertain when one basis of liability starts and when the other stops. Such confusion will obviously lead to an inadequate level of care.

Another factor that will have an influence on multimodal allocation of risk would be the cost resulting from establishing who is liable for what loss. Elimination of this cost will result if the liability regime was strict liability
However, according to the Coase theorem, it will make no difference how the law initially allocates liability for cargo loss or damage on a theoretical framework.[565] Because parties would negotiate to reach the most efficient risk allocation regardless of what law is imposed. For this reason, changing the liability will have no impact on the determination of which party will ultimately be liable for cargo damage. Therefore any new allocation of risk from one party to another will not change the party's behaviour, i.e. making the carrier more liable will not change his level of care. If the carrier would have avoided the risk more efficiently, the parties would have negotiated an agreement shifting the risk to him.
A result of this reasoning is that in the context of liability for loss or damage to goods. It would make no difference whether liability is allocated to the shipper or the carrier. Shifting liability to the carrier would lead to a situation in which more freight will be demanded from the cargo concern. If the cargo owner bears the responsibility he will pass on the cost to the end user of the product.

However, if strict liability is imposed on the MTO for damage, loss or delay, it invariably will be based on the notion that the MTO is in a better position to bear the risk.[566] Economic literature on accident law has demonstrated that other liability theories may be put in place to achieve a certain result.[567] In the case of multimodal transport, the unilateral accident theory holds true. Under that theory, in case of

[565] Coase, "The Problem of Social Cost, (1960) 3 Journal of Law and Economics, 1, 7-8
[566] Katz, "The function of tort liability in technology assessment" (1969) 38 CM L Rev 587. Calabresi, "Does the fault system optimally control primary accident cost?", 33
Law and Contemporary Problems, p 429. The Decision for Accident: An approach to non-fault allocation of cost" (1965) 78 Harv L Rev 73. IMCO Document CT C N/5/Annex III.
[567] Shavell, S. Economic Analysis of Accident Law, Cambridge, Harvard University Press, (2004) 175

unilateral accident in which only one party can influence the accident risk, both the negligent and the strict liability theories will lead to a higher care level, but only strict liability would lead to an efficient level of activity by the carrier to reduce loss.

The result is that the development of a test for strict liability should be based on whether it is more important to control the MTO or the cargo concern. If it is proven that the influence of the MTO on the activity is far more important than the cargo owner this may be an argument in favour of strict liability.[568]

It is also important to stress that in cases in which the victim can also influence the outcome, in case of bilateral accidents, a liability rule should be chosen which provides an incentive to the victims to take optimum care. A typical case would be the case of contributory negligence.[569]

In applying this rule to multimodal transport, it is argued that there is a strong economic argument in favour of a strict liability rule. Although loss and damage in multimodal transport may not be purely unilateral, as the cargo owner can contribute to ensuring that loss in minimised by appropriate packing, the influence on the goods by the carrier is far superior to the influence the shipper can have. Thus according to the economic test, it may be more important to control the MTO's activities than those of the cargo concern which points to the establishment of a strict liability regime.

Including contributory negligence as a defence may modify such strict liability, which in this case is fair, as it would ensure that the carrier is not liable for the faults of the cargo concern.

Objection to this system of liability has been based primarily on the argument that it will lead to high insurance cost for the MTO.[570] The question is if it usually leads to high insurance cost, which is reflected as high premiums, higher transporting cost and higher prices for the goods.

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[568] Landes, W. and Posner R, The positive Economic theory of tort, (1981) Georgia Law Review 877 at p.907

[569] Haddock D, and Curran C. An Economic Theory of contributory negligence, (1985) Journal of Legal Studies 49 at p.73

[570] Rossmore, A E "Cargo insurance and carrier liability. A new approach" (1974) 6 JMLC 425-427. Massey supra, p 739. McDowell, C E "Containerisation: Comments on insurance and liability" (1972) 3 JMLC p 506.

6.2.1.3 Disadvantages of Strict Liability

1) Morality

The most celebrated criticism of strict liability is the immorality of holding one liable when it cannot be proven that he has been negligent. This basically stems for the general rule that loss should lie where it falls.[571] Strict liability has often not gained support based on the belief that it will dampen incentive within carriers to take adequate precautions to avoid the loss.

Extinguishing liability altogether will offend the morality of the advocates of a fault based liability system. Those who believe that the only liability sustainable is one based on fault: that one should be liable for their fault. To then totally absolve one even for the faults of his servants would be immoral.

Contrast against the dictum by Massey, who states that:

> *"The ideal legal system should encourage minimisation of loss and damage and permit efficient distribution of those losses that inevitably occur. The insurance market could then function in a legal framework focused on efficiency. Such a focus means abandoning the traditional basis of fault liability, leaving the search for rectitude to theologians, philosophers and pundits rather than to those administering the allocation of resources within the transportation network. I recognise that this suggestion may cause a certain hesitation by those who are inclined to view the world in moral terms and believe in the importance of rooting out the impure of heart and making them pay for their transgressions. However, the adaptation of an amoral approach is not quite as radical as it may sound since insurance has already by and large immunised wrongdoers from the consequences of their actions.*

[571] Richard Epstein "A theory of Strict liability" (1972) 2 J. Leg Stud. 151, Donald Dworkan, "Is Wealth Value" (1980) J. Leg. Stud. 191

2) Over-deterrence

Strict liability has been criticised in Economic theory on the grounds that it will lead to over-deterrence. This risk is particularly strong in cases of new developments and new technology. This is based on the grounds that if new industries are exposed to all risk foreseeable and unforeseeable, they will be deterred from pursuing innovations where risks might be unknown.[572]

3) Negligence of the Plaintiff

It has also been argued that strict liability will lead to a level of negligence on the part of the plaintiff who will be compensated under the law.

4) Regressive tax

Strict liability might have a regressive effect in practice. This stems from the fact that the award is spread to all end users of the product. This will affect two groups of people, those who will pay a higher price and those who will not be able to afford it. In this sense this liability has been said to lead to a regressive tax.

6.2.1.4 The Advantages of Strict Liability in Multimodal Transport

The outcry against the use of the presumed fault concept as the basis of liability in multimodal transport is predicated on the fact that localisation of loss is usually difficult at the best of times to achieve. And when such loss has been localised, it may also be difficult to benefit from the exception clauses, by adducing evidence to show an absence of fault in a case in which a performing carrier's agent performed the carriage thousand of miles away. The advantage of strict liability in this case is that it will take away the need for localisation. The MTO will be liable regardless of where loss took place and regardless of who was in charge of the goods. This will not only reduce the cost of adducing evidence to localise loss, but also completely eliminate the problem of suing performing carriers. Because there will be no incentive to go after any other person, as the MTO is strictly liable. The efficacy of this will however depend on the limit of liability placed on the MTO. If his liability coverage is very little, the cargo concern might have reason to still seek to sue the performing third party who not being privy to the contract might be sued in tort for the full amount.

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[572] Richard Posner, "Strict Liability , a Comment", (1973) 2 J.Leg. Stu. 205

1) CARE OF THE CARGO

Of prime importance is the implication that no liability will lead to negligence and therefore loss and damage. Deterrence has been hailed as one of the attributes of a fault based system of liability, thus as a corollary it is assumed that no-liability will lead to more cargo damage and loss.
If that is the case then the present system especially as exemplified in the Hague Rules with its catalogue of exceptions, should also lead to such loss and damage, because the width of this exception ensures that the carrier is only liable in cases of gross negligence.

> *"... by far the best way to achieve uniformity in the liability structure and thereby achieve expedited settlement and recovery at less cost, is to do away with the liability system altogether. The cargo shipper in the traditional way would then arrange cargo insurance to suit his own needs."*

Ramberg questions the utility of deterrence. In the field of transportation he states

> *"...in fact, it may be seriously doubted whether the sanction of damages has any preventive effect at all in this particular field. Presumably the drive of carriers to uphold efficient and safe traffic, stimulated by the accentuated competition in the carriage of cargo, would be a more realistic motive for exercising due diligence in the case of goods than would fear of being held liable in damages to some cargo owner. Since the liability is normally insured, the preventive effect is even more diluted, the only risk being a possible increase of premiums on account of a 'bad' record."*

2) COST

The administrative cost of a negligence rule is higher than that of a strict liability rule. To apply a negligence rule, a court will first have to determine the level of care then

decide if that level of care has been met. In the case of strict liability, all the Court need to do is determine whether or not the defendant caused the plaintiff injury. Strict liability is thus easy to administer and cheaper to the parties and the Courts.

Cargo loss or damage is ultimately borne by one of 4 persons, the cargo owner, (made up of the shipper, consignee, seller, consignor or cargo owner), the cargo insurance, the carrier and the liability insurer. Ultimately, in most cases uncertainty in the allocation of loss between the parties means that there is usually double insurance leading to more cost to the parties. The choice of strict liability will reduce the cost spent overall and eliminate uncertainty.

Although the cost of cargo insurance will go up, it is believed that it will stabilise in the long run due to the elimination of the cost normally incurred in trying to claim subrogation rights.

Cost to be avoided will include lawyers' fees, etc which will greatly reduce overall cost of administering the policy. Cost of freight will come down because of the elimination liability insurance therefore cost of overall transport will generally fall.

4) SAVINGS TO THE CARGO CLAIMANT

Improvement of the loss experience of the cargo owner will reduce his cost of insurance in the form of no-claims bonus; therefore it will be advantageous for him to choose careful carriers. This too will act as an incentive to carriers, because although fault will not make them liable, it will affect their business. This has been described as the 'insurance function of strict liability. Holding the carrier liable will permit him to spread the risk to all its customers.

6.3 The Insurance argument

> *"Throughout this century, of controversy, certain arguments have reappeared virtually every time the subject has been discussed. The most prominent of these might be characterised as the "Insurance Argument".*[573]

[573] M.Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby and Hamburg in a vacuum of Empirical Evidence" (1998) JMLC 119 at 120

The importance of insurance on liability was effectively summarised by Jeffrey A. Greenblatt, when he stated that,

"...Commenting on cargo loss and carrier liability without understanding insurance mechanisms and economics is equivalent to determining chess moves by rolling dice".[574]

The contention is that insurance plays a big role in transport liabilities and should therefore be taken into account when deciding any liability regime. The reality of transport dictates that the insurers are principal players as the cases are always decided between the cargo and liability insurance.

A clear understanding of insurance concepts in liability law also brings into play the guiding principles of law and economics. According to law and economics, when the preventive measures are less costly than the reduction of the risk their adoption operates, the measures should be taken. However, when the risk cannot be prevented it should be covered by insurance to mitigate loss or damage.

The primary function of insurance is not to prevent loss but to mitigate the effects of loss or damage caused by such loss by indemnifying the party likely to suffer hardship from such loss.[575] Theoretically, in transport law, the entire risk can be assigned to either party; the carrier or the shipper, in practice the risk is allocated between both parties making it appropriate for each party to purchase insurance to cover their respective risk.[576]

In this regard two types of insurance are prevalent; cargo and liability insurances. Cargo insurance covers the economic loss to shippers resulting from loss of or damage to the goods carried, while liability insurance in taken out by carriers to cover their liability for loss to or damage to goods carried during carriage.

