

**Dissertation submitted in completion of the requirements for an
LLM**

**The Quest For A Uniform Multimodal Regime:
Persevere, Abandon Or Start Again?**

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“To cut the Gordian knot of multimodal transport what seems to be needed is less the trusty sword of Cervantes than the Subtle Knife of Philip Pullman, as well as the wisdom of Solomon.”

Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 39.

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Introduction

“The multimodal transport industry is inherently complicated.”

Chris Hilton¹

The legal problems faced by multimodal transport are as old as modern transport itself.² The first attempts made at solving these problems can be traced back to 1913. To date, however, all attempts at producing a convention, or set of rules, to bring uniformity to multimodal transport have failed.³ The main reason for these continuing failures is captured in the above quote; multimodal transport is complicated, very complicated.

The Draft Instrument on Carriage of Goods by Sea, 11 December 2001, (“the Draft Instrument”), which took three and a half years to draft⁴ and has now been under consideration for a further four years⁵, is the latest torch bearer of hope for the multimodal transport industry. The Draft Instrument has, however, been poorly received by the legal fraternity and it’s flame also seems destined to be snuffed out.

This thesis provides a short background to multimodal transport and an overview of the problems currently facing the industry. The accepted models for a solution are considered and an analysis is then conducted of the strengths and weaknesses of the two recent attempts at producing a uniform legal regime for

¹ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 40.

² De Wit, R *Multimodal Transport* 147.

³ *Ibid.*

⁴ Document titled "Draft instrument on carriage of goods [wholly or partly][by sea]", page 2, accessed on the website of the Comite Maritime International (Author's details not provided): <<http://www.comitemaritime.org/draft/draft.html>, accessed on 21 February 2005.

⁵ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal* 16.

multimodal transport namely; the Draft Instrument and The United Nations Convention On International Multimodal Transport Of Goods, 1980 (“the Multimodal Convention”).

As neither of these attempts appear to be a tenable solution, I then examine whether the quest for uniformity should be abandoned or, if the process were to begin again, what lessons can be learned from the failures of these attempts.

“All things are wearisome....what has been done is what will be, and what has been done is what will be done, there is nothing new under the sun.”

Ecclesiastes 1:8-9

Professor Malcolm Clarke refers to this philosophical verse when lamenting that the drive for a uniform multimodal transport regime seems to have succumbed to a large degree of drafting fatigue.⁶ There appear to be no new solutions to the problems faced and, despite years of effort, a final solution is not yet tangible.

Despite this, I believe I have proposed some original ideas that may, in the future, interest drafters charged with finding a new solution.

Defining international multimodal transport

What is international multimodal transport? Some definitions of prevalent terms in international multimodal transport are provided in the Multimodal Convention. This convention, which is discussed in greater depth later, was prepared under

⁶ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 29.

the auspices of the United Nations' Commission on Trade and Development ("UNCTAD") in an effort to bring uniformity to the legal problems facing multimodal transport.⁷ The definitions are, therefore, a helpful guide to understanding multimodal transport.

"International Multimodal Transport" is defined as:

*"... the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country, the operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport."*⁸

There are four recognised modes of transport for the carriage of goods; carriage by sea, rail, road or air. Each of these modes are referred to singularly as a form of "unimodal" transport. The above definition recognises international multimodal transport utilising at least two forms of unimodal transport for the carriage of goods from one country to another.

An example could be the transport of fruit from South Africa to the United Kingdom. The goods could be transported from the South African interior to a port by rail, by ship from the South African port to a port in the United Kingdom and then by road transport to a distribution point in the British interior.

⁷ De Wit, R *Multimodal Transport* 147 and 164.

⁸ Article 1(1) of the Multimodal Convention.

A “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.”⁹

In the above example, a multimodal transport contract would be the single contract entered into between the shipper and the receiver for the transport of fruit from the South African interior to the British interior. The terms of the contract would regulate the relationship between the parties for all the “unimodal” modes of transport used in the transport operation.

A “Multimodal transport operator” is defined as:

“...any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.”¹⁰

This definition needs some clarification. It envisages a multimodal transport operator, or carrier, accepting responsibility for the whole carriage of a consignment of goods from the moment the goods are taken over from the consignor until they are delivered to the consignee, even though the goods will be transported by different modes of carriage. Although the carrier may not personally perform each leg of carriage, but rather sub-contract certain legs of

⁹ Article 1(3) of the Multimodal Convention.

¹⁰ Article 1(2) of the Multimodal Convention.

the carriage to other specialised transport operators, the carrier will still be liable to the consignor or consignee for the whole operation in terms of the multimodal transport contract.¹¹

Background to multimodal transport

In the 1960's the development of containers and the standardisation of container sizes revolutionised the transport of goods by reducing turn around times in ports of loading and discharge. The subsequent incorporation of these standardised units into other modes of transport facilitated the seamless handling of cargo between sea, rail and road transport.¹²

The ever-increasing demand for speed and efficiency in the delivery and transport of goods has led to continual capital investment being made by participants in the multimodal transport industry. This has, in turn, led to continual improvements in the technological and managerial aspects of multimodal transport.¹³

On the technological side, automated container handling has become so sophisticated that some terminals now have driverless stacking cranes and vehicles guided by computers. The design of deep-sea container vessels is also continually improving. Cell guides and hatchless vessels obviate the need for the time consuming job of lashing.¹⁴ The capacities and speed of loading for deep-sea container vessels is also constantly increasing.

¹¹ De Wit, R *Multimodal Transport* 3.

¹² Hare, J *Shipping Law & Admiralty Jurisdiction in South Africa* 464 – 465.

¹³ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 1.

¹⁴ Faber, D “The problems arising out of multimodal transport” [1996] *LMCLQ* 504.

On the managerial side, large multimodal transport operators have expanded their operations to an extent that they now operate or control ships, railways and road transportation themselves. Some have specialised in understanding the logistics of producing manufactured goods, warehousing them and releasing them to the market so that consumer demand is effectively satisfied, whilst ensuring that warehousing, production and transport costs are kept to an effective minimum. Multimodal transport operators refer to this as a “just in time” service which they are able to offer their clients.¹⁵

Electronic communications have also assisted the logistics of transportation, the numbers and locations of containers can be continuously tracked and some transport operators use electronic communications to expedite booking of goods, create contracts of carriage and produce loading lists. In some countries customs declarations can now be made electronically.¹⁶

The net result of these continuing developments is a more effective industry whose customers are better served. Another result has been the development of the widespread need for a single multimodal contract to govern the carriage of a single consignment of goods through various modes of transport.

Problems facing multimodal transport

The development of the law in the area of multimodal transport has not kept pace with the practical and technological developments, the result has been confusion over the legal rights of parties to a transport contract when damage occurs to the goods being transported.¹⁷ The main problem areas are discussed below.

¹⁵ Faber, D “The problems arising out of multimodal transport” [1996] *LMCLQ* 504.

¹⁶ *Ibid* 505.

¹⁷ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 1.

Disharmony of existing legal regimes for unimodal forms of transport

The fundamental problem that has been brought to the fore is the inability of the law to successfully harmonise the differing legal regimes that are already in existence for unimodal methods of transport.¹⁸

The six major legal regimes for the differing forms of unimodal transport include; the Hague Rules, the Hague-Visby Rules and the Hamburg Rules which apply to the carriage of goods by sea; the Convention For The International Carriage Of Goods By Road (“CMR”) (the abbreviation is based on the French title); the Convention For The International Carriage By Rail (“COTIF”) (this abbreviation is also based on the French title) and the Warsaw System for carriage by air. These conventions will be examined in greater depth later.

The conventions contain different provisions on important issues including; the basis and determination of liability (which includes defences available to a carrier), the calculation of monetary limits of liability, the burden of proof upon claimants and the time limits within which claims must be made.

Even though parties to a transport contract may wish to contract on agreed terms, this freedom will be impaired by unimodal conventions which may have mandatory application if damage to goods occurs during a unimodal leg of a multimodal transport contract. The intervention of the provisions of a unimodal regime may alternately favour or prejudice cargo interests depending on which regime is applicable in the specific circumstances.

¹⁸De Wit, R *Multimodal Transport* 7.

The problems facing cargo interests are compounded as it is often very difficult to determine whether a specific unimodal regime will be applicable.

(Please note that I have used the term “cargo interests” to refer to the seller, the buyer and the insurers. When goods are lost or destroyed the buyer or seller will, depending on who was bearing the risk, look to their insurers, who upon recompensing the loss will consider recovering from the party responsible for the damage.)

The amounts of compensation which cargo interests will be entitled to receive, the time periods for giving notice of a claim and the basis of liability are, therefore, dependant on the stage of transport where the damage occurs and the corresponding applicable convention.¹⁹ The unimodal conventions may also provide for forums for the hearing of disputes that parties would not otherwise have agreed to had they had freedom to contract on their own terms.

The result for cargo interests is that they cannot contract on predictable terms as it is impossible to predict on which leg of multimodal transport damage may occur. Even when the localisation of damage can be confirmed, there is generally further confusion over whether the legal regime applicable to that unimodal form of transport will apply.²⁰

Localisation of damage

A quandary is presented when there is difficulty in determining where in the transport chain the damage actually occurred. As goods are frequently moved in

¹⁹Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 16.