The present practice of multimodal transport warrants that the shipper takes out cargo insurance; such insurance is paid irrespective of inquiries as to culpability and

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[574] Jeffrey A. Greenblatt, "Insurance and subrogation: When the Pie is no Big Enough Who Eats last?" (1997) 64 Univ. of Chicago L.Rev. 1335 at p.1337

[575] John Isaac, " Cargo Insurance in Relation to through transport" Through Transport Seminar, (London: London Press Centre, 1978) 1

[576] Stephen G. Wood "Multimodal Transportation; an American Perspective on Carrier Liability and Bills of Lading Issues" (1998) 46 Am. J.Comp. Law 403

the insurer is subrogated to the shipper's rights.[577] In some instances, the carrier can provide cargo insurance if the shipper pays a higher freight. Although this insurance is always on "all risk", it is not all losses that are covered by insurance.[578] In some instances there is no cover for delay.

Cargo insurance ensures that the shippers are compensated for loss or damage, even when the carrier can exonerate himself by an appropriate exception clause. In cases in which he cannot so exonerate himself the insurer pays the shipper and is subrogated to the latter's right against the carrier.[579]

Carrier liability insurance which is taken out by the carrier is usually based on the mode used and may vary from country to country as a function of the extent of the carriers 'legal liability'. This carrier liability will compensate the shipper for loss or damage in cases in which the carrier's liability is clear, when there is a dispute, cargo insurers usually pay the shipper. The resolution of who is liable becomes a matter between the insurers.[580]

In multimodal transport, liability insurance follows the network principle of liability, thus the MTO who is an Ocean carrier would have his liability pegged to the Hague Visby Rules limits, while the Road Carrier will have his on the CMR limits. Thus it is imperative for the shipper to buy insurance as he would have no idea who might be liable and under what basis and limits, by so doing he is protecting himself and mitigating whatever loss or damage he might suffer. To be certain that loss will be compensated, shippers are encouraged to take out insurance.

A fact that stands out of this situation is that in multimodal transport, the carrier's liability might be double or even triply insured, by the MTO, the different performing carriers, and even the freight forwarding agent in certain instances. (Cargo insurance makes 4) This must be a windfall for the insurance industry and a re-assuring fact for the shipper.[581] There is thus an overlap of insurance by the different parties, which brings up the transportation cost of the goods. Additionally,

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[577] Kurosh Nasseri "The Multimodal transport Convention" (1998) 19 J. Mar.L. & Com. 231 p.234

[578] Raymond P. Hayden, Sandford E. Brook, "Marine Insurance: Variety Combination and coverage" (1991) 66 Tul.L.Rev. 311 at p. 320

[579] M.E de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 ETL 691 at p. 704

[580] William Driscoll, Paul B. Larsen " The Convention on International Maritime Transport of Goods" (1982) 57 Tul .L. Rev 193 at p. 198

[581] Richard Butler, "Trade Law uniformity remains out of reach" LL. List Int'l (1999) online: WESTLAW (newsletter)

duplicative cost occurs when more than one insurer incurs cost in maintaining the system for the same set of goods.

If the liability regime was strict liability, with the carrier bearing all the loss or damage, the need for cargo insurance will be eliminated so will be the costs associated with double insurance. The desire for cargo insurance will still be strong because of prompt payments, and to cover cases of insolvency.[582]

The currently applicable insurance system in multimodal transport burdens the parties with unnecessary cost that uniformity of carrier regime would reduce. And even if the status-quo favours insurers, they too face problems in cases of unlocalised loss when they have to deal with multiple liability regimes while trying to litigate their claims. The courts are therefore left with the duty of resolving the legal complexities of multimodal transport and the different insurance regimes.[583]

To take care of this uncertainty, both types of insurance; cargo and liability are bound to raise their premiums.

Thus the argument for a uniform and efficient system in multimodal transport persists, as uniformity and predictability would encourage swift and efficient transportation and insurance settlements.

In the case of strict liability, the liability of the MTO will be increased; this will theoretically push up liability insurance while cargo insurance will decrease, as shippers will experience a higher level of settled claims. Carriers will however, offset this against freight which will go up. It is normally not certain to what extent a rise in carrier's liability will be reflected in the premiums as other market forces also play a role in determining the premiums.[584] A strongly contested debate is which of the insurances are more expensive;[585] it is also asserted that this cannot be determined because of the absence of reliable empirical evidence.[586]

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[582] Michael F. Sturley, "changing liability rule and Marine insurance: conflicting empirical arguments about Hague, Visby, and Hamburg in a vacuum of empirical evidence" (1993) 24 JMLC, 119 at p.143,
[583] Michael F. Sturley, "Restating the law of Marine Insurance: a workable solution to the Wilburn Boat Problem" (1998) 19 JMLC 41 at p.45
[584] Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence." (1993) 24 JMLC 119 at p.127
[585] Lord Diplock, "Conventions and Moral-Limitation Clauses in Maritime Conventions(1970) 1 JMLC 525, at p. 527
[586] Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence." (1993) 24 JMLC, 145

It is expected that insurers might oppose change of the current liability system preferring that the status quo be maintained as it is profitable and workable for them.[587]

It has even been argued that the solution to the multimodal transport problem does not lie in a new convention but in a new insurance regime, one in which all risks are concentrated on one party which will eliminate overlapping, dual insurance and subrogation between the parties.[588] Proponents of this system argue that such a system will permit reductions of insurance and fairness of compensation, as opposed to the costly adversarial unfair and frequently arbitrary fault based system. Such a strict system will encourage speedy settlements with no need for lawyers, courts and delays; since it is the insurance companies that pay for the damages.

The strict system of liability would lead to certainty as to who is liable, the parties will know beforehand who and to what extent liability is predicated, enabling each to take out appropriate insurance. In the case of cargo insurance it is usually important, as it would make up for any cases in which the MTO is not liable under the strict system or to make up the short fall likely to flow from the carrier's limits of liability.

When loss or damage occurs:

(1) The cargo claimant proves that goods have been lost or damaged.

(2) His insurer pays out to compensate him for his loss.

(3) His insurers are then subrogated to his rights against the carriers.

(4) His insurers claim against the carriers.

(5) The carriers refer them to their insurers.

(6) The carrier's insurers try to adduce evidence to exonerate carriers from liability.

(7) The cargo insurers further adduce evidence in rebuttal.

Thus at the end of the day it is the insurers who bear the cost of any loss or damage, and any workable liability would be one that takes into consideration this fact.

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[587] Jan Ramberg, "Freedom of Contract in Maritime Law, (1993) LMCLQ 178 at pg 156

[588] Tony Young, "Position statement on multimodal liability" (1999): CIFFA homepage http:/ciffa.com/current issues_transport_multimodal transport_html

Another view that is being expressed increasingly is that of no-fault insurance.[589] In which case, the carrier is not liable and the cargo insurance pays for any loss or damage. The rationale for this view is that, ultimately the loss is invariably borne by insurance companies; either the cargo insurers or the liability insurers.
Advocates of the no-fault liability systems maintain that the present carrier liability system in multimodal transport does not create certainty and predictability, thus a new system should be introduced: based on no-fault, as this system has showed considerable success in automobile cases.[590] Massey[591], states that

> *"Some thought be given to relieving carriers from all liability and requiring the shipper and his insurer to bear the risk of loss in Toto,"*

Holding that the present system leads invariably to dual liability and thus double overheads, including sales, commissions to the administration of two policies, and when loss occurs, the cost of establishing which insurers will bear the loss will fall on both insurers. This was also emphasised by Sassoon,[592] that

> *"The system thus necessarily involves a certain amount of double or overlaps insurance, and moreover is premised on a risk allocation or distribution theory that is gradually but quite definitely being replaced in other cases of tort liability".*

Under this theory, the carrier will no longer be held liable, but in case of loss or damage, the cargo concerns will claim from their insurers, who in turn will know from the beginning that no subrogation rights will accrue. Thus instead of a battle between the insurers accruing, it will be a matter of distribution around the world insurance and re-insurance markets for cargo insurance.

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[589] Rossmore, A E, " Cargo Insurance and Carriers Liability: A new approach (1974) 6 JMLC 425.

[590] Claydon, W J, "Fair play", *International Shipping Journal,* Jan 1 1994.

[591] ibid, p 754.

[592] Sassoon., supra (3 JMLC) p 760.

6.3.1 THE EFFECT OF INSURANCE ON PREDICTABILITY IN MULTIMODAL TRANSPORT

By their very nature all forms of carriage whether multimodal or unimodal face certain risks inherent in transporting goods. Most obviously, they are subjected to the possibility that the goods may sink, be destroyed by fire, floods, crashes, or any other misfortune. To guard against the consequences of such risk materialising, the parties to the transactions invariable take out insurance cover. So important is the need for such insurance that unless there is insurance, the parties are unlikely to obtain the necessary financing when needed. So why as Lord Diplock stated, that

> *"When Conventions reach the stage of a diplomatic Conference, the 'Deus et machina' the insurer is not mentioned in the cast"*[593]

In spite of this, the "invisible hand" of insurance has been a part of transport liability history.[594] During the deliberations of The Hague Rules in 1924, insurance was an important factor in the debate that determined the amount of liability of the carrier.

Since then, insurance has taken the stage in the transport industry as the most effective way to manage the risks inherent in transporting goods. This allows carriers to transfer the risk of carriage in the form of liability to insurers for the price of premiums, which they pay.

6.3.2 The Effect of Insurance on Multimodal Transport

The presence and effect of insurance on multimodal transport has given this mode a reasonable level of certainty. This has been done by the role of insurance: It has

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[593] Lord Diplock. `Conventions and morals' JMLC 525 (1990)

[594] Malcolm Clarke, *Policies and Perceptions of Insurance; An Introduction to Insurance Law Clarendon Press, (Oxford) 1997.*

even been asserted that multimodal transport survives because of the presence of insurance.[595]

1) The Litigation Process.
2) The Multimodal Contract.
3) The Legislation, and
4) The Judiciary.

1) The litigation process.

The reality in transportation law often means that it is the insurance companies who bear the final burden of either going to court or settling out of court. The nature of carriage usually dictates that the parties take out both cargo and liability insurance, hence in the case of any loss or damage the battle is, usually between two insurance companies. This gives insurers the power to decide in this way the future of a particular head of liability. Insurers can therefore stifle the development or refinement of liability by smothering it with settlements.[596] The normal aspect of insurance is an out of court settlement, when insurers fight it is usually because of the size of the claim. This habit means that certain heads of liability fail to be litigated and thereby gain academic exposure to entitle them to receive the required legislative attention. In such a case any problems are contained not solved. A corollary to this is the fact that if insurers feel that the law ought to be changed it will be easier for them to use the leverage they have to effect change.

6.3.3 The Multimodal transport Contract and Insurance

Insurance companies influence multimodal transport contracts in two ways; directives and the fact that multimodal transport does not attract any extra premium over and above what is required for unimodal transport.