²⁰*Ibid* 7- 8.

containers it can be virtually impossible to determine where the damage took place. This confusion can result in cargo interests having to protect their claim by issuing suit against all the parties involved in the transport until the actual cause of damage is finally determined.

This difficulty is greatest for multimodal transport operators who assume responsibility for goods for the entire multimodal transport operation. If damage occurs, cargo interests will be able to recover from the multimodal transport operator or the multimodal transport operator's third party insurers leaving the headache of determining where the damage occurred for the purposes of recovery with the multimodal transport operators or their insurers.

Recovery actions by multimodal transport operators

Even if the multimodal transport operator is able to determine the locality of the damage there may be other legal impediments to recovery as demonstrated in *Transcontainer Express Ltd. v Custodian Security Ltd.*²¹ In this matter the multimodal transport operator, Transcontainer, had to pay compensation to cargo interests for their loss and was unable to recover the compensation amount from the sub-contractor actually responsible for the loss.

Transcontainer had subcontracted a road carriage leg to a road haulage operator, Crossland, who left a trailer load of goods at the premises of Custodian, who provided a security service, for safe keeping, the goods had been stolen from Custodian's premises.

²¹ [1998] 1 Lloyd's Rep 128.

Transcontainer were unable to sue Custodian in contract and relied upon their delictual rights. Under English law, Transcontainer had to prove that they had “possessory title” to the goods. Their limited contractual rights to the property and the fact that they had to recompense cargo interests were not sufficient to establish this. If Transcontainer had been able to prove that Crossland were their agents they would have succeeded in their claim but they were unable to prove this.

Transcontainer were precluded from raising a new argument at the appeal court stage that, under the contract with Crossland, they could have taken possession of the goods at any time, which may have lead to success in the action.

Although this quagmire could have been avoided through tighter contractual drafting and different argument before the court, what is illustrated by this case is the complexities faced by a multimodal transport operator and the prejudices that a multimodal transport operator may suffer where the law is not flexible enough to protect their interests.

Multimodal transport documents as documents of title

Bills of lading have long since been recognised as documents of title, giving the holder thereof the rights to possession of the goods stated therein. This acceptance has facilitated payments between shippers and receivers banks who rely on documents of title as pledges to provide security for credit given to the customer. The documentation produced when goods are transported by multimodal transport is, however, not as widely recognised.

A receipt for goods to be transported by multimodal transport does not have the same characteristics as a normal bill of lading. Firstly, the goods are not necessarily “shipped” and may only be indicated as “received for shipment”. Furthermore the goods indicated on a multimodal transport document may be subject to transshipment down the transport chain which means that the document does not lend itself to security purposes if the responsibility for the goods is to be subcontracted.

The international banking community has however recognised the growing utilisation of multimodal transport documents in international trade and has developed its own rules to govern the acceptance of multimodal transport documents as documents of title.²² Article 26 of the ICC Uniform Customs And Practice For Documentary Credits (“UCP500”) sets down certain requirements allowing for the acceptance of multimodal transport documentation provided the single document covers the entire transportation of the goods and the carrier assumes responsibility for all legs of transport.²³

The acceptance of multimodal transport documents to facilitate payments between banks has not, however, developed through any recognition attributed by law but rather through customary banking practice developed out of the necessity to facilitate international trade. It remains for an adopted convention to formally recognise the validity of multimodal transport documents as documents of title.²⁴

The status of multimodal transport documents as documents of title is also important to determine who has title to sue. Different conventions apply different rules for the passing of risk and title to sue.

²² Proctor, C *The legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* 114.

²³ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 17.

²⁴ Proctor, C *op cit* 115.

For traditional bills of lading the United States Carriage of Goods by Sea Act, 1992, is recognised as one of the simpler systems regarding title to sue, it separates the issue of title to sue from the passing of property in goods and provides that “the lawful holder” of a bill of lading has rights of suit.²⁵ Other systems are not so simple. Article 13 of the CMR provides that the consignee will only have title to sue in cases of loss and English law is recognised as having a complex doctrine of title to sue.

The obvious difficulty for multimodal transport is that there is not a developed body of jurisprudence regulating title to sue for multimodal transport documentation.

Confusing agents and principals

The freight forwarder has traditionally played an integral role in the transport of goods. The services provided by freight forwarders have included; agency, organising cargo insurance, handling export and import documentation and advice to clients on transport and distribution.²⁶

Containerisation has however provided opportunities for freight forwarders to expand their services and some now receive recognition as major players in the transport industry as they are able to act as multimodal transport operators by assuming responsibility for the multimodal transport of goods. They are able to do this even though they do not own infrastructure of their own, most of the duties are subcontracted to other carriers.²⁷ The term “non-vessel operating common carrier” has been coined to describe their operations. In practice,

²⁵ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 15.

²⁶ *Ibid* 21.

²⁷ Proctor, C *The legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* 99.

however, the failure of parties to ensure that they are contracting with freight forwarders or multimodal transport operators as principal and not as agent for other carriers is cause for many problems.

It can be difficult to determine whether a party has assumed liability as an agent or as a principal. The effect is that cargo interests may be uncertain who to institute action against. In addition, there is the risk that a multimodal transport operator may have contracted, as agent, with a party of poor financial standing rendering suit ineffective.

Furthermore, where a multimodal transport operator acts as agent, the cargo interests will not be able to control the terms and conditions they will find themselves bound by for any potential actions against the carriers their agents have contracted with. Cargo interests may be precluded from suing in contract and may have to rely on their delictual remedies, which may present difficulties that could otherwise have been avoided.²⁸

A consignor needs to take care when entering into a through transport contract as opposed to a combined transport contract with a multimodal transport operator or a freight forwarder. The danger of the former is that the multimodal transport operator may act as an agent on behalf of the consignor when entering into transport by differing modes, although the multimodal transport operator may assume responsibility when the goods are in own care.²⁹ In terms of the latter, the multimodal transport operator assumes responsibility for care of the goods for the entire transportation of the goods.

²⁸ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 10.

²⁹ Faber, D "The problems arising out of multimodal transport" [1996] *LMCLQ* 503.

Conclusion

The result of all these difficulties is confusion. Confusion over which legal regime is applicable, who the contracting parties are, what contractual terms are applicable and which time bar period is applicable. This causes time delays and unnecessary expenditure on lawyers who may have to issue multiple legal suits against various potential defendants in order to protect the cargo interests' rights. These legal problems drain the industry of funds that could rather be invested in the industry itself.³⁰

Theoretical models for a uniform regime

A uniform regime refers to a single set of rules which would govern a multimodal transport contract. There are two main theoretical models for a uniform legal regime. The first model is referred to as the “network system” or “chameleon system”, the second is the “uniform system”.³¹ A “modified network system”, being a hybrid of the network system, has also been considered.

The network system essentially “knits” the different legal regimes for unimodal carriage together so that when damage occurs during one of the modes of carriage the unimodal rules specific to that form of carriage will apply to resolving disputes over damage to cargo between cargo interests and multimodal transport operators. In the network system no consistent set of rules applies, it is merely a meshing of the different regimes. The multimodal transport operator and the cargo interests must resolve their disputes according to the applicable regime. Under the uniform system, a multimodal transport operator and a shipper would

³⁰ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems 2*.

³¹ De Wit, R *Multimodal Transport* 138.

contract to the application of the same set of rules for determining liability regardless of the form of transport being used when damage occurs.³²

Under the network system the obvious question which stands out is; what will happen when the localisation of damage cannot be determined? What rules will apply? There appear to be no easy answers to these questions.

The network system also has potential liability gaps. Where damage occurs to cargo which is in storage between two transport legs there may not be a transport regime governing such storage resulting in a “liability gap”. The network system does not overcome problems faced by conflicts between a “network” based carriage contract and national laws. The choice of law and jurisdiction forums contained in carriage contracts may also conflict with the specific unimodal regimes.³³ It is argued that these issues create the greatest problem for the network system, which is its lack of predictability.³⁴

“The pure network system of liability presents enormous problems and disadvantages to the extent that in many situations it is practically impossible to apply with any reasonable result.”

Ralph De Wit³⁵

Ralph De Wit has dubbed the network system as “unworkable”³⁶, this conclusion and the above quote cast a melancholic view on the network system. In short, it is hard to see how a network system could solve any of the problems already faced by multimodal transport. It does not change the conflicting regimes which

³² De Wit, R *Multimodal Transport* 139 and 143.

³³ *Ibid* 142.

³⁴ *Ibid* 140.

³⁵ *Ibid* 139.

³⁶ *Ibid* 513.

multimodal transport operators have to face, in fact, it seems that even more problems are caused where the regimes are interfaced or knitted together.

A modified network system may solve some of the problems. This entails inserting provisions to cover the problem areas of non-localisation and liability gaps, there would still be difficulty regarding potentially conflicting laws. Even if the localisation problems could be solved there would still, therefore, be an unpredictability about which legal regime, and thus limits, were going to apply in case of damage.³⁷

It is suggested that the uniform system is the ideal system.³⁸ Here the shipper and multimodal transport operator would enter into a contract where the liability of the multimodal transport operator is certain regardless of the form of transport used. A shipper would be able to hold the multimodal transport operator liable for damage on the agreed terms no matter where the damage occurred.

The system solves the problem of localisation faced by cargo interests, however, what it effectively does is shift the unpredictability onto the multimodal transport operator who will be left considering his recourse actions after compensating the shipper or cargo interests for their loss. Hopefully some of the unpredictability caused by differing legal regimes will be reduced for multimodal transport operators if a number of countries adopt a uniform system and apply it ahead of their own unimodal laws.

³⁷ De Wit, R *Multimodal Transport* 143.

³⁸ *Ibid.*

The effect of this shift in risk from shippers or cargo interests to multimodal transport operators would result in lower cargo insurance premiums for cargo interests and an increase in liability insurance for multimodal transport operators. It has, however, been argued that the relative size of the increase faced by multimodal transport operator's would be smaller than the size of the decrease in cargo insurance for cargo interests.³⁹ The general view is that the increase in premiums for multimodal transport operators would be bearable.⁴⁰ This still needs to be conclusively confirmed by risk analysts.

Practically, the effects of the uniform system would therefore be certainty for cargo interests, as opposed to uncertainty for both cargo interests and multimodal transport operators. It would also mean an overall decrease in the amount of insurance premiums paid by cargo interests and multimodal transport operators collectively, despite the increase in premiums for multimodal transport operators.

The industry gain, being the collective decrease in insurance premiums, would probably be nullified by the introduction of increased transport rates by multimodal transport operators. The net effect of a uniform system may, therefore, only be certainty for cargo interests. This is, nevertheless, a better option than the network system.

De Wit believes that the allocation of risk in carriage is not that important but the predictability must be. This is the advantage afforded to cargo interests under a uniform system which can never be fulfilled under a network system.⁴¹

³⁹ De Wit, R *Multimodal Transport* 145.

⁴⁰ *Ibid* 430.

⁴¹ *Ibid* 513.

Although it has been argued that the introduction of a regime based on the uniform system would cause some discrepancies as it would initially run concurrently with unimodal regimes, it is suggested that if it is well drafted, this problem may be overcome and it may be the first step towards a “famous universal transport convention that has been a lawyers dream for such a long time”.⁴²

There have been numerous failed attempts at producing a uniform legal regime, which date back to 1913, these previous attempts can all be analysed against the models discussed above. I will now consider the strengths and weaknesses of the two recent attempts namely; the Multimodal Convention and the Draft Instrument, and the models on which they were based namely.

The Multimodal Convention

Introduction

The Multimodal Convention was designed, under the auspices of the United Nations' Commission on Trade and Development (“UNCTAD”), to regulate all contracts of international multimodal transport. Various provisions of the Hamburg Rules were drawn on, especially the “basis of liability” provisions for determining the responsibility of the carrier and the onus of proof to be borne by a claimant.⁴³

At the time of drafting it was felt that the Hamburg Rules would be an ideal basis for the Multimodal Convention as the Hamburg Rules had been developed to

⁴² De Wit, R *Multimodal Transport* 146.

⁴³ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 52.

replace the complicated and intricate liability pattern of the Hague Visby Rules and had effectively brought shipping law closer to the regimes for land-based carriage.⁴⁴ It was anticipated that the Hamburg Rules would not take long to be come into force, thus encouraging the ratification and adoption of the Multimodal Convention.⁴⁵ The Hamburg Rules were, however, not received as well as anticipated. Due to its failings, there have been insufficient signatories for its ratification and it has never come into force.

Theoretical model: network or uniform system

The Multimodal Convention was said to have adopted the “uniform” system as opposed to a “network” system.⁴⁶ It has, however, retained features of the network system where damage is localised. Article 19 of the Convention essentially creates this network system, it states:

“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 that which would follow from the application of paragraphs 1 to 3 of article 18, then 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.”

Consequently, if the loss is localised, liability will be governed by any applicable international convention or national law containing higher limits of liability than those set out in the Multimodal Convention.⁴⁷ This is not reflective of a “uniform”

⁴⁴ De Wit, R *Multimodal Transport* 165.

⁴⁵ *Ibid.*

⁴⁶ Faber, D “The problems arising out of multimodal transport” [1996] *LMCLQ* 507.

⁴⁷ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 58.

system, the Convention is better described as "modified network" system. It is argued that the minimum requirements for a convention are not met as a predictable limit of liability cannot be determined.⁴⁸ To compound matters the methods set out in the convention for determining limits of liability when the damage is non-localised are quite complex.⁴⁹

The network system for localised loss created by Article 19 raises further problems. There is confusion over what system of law will be used to determine whether an international convention or mandatory national law is applicable in the first place. It could be the law of the contract, the law of the place where the dispute is decided or the law of the particular stage where the damage occurred.⁵⁰ It is also possible that an international convention or mandatory national law may not apply where the carriage is by two or more modes of transport.⁵¹

The Multimodal Convention does not prevent contracting states from introducing local laws setting limits of liability higher than those contained in the Convention, effectively making the Convention useless where damage is localised. This destroys the uniformity intended by the Convention.⁵²

Disappointingly, even though the Convention creates a minimum level of liability, the unpredictability of which legal regime will be applied where damage is localised remains.⁵³

⁴⁸ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 58.

⁴⁹ *Ibid* 57.

⁵⁰ *Ibid* 59.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid*.

Clash between the Multimodal Convention and the Hague-Visby Rules

As referred to above there will be a difficulty in determining whether an applicable international convention or mandatory national law applies to a dispute arising under a multimodal contract, which would have to be done before considering whether the limits of another regime are higher than those set out in the Multimodal Convention.⁵⁴

To demonstrate some of the difficulties that may arise an analysis is conducted below on the applicability of the Hague-Visby Rules in circumstances where the Multimodal Convention may also be applicable. The Hague-Visby Rules are a good example to use as it is a regime that has been adopted by many of the major sea-faring nations.

To determine whether the Rules would apply to a contract concluded with a multimodal carrier who may be utilizing more than one mode of transport one would have to consider, firstly, whether one of the parties satisfy the Rules' definition of a carrier. Secondly, whether a multimodal transport document constitutes a contract of carriage and thirdly whether it is a bill of lading or similar document of title.⁵⁵

Article 1(a) of the Hague-Visby Rules define a "carrier" as:

“Carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper.”

⁵⁴ Faber, D “The problems arising out of multimodal transport” [1996] *Lloyd's Maritime and Commercial Law Quarterly* 509.

⁵⁵ *Ibid.*

It is suggested that the use of the word “includes” in the above definition does not limit a carrier to being an owner or charterer and will be wide enough to apply to a multimodal transport operator who neither owns nor charters vessels but accepts responsibility for the carriage of goods.⁵⁶

Secondly, Article 1(b) of the Hague-Visby Rules defines a “contract of carriage” as:

“...applying only to contracts of carriage covered by a bill of lading or any other similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of same.”

Two reported cases have suggested that the Rules may not be applicable to multimodal transport contracts. In *A. Gagniere & Co. v. The Eastern Company of Warehouses*⁵⁷ freight forwarders issued a document, in the form of a house bill of lading, evidencing a promise to arrange for the forwarding of the goods between the shippers and the carriers of the goods. The forwarders were held not to be liable on the contract for the loss of the goods. The judge held that, despite the form of the bill, it was not an undertaking of an absolute character to carry the goods anywhere.

⁵⁶ Faber, D “The problems arising out of multimodal transport” [1996] *Lloyd's Maritime and Commercial Law Quarterly* 509.

⁵⁷ (1921) 7 Ll. L. Rep 188.

Similarly, in *The Cape Comorin*⁵⁸ it was held that a “house bill of lading” issued by a freight forwarder as agent was at most a receipt with authority to enter into carriage on behalf of a shipper.

These cases show that that it is necessary for a party to assume some liability for the transportation in order for the contract to amount to a contract of carriage. It is suggested that the same principles should be applied in determining the applicability of the Hague-Visby Rules to multimodal transport contracts.⁵⁹ If this requirement were met, the Rules would apply to multimodal contracts. This reiterates the need to ensure that the capacity and role of parties entering into a multimodal contract are carefully considered.

Thirdly, in terms of Article 1(b) of the Rules, stated above, a contract is required to be “covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea.”

This requirement questions whether a multimodal transport document, which includes transport both ashore and at sea, would be prevented from being termed a bill of lading or similar document of title.⁶⁰ In *Pyrene Co. v Scindia Navigation Co*⁶¹ the court held that where a single contract covers both inland and sea carriage, the only part which falls within the Rules is that which relates to the carriage of goods by sea, which means that the Rules would apply to contracts for multimodal transport which cover both sea and inland carriage.⁶²

⁵⁸ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 N.S.W.L.R. 745 (N.S.W.C.A.).

⁵⁹ Faber, D “The problems arising out of multimodal transport” [1996] *Lloyd's Maritime and Commercial Law Quarterly* 510.

⁶⁰ *Ibid* 511.

⁶¹ [1954] 2 Q.B. 402.

⁶² Faber, D *op cit* 511.

It would still be necessary, however, to determine whether a multimodal transport contract qualifies as a bill of lading or similar document of title. There is no clear case law deciding this issue and doubt remains whether a multimodal transport document would qualify as bill of lading or similar document of title. This may have been a very complicated issue had the Multimodal Convention been adopted.⁶³ The best basis for the recognition of multimodal transport documents remains that afforded by traders and the banking community in the ordinary course of their business, but formal legal recognition would still be welcomed.