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[595] Maria Eleftheria Katsivela " Cargo, Liability and Self Insurance, in considering uniformity of Intermodal (Ocean and Land) Carrier Liability Regimes in the United States, Canada and Internationally, Pub CRT-2004-01 University of Montreal, p 12

[596] Malcolm Clarke, *Policies and Perceptions of Insurance, Supra at note. 593 at* p 272 296

a) Following the coming into force of the Hamburg Rules, most mutual insurers sent out circulars to their club Members advising them on the necessary amendments brought about by the Hamburg rules. A part of one of the directives stated that, members should endeavour to always use The Hague and Hague Visby Rules unless it was in a situation in which the Hamburg Rules were compulsory. Failure to do so would result in cover being prejudiced. This point forcefully to the fact that the insurers have ways of making sure that the particular conventions they favour are implemented. This brings a certain degree of uncertainty once it is clear that the particular liability regime applicable is not strictly the one that would have been chosen by the carrier but that which would have been chosen by insurance companies.

b) Another factor that greatly influences multimodal transport is the fact that no extra premiums are required. There is even the contention that multimodal transport might attract lower premiums because of the fact that it is considered to be more safe than traditional unimodal transport.[597]

Additionally, the fact that there is a difference in premiums between multimodal and unimodal transport also accounts for the fact that most carriers use the same document for both types of transport, which also brings a degree of complacency in multimodal transport.[598]

6.3.4 The power to influence legislation.

The effect of insurance is quite visible in the legislative field. A good number of legislative reforms were influenced by the fact that insurance cover could be gained. Apart from the Hague Rules, we have legislation such as the Employers Liability (compulsory Insurance Act) 1969, the Nuclear Installation Act (Licensing and Insurance Act) 1959 and the Unfair Contracts Act 1977 just to name a few. There is

[597] Poole, 'Insurance Aspect of Combined Transport' Conference on multimodal transport organised by Lloyds of London :Press (1975).p. 3.

[598] It was difficult to gain statistics from insurance companies because both modes where treated the same, even attempts to gain such information from the international Insures Union was not fruitful.

thus hope that insurance will be able to positively influence multimodal transport if need be. Insurance actually influences the law maker in the development and delimitation of the law.[599]

6.3.5 The Power to influence the Judiciary.

The effect on the judiciary is less visible given the fact that courts are likely to interpret contracts and uphold legislation than formulate rules. Courts may also be inclined to be influenced by precedence and incline the decision to move towards what obtains in the particular field. In *Morgans v. Launcnburg*[600] Lord Wilberforce stated that liability and insurance

> *"are so intermixed that judicially to alter the basis of liability without adequate knowledge ...as to the impact this might make upon the insurance system is a dangerous and in my opinion irresponsible thing".*

The judicial attitude today is to extend liability only in cases in which it is believed that affordable insurance can be had.

The questions that are thrown up by the place of insurance in multimodal transport. Such as;

(1) What is the impact of a two-tier liability regime, strict and presumed?

(2) Will claims management be different?

(3) Will premiums increase?

(4) Will freight increase?

(5) Will litigation increase?

Need answers.

In the last section we saw the place of insurance in facilitating strict liability; the question is the feasibility of this regime in multimodal transport.

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[599] B.A. Heppel and M H Mathews, *Tort Cases and Materials(4th Ed.) London 1991* 591

[600] [1973] A.C. 127 at 137

6.4 STRICT LIABILITY AND THE MULTIMODAL TRANSPORT LIABILITY SYSTEM

The debate in multimodal transport as to the liability system has centred on the liability system that best suits multimodal transport. In this regard two main systems have gained prevalence; the Uniform liability regime and the network liability regime. The question here is which one will eradicate the liability problem in multimodal transport. In chapter 3 we noted that the network system of liability has fostered the unpredictability in multimodal transport importing into this regimes different liability regimes ranging from; presumed liability with varying exceptions and limits to utmost liability of the CMR with its own exceptions to stricter liability of the MP4.

The uniform system proposed by the convention, on closer examination was also based on a 'modified network system' of liability when attributing the limits. This meant that this system also ceased to be uniform, as the different parties strove to show where and when loss occurred to benefit from a particular limit of liability. What is needed in multimodal transport is a liability regime which is totally predictable uniform and seamless.

The presumed fault system of liability can be said to be the main stay of the network system of liability because the liability needs to be the same to make any sense. The network system of liability by chaining the various liability regimes together ensures that the different conventions apply to loss damage or delay localised to their modes. A typical scenario will have the Hague Visby Rules applying to the sea potion, the CMR to the road section and the Warsaw convention to the air section of the same multimodal transport contract. A liability regime which is different from that applied by these conventions will lead to added inconsistency and disharmony. Thus the presumed liability regime is also adopted by multimodal transport to be in line with the principles of network liability which it has chosen.

Strict liability as proposed cannot be operated within a network system as it will lead to a further proliferation of potential laws. Once loss is localised, the liability basis will be presumed while unlocalised loss will lead to an application of the strict liability model. This will maintain the statusquo within multimodal transport of unpredictability and uncertainty.

The proposed strict liability will be easily applicable within a pure uniform liability system in which one law applies irrespective of localisation of loss, damage or delay and irrespective of the party responsible for the goods at time of loss. To achieve true uniformity in this case, it will be imperative that parties are not allowed to invoke any part of any other laws to cover loss or damage in multimodal transport even when such loss has been localised to a particular mode.

The problem here is if this will not conflict with the existing unimodal conventions. There will obviously be the contention that the existing conventions should be respected and applied in case of localised loss, in addition to the contention that the carriers liability exposure might be greater than his exposure under the different unimodal conventions under which he might have a recourse action.

When viewed from the point of view of the benefit that this system will bring to multimodal transport, it is worth effecting the requisite changes.

For the uniform strict liability to effectively apply, the nature of the multimodal transport contract would need to be reviewed. Presently, the popular stance is that it is viewed as a chain of contracts to which different conventions apply, a corollary to which is that the different laws apply to it. If this contract is viewed as a contract sui generis, it will mean that no conflict of conventions will apply. The MT contract will be taken out of the domain of unimodal conventions which par excellence will cover parts of multimodal contracts.

Alternatively, the different unimodal transport conventions will have to be modified to take into account this reality. Their multimodal provisions could be modified, and the definition of their scope of application clarified to ensure that it does not conflict with multimodal transport, otherwise the multimodal transport provisions in unimodal transport conventions will contradict this uniform basis.

6.4.1 STRICT LIABILITY AND THE BASIS OF LIABILITY

The importance of the basis of liability is a central issue in multimodal transport as it lays down the rules under which the carrier is liable for loss or damage. As noted in Chap 3, the basis in transport law is presumed liability. This is the liability system which operates in multimodal transport in varying degrees.

The question that needs to be asked here is if the differences between the conventions are so different and exclusive to their particular modes that uniform legislation would not be able to address the specific problems and differences in each mode.
Can the strict liability system as a uniform basis of liability apply to all modes of transport, or are they so different that they require different liability regimes. If the answer to this question is no, then a uniform system will be difficult to implement.

All transport conventions as noted were drafted to create an equitable risk allocation between the shippers and carrier interest. These conventions are therefore seen as compromises in which the carrier surrenders a part of his contractual freedom for certain benefits; exceptions of liability and limits. Although all conventions ascribe to these rules and find their origins in either the common law or civil laws systems, the end result is a form of presumed fault liability.[601]
Under The Hague Visby Rules, compulsory duties, which cannot be contracted out of, are set out with exceptions and limits of liability.
The basis of liability and the burden of proof used in multimodal transport is usually pegged to that which obtains in unimodal transport by default as the liability regime is also pegged to unimodal liability. This it is contended here is one of the major hurdles to a predictable liability regime. What is needed here is therefore a basis that is predictable and certain.

6.4.2 STRICT LIABILITY AND EXCEPTIONS TO LIABILITY

As also noted in Chapter 3 especially, there are exceptions to liability in all the different modes of transportation and multimodal transport in subject to all these exceptions. An ideal situation will be one in which the exceptions are reduced. This was done in the Multimodal Transport Convention 1980.[602] The benefits of this

[601] Under the common law, exceptions were available to the carrier, but the carrier had to prove the existence of the exception and prove that there was no negligence. While under the civil law, the concept was more fluid and the carrier needed to prove "force majeur" exceptions; overwhelming force or forces beyond the control of the carrier.
[602] Art. 16 of the convention which states that the MTO will be liable 'unless the multimodal transport operator proves that he, his servants or agents have taken all measures that could reasonably be required to avoid the occurrence and its consequences.' without the catalogue of exceptions as found in the Sea and land modes.

cannot be realised as the convention has not yet come into force and is unlikely to do so at this time. However, even if it came into force the difference would not be felt, as it will involve adducing evidence to show that the MTO was not negligent. This as seen from chapter 3 is indeed a heavy burden to discharge in multimodal transport.

6.4.3 STRICT LIABILITY LIMITS OF LIABILITY

The limits of liability are always a vital part of any liability regime and are thought to map out the financial burden for loss or damage to goods. It is also a measure of what cargo insurance needs to take out to make up for what ever loss the carrier is not entitled to pay because he has limited liability. In the case of multimodal transport, this is difficult as the carrier can never tell which of the limits will apply until the carriage has started and damage incurred. What is needed is a limit that is predictable and not one that varies as to the mode to which loss is localised.[603]

Of particular note in multimodal transport is the interplay between strict liability and limits of liability. The limits that are set will eventually determine the efficacy of this system. After all it is always about the risk allocation of both parties. If the limits are high enough, the cargo concern will have no incentive to sue the performing carrier even in cases in which the loss is localised. Because, his suit might be out of jurisdiction and he might have to satisfy the burden of proof under the particular liability regime. However, if the limits are low, the cargo concern will obviously have an incentive to sue the performing carrier who was in charge of the goods at the time. An alternative will be the case of channelling liability in which case the cargo concern cannot under the contract sue anyone other than the MTO. Such a principle can only be enforced within a mandatory convention.[604]

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[603] Patrick Vlacic "Monetary Limitation of liability-For how long" [2006] Il Diritto Marittimo 438, p.447, P Griggs & R. Williams, Limitation of liability for Maritime Claims (4th ed,. 2005)

[604] Michael Faure and Wang Hui, "Economic analysis of Compensation for Oil Pollution Damage" (2006) 37 JMLC 179, p.198

6.5 FAULT LIABILITY VERSUS STRICT LIABILITY AS THE BASIS OF LIABILITY IN MULTIMODAL TRANSPORT

The question of multimodal liability and the rationale for liability taken by the different standards of liability shows the emergence of the scholarly analysis of two important issues.

Should liability be based on fault or strict?

It is clear from the foregoing analysis that both written provisions of carriage law as seen from international conventions and decided cases have unanimously imposed a presumption of liability on the carrier for safe carriage of goods.[605]
There are questions which invariably stem out of this treatment of the multimodal transport, should one retain the presumption of liability as a fundamental ideal in multimodal transport, or seek to change the basis to strict liability.