Basis of liability

The system that the Hamburg Rules uses to determine liability is referred to as the negligence theory. This presumes that when goods are damaged whilst under the responsibility of a carrier the damage was caused by the carriers negligence, unless he is able to disprove such negligence.⁶⁴ It is a system presuming negligence whilst allowing for a reverse onus of proof.

The negligence system has been hailed as an ideal system for determining liability of a carrier when damage occurs.⁶⁵ The advantages of the negligence system are discussed in depth later, however, the adoption of the negligence system in the Hamburg Rules was felt to be a vast improvement on the complicated system of liability under the Hague-Visby Rules and brought the law for carriage of liability at sea more in line with systems for liability applied under other unimodal forms of carriage.⁶⁶

⁶³ Faber, D "The problems arising out of multimodal transport" [1996] *Lloyd's Maritime and Commercial Law Quarterly* 510.

⁶⁴ De Wit, R *Multimodal Transport* 35 and 90.

⁶⁵ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 34.

⁶⁶ De Wit, R *Multimodal Transport* 165.

The provisions for liability under the Hamburg Rules were thus restated in the Multimodal Convention, under Article 16, and was heralded as one of the major successes of the Multimodal Convention. Article 16 states:

“The multimodal transport operator shall be liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge 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.”

Limits of liability

The provisions limiting the actual amount of liability, which are set out in Article 18 of the Convention, have been described as “difficult, unsatisfactory and somewhat complex.”⁶⁷ These limits will apply where an international convention or mandatory international law does not.

Calculations for limiting liability differ depending on whether damage occurred in transit which included a sea leg or not. The basis upon which it is decided that a transportation operation has a sea leg or not is not clear and may lead to various disputes. Article 19 also contains awkward calculations for limiting liability for delay.⁶⁸

⁶⁷ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 57.

⁶⁸ *Ibid* 57-58.

The multimodal transport operator will lose the right to limit liability if it can be proven that the he acted recklessly or with intent to cause damage.

Relationship with other conventions

The convention faces difficulty where states elect not to accede and wish to apply their own conventions. This would come to the fore where the loss is localised in a specific state and a claimant would prefer to sue in that state because the applicable local convention provides more favourable terms to the claimant.

The Multimodal Convention attempts to solve the difficulty which would arise where two different regimes may appear applicable to a certain scenario and has created Article 38, it provides:

“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 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 obligations under such convention, give effect to the provisions thereof.”

An example of its application would be a where there is transit between a place in State A and a place in State B but the dispute is to be resolved in State C, then if States A and C are contracting States to the Multimodal Convention and have given effect to the Convention in their domestic law, but State B is not a contracting state to the Multimodal Convention, a court or arbitrator in State C “may” give effect to any rules appearing in an international convention to which

both State A and State B are contracting parties.⁶⁹ This provision has been modelled on the Vienna Convention on the Law of Treaties, 1969.⁷⁰

Not only is the provision complicated, it is also not exhaustive and leaves open a considerable area of potential conflict where no rules apply to prioritise one convention ahead of another. Furthermore, it is left to the court or arbitrator to resolve the conflict, who will have a discretion to do so.⁷¹ This leaves a problem for cargo interests in anticipating how it would be applied in practice. Cargo interests would not be able to assess the extent of their legal rights and obligations and considerable uncertainty would remain, not only at the time of entering into a multimodal contract, but even after a dispute has arisen.⁷²

The drafters of the Multimodal Convention have also borne in mind the popularity of the CMR, particularly in Europe, and have drafted Article 30, paragraph 4, to provide that the Multimodal Convention shall not apply to circumstances where an incident would be regulated by the terms of the CMR.

Although the provision may seem simple, it brings further headaches as the interface between road transport and sea transport is slightly blurred by the roll on roll off nature of road haulage. A road carrier or truck may, itself, be carried on board a ship for certain legs of the multimodal transport operation, making it difficult to determine whether the CMR or Multimodal Convention applies.⁷³ The uncertainty faced by cargo interests is, therefore, perpetuated.

⁶⁹ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 65.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid* 63.

Confusing agents and principals

As discussed previously, Article 1, paragraph 3, of the Multimodal Convention states:

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

The resultant interpretation thereof, insofar as it is applicable to a multimodal transport operator, is that there must be a voluntary contractual assumption of liability by the multimodal transport operator before the mandatory rules apply, the carrier must, therefore, “contract in” to the multimodal transport arrangements.⁷⁴ It is argued that this does not alleviate any of the problems experienced by cargo interests who must still determine whether they contracted with a freight forwarder as agent or principal.⁷⁵

The Multimodal Convention does not solve this problem and shippers will have to resolve it practically by obtaining clarity on whether they are contracting with a purported multimodal transport operator as a principal or agent.

The Multimodal Convention and third parties

The Multimodal Convention tries to regulate relationships between multimodal transport operators and third parties or subcontractors. The applicable provisions, however, appear to be more well meaning than practically applicable.

⁷⁴ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 54.

⁷⁵ *Ibid.*

Article 25, paragraph 4, provides that where a party seeking indemnification wishes to institute action, it must be instituted within 90 days after a claim was settled or after an action was issued against itself. It is however unlikely that actions between multimodal transport operator's and subcontractors will be regulated by the Multimodal Convention as the majority of those actions are likely to be governed by the convention relating to the localisation of the damage.⁷⁶

Furthermore, Article 20, paragraph 2, introduces a "Himalaya" type clause for subcontractors for protection against the shipper or goods owner. Similarly, it is seldom that this protection will probably be relied on as such an action is, where the damage is localised, likely to be governed by the applicable local regime.⁷⁷

The failings and successes of the Multimodal Convention

There appear to be two main reasons for the failings of the Multimodal Convention. Firstly, the disruptive and unnecessary influence of political factors in the drafting process. It has been argued that UNCTAD was perhaps not the wisest choice of drafting body as it led to political issues influencing the drafting of what should just have been a consideration of technical issues.⁷⁸

These political interests included concerns by developing nations that the rationalisation of carriage may adversely effect their unemployment problems.⁷⁹ Some nations feared that a pure network system would lead to innumerable problems in trying to determine which convention would be applicable in certain

⁷⁶ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 54.

⁷⁷ *Ibid* 61.

⁷⁸ De Wit, R *Multimodal Transport* 514.

⁷⁹ *Ibid* 160.

circumstances. Other nations did not wish to leave the security of already applicable conventions.⁸⁰

Although it has been argued that the arguments by nations against a uniform system were unjustified⁸¹, the large number of states representing important carriage interests bitterly opposed the adoption of a uniform system and a compromise was reached by adopting a “modified network” system, as demonstrated in the wording of Article 19.

Secondly, the 1980 Convention was badly drafted.⁸² The very problem the drafters tried to achieve, namely clarity on which convention would apply where damage was localised was, in fact, compounded by vague drafting. This poor drafting resulted in “a lack of precision and uncertainty” in a number of important areas destroying the objective of providing multimodal transport operators with predictability on their rights and obligations.⁸³

On the positive side, the Multimodal Convention has received praise for various improvements it made in areas that were unclear under the Hamburg Rules. The most positive step appears to have been the adoption a simple liability regime. The objective of adopting a “principle of presumed fault or neglect”, effectively placing an onus on the carrier to disprove the presumption, was set out in the preamble to the Convention.⁸⁴

⁸⁰ De Wit, R *Multimodal Transport* 167.

⁸¹ *Ibid* 514.

⁸² *Ibid* 515.

⁸³ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 66.

⁸⁴ Paragraph (d) of the preamble.

The Multimodal Convention has not, however, been adopted as insufficient signatories have been deposited. Attention has now turned to the latest attempt at producing a uniform regime, the Draft Instrument.

The Draft Instrument

Introduction

At the 29th session of The United Nations Commission on International Trade Law ("UNCITRAL" or the Commission"), which was held in 1996, discussion turned to the lack of uniformity in international trade law.⁸⁵ It was felt that the 1996 UNCITRAL Model Law on Electronic Commerce had exposed gaps between existing national laws on issues including; the functioning of bills of lading, their effect on the rights and obligation of sellers and buyers and the legal position of parties financing contracts of carriage.⁸⁶ These gaps in the different national laws were considered an obstacle to the free flow of goods and a threat to an increase in the cost of transactions.⁸⁷

It was suggested that the Secretariat of the Commission should gather views on the difficulties experienced by governments and other organisations involved in the carriage of goods by sea specifically. These views would then be analysed to allow the Commission to consider an appropriate course of action, and a possible new convention or regime.⁸⁸

⁸⁵Beare, S "Liability Regimes: where we are, how we got there and where we are going." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 306.

⁸⁶ *Ibid.*

⁸⁷ Document titled "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on Transport Law" prepared by UNECE secretariat, accessed on the website of the Comité Maritime : <<http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 3.

⁸⁸ *Ibid.*

There were reservations to the suggestion. One reservation was that a new liability regime would create further difficulties getting states to adhere to the Hamburg Rules and that the new proposal may lead to further disharmony of international laws. It was, however, stated that a review of the liability regimes was not the objective of the suggested work.⁸⁹ The main objective would be to consider modern solutions to issues not adequately dealt with by existing treaties which would not adversely affect the prospects of future adoption of the Hamburg Rules by states.⁹⁰

A proposal was therefore included in UNCITRAL's work programme to "review current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no rules existed and with a view to achieving uniformity of laws." The Secretariat was to be the focal point for gathering the information.⁹¹ It was agreed that the Comité Maritime International ("CMI") should be invited to assist the Secretariat and that the CMI should take the lead in gathering the information and creating a working document to be considered by the Commission, the invitation was accepted by the CMI.⁹²

The mandate to the CMI had not included a consideration of a revised liability regime. A committee within the CMI had, however, already commenced work on the possible uniformity of legal regimes for the carriage of goods by sea under the supervision of Professor Berlingieri before the invitation was extended.⁹³

⁸⁹ Document titled "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on Transport Law" prepared by UNECE secretariat, accessed on the website of the Comité Maritime : <<http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 4.

⁹⁰ Berlingieri, F "Basis of liability and exclusions of liability." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 336.

⁹¹ Document titled "United Nations Economic Commission for Europe (UNECE): *op cit* page 3.

⁹² *Ibid.*

⁹³ Beare, S "Liability Regimes: where we are, how we got there and where we are going." [2002] *Lloyd's Maritime and Commercial Law* 307.

The CMI consulted with various international organisations to gather information. During discussions with the organisations it became clear that a strong desire existed for liability issues to be reviewed and that considerations of liability should be included in the report to the Commission.⁹⁴ The executive counsel of the CMI was conscious that the liability regime was an essential consideration in the law of transport and that because the relevant liability regime impinged on the issues in the mandate⁹⁵, it would be practically impossible to draft a set of rules capable of application if liability provisions were not included.⁹⁶

The CMI therefore decided to; consider what areas of transport law greater international conformity could be achieved in, prepare the outline of an instrument designed to bring about uniformity, and then draft provisions for liability to be included in the proposed instrument.⁹⁷ Professor Berlingieri's work was thus absorbed into the CMI's work on the mandate set out by the Commission.

This approach was informally condoned by the Commission at an UNCITRAL/CMI Colloquium in July 2000. At the Colloquium suggestions were made to extend the regime beyond the sea leg to cover inland carriage before and after the sea leg.⁹⁸

The Commission stated that "since a great and increasing number of contracts of carriage by sea, in particular in the liner trade of containerized cargo, included

⁹⁴ Beare, S "Liability Regimes: where we are, how we got there and where we are going." [2002] *Lloyd's Maritime and Commercial Law* 307.

⁹⁵ Document titled "Draft instrument on carriage of goods [wholly or partly][by sea]" accessed on the website of the Comite Maritime International (Author's details not provided): <<http://www.comitemaritime.org/draft/draft.html>, accessed on 21 February 2005, page 1.

⁹⁶ Berlingieri, F "Basis of liability and exclusions of liability." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 336.

⁹⁷ Beare, S *op cit* 307.

⁹⁸ Document titled "Draft instrument on carriage of goods [wholly or partly][by sea]" *Ibid.*

land carriage before and after the sea leg, it was desirable to make provision in the draft instrument for the relationship between the draft instrument and conventions governing inland transport". The CMI thus attempted to draft the necessary provisions which, as demonstrated in the drafting of the 1980 Multimodal Convention, are notoriously difficult.

The Commission's initial mandate to the CMI had only required the collection of information and a possible draft instrument on issues particular to maritime transportation. At a late stage in the drafting process the CMI were required to consider extending the provisions of a draft instrument to inland transport. The liability rules, which were drafted to apply to maritime transportation, were thus extended to other modes of transport without consulting the parties having an interest in the other modes of transport. The final draft instrument, therefore, essentially reflects maritime transport interests.⁹⁹

The CMI took 3½ years to complete preparation of the CMI Draft Instrument on Transport Law, which has become known as the "Draft Instrument". A completed draft was handed to the UNCITRAL Secretariat in December 2001. The CMI did not claim that the draft was perfect, but hoped that it would be constructive. A number of issues that had remained unresolved were bracketed and explained in a commentary to the draft.¹⁰⁰

Various matters already dealt with in existing regimes are covered in the Draft Instrument, these include; electronic commerce, liens, delivery, transport documents and aspects of the liability provisions of the Hague Visby and

⁹⁹ Document titled "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on Transport Law" prepared by UNECE secretariat, accessed on the website of the Comité Maritime International : <<http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 5.

¹⁰⁰ Document titled "Draft instrument on carriage of goods [wholly or partly][by sea]" accessed on the website of the Comité Maritime International (Author's details not provided): <<http://www.comitemaritime.org/draft/draft.html>, accessed on 21 February 2005, page 2.

Hamburg Rules.¹⁰¹ There were, however, no previous international laws or conventions covering; freight, rights of control, transfer of rights and rights of suit, regulations on these issues have now been included in the Draft.¹⁰²

Drafting approximately nine conventions into one convention has been described as an enormous task.¹⁰³ UNCITRAL has, subsequently, appointed a working group to consider the Draft Instrument, which is still conducting work sessions to reach a final draft.

Theoretical model: network or uniform system

The Draft Instrument has been based on a network system and contains similar “network” elements of the Multimodal Convention. It is, however, a peculiar type of “network” system referred to as “minimal” network system and is set out in Article 4 of the Draft Instrument.

Article 4 provides that the test for liability in the Draft Instrument, which is set out in Article 5, will generally apply where the localisation of damage occurs beyond the sea leg, in addition to its application to the sea leg. The provisions of the Draft Instrument relating to; the liability of the carrier, limitation of liability and time for suit will not, however, apply when mandatory international conventions apply to damage occurring beyond the sea leg. Article 4 provides that the other provisions

¹⁰¹Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal* (1), 7.

¹⁰²Document titled "Draft instrument on transport Law: Comments submitted by the UNCTAD secretariat " Authors details not provided, accessed on the website of the Comite Maritime : <<http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 10.

¹⁰³ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA "99" (2003) 28 *Tulane Maritime Law Journal* 1, 8.

contained in the Draft Instrument will not be removed when other international conventions are applicable to road, air, railway or inland carriage.¹⁰⁴

The provisions of international conventions will only be applicable where the damage occurred undoubtedly and solely in the segment of transport regulated by the mandatory international conventions.¹⁰⁵ A mandatory international convention is one that cannot be departed from by private contract or to the detriment of the shipper.

The result of this "network" approach is that the determination of liability issues will continue to involve an examination of which particular regime is applicable when damage can be localised for land carriage. It is difficult to understand how this is an improvement on the current situation in multimodal transport or an improvement on the Multimodal Convention.

The difficult matter that hits at the heart of a network system is the determination of the applicable legal regime when the localisation of damage cannot be pinpointed.¹⁰⁶ The solution forwarded in the draft is interesting. If a party cannot prove where the place of damage occurred in non-maritime carriage, or where it cannot be proven what the sole cause of the damage was, then the provisions of the Draft Instrument shall apply over any other international convention or national law.

An objection to this provision is that causation must be determined according to the law applicable at the alleged place of damage before determining whether the provisions of the Draft Instrument or another convention are applicable.

¹⁰⁴ Article 4.

¹⁰⁵ Alcantara, J "The new regime and Multimodal transport" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 403.

¹⁰⁶ *Ibid.*

Furthermore, as the Draft Instrument does not contain rules on the burden of proof, a party wishing to rely on another unimodal convention will carry the burden of proving where the damage occurred and because this burden of proof will be subject to the relevant national laws in the place of jurisdiction it may lead to diverse results.¹⁰⁷

The dividing line between the applicability of the Draft Instrument or a unimodal convention is therefore left to national laws governing the rules of proof in different jurisdictions. This solution does not reduce the uncertainty inherent in a network system of liability.¹⁰⁸

The Draft Instrument also allow parties in contracting states various ways to "opt out" of the multimodal provisions. If utilised by parties this will essentially make the Draft a non-multimodal project.¹⁰⁹

"...can anyone explain when this convention will or will not apply?"

William Tetley¹¹⁰

In addition, the Draft suffers from the same poor drafting technique evidenced in the Multimodal Convention. The drafting and meaning of Article 4 is puzzling and unclear¹¹¹, as reflected in the above sentiment of Tetley.

¹⁰⁷ Alcantara, J "The new regime and Multimodal transport" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 404.

¹⁰⁸ *Ibid.*

¹⁰⁹ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal* 1, 10.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

UNCITRAL were involved in drafting the Convention on the Combined Transport Contract, 1970, ("the TCM"), which was an attempt at a uniform multimodal instrument. The airline industry was not consulted in the preparation of the TCM and, consequently, strenuously opposed its implementation. It is therefore surprising that UNCITRAL considered the implementation of a multimodal network system without having consulted road and rail interests, insurers and cargo interests.¹¹²

The single minded drive among maritime interests for the revision of the legal regimes for sea carriage, which was extended to other modes at a late stage, is submitted to be an explanation for the slightly awry development of the network system in the draft.¹¹³

Basis of liability

The Hague-Visby and Hamburg Rules are based on the principle of presumed fault of the carrier. The two sets of rules differ, however, in their drafting. The Hamburg Rules contain a simple provision allocating the burden of proof, whilst the Hague-Visby Rules create a system where liability is determined by shifting the onus of proof between the carrier and shipper like a ping-pong match. The Draft Instrument is a complex amalgamation of the provisions of both the Hague-Visby and Hamburg Rules with substantial modifications in terms of substance, text and structure.¹¹⁴

¹¹²Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 31.