The choice of a system of liability must begin with a careful assessment of the goals and interest it is meant to safeguard. In multimodal transport the main aim of all concerned must be the fair and rapid settlement of claims without undue or unnecessary delay and financial loss. This simple task takes on huge proportions when the different modes interplay and different interests are sought to be safeguarded.

At first glance, the fault system as exemplified by the presumption of liability seems to be of considerable benefit to the different parties.[606] Proving fault however greatly increases cost and delays and might leave the victims without compensation for their injuries what has been referred to as the "negligence lottery".[607]

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[605] Chapter 3

[606] Larsen, Paul B, "Air Traffic Control: A recommendation for a proof of fault system without a limitation of liability" (1966) 32 JAL & C pg 9.

[607] Franklin, Mark A, "Replacing the Negligence Lottery: Compensation and selective re-imbursement" 53 (1967) VA L Rev 774.

Further it is becoming extremely difficult to define the exact scope of care required. The standard of care applied is likely to change with changing technology. Thus fault which represents a standard of behaviour, good or bad, changes with geographical location and with technological change.

The main problem faced in multimodal transport in using this presumption of liability stems from the fact that it invariably leads to a multiplicity of liability regimes and liability basis.

Whenever loss is localised, the liability regime is that which would have applied if a contract was concluded using that particular mode of transport. When loss is not localised then the contract of carriage becomes the applicable law.
Additionally even when loss is localised to a particular mode of transport, the (carrier) MTO would find that the different conventions might be interpreted differently in different jurisdictions,[608] as the courts of different countries tend to adopt variant approaches to the interpretation of these Articles.

The MTO thus finds out that whenever loss is localised, he is subjected to a particular mandatory unimodal regime, with varying degrees of strictness as to the bases of liability ranging from presumed to strict,[609] and when loss is unlocalised he finds himself subject to a strict regime of liability, as he is unable to exonerate himself if he does not know where loss or damage occurred thus he will not be able to adduce evidence to show that he was not negligent, subject however to situations in which the claimant is at fault.

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[608] In some cases under Art 17 of the CMR, the carrier is held to a stricter liability, i.e. France, Belgium, Holland, Spain, Italy, while in others notably Germany, Switzerland and Austria, his liability is based on negligence.

[609] From,; (1) Liability for negligence with onus of proof on the claimant (private carrier).
(2) Liability for negligence with onus of proving non-negligence on carrier.
(3) Liability for negligence with onus of proving non-negligence on carrier with exceptions (Hague Rules).
(4) Strict liability, regardless of negligence with exceptions for claimant's fault.
(5) Strict liability regardless of negligence without exceptions.

In the 1960s and 1970s the trend was to move from a fault based to a system of liability regardless of fault notably in fields such as workmen's compensation, automobile accidents, product liability etc.

When elaborating the different unimodal concepts, especially the Warsaw Convention, its promoters discarded the idea of absolute liability, because of the state of the industry. It was deemed restrictive to impose such liability to loss or damage during carriage regardless of negligence.[610]

As technology grew, the risks linked to technological factors decreased and in some areas there was a move towards absolute liability.
This was particularly present in the Warsaw Convention when the series of changes - initiated moves towards a strict liability regime, which led leading commentators to regard it as the "Warsaw Shambles".[611]

From the introduction in the Montreal Interim Agreement of 1966 of a strict limited liability system which resulted from the failure of the fault system to ensure that victims of aircraft accidents were adequately compensated, to the Guatemala City Protocol which replaced liability of fault rule of the Warsaw Convention in case of passengers (Art IV replacing Art 17 of Warsaw), to the Montreal No 4 Protocol of 1975. And more recently the Intercarrier Agreement of Kuala Lumpur of 1995, which imposes absolute liability of up to 100,000 SDR then thereafter, reverts to presumed liability.

This change was possible in the carriage of goods by air because of the particular difficulty in exonerating themselves through the defence of "all necessary measures".[612] This difficulty led to the Warsaw Convention being viewed as a strict liability convention as opposed to one based on the presumed negligence.

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[610] The 1933 Rome Convention, strict liability was an option for damage caused by aircraft to 3rd persons on the surface and retained when in 1952 the Convention was revised.

[611] Prof Cheng, "Wilful Misconduct: From Warsaw to Hague and from Brussels to Paris" (1977) 11 Ann of Air & Space Law, pg 55.

[612] See Chapter 5 on the liability regimes in unimodal transport.

The difficulty faced in carriage by air in adducing evidence to satisfy the requirement of an effective rebuttal is reflected in multimodal transport. In this case the evidence to be adduced is not always primary evidence, but might be secondary in the sense that the evidence would have to be furnished by the sub-carrier under whose care loss or damage occurred, with the implications of time and money spent in adducing such evidence.

In light of such changes in unimodal concepts,[613] it is logical that the dogmatic attachment to unimodal concepts which has plagued multimodal transport contracts might lead to similar calls for a change to strict liability.

6.6 Harmonisation of Multimodal Transport law

The question within multimodal transport remains how to achieve uniformity in the liability regime in multimodal transport.
The facts emerging from a survey of transport conventions confirms the sentiments which are increasingly been expressed, that unification does not always produce harmonisation.[614] Many reasons have been given for this view;

1) Fragmentary. Harmonised law is in constant need of supplementary legislation to keep it up to date with relevant developments in the particular field. If law is static, it will be by-passed especially in this era of swift global economic changes. Because of the changes in technology, most businesses go out and create rules and standards which are later on emulated by legal systems

2) Time Factor. The processes of promulgating the different laws are usually time consuming. In addition to that, some of the laws are out of date before they come

[613] Chapter 5 on the liability regimes in unimodal transport looks at the different changes in the basis of liability and the rationale behind these changes.

[614] Mistelis., "Is Harmormonisation a necessary evil? The future of harmonisation and the new sources of international trade law" in Foundations and Perspectives of International Trade Law(2001) para.1-003

into national law, usually a result of the administrative red tape normally involved in converting such conventions into national law.

3) Technological changes. This is usually based on the fact that Conventions 'Freeze' the law not allowing for amendments as required to keep pace with the developments in the law. The was brilliantly stated by Rosett, *when he stated that `as time changes ...codification becomes the enemy of substantive reform'*[615]

6.6.1 The Emerging Trend in Harmonisation.

The history of harmonisation in transportation had for a long time taken the form of international conventions in the various modes. The processes which culminated into these conventions took a long time and money. This has changed and now we find different methods used in harmonising laws; the future of harmonisation was summed by Ramberg, as an era in which the parties to commercial transactions would regain their right to choose their own solutions from the available rules and codes without governmental interference.[616] So far in the case of multimodal transport the industry has had to deal with model laws, mostly based on the UNCTAD/ICC rules for a multimodal transport document. Now there are increasing calls for a return to none legislative means of harmonisation.[617] In the form of;

1) International Commercial Custom; model rules and contracts clauses, codes, and guidelines formulated by interested parties on the bases of trade practices[618]. The IMO legal committee is currently considering whether a code might be a suitable instrument in the field of third party insurance for ship

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[615] Rosett, A. `Unification, Harmonisation, Restatement, codification and Reforming International Commercial law.(1992) 40 AJCL.683

[616] Ramberg, in the 1992 Donald O'May Lecture, at the Institute of Maritime Law Southampton (1993) LMCLQ 178 at 191

[617] The Economic impact of carrier liability on Intermodal freight transport, European Commission, London Jan 2001. p 2

[618] The ICC has been noted for the different self regulating instruments it has helped to formulate to facilitate trade, rules such as; the UNCTAD/ICC Rules on multimodal transport document1992, INCOTERMS 2000,ICc international code on direct selling 1999, the ICC model contract for international franchising contracts 2000, ICC guidelines on advertising and marketing on the internet 1998.

owners. This is self regulation and has been the remit of organs such as the ICC who have created numerous rules which have later on been solemnised into legislation.

2) A modern restatement of the general principle of law prevailing in that field.[619] This idea was also taken up by the European community, when Ole Lando was commissioned to prepare the general principles of a European contract law.[620] UNIDRIOT was also engaged in a similar venture, in the field of international contracts to propose rules aimed at reflecting all legal systems of the world.

3) There are yet others who feel that social goals and further improvements in the law can only be achieved under diverse rules as this creates a need for constant re-evaluation of the law.[621]

Harmonisation by self regulation is not direct but indirect and gains force from the fact that it is adopted by private bodies. Increasingly, world wide acceptance has given credence to these rules in international trade. These rules are accepted because they are flexible and can be adopted in their entirety or modified to suit specific contracts or national laws. The success of these rules is obvious; it works because it is the joint effort of the people who are directly affected by it. The rules are often a result of surveys and are changed when needed. Harmonisation through self regulation by private bodies is cost effective and efficient; these normally need no public funding and are therefore not subject to any administrative red tape. This trend towards self-regulation is worthy of praise as it fills in a lacunae in the law and is useful in developing useful reliable and fair rules capable of complementing other laws. One must however not loss sight of the fact that self

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[619] R David, 'The international Unification of Private law' Encyclopaedia of comparative law 65 (1971)

[620] Ole Lando 'European Contract Law' 31 Am. J. Comp. L (1983) 653

[621] Ureil Prococcia., 'The case against Lex Mercatoria' in Jacob S. Ziegel (edn.), New Developments in International Commercial Law. Oxford (Hart) 1998 pp 87

regulation was not conceived as an alternative but as a complement to harmonised efforts sought to be achieved by international conventions.[622]

Harmonisation of transport law is considered as the most viable method of gaining predictability in multimodal transport. The fact that the different modes are recognising the importance of including multimodal provisions in their various regimes is a clear indication that it is considered as important. The fact that the different regimes are quite similar in their essential liability ingredients means that such a mode is feasible. A unified liability regime is the law of the future, as multimodal transport is the mode of the future. Such a regime will bring predictability and certainty in transportation of goods, it will eliminate costly enquires as to where loss or damage occurred.

6.6.2 PROPOSAL FOR REFORM

Having looked at the possible methods of harmonisation, the question still remains what should form the substance of this harmonise law to bring about certainty in multimodal transport liability.

Since the policy objectives of the law constitutes the material from which legal rules are formulated, it seems clear that reform of the law demands that these policy objectives be determined and made clear in advance. The more explicit the objectives, the clearer the rules would be, like structures which depend on their foundations.

In multimodal transport, calls for harmonisation are particularly strong given the fact that the proliferation of different laws makes it difficult to pinpoint the particular legal regime applicable.

The problem with multimodal transport is that its policy foundation is neither steady nor clear. Even the highest authorities are not particularly instructive on the matter.

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[622] Schmitthoff, The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions (1968) 17 Int. & Comp. L Q. 569 pp 661

Take the recent case of *Sonicare v EAFT.* The courts were in favour of determining the case on the basis of traditional bailment, in spite of the obvious multimodal transport contract.