¹¹³ *Ibid.*

¹¹⁴ Document titled "Draft instrument on transport Law: Comments submitted by the UNCTAD secretariat" Authors details not provided, accessed on the website of the Comité Maritime : <http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 10.

Articles 5 and 6 of the Draft Instrument contain the substantive liability rules for determining liability when damage occurs. Article 5 states that the carrier is under a duty to carry the goods to the destination appointed by the consignor and to deliver them to the consignor. Article 5 of the Draft also sets out the fundamental obligation of the carrier to care for the ship and the goods.¹¹⁵

Article 6 contains a statement that the carrier is liable for loss or damage to the goods and for delay in delivery unless he proves that his fault, or that of any other person for whom he is responsible, caused or contributed to such loss, damage or delay. A list of "excepted perils" is then provided for which, if proven, damage will not be attributed to the fault of the carrier.¹¹⁶

The effect of combining the two sets of rules has been to alter their original terms of substance, structure and text. The benefit of certainty associated with the accepted interpretation of the original terms of these rules has therefore been compromised. International conventions should be as clear as possible to ensure their uniform application, however, the structure of the provisions in the Draft relating to substantive liability do not meet this standard.¹¹⁷ The new regime doesn't provide clarity and there would therefore be little incentive to adopt it.

Clash between the Multimodal Convention and the CMR

The CMR is the most widely accepted carriage regime for goods transported by road in Europe and has become a settled means of resolving disputes.¹¹⁸ During

¹¹⁵ Berlingieri, F "Basis of liability and exclusions of liability." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 337.

¹¹⁶ *Ibid* 341.

¹¹⁷ Asariotis, R "Allocation of liability burden of proof in the Draft Instrument on Transport Law" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 398.

¹¹⁸ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 33.

the preparation of the Draft Instrument it became clear that political influences, driven by support for the CMR, necessitated the drafting of a network system to allow for the CMR, and other land carriage regimes, to be applicable in appropriate circumstances.¹¹⁹ This should have been a foreboding notice about the ultimate future of the Draft.

Similar to the attempts made in the Multimodal Convention, there are difficulties in determining what the applicable regime will be where the land and sea legs interface. Based on the current drafting, both the Draft Instrument and the CMR will be applicable where damage cannot be localised for goods transported on a truck which is itself carried for part of the journey by ship.¹²⁰

It had initially been hoped that the issue of "networking" with the CMR and determining its applicability could possibly be side-stepped. Suggestions were made that a door to door contract governed by the Draft Instrument would not necessarily be subject to the CMR.¹²¹

The first rationale for this suggestion was the belief that a contract under the Draft Instrument did not fall within the CMR definition of a "contract for the transport of goods by road" even for the land stage. This point was tested in *Quantum Ltd v Plane Trucking Ltd* ("*Quantum*").¹²² The court held that where a transport journey takes place by various modes of transport the land leg of that

¹¹⁹ Sturley, M "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 *The Journal of International Maritime Law* 147.

¹²⁰ Article 2 of CMR and Document titled "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on Transport Law" prepared by UNECE secretariat, accessed on the website of the Comité Maritime International : <http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 5.

¹²¹ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 31, footnote 28.

¹²² [2001] 2 Lloyd's Rep 133.

mode will fall within the provisions of the CMR regardless of how insignificant that land leg may be, defeating this first theory.

The second basis for the suggestion was that because goods could be taken over at the beginning of a sea leg the CMR would not apply because it applied from when goods are taken over by the "carrier" which would not be the carrier of the land leg. This view was also tested and rejected in *Quantum*. The court held that Article 1(1) of the CMR was to be read as being applicable to the road carrier taking over goods from the beginning of the land leg.¹²³

It was thus clear that conflict with the CMR could not be avoided and that, due to political pressures, provisions would have to be made for the interaction of the regimes which has led to some inconsistencies between the two.

The liability provisions of the Draft Instrument are different to those of the CMR, an important difference are the proof and presumption provisions. In the CMR, and the COTIF from which it is copied, there are special risk provisions, which trigger presumptions for the cause of the damage. This is different from the Draft Instrument which is based on an initial premise of negligence by the carrier. European judges would therefore be unaccustomed to the concepts and manner of thinking behind the Draft Instrument if it were adopted.¹²⁴

The duty of care in the Draft is also different from the duty found in many land carriage regimes. Under the CMR the road carrier is relieved of liability if the loss, damage or delay was caused by circumstances which the carrier could not have

¹²³ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 32.

¹²⁴ *Ibid* 35.

avoided even by exercising the utmost due diligence. In the Draft, in terms of Article 5.4, the carrier must only exercise a reasonable standard of due diligence

to make the ship. In terms of Article 6.1.3 the carrier will be excused for latent defects in the ship not discoverable by due diligence.

In summary, the duty of care obligation in the Draft is of a significantly lower standard than the duty of utmost due diligence found in the CMR, it is also lower than the standard of care for an air carrier.¹²⁵ The standard for duty of care incumbent upon a multimodal carrier will therefore be unpredictable at the commencement of his multimodal transport contract.

Limits of liability

The monetary limits of compensation for damage which may be claimed by cargo interests have not yet been agreed in the Draft Instrument and have been left in blank.¹²⁶ The preparatory documents show that the drafters consider the figures in the Hague-Visby Rules as a good starting point for determining the monetary limits of compensation.¹²⁷ This approach has received sharp criticism and will be a serious concern for cargo owning interests.¹²⁸

The limits in the Hague-Visby Rules are low compared to the limits in land transport conventions. The Hague-Visby Rules provide for a limit of 2 Special

¹²⁵ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 35.

¹²⁶ *Ibid* 36.

¹²⁷ Huybrechts, M "Limitation of liability and of actions" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 377.

¹²⁸ *Ibid* 378 and Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal*(1), 70.

Drawing Rights per Kilogram (SDR per Kg) whereas the CMR has a limit of 8.33 SDR per Kg. The German version of the CMR, the TRG, also has a limit of 8,33 SDR. The COTIF and the Montreal Convention, 1999, for air transport both have a limit of 17 SDR per Kg.¹²⁹ The drafter's approach indicates that limits in the Draft instrument is likely to fall well short of the limits in land carriage conventions.

Other sea carriage conventions, including the Hamburg Rules and the 1980 Multimodal Convention, to the extent that it covers sea transport, have limitation values which have taken account of currency erosion and have increased their monetary limits leaving the Hague Visby Rule limits behind on unrealistic values.¹³⁰

It has been argued that if the final limits are lower than those of the CMR there is no reason why they should be applied to the land legs of carriage under the Draft Instrument, because whatever exceptional circumstances may warrant low limits of liability at sea do not exist on land.¹³¹ It has also been submitted that the technical superiority of modern ships and advanced navigation techniques have surpassed the grounds upon which the rather outdated provisions of liability were established when ocean transport was perhaps more hazardous.¹³²

In terms of Article 6, paragraph 8, the multimodal carrier will lose the right to limit liability if the damage to goods under his care resulted from a personal act or omission and was caused with intent or recklessness with knowledge that such damage or loss would probably result. The wording of this provision is repeated

¹²⁹ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 36.

¹³⁰ Huybrechts, M "Limitation of liability and of actions" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 378.

¹³¹ Clarke, M *op cit* 36.

¹³² De Wit, R *Multimodal Transport* 146.

almost verbatim from the Convention on Limitations of Liability for Maritime Claims, 1976, ("the LLMC Convention") where the aim of the drafters was to set an almost unbreakable limit in exchange for high limitation amounts.¹³³

The effect of using the word "personal" means that only the act or omission of a senior management official committed with the requisite intent would be sufficient to break the limitation and, conversely, that the personal act or omission of persons such as the master and crew members would never break the limit, no matter how intentionally committed.¹³⁴

In the discussion papers on the Draft Instrument it is evident that the drafters made the deliberate decision that the actions of the servant or agent of the multimodal carrier should not defeat the carrier's right to limit liability.¹³⁵ This tough requirement to pierce the liability ceiling is higher than most conventions. It may be justified if there were strong indications that the monetary limit would be quite high, but at the moment there are none. The limitation provisions are, as a whole, unsatisfactory.

The position of third parties and subcontractors under the Draft Instrument

Multimodal carriers seldom perform all aspects of the carriage themselves. Even large multimodal operators subcontract aspects of the carriage to stevedores, terminal operators and other carriers with carriage equipment facilities and vehicles. Some carriers, particularly non vessel operating carriers perform none of the carriage themselves and specialise in subcontracting their performance

¹³³ Huybrechts, M "Limitation of liability and of actions" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 376.

¹³⁴ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal*(1) 12.

¹³⁵ Huybrechts, M *op cit* 376.

obligations.¹³⁶ It is therefore understandable that the drafters of the Draft Instrument agreed, during preparatory discussions, that one of the ways to overcome potential problems in the application of the Draft Instrument from door to door was to include third parties and ensure that they were treated as appropriately as possible.¹³⁷

Greater attention has been paid to the role of subcontractors and other third parties in the drafting of the Draft Instrument than in the Multimodal Convention. Previous efforts to deal with subcontracted parties who actually performed the carriage appeared in the Hamburg Rules, the other earlier carriage regimes, however, did not feature any attempted provisions.

The Hamburg Rules introduced the concept of an "actual carrier" which included any of the carrier's employees, agents and subcontractors.¹³⁸ The preparatory texts of the Draft Instrument introduced a concept known as "performing carrier". This was criticised as being too narrow as many parties are not involved in actual "carriage" and it was later expanded to "performing party".¹³⁹ The advantage of a wider definition was that all litigation for cargo damage could be regulated by a uniform liability regime regardless of a parties' role in the carriage transaction.

The International Federation of Freight Forwarders Associations ("FIATA")¹⁴⁰ was particularly concerned that such a wide definition might apply to its members who had no intention of actually performing any of the freight and would consequently find themselves liable for a subcontractors actions. FIATA, therefore, motivated a narrower definition for the final draft which has been

¹³⁶ Sturley, M "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 *The Journal of International Maritime Law* 148.

¹³⁷ *Ibid* 147.

¹³⁸ *Ibid* 148.

¹³⁹ *Ibid*.

¹⁴⁰ This acronym is derived from its French title, Fédération Internationale des Associations de Transitaires et Assimilées.

carried forward for consideration to UNCITRAL. There is still, however, support for a wider definition and it is not yet a resolved issue.¹⁴¹

The network structure of the Draft Instrument prompted various delegates to consider provisions for the protection of cargo interests' rights against performing carriers or parties who were not the contracted carrier. Italian delegates proposed that cargo interests should be able to sue inland performing contractors on a subrogation basis with the non-performing contracted carrier. A cargo claimant could therefore recover from an inland performing party on the same basis as the door to door contracting carrier could have.¹⁴²

In opposition, the United States proposed that where claims against an inland carrier arose, cargo interests should be free to sue under the existing laws. Both delegations agreed that for maritime performing parties the Draft Instrument would recognise a direct cause of action on its own terms. Although overwhelming support was received in favour of the US proposal the issue has still not been finalised.¹⁴³

During the drafting process FIATA also argued that the liability provisions should be removed for third parties, however, other delegates involved in the drafting process agreed that the convention should ultimately provide a liability regime that was as uniform as possible.¹⁴⁴ This goal was always going to be problematic as the deference paid to the CMR in order encourage the accession of European countries to the draft had resulted in a network system.

¹⁴¹ Sturley, M "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 *The Journal of International Maritime Law* 150.

¹⁴² *Ibid* 151.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* 149.

Another debated issue which has still not been finalised is the inclusion of an automatic "Himalaya" clause extending protection to all subcontractors who would be able to invoke the carriers defences and limits of liability.¹⁴⁵ This was attempted under the Hague Visby and Hamburg Rules but legal obstacles were encountered in its application. Nevertheless, its inclusion is indicative of the intentions to ensure uniform treatment for all parties to a multimodal contract and thus uniformity, even though many issues are still not settled.

The failings and successes of the Draft Instrument

Sadly, it is very difficult to find commentary on the successes of the Draft Instrument. In general, it has been severely and roundly criticized for falling well short of the requirements expected in a draft convention to be considered for international acceptance.

The Draft Instrument re-highlights some of the problems already demonstrated by the Multimodal Convention, which remain unsolved. It also raises some new problems. Perhaps the most positive way of looking at the Draft Instrument is to welcome the new problems it has highlighted which may be constructive as guidelines for the future implementation of a uniform regime.

The thrust of the criticism is that the CMI has prepared a draft convention which only covers inland transport when a sea leg is involved.¹⁴⁶ This criticism of the CMI's effort is unfair. If one looks at the origins of the project it is clear that the initial mandate handed to the CMI was based on the inconsistencies being experienced at sea. To expect a draft providing a solution for a uniform transport

¹⁴⁵ Sturley, M "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 *The Journal of International Maritime Law* 152.

¹⁴⁶ Beare, S "Liability Regimes: where we are, how we got there and where we are going." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 313.

regime when the mandate was only changed at a very late stage is unreasonable. Some of the prominent criticisms are canvassed below.

The Hague-Visby and Hamburg Rules only apply to the carriage of goods by sea. The draft, being an amalgamation of both, extends this liability regime to other modes of transport where possible.¹⁴⁷ It was probably unwise to expect a maritime regime to be a suitable base for a multimodal transport regime particularly in light of the difficulties and criticisms relating to the Hague-Visby Rules. The disparity between the Hamburg and Hague-Visby Rules and the time it has taken, without success, to get maritime countries to reach an agreement on which is more suitable should also have been an indication that an amalgamation of the legal regimes for sea carriage do not present a stable base for a multimodal transport regime.

Rosaeg points out that the maritime liability regime should not be extended to circumstances for which they were not made, being terminal storage periods and on-carriage by road. The reasons for limits and exceptions which may have been warranted for a sea-leg do not exist on land, and may in fact, in light of developments in sea transport, no longer exist for sea carriage either.¹⁴⁸

Conversely, Tetley strongly advocates that the drafting of a multimodal transport document should begin with the Hague-Visby Rules because it is estimated that 75% of the world trade is conducted under the Hague-Visby Rules. He argues that if nations already subscribing to the Hague-Visby text are ever going to be convinced to change to the new convention it would need to be based on these Rules in order to encourage transition. His second choice for a basis for drafting a multimodal regime would be the Hamburg Rules, because twenty nine nations

¹⁴⁷Rosaeg, E "The applicability of Conventions for the carriage of goods and for multimodal transport." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 326.

¹⁴⁸ *Ibid* 323.

have adopted these Rules.¹⁴⁹ In light of the above submissions, Tetley's position seems unlikely to succeed. Furthermore, as discussed in detail below, the Hague Visby Rules are very different in format to the conventions for the other unimodal forms of transport.

The Draft Instrument "can" apply to land carriage where a sea leg is included in a multimodal transport contract. Although this flows well with the trend that sea carriers now arrange for carriage of goods from door to door on uniform terms, it does leave a gap open for a carrier to consider avoiding a sea leg in multimodal transport, if possible, thereby attracting a different legal regime if damage occurs. Critics are not satisfied that there exists any reason why a carrier's liability should vary according to how he exercises this option.¹⁵⁰

"Who's in charge here?"

John F Kennedy

Tetley refers to this quote when criticizing the procedure adopted in preparing the Draft Instrument. He suggests that the drafters failed to take decisions between the different viewpoints forwarded by the parties involved in the consultative process, possibly because of the pressures exerted by these parties. He suggests that the draft represents a summation of the ideas forwarded by all these bodies.¹⁵¹

The consultative organizations which attended the subcommittee meetings included; NGO's, trade associations, FIATA, Canada's CIFFA, the NITL, the

¹⁴⁹ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal*(1) 9.

¹⁵⁰ Rosaeg, E "The applicability of Conventions for the carriage of goods and for multimodal transport." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 326.

World Shipping Council, Ship owning bodies, P&I clubs and others. Each of these bodies had differing views that, ultimately, are reflective of their personal agendas. The trade associations were also allowed to join in with delegates representing particular nations in the “show of hands” on various points as to whether there was consensus. No wonder so much is undecided and has been included in square brackets.¹⁵²

Tetley suggests that drafters have confused consultation and participation with decision taking¹⁵³, he appears to be advocating that the appointed drafters make the final decision after having heard all parties' views, rather than invite a consultative process on the final draft. Based on the cumbersome nature of the Draft Instrument and the length of time for which undecided provisions have remained under consideration, this criticism is worth noting.

“We have bitten off more than we can chew”

William Tetley

Tetley questions whether all the various components of a number of international conventions can be drafted into one convention to cover; multimodal carriage, negotiability, electronic commerce, freight, liens, rights of control, transport documents, liability and delivery. He suggests that it was perhaps too great a task at this stage and that to complete such a job may in fact take more time than the 3½ years taken by the CMI to prepare a draft.¹⁵⁴ This seems to be a valid criticism.

¹⁵¹ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal*(1) 15.

¹⁵² *Ibid.*

¹⁵³ *Ibid* 17.

Tetley also comments that the body of jurisprudence created by the Hague, Hague Visby and Hamburg Rules will be worthless as the new law, language, terminology and numbering of the Draft is so different from the existing body of jurisprudence that it will not be understood. This problem will not only be experienced by legal practitioners but by merchants as well.¹⁵⁵

In the comments on the draft made the United Nations Economic Commission for Europe (UNECE) it was concluded that the draft was not appropriate for covering multimodal transport. Although UNECE lauded the contributions made by the CMI to maritime transport it was felt that an acceptable multimodal transport convention would be better achieved by consulting with and considering the needs of parties with vested interests operating outside of maritime transport.¹⁵⁶ For UNECE to raise this criticism when the mandate to the CMI was changed at a late stage is an unnecessary slap in the face for the CMI.

A similar slap is delivered by UNCTAD who have condemned the draft as unworkable and likely to be incapable of practical application, citing it as "complex", "difficult to understand" and "moving away from accepted wording and interpretations". The main failing being attributed to the drafters having represented maritime interests only.