This case and a few preceding cases on multimodal transport, show no clear statement of the policy upon which multimodal liability ought to be based even in the presence of a multimodal contract[623]. Although it is not difficult to see that the course taken in the case was motivated by a strong desire to do justice to the claimant by the common law itself as International Unimodal Conventions have shown themselves incapable of formulating a coherent and firm policy to serve as a foundation upon which multimodal rules may be erected. Is it now time for the legislature to step in?
However, the quest remains the same.

6.7 A New Instrument for Multimodal Transport

"Until there is a change of human perceptions and attitude, and perhaps a shift in calculation of economic benefits, the drafting of a single convention [for multimodal transport] remains a dream"[624]
This quote by Indira Carr epitomises the feeling in multimodal transport. After numerous attempts at enacting a convention on multimodal transport, the feeling within academia is that attitudes towards this mode must change.
We have seen increasingly that the attitudes have changed as there are increasing calls for a separate liability regime in multimodal transport. The most perceptible change is the one that now accepts that multimodal transport should depart from unimodal transport concepts.
Variously, there have been calls from the different stakeholder groups that there is an urgent need for a multimodal transport convention. What is not clear is what that instrument in multimodal transport should be;[625] the calls have ranged from calls that it should be a;

[623] Sony Chemicals Europe B.V. v .M/V Ingrita, [1997] AMC 755 (D Maryland 1996),
[624] Indira Carr, International Trade Law, (2004) p. 415
[625] UNCTAD Questionnaire, The feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1,13 January 2003, the questionnaire and answers form the different groups

1) New International Multimodal transport Convention
2) New International Generic transport Convention
3) New International Unimodal Convention with an extended Multimodal Arm
4) New Private Non-mandatory Convention and,
5) A Protocol to the 1980 Multimodal transport Convention.

In this section an examination is carried out to determine which of these suggestions will meet the aspirations of a predictable liability regime in multimodal transport. This will be done by examining it against certain pivotal principles of multimodal transport, principles that will have an impact on any new liability regime;

- Predictability
- Avoidance of friction and compatibility with other transport conventions
- Avoidance of Double insurance
- Acceptance

6.7.1 A NEW INTERNATIONAL MULTIMODAL TRANSPORT CONVENTION.[626]

With the increasing growth of multimodal transport, it is evident that a convention is required to regulate it. The existing conventions in transportation of goods being unimodal conventions cannot meet the needs and aspirations of multimodal transport. The question is the feasibility of such a new convention; will the different stakeholders accept it? Will it gain enough ratification where the 1980 one did not? What will it need to meet with approval? This particular recommendation was made to the UNCTAD commission charged with researching what regime should be appropriate.[627] This group reasoned that this will be a viable option because at the time the convention was drawn there was not enough publicity to allow inform choices; additionally certain elements were not attractive

[626] 39% of respondents favoured a new liability regime, see chap 4. Implementation of Multimodal transport rules. Report prepared by UNCTAD Secretariat.
www.UNCTAD.org/en/docs/pdsdetlbd2.en.pdf.
[627] The Feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1

to the shipping interest. The above reasons are quite valid but are not exhaustive; because the convention did not come into force because it was a half hearted attempt to regulate multimodal transport. By seeking to satisfy all factions its provisions failed to take into consideration the essential factors important for a viable liability regime in multimodal transport. A new regime in multimodal transport has as a major impediment the fact that the different modes will reject it if it conflicts with their provisions; this was one of the reasons why the 1980 regime did not gain the required support. Its provisions were thought to be different in certain respects especially its limits. This option is thus a difficult one in terms of acceptability. The ad hoc working group on multimodal transport law reviewed the status of multimodal transport and concluded that the multimodal transport convention was not a feasible option that the way forward lies in self-regulation.

6.7.2 A PROTOCOL TO THE UNITED NATIONS MULTIMODAL CONVENTION 1980

This convention was drawn up to fill in the lacunae in the law introduced by multimodal transport. This convention after 26 years has failed to come into force because it has not had the requisite ratifications needed. The convention failed to illicit the appropriate backing especially from the major shipping nations.[628] The raison d'etre for the 1980 Multimodal convention still stands,[629] and now the calls are from a wider group as the problems caused by a lack of predictable laws are affecting international carriage adversely. The question that demands an answer is what provisions will need to be modified by the protocol? The responses of the UNCTAD questionnaire shows that there is indeed wide support for something to be done, however even this calls are made within the context of avoiding any conflict with unimodal regimes. It is clear that this has been an albatross on the back of this regime, this inability to ride alone without hanging on the strings of

[628] Kindred and Brooks, *Multimodal Transport Rules*, The Hague, 1997

[629] The IATA Intercarrier Agreement 1995. Also see chapter 5 on the Multimodal Transport Convention.

unimodal transport. The fact is that this convention needs to be rejected and we need to go back to the drawing board afresh.
This option might seem unattractive when viewed in the light of the time it took for the 1980 convention to be ready for signature; but time cannot be the decisive factor.

6.7.3 PRIVATE NON-MANDATORY AGREEMENTS

Private agreements in the footsteps of the Intercarrier Agreement 1995 might be the way forward.[630] It is believed by some that, the solution, which can eradicate the problems faced by multimodal transport, is the use of model rules in the form of the UNCTAD/ICC rules. The advantage of model rules lie in the fact that they seek to inform and to provide a model which can be used. It is not a statute which is rigid and needs to be adopted without change.[631] Such rules will require extensive research into the topic, setting down specifically the particular system that it will operate in international multimodal transport and the implication of competition law on such agreements. This method was recommended by the ICC ad-hoc working group on multimodal transport as the way forward, in this regard they came out strongly in support of the UNCTAD/ICC Rules.[632]

1) The underlying Principle.
The basic underlying principle which should run right across the rules should be stated, re-iterating the fact that there are intended to reflect the common rules already in existence. The difficulty here would be to make the rules more innovative. A more likely way would be to take a new perspective.

2) The Expected role of the rules.

What is expected is that such rules would bind and apply because of their persuasive character. However it is also hoped that such rules will affect favourable future

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[632] Implementation of multimodal transport rules, supra note 626 sect. 46

advances in multimodal transport especially in the light of the advances being made in transport technologies. It is hoped that this will made minor adjustments possible to keep abreast with developments.

3) A model for Legislation.

It would be hoped that such rules would influence legislation in this field. This would be particularly helpful to underdeveloped countries which have no special rules on the topic and to international panels in drafting future laws. A look at national legislation shows a strong bias in favour of developed countries, it is the hope of all that south-south countries will also take appropriate steps to introduce multimodal rules in their various countries.[633]

1) Help to those drafting multimodal contracts.

This should also help parties in drawing up their contracts.
The advantages of such model laws are more appropriate in this modern era with vast changes, in that the agreement would act as a mere guide which may be modified or further added to within certain limits to suit particular requirements.

6.7.4 A NEW UNIMODAL TRANSPORT CONVENTION WITH AN EXTENDED MULTIMODAL TRANSPORT ARM

This is of particular importance now because of the on-going work by the working group of UNCITRAL in considering a draft convention on the carriage of goods by sea with an extension to multimodal transport contracts involving a sea leg.[634] Under the draft, the maritime liability regime will be applicable also to claims arising out of multimodal transport involving a sea leg, in particular,

a) in cases where loss cannot be localised ; and

[633] See chapter 5
[634] UNCITRAL document A/CN.9/WG/III/WP.21.

b) in cases where loss was attributable to a land or air leg of transport but no international unimodal convention applied.

This draft was initiated by CMI under the auspices of UNCITRAL to update the legislation in the carriage of goods by sea, especially after the limited success achieve by the Hamburg Rules of 1978.

In the light of the technological development in transportation and especially the growth and importance of multimodal transport, it is expected that any new unimodal transport conventions must include multimodal transport if they wish to gain recognition.

Any such convention however, will not solve the problem in multimodal transport as it will be self limiting;

1) It is basically a unimodal transport contract extended to cover the obvious; carriage subsequent and precedent to the main transport contract.
2) Par excellence it fails to solve multimodal specific problems.

Such a document is feasible in the light of the fact that very few provisions are exclusive to sea transport. Such exclusive provisions can then be put in special sections while the rest of the draft deals with issues of extended responsibility to cover per and on-carriage. This is of particular importance especially in the carriage of goods in containers which is often under a multimodal transport contract. As a follow up to this extended responsibility, the draft also does not differential between a sea carrier and an agent allowing carriers to act in both capacities.

Additionally the new Montreal convention on the carriage of goods by air 1999 also takes into consideration the multimodal transport problem, this re-enforces the fact that any new unimodal transport convention cannot afford to ignore multimodal transport.

6.7.5 A NEW GENERIC INTERNATIONAL TRANSPORT CONVENTION[635]

The most widely advocated change in multimodal transport recommended to solve most of its problems is the results likely to accrue from harmonisation of carrier liability in transportation law generally. The contention among legal writers[636] is that any harmonisation of carrier liability meant to unify the different unimodal convention will regulate and eradicate the unpredictability problem in multimodal transport.

However, one must not lose sight of the fact that calls for this solution usually follows shortly after an outcry as to the unpredictability of multimodal liability, and is usually thus in the context of multimodal liability. Herber R stated that[637]

> *"In former times, where unimodal transportation was the normal kind of carriage of goods, one could afford to apply different kinds of liability regimes. In the course of the container revolution, multimodal transport has become the more modern and effective way of handling most of cargo transactions at least in international trade. The fact that the liability rules for the various modes of transport differ so fundamentally as they actually do complicates extremely the legal settlement of damages occurring during transportation. This is one ... very practical reason for thinking of a means to achieve greater uniformity between the various liability regimes."*

He then went on to lament the effect that divergent rules have on multimodal transport, that all

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[635] Multimodal transport: The feasibility of an international legal instrument, UNCTAD/SDTE/TLB/2003/1. para. 29

[636] Asariotis, "Towards Improved Multimodal freight in Europe, and the United States p.42

[637] Herber. R, "Towards the Harmonisation of Carrier Liability Regimes" (1992) 94. Il Diritto Marittimo 734.

"attempts to [improve additional Rules in multimodal transport] to this end have ... been undertaken with little result as long as the divergences between the unimodal rules are so fundamental as they are at present."

These sentiments are concurred here, that multimodal transport problems are but an off-spin of such divergences, among the different multimodal convention. The problems caused by such divergences are impediments to coherent multimodal transport. The greatest problem in transport law is considered to be the differences between the rules governing the different transport modes; different basis of liability, different limits, different documents and time bars etc. These differences represent a formidable problem when one attempts to combine them into a single contract as is the case in multimodal transport.[638]

For a long time now, there is the assumption that harmonisation of laws in transportation is not only desirable but probable the most important development in the field of international carriage.[639] This conclusion was clearly and unequivocally drawn from the frequency with which enabling agencies such as the CMI, UNIDROIT, UNCITRAL and UNCTAD have churned out international harmonised laws for over 100 years.

Calls for a generic convention in transportation to cater for all modes of transport also carries the implication that all other international conventions, regional agreements and national legislation will have to be replaced. This in itself has enormous implications for the transport industry and will entail a lot of compromises to meet the aspirations and particular problems of each mode. The question is if this is a realistic

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[638] De Wit., *Multimodal transport: Carrier liability and documentation. Lloyd's of London Press 1995*,p 7.

[639] Diana Faber, at a Seminar in London stated that, "... The Multimodal industry is investing heavily in improving its services and it is a very sophisticated industry, yet the same cannot be said for its legal infrastructure; There is a large number of transport conventions which are potentially applicable to any contract. This means that enormous sums which would be better applied commercially, are spent in legal disputes as to whether the contract terms apply or the convention and if so which convention should apply to govern the relations between the parties. The way forward is to abolish all the individual conventions and introduce one which would govern all transport contracts, by whatever means of transport and whether unimodal or multimodal."

expectation; especially in the light of the lengths of time that has taken each convention to fine tune its law to suit its particular problems.

The only way to uplift itself from this muddle would be by applying a liability standard which is compatible with multimodal transport. In this world of multimodal transport with its changing landscapes the logical suggestion would be the use of a liability regime that will be compatible with multimodal transport. Having examined the various ways of harmonisation, notably by international conventions and by self regulation, and the potential basis of liability, different conclusions have been arrived at;

1) The first conclusion is that, predictability and certainty can only be attained through uniformity in multimodal transport in the form of a mandatory international convention. However, it should be appreciated that any such convention will meet with hostility from the different modal transports as conflicting with their respective provisions. The one solution guaranteed to be acceptable to all parties concerned will be one in which all modes of transport are implicated in the form of the ultimate transport convention for all modes of transport. As noted earlier, the differences and divergences in the different transport conventions acts as an impediment to facilitating international trade. Such a convention should be mandatory with no opting out allowed to parties to ensure that there is certainty especially as regards the liability and limitation provisions. This is because a non- mandatory convention will be unable to maintain the integrity of transport rules. This convention should be accompanied by maximum promotion to allow all parties concern to fully understand it and to facilitate the national procedures for ratifying it.

2) The second conclusion arrived at is the basis of liability to be used in this convention. After examining the potential liability regimes which can become applicable in multimodal transport, it is clear that with the changes in transport technologies, presumed fault has lost its place in transportation generally. The new way of transporting

goods is by containers in fast ships, goods are arriving at their destination quicker with less loss and damage record. It has also become difficult to state at what stage such loss could have happened. Presumed liability is based on the localisation of loss or damage, in multimodal transport localisation is often not obvious, thus this principle plays a limited role. The basis of liability should then be strict liability. This will tie in with the current climate where goods arrive faster with less loss or damage. In such a case once loss or damage occurs the question as to the extent of liability is eliminated. This will reduce time and cost in adducing evidence to show that the carrier is at fault. The fact is that this will not in anyway change the status–quo as the loss normally falls on insurance. There is already in existence a limited strict liability in air carriage which can be extended to full strict liability on all modes.

3) The third conclusion is that there should be limits of liability. This will ensure that the parties at the commencement of each contract will know what to expect. The shippers shipping high value goods will take extra insurance to ensure that they are fully compensated for any loss or damage. The carriers on their part will take out insurance to cover any loss or damage to goods. This will ensure that cost is kept at a minimum as resources are not wasted in localising loss or damage and pinpointing the liability regime applicable. This will facilitate international trade greatly.

CONCLUSION

This thesis concludes that multimodal transport should take an active part in the legal and institutional regulation of a liability regime in transportation, much in the way of one liability system that will be made applicable to all modes of transport to support predictability and certainty in global multimodal transport.

This thesis has showed that the legal regulation of multimodal transport is in an unacceptable doctrinal state today because it developed not from any firm and clear policy as to what multimodal transport should be, but from the view point of social convenience and rough justice; because it was regarded as a chain contract, all the applicable regimes in that chain were made available and applicable to it.
Devoid of an applicable convention, inconsistencies have piled up as the different contractual rules strive to achieve the desired effect in case unlocalised loss or when none of the mandatory conventions would apply to localised loss.

The only way to up-lift it from this 'muddle' would be to apply a uniform liability regime which would take into consideration the realities of multimodal transport and be capable on an institutional level of regulating all transport modes.

Presently, there should be great anxiety in all quarters involved in multimodal transport that although much has been said about the importance and the need for a uniform liability regime nothing has as yet materialised.
This thesis has been involved in looking at this problem by providing answers to some pertinent questions asked in the introduction;

a. Why is liability unpredictable in multimodal transport?
b. What solutions have been proposed? and
c. Is there a better solution?

1- What makes multimodal transport unpredictable?

The first three chapters provided three different answers to this question.
The primary conclusion to be drawn from chapter one is that the unpredictable and uncertainty is linked to the way in which multimodal transport is interpreted and regarded. This has been responsible for also implementing the liability regime of all the modes implicated in any given carriage. Specifically, it was proven here that the reality in (multimodal) transport has moved away from enquires as to the mode(s) to be used to expectations that the carrier will provide all necessary services to ensure that the goods are carried to destination. On this bases it was argued that since the basic expectation have moved from modes used to total transport, the liability regime should also reflect this move.

In the second chapter, it was shown that the nature of multimodal transport dictated that numerous parties formed part of the transport chain. This led to questions of the identity of the carrier especially in the light of the identity of carrier and demise clauses in multimodal transport documents. It was concluded that the emphasis here should be on ensuring that the MTO was the only one who should be sued in case of loss or damage. It was asserted here that this problem compounded the multimodal transport problem. The solution might be in channelling responsibility to the MTO but within a mandatory convention.

Chapter three on its part went on to out-line the applicable liability regime in multimodal transport. To critically assess the nature of this regime, the current liability rules were examined through the example of a hypothetical case. Specifically, the unimodal conventions are also examined to show the extent of the differences and therefore of the level of unpredictability faced in multimodal transport.
The conclusion here is that the unpredictability in the liability regime is exacerbated by the use of the presumed liability regime which is inappropriate in multimodal transport.
This liability regime in multimodal transport, ignores the basic rationale behind the concept and fractionalises multimodal transport by introducing a liability regime that is potentially multiple.

The reason for this is simple the constructs of unimodal regimes have been superimposed on to multimodal transport unmodified. Therefore multimodal transport is equated to unimodal transport and the liability regimes applicable to unimodal transport are made applicable to multimodal transport. This it is asserted here, is problematic as the differences in the different liability regimes in transportation are a hindrance to international trade. But when these regimes are required to co-exist in the same contract as is the case in multimodal transport, chaos reigns; because all these liability regimes have different basis of liability, different limits of liability and different exemptions from liability.

Thus when a contract is concluded in this mode, there are no clear cut rules for determining the applicable liability regime. The parties face the possibility that any of these potentially liability regimes can apply.

All the above factors mean that the liability regime is unpredictable and hampers the growth of this mode of transportation while also slowing it down as the most dynamic mode of carriage so far.

This state of affairs led different groups to propose solutions to bring about predictability in multimodal transport.

2 What Solutions have been proposed to curb this Problem?

Chapters 4 and 5 of this work examined the solutions proposed by different groups. This part concludes that although the 1980 multimodal transport convention failed to illicit the required support to bring it into force, it put in place building blocks on which the current rules on multimodal transport are based.

Specifically, this thesis came to the conclusion that, the Multimodal Convention would not have changed the multimodal landscape because its basis principles when interpreted gave similar results to what obtained under the network system of liability. The thesis also enumerated some reasons why the convention has not been ratified. Here it was contended, that this convention was closely modelled after the Hamburg rules and thus suffered from the imperfections of the rules together with its own short comings. The conclusion here is that what is needed is a new convention which will

severe the ties it has to any form of unimodal conventions and reflect the current practice of carrying goods multimodally.
Chapter five is dedicated to the attempts by different bodies to regulate multimodal transport: Groups ranging from United Nations bodies to regional and national legislature. Here the different attempts are examined and the conclusion reached is that they,
like their predecessors of 30 and 20 years are basing their solutions on unimodal transport solutions.

Specifically, the laudable elaborate attempt by the UNCITRAL is examined and the conclusion is that it falls short of what is expected within multimodal transport, because its accent is on sea carriage together with its specific opting out provisions which ensures that unpredictability will continue to exist under its wings.

All this attempts had one thing in common; they sought to maintain the status-quo existing in transportation and thereby failed to address the substantive issues relevant to a successful multimodal transport regime. In this regard they all ascribe to the presumed liability of the carrier which can no longer be sustained in multimodal transport.
There is a wide range of Academic opinion on this problem; some proposals have been advanced which are quite similar to those adopted by private and international organisations as noted above. The views were beautifully summarised by UNCTAD and range from calls to examine the different elements of multimodal transport; basis of liability, type of liability, and limitations of liability and whether the convention should be mandatory or not.
However, there are also some, who feel that the best way to achieve predictability would be through the harmonisation of all transport laws into one uniform law applicable to all contracts of carriage irrespective of mode.

3) What is the most viable solution?

The liability regime that is believed will bring about predictability is discussed and justified in chapter 6 of this work. These Chapters emphasise the fact that inherent in the nature of multimodal transport is the fact that we ought to emphasis what has been described as it flexibility, that much preached and much desired, although in our present climate much less practised virtue of multimodal transport. This flexibility which allows the contract to be executed by one using any mode(s) deemed appropriate is fast emerging as the new form of international transport contract. It is thus important that this flexibility is enhanced by an appropriate liability regime that will allow growth.

The unpredictability in the liability system in multimodal transport stems not so much from the fact that unimodal concepts are being used but more from an inability on the part of multimodal transport to formulate its own liability regime and move away from archaic transport concepts.

1) A proposed liability regime for multimodal transport

Having examined the different potentially applicable liability regimes and the suggestions for a solution, it is strongly believed that the liability regime that would bring about predictability would be one that is strict with limits, and the method of achieving this liability would be by harmonising all transport conventions and making one true liability regime applicable to all modes of carriage.
Such a liability regime will bring abut predictability in multimodal transport as it will eradicate the need to localise loss, eradicate the need to seek to sue performing carriers, reduce cost of adducing evidence to prove or rebut liability under the presumed liability system.
Specifically, this chapter examined the question of risk allocation within multimodal transport using economic parameters and concludes that the basis of presumed liability even in unimodal transport can no longer be sustained. The arguments put forward for the use of fault liability have become archaic. Following on this, the thesis strongly advocates that the presumed liability be replaced with strict liability. It

also asserts that if the base on which presumed liability can no longer be justified, the unimodal conventions should also be allowed to benefit from the mandatory multimodal transport convention when it is eventually drafted.

The work than goes ahead and examines the likely route such a harmonised law will take. Such harmonised rules will reduce the uncertainty as to the predictable liability regime, uncertainty as to the basis of liability applicable, uncertainty as to the documents required and their interpretations, uncertainties as to the burden of proof and time limits. By removing a number of duplicate information flows such as found in the present system, and rationalising the responsibilities of the carrier, the ideal liability regime can be sketched. In this proposed situation, there is a seamless liability regime which is applicable regardless of type of loss or damage or place of loss or damage.

2) Principles on which the proposed solution is based.

The proposed solution is based on two principles. First of all it is based on uniform liability in all modes of carriage by the harmonisation of all transport conventions and laws.
Such harmonised laws will reduce the fears of the different stakeholders that such a basis will lead to an increase in cost, on the contrary, it will lead to reduced cost as costs associated with claim handling and litigation will be eliminated. This will also do away with the conflict between and among conventions. Any other solution in multimodal transport will invariably lead to the same problems of conflict with existing unimodal transport conventions.

The second principle is based on strict liability with limits; uniform harmonised laws in this case will reduce the costs associated with litigation and premiums.
Such a strict liability will also mean that there is no duplication for insurance as cargo insurance will play a different role. Insurance here will be used to mitigate the risk of loss and damage and also the risk of liability.

The liability issue in a way is about insurance, on the one hand is the issue of the reality of the risk of shipping goods which the cargo owner assumes and on the other

hand is the risk of liability of loss or damage to the goods which is assumed by the carrier, and the insurer is in the middle dealing with both parties.
In a normal loss and damage scenario, the actual parties concerned are the cargo and liability insurers, who respectively have to claim for the loss and pay for it. In the light of these findings, insurance reform may be an alternative solution to the multimodal transport problem.

The tasks now is for politicians to come together and draw a uniform convention which is clear and simple and one that will create certainty; and most important of all one that is fair and equitable to all parties. This will be possible if one liability regime were to govern all transportation of goods regardless of modes because at the end the different liability regimes are more similar than different and all aim at one thing certainty and predictability in their respective modes.

The main bottlenecks towards a predictable liability regime have been identified by this work. For each of them suggestions can be made for improvements.
It is recognised that the existing legal framework existing in multimodal transport is fragmentary and unsatisfactory. The problem seems to be the direction that a solution should take due to conflicting interest. This is particularly felt in issues such as the system of liability and the basis of liability. This problem can be put down to insufficient communications among the different parties involved in multimodal transport at a global level. It is highly recommended that such contact should be solicited before the new regime is promulgated to ensure that it will have the requisite support from all sectors. The need for such dialogue especially for these matters is crucial to the success of the new rules. There is every confidence that this is a workable solution but unlike the 1980 convention, it must inform and educate its stake holders to ensure acceptance and facilitation.
In the light of the fore-going it is now time to call on the different private and UN organisations such as UNCTAD, UNCITRAL, ICC, CMI and UNIDRIOT concerned with harmonisation of law to initiate informal international seminars and workshops to debate these issues in a frank and sincere manner by all parties involved to bring to light viable solutions preferably along the lines enumerated in this work.

After examining the merits of multimodal transport and the importance of this mode in the overall globalisation of transport laws,
After noting the confusion caused by the proliferation of liability regimes in international transport,
Having acknowledged the fact that global transport requires global rules,
This work recommends that multimodal transport should assume a modern role in international trade and transport. The promulgation of rules to govern multimodal transport will be sufficient to cover all types of unimodal transport contracts. The era in now ripe for a truly universal transport rule to cover all forms of transportation.

APPENDIX

United Nations Convention on International Multimodal Transport of Goods

UN Doc. TD/MT/CONF/17 (1980)

The States parties to this Convention,

Recognizing:

(a) That international multimodal transport is one means of facilitating the orderly expansion of world trade;

(b) The need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned;

(c) The desirability of ensuring the orderly development of international multimodal transport in the interest of all countries and the need to consider the special problems of transit countries;

(d) The desirability of determining certain rules relating to the carriage of goods by international multimodal transport contracts, including equitable provisions concerning the liability of multimodal transport operators

(e) The need that this convention should not affect the application of any international convention or national law relating to the regulation and control of transport conventions.

(f) The right of each state to regulate and control at the national level multimodal transport operators and operations.

(g) The need to have regard to the special interest and problems of developing countries, for example, as regards introduction of new technologies, participation in multimodal services of their national carriers and operators, cost efficiency thereof and maximum use of local labour and insurance;

(h) The need to ensure a balance of interests between suppliers and users of multimodal transport services;

(i) The need facilitate customs procedures with due consideration to the problems of transit Countries;

Agreeing to the following basic principles:

(a) That a fair balance of interests between developed and developing countries should be established and an equitable distribution activities between these groups of countries should be attained international multimodal transport;

(b) That consultation should take place on terms and conditions service, both before and after the introduction of any new technology in the multimodal transport of goods, between the multimodal transport operator shippers, shippers' organizations and appropriate national authorities;

(c) The freedom for shippers to choose between multimodal au, segmented transport services;

(d) That the liability of the multimodal transport operator under the Convention should be based on the principle of presumed fault or neglect;

Have decided to conclude a Convention for this purpose and ha, thereto agreed as follows:

PART I

General provisions

Article I

DEFINITIONS

For the purposes of this Convention:

1. "International multimodal transport" means the carriage of good by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pickup and delivery of goods carried out in the performance of a

unimodal transport contract as defined in such a contract shall not be considered as international multimodal transport.

2. "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes multimodal transport contract and who acts as a principal, not as an agent on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.

3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.

4. "Multimodal transport document" means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.

5. "Consignor" means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract

6. "Consignee" means the person entitled to take delivery of the goods.

7. "Goods" includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.

8. "International convention" means an international agreement concluded among States in written form and governed by international law.

9. "Mandatory national law" means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.

10. "Writing" means, inter alia, telegram or telex.

Article 2

SCOPE OF APPLICATION

The provisions of this Convention shall apply to all contract s of multimodal transport between places in two States, if:

(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is. located in a Contracting Skate, or

(b) "The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.

Article 3

MANDATORY APLICATION

1. When a multimodal transport contract has been concluded which according to article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract.

2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.

Article 4

REGULATION AND CONTROL OF MIULTIMODAL TRANSPORT

1. This Convention shall not affect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations.

2. This Convention shall not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, between multimodal transport operators, shippers, shippers' organizations and appropriate national authorities on terms and conditions of service; licensing of multimodal transport operators; participation in transport; and all other steps in the national economic and commercial interest.

3. The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.

PART II

Documentation

Article 5

ISSUE OF MULTIMODAL TRANSPORT DOCUMENT

1. When the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form.

2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.

3. The signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued.

4. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document. In such a case the

multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such document shall for the purposes of the provisions of this Convention be deemed to be a multimodal transport document.

Article 6

NEGOTIABLE MULTIMODAL TRANSPORT DOCUMENT

1. Where a multimodal transport document is issued in negotiable

(a) It shall be made out to order or to bearer;

(b) If made out to order it shall be transferable by endorsement;

(c) If made out to bearer it shall be transferable without endorsement;

(d) If issued in a set of more than one original it shall indicate the number of originals in the set.

(e) If any copies are issued each copy shall be marked "non-negotiable copy."

2. Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary,

3. The multimodal transport operator shall be discharged from his obligation to deliver the goods if, where a negotiable multimodal transport document has been issued in a set of more than one original, lie or a person acting on his behalf has in good faith delivered the goods against surrender of one of such originals.

Article 7

NON-NEGOTIABLE MULTIMODAL TRANSPORT

1. Where a multimodal transport document is issued in non negotiable form it shall indicate a named consignee.

2. The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee

named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.

Article 8

CONTENTS OF THE MULTIMODAL TRANSPORT DOCUMENT

1. The multimodal transport document shall contain the following particulars:

(a) The general nature of the goods. the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;

(b) the apparent condition of the goods;

(c) The name and principal place of business of the multimodal transport operator,

(d) Name of the consignor;

(e) The consignee, if named by the consignor,

(The place and date of taking in charge of the goods by the multi modal transport operator;

(g) The place of delivery of the goods;

(h The date of the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;

(i) A statement indicating whether the multimodal transport document is negotiable or non-negotiable.

(J) The place and date of issue of the multimodal transport document.

(k) The signature of the multimodal transport operator or of a person having authority from him.

(l) The freight for each mode of transport, if expressly agreed between the parties, or the freight including its currency, to the extent payable by the consignee or other indication that freight is payable by him.

(m) The intended journey route, modes of transport and places of transhipment, if known at the time of issuance of the multimodal transport document.

(n) The statement referred to in paragraph 3 of article 28;

(o) Any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.

2. The absence from the multimodal document of one or more of the particulars referred to paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.

Article 9

RESERVATIONS IN THE MULTIMODAL TRANSPORT DOCUMENT

1.. If the multimodal transport document contains particular concerning the general nature, leading marks, number of packages or pieces or weight or quantity of the goods which the multimodal transport operator or any person acting on his behalf knows, or has reasonable grounds to suspect that the documents do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the multimodal transport operator (or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these inaccuracies, grounds for suspicion or the absence of reasonable means of checking

2. If the multimodal transport operator or a person acting on his behalf fails to note o:1 the multimodal transport document the apparent condition of the goods he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.

Article 10

EVIDENTIARY EFFECT OF THE MULTIMODAL TRANSPORT DOCUMENT

Except for particulars in respect of which and to the extent to which a reservation permitted under article 9 has been entered:

(a) The multimodal transport document shall be prima facie evidence of the taking in charge by the multimodal transport operator of the goods as described therein; and

(b) Proof to the contrary by the multimodal transport operator shall not be admissible if the multimodal transport document is issued in negotiable from and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.

Article 11

LIABILITY FOR INTENTIONAL MISSTATEMENTS OR OMISSIONS

When the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraph 1. (a) or (b) of article 8 or under article 9, he shall he liable, without t11e benefit of the limitation of liability provided for in this Convention, for any loss, damage or expenses incurred by a third party, including a consignee, who acted in on the description of the goods in the multimodal transport document issued.

Article 12

GUARANTEE BY THE CONSIGNOR

1. The consignor shall be deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity

and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document.

2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his

liability under the multimodal transport contract to any person other than the consignor.

Article 13

OT'HER DOCUMENTS

The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. However, the issue of such other documents shall not affect the legal character of the multimodal transport document.

PART III

Liability of the multimodal transport operator

Article *14*

PERIOD OF RESPONSIBILITY

1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.

2. For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods:

(a) From the time he has taken over the goods from:

(i) The consignor or a person acting on his behalf;

or

(ii) An authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;

(b) Until the time he has delivered the goods:

(i) By handing over the goods to the consignee; or

(ii) In cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or

(iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

3. In paragraph 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services hr makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents.

Article 15

THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR FOR HIS SERVANTS, AGENTS AND OTHER PERSONS

Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.

Article 16

BASIS OF LIABILITY

1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal

transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which 1 twould be reasonable to require of a diligent

multimodal transport operator, having regard to the circumstances of the case.

3. If the goods have not been delivered within 90 consecutive day: following the date of delivery determined according to paragraph 2 of the article, the claimant may treat the goods as lost.

Article 17

CONCURRENT CAUSES

Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any other person referred to in article 15 combine with another cause to produce loss, damage or delay in delivery the multimodal transport operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect provided that the multimodal transport operator proves the part of the loss damage or delay in delivery not attributable thereto.

Article 18

LIMITATION OF LIABILITY

1. When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport if

deemed packages or shipping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit.

3. Notwithstanding the provisions of paragraphs 1 and 2 of the article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the

APPENDIX 3

liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.

3. The aggregate liability of the multimodal transport operator, under paragraphs 1 and 4 or paragraphs 3 and 4 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 or 3 of this article.

6. By agreement between the multimodal transport operator and the consignor, limits of liability exceeding those provided for in paragraphs 1, 3 and 4 of this article may be fixed in the multimodal transport document.

7. "Unit of account" means the unit of account mentioned in article 31.

Article 19

LOCALIZED DAMAGE

When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport

operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Article 20

NON-CONTRACTUAL LIABILIT'Y

1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal transport operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

2. if an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent or such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention.

3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport operator and from a servant or agent or any other person of whose services he makes use for the performance of the multimodal transport contract shall not exceed the limits of liability provided for in this Convention.

Article 21

IF LOSS OF THE RIGHT TO LIMIT LIABILITY

1. The multimodal transport operator is not entitled to the benefit of the limitation. of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose

services he makes use of in the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery re5ulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss; damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

PART IV Liability of the consignor

Article 22

GENERAL RULE

The consignor shall he liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part.

Article 23

SPECIAL RULES ON DANGEROUS GOODS

. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the consignor hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignor shall inform hïm of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the multimodal transport operator does not otherwise have knowledge of their dangerous character:

(a) the consignor shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and

(b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods ir his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2 (b) of this article do not apply or may not invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or the multimodal transport operator is liable in accordance with the provisions of article 16.

PART V

Claims and actions

Article 24

NOTICE OF LOSS, DAMAGE OR DELAY

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over *is prima facie* evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties or their authorized representatives at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the multimodal transport operator and, the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall he payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2 (b) (ii) or (iii) of article 14.

6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 (b) of article 14, whichever is later, the failure to give such notice is prima facie evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.

7. if any of the notice periods provided for in paragraphs 2, 5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, or to the consignor, respectively.

Article 25

LIMITATION OF ACTIONS

1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.

2. The limitation period commences on the day after the day on which the multimodal transport operator has delivered the goods or part thereof or,

where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Article 26

JURISDICTION

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(d) Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

2. No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.

4. (a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;

(b) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.

Article 27

ARBITRATION

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ü) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or

(b) Any other place designated for that purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties, after the claim relating to the international multimodal transport has arisen.

PART VI

Supplementary provisions

Article 28

CONTRACTUAL STIPULATIONS

1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the multimodal transport operator or any similar clause shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.

3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating there from to the detriment of the consignor or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Article 29

GENERAL AVERAGE

1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.

2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contributing in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.

Article 30

OTHER CONVENTIONS

1. This Convention does not modify the rights or duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels of 25 August 1924; in the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating

to the limitation of Liability of owners of sea-going ships and inland navigation vessels.

2. The provisions of articles 26 and 27 of this Convention do not prevent thEl application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention. However, this paragraph does not affect the application of paragraph 3 of article 27 of this Convention.

3. In liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or

(b) Every virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 1^{0}, May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far a, such States are bound to apply the provisions of such Conventions to such carriage of goods.

Article 31

UNIT OF ACCOUNT OR MONETARY UNIT AND CONVERSION

1. The unit of account referred to in article 18 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in article 18 shall be converted into the national currency of a State according to the value of such currency on the

date of the judgement or, award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund shall be calculated in a manner determined by that State.

2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows: with regard to the limits provided for in paragraph 1 of article 18, to 13,750 monetary units per package or other shipping unit or 41.25 monetary units per kilogram of gross weight of the goods, and with regard to the limit provided for in paragraph 3 of article 18, to 124 monetary units.

3. The monetary unit referred to in paragraph 2 of this article corresponds to 65.5 milligrams of gold of millesimal fineness nine hundred The conversion of the amount referred to in paragraph 2 of this article into national currency shall be made according to the law of the State concerned.

4. the calculation mentioned in the last sentence of paragraph 1 of this article and the conversion referred to in paragraph 3 of this article shall be made in such a manner as to express in the national currency of the

Contracting State as far as possible the same real value for the amounts in article 18 as is expressed there in units of account.

5. Contracting States shall communicate to the depositary the manner of calculation pursuant to the last sentence of paragraph 1 of this article, or the result of the conversion pursuant to paragraph 3 of this article,

as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII

Customs matters

Article 32 CUSTOMS TRANSIT

1. Contracting States shall authorize the use of the procedure of customs transit for international multimodal transport.

2. Subject to provisions of national law or regulations and intergovernmental agreements, the customs transit of goods in international multimodal transport shall be in accordance with the rules and principles contained in articles I to VI of the annex to this Convention.

3. When introducing laws or regulations in respect of customs transit procedures relating to multimodal transport of goods, Contracting States should take into consideration articles I to VI of the annex to this Convention.

PART VIII

Final clauses

Article 33 DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 34

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION

1. All States are entitled to become Parties to this Convention by:

(a) Signature not subject to ratification, acceptance or approval; or

(b) Signature' subject to and followed by ratification, acceptance or approval; or

(c) Accession.

2. This Convention shall be open for signature as from 1 September 1980 until and including 31 August 1981 at the Headquarters of the United Nations in New York.

3. After 31 August 1981, this Convention shall be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the depositary.

5. Organizations for regional economic integration, constituted by sovereign States members of UNCTAD, and which have competence to negotiate, conclude and apply international agreements in specific fields covered by this Convention, shall be similarly entitled to become Parties to this Convention in accordance with the provisions of paragraphs 1 to 4 of this article, thereby assuming in relation to other Parties to this Convention the rights and duties under this Convention in the specific fields referred to above.

Article 35

RESERVATIONS

No reservation may be made to this Convention.

Article 36

ENTRY INTO FORCE

1. This Convention shall enter into force 12 months after the Governments of 30 States have either signed it not subject to ratification,

acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the depositary.

2. For each State which ratifies, accepts, approves or accedes to this Convention after the requirements for entry into force given in paragraph 1 of this article have been met, the Convention shall enter into force 12 months after the deposit by such State of the appropriate instrument.

Article 37

DATE OF APPLICATION

Each Contracting State shall apply the provisions of this Convention to multimodal transport contracts concluded on or after the date of entry into force of this Convention in respect of that State.

Article 38

RIGHTS AND OBLIGATIONS UNDER EXISTING CONVENTIONS

If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.

Article 39

REVISION AND AMENDMENTS

1. At the request of not less than one third of the Contracting States, the Secretary-General of the United Nations shall, after the entry into force of this Convention, convene a conference of the Contracting States for revising or amending it The Secretary-General of the United Nations shall circulate to all Contracting States the texts, of any proposals for amendments at least three months before the opening date of the conference.

2. Any decision by the revision conference, including amendments, shall be taken by a two thirds majority of the States present and voting. Amendments adopted by the conference shall be communicated by the depositary to all the contracting States for acceptance and to all the States signatories of the Convention for information.

3. Subject to paragraph 4 below, any amendment adopted by the conference shall enter into force only for those Contracting States which have accepted it, on the first day of the month following one year after its acceptance by two thirds of the Contracting States. For any State accepting an amendment after it has been accepted by two thirds of the Contracting States, the amendment

shall enter into force on the first day of the month following one year after its acceptance by that State.

4. Any amendment adopted by the conference altering the amounts specified in article 18 and paragraph 2 of article 31 or substituting either or both the units defined in paragraphs 1 and 3 of article 31 by other units shall enter into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Contracting States which have accepted the altered amounts or the substituted units shall apply them in their relationship with all Contracting States.

5. Acceptance of amendments shall be effected by the deposit of a formal instrument to that effect with the depositary.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of any amendment adopted by the conference shall be deemed to apply to the Convention as amended.

Article 40

DENUNCIATION

1. Each Contracting State may denounce this Convention at any time after the expiration of a period of two years from the date on which this Convention has entered into force by means of a notification in writing addressed to the depositary.

2. Such denunciation shall take effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have affixed their signatures hereunder on the dates indicated.

DONE AT Geneva, this twenty-fourth day of May, one thousand nine hundred and eighty, in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, all texts being equally authentic.

ANNEX

Provisions on customs matters relating to international multimodal transport of goods

Article 1

For the purposes of this Convention:

"Customs transit procedure" means the customs procedure under which goods are transported under customs control from one customs office to another.

"Customs office of destination" means any customs office at which a customs transit operation is terminated.

"Import export duties and taxes" means customs duties and all other duties, taxes, fees or other charges which are collected on or in connection with the import/export of goods, but not including fees and charges which are limited in amount for the approximate cost of services rendered.

"Customs transit document" means a form containing the record of data entries and information required for the customs transit operation.

Article II

1. Subject to the provisions of the law, regulations and international conventions in force in their territories, Contracting States shall grant freedom of transit to goods in international multimodal transport.

2. Provided that the conditions laid down in the customs transit procedure used for the transit operation are fulfilled to the satisfaction of the customs authorities, goods in international multimodal transport:

(a) Shall not, as a general rule, be subject to customs examination during the journey except to the extent deemed necessary to ensure compliance with rules and regulations which the customs are responsible for enforcing. Flowing form this, the customs authorities shall normally restrict themselves to the control of customs seals and other security measures at points of entry and exit;

(b) Without prejudice to the application of law and regulations concerning public o: national security, public morality or public health, shall not he subject to any customs formalities or requirements additional to those of the customs transit regime used for the transit operation.

Article 111

In order to facilitate the transit of the goods, each Contracting State shall:

(a) If it is the country of shipment, as far as practicable, take all measures to ensure the completeness and accuracy of the information required for the subsequent transit operations;

(b) If it is the country of destination;

(i) Take all necessary measures to ensure that goods in customs transit shall be cleared, as a rule, at the customs office of destination of the goods;

(ü) Endeavour to carry out the clearance of goods at a place as near as is possible to the place of final destination of the goods, provided that national law and regulations do not require otherwise.

Article IV

1. Provided that the conditions laid down in the customs transit procedure are fulfilled to the satisfaction of the customs authorities, the goods in international multimodal transport shall not be subject to the payment of import/export duties and taxes or deposit in lieu thereof in transit countries.

2. The provisions of the preceding paragraph shall not preclude:

(a) The levy of fees and charges by virtue of national regulations on grounds of public security or public health;

(b) The levy of tees and charges, which are limited in amount to the approximate cost of services rendered, provided they are imposed under conditions of equality.

Article V

1. Where a financial guarantee for the customs transit operation is required, it shall be furnished to the satisfaction of the customs authorities of the transit country concerned in conformity with its national laws and regulations and in international conventions.

2. With a view to facilitating customs transit, the system of customs guarantee shall be simple, efficient, moderately priced and shall cover

Article VI

1. Without prejudice to any other documents which may be required by virtue of an international convention or national law and regulations, customs authorities of transit countries shall accept the multimodal transport document as a descriptive part of the customs transit document.

2. With a view to facilitating customs transit, customs transit documents shall be aligned, as far as possible, with the layout reproduced below.

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