Alcantara suggests that the draft will not help procure international uniformity as the draft does not embrace multimodal transport through any combined modes

¹⁵⁴ Tetley, W "Reform of Carriage of Goods – The Uncitral Draft and Senate COGSA '99" (2003) 28 *Tulane Maritime Law Journal* 8.

¹⁵⁵ *Ibid.*

¹⁵⁶ Document titled "United Nations Economic Commission for Europe (UNECE): Comments to the UNCITRAL draft instrument on Transport Law" prepared by UNECE secretariat, accessed on the website of the Comité Maritime International : <<http://www.comitemaritime.org/draft/draft.html>, containing a link to this document with path: A/CN.9/WG.III/W.21/Add.1, accessed on 21 February 2005, page 6.

and, because of the various “opting outs”, it is set to become “another solution” only.¹⁵⁷

The complexity and style of the drafting has been criticised as marking a return to more traditional methods of drafting. The method of specificity and complexity which has been employed was purposefully avoided when drafting the Hamburg Rules in favour of more general concepts. This trend has recently been followed in the re-drafting of other carriage conventions. On the rails the COTIF is less detailed than the old and, similarly, in the air the Montreal Convention is less detailed than its predecessor.¹⁵⁸

Despite the criticisms of the Draft it is currently the only tenable solution for a harmonized multimodal transport regime being considered by UNCITRAL. The “Working Group on Transport Law” created by UNCITRAL to consider the Draft completed its 13th session on the draft in New York in May 2004¹⁵⁹ but, seven years after work commenced on its preparation, there are still many unresolved issues in the Draft Instrument and, surely, many more sessions to follow.

In light of these criticisms one must ask whether the Draft Instrument is not already destined for failure? How many more years will be invested on the project before a viable conclusion is reached? Is it destined to be a shelf-mate of the Multimodal Convention? Has the time not come to ask whether it is not better to abandon the Draft Instrument and begin again?

¹⁵⁷ Asariotis, R "Allocation of liability burden of proof in the Draft Instrument on Transport Law" [2002] *Lloyd's Maritime and Commercial Law Quarterly* 404.

¹⁵⁸ Sturley, M "Scope of coverage under the UNCITRAL Draft Instrument" (2004) 10 *The Journal of International Maritime Law* 37.

¹⁵⁹ Document titled "Draft instrument on carriage of goods [wholly or partly][by sea]" accessed on the website of the Comité Maritime International (Author's details not provided): <<http://www.comitemaritime.org/draft/draft.html>, accessed on 21 February 2005, page 2.

Abandon or persevere with the Draft Instrument?

"Round and round the mulberry bush"

Nursery Rhyme

The quest for an answer to the problems facing multimodal transport seems to have gone round and round in circles since 1913. As lamented by Clarke in his reference to Ecclesiastes, "all things are wearisome...there is nothing new underneath the sun", the drive for a uniform transport regime seems to have succumbed to a large degree of drafting fatigue.¹⁶⁰

In my opinion, the options open to the drafters are to persist with the Draft Instrument, start again with a new structure for a multimodal regime or abandon the quest for a universal multimodal regime altogether.

Firstly, it seems sadly clear from the weight of the criticisms already discussed that there is not a future for the Draft Instrument in its current format. Too much seems to have been overlooked in the drafting process and the use of a maritime regime as a basis for one of the integral clauses in a multimodal regime, namely the basis for determining liability, was ill-advised. The effort being expended on the Draft Instrument should be discontinued.

Secondly, an examination is required of whether the process should begin again or whether the quest should be abandoned altogether. Let us first try and single out the crucial ingredient that is needed before a new convention is pursued.

¹⁶⁰ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 29.

“It worries me that this issue of “compelling need” is often glossed over in the early stages of discussion of a new harmonizing instrument. By the time the issue is addressed, the forward momentum that the project has developed meanwhile cannot be checked. An unwanted, unloved and therefore ungratified convention may then be the result.

What should we learn from this? In analysing the success or failure of a convention, we may be forced to conclude that the area of the law covered by the instrument was not suitable for harmonization because there was no compelling need, and that time, in consequence, has probably been wasted”

*Patrick J.S. Griggs*¹⁶¹

*The Nicholas J. Healy Lecture 2002*¹⁶²

The above quote is quite long but has been reproduced because of its gravity and the déjà vu effect it certainly has on me. It is not hard to think of a draft convention that is “unwanted, unloved and ungratified”. The Multimodal Convention and, potentially, the Draft Instrument, fill the criteria. It is also not hard to think of a project which “cannot be checked” because of the development of “forward momentum”, the four years spent considering the Draft Instrument qualifies it to fill this category. This statement referred to various other attempted conventions which had failed prior to the presentation of the lecture. At that stage high hopes were still being held for the development of the Draft Instrument. It seems, however, that “the wheel hath come full circle”¹⁶³.

¹⁶¹ President of Comité Maritime International 2002.

¹⁶² *“Obstacles to Uniformity of Maritime Law”* 6th Biennial Nicholas J. Healy Lecture delivered at New York University School of Law on 29 October 2002, reprinted at p158 of CMI Yearbook 2002.

¹⁶³ Shakespeare W, *King Lear*.

The thoughts of Mr Griggs resonate in the words of Mr Justice Hobhouse, as he then was:

*“What should no longer be tolerated is the unthinking acceptance of a goal of uniformity...only conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified...”*¹⁶⁴

In 1980 Anthony Diamond ,Q.C., who has been involved in the drafting of the Draft Instrument, said;

*“There can be said to be a need for the general adoption of a new sea carriage convention but there is no comparable need for a multimodal convention.”*¹⁶⁵

This view proved correct, the 1980 Convention was not ratified and neither it seems will the Draft Instrument any time soon. The message is clear. There must be “a compelling need” for a harmonised regime before drafters begin the process. It must, therefore, be determined whether such a compelling need exists for a uniform multimodal regime.

Diana Faber¹⁶⁶ argues that enormous sums are being spent on legal disputes regarding the conflicting terms of conventions for transport and that these funds would be better spent investing in the industry. She argues that although establishing a precedent for such a convention may mean legal expenditure in the short term, it would remove many of the current problems and costs faced by the industry.¹⁶⁷

¹⁶⁴ [1990] L.Q.Rev. Col. 106 pp. 530-535.

¹⁶⁵ Presentation at University of Southampton at seminar on the Multimodal Convention, 1980.

¹⁶⁶ Law Commissioner for England and Wales.

¹⁶⁷ Faber, D “The problems arising out of multimodal transport” [1996] *LMCLQ* 518.

The CMI and UNCITRAL have expressed concern over the growing dis-unification of regimes governing sea carriage. Various states have made modifications to the various sea conventions resulting in a unilateral and piecemeal procedure for the breaking down of uniformity into a multiplicity of legal regimes.¹⁶⁸ Furthermore, there appear to be more national laws and regional agreements developing, there are also more than 20 countries drawing their own responses to multimodal transportation.

“Regional uniformity is unlikely to lead to global uniformity except by conquest.”

Clarke, M¹⁶⁹

The threat of this development is that states will become settled in the application of their modified laws and resistant to change. This will create even greater confusion should a multimodal regime be implemented. Diana Faber believes the best way forward would be to abolish all the individual conventions and introduce one which would ultimately govern all transport contracts.

“What the transport industry needs...is consistency and uniformity. This means that an ideal world will bring the replacement of the existing unimodal conventions with a single transport convention. Sadly, there are all too few signs that the prospect of living in an ideal world is getting any better.”

Chris Hilton¹⁷⁰

¹⁶⁸ Beare, S "Liability Regimes: where we are, how we got there and where we are going." [2002] *Lloyd's Maritime and Commercial Law Quarterly* 313.

¹⁶⁹ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 29.

¹⁷⁰ Faber, D and other contributors *Practical Guides: Multimodal Transport-Avoiding Legal Problems* 40

Currently, multimodal transportation creates confusion over conflicting laws leading to money being spent on legal costs to resolve these problems. There appears to be little doubt that a single or harmonized regime will bring order to the chaos caused by conflicting legal regimes. A “compelling need”, which will ultimately have to be driven by commercial interests is, however, necessary. Unfortunately, although it seems that the savings to the industry as a whole would be beneficial, this "compelling need" does not appear to exist.

Perhaps it is because individual multimodal transport operators experience the legal problems facing multimodal transport sporadically and not on a consistent basis leaving them unaware of the overall effect of the problems. This possibly results in the issues being dealt with as a passing headache or "just part of running a business".

The overall effect of the problem would probably only be appreciated if viewed collectively by multimodal transport operators. A possible solution to create a “compelling need" would therefore be to motivate the commercial bodies and representatives of industries most affected by the problems and financial losses as a whole, to rally for change.

Until this desire is created it would seem that the pervading lethargy of finding a solution will add further draft conventions to the list of historical attempts. In my opinion, the drafting of a uniform regime should therefore be abandoned until a compelling need is clearly established.

Let us hope that an injection of enthusiasm is experienced sometime in the 21st century. It would reflect poorly on the creativity of legal minds if, in the future, no solution is reached, legal regimes for transport through space and underwater may bring even further disharmony.

In the event that a compelling need is established, justifying the process starting again, I have set out some important points below, which, I believe, should be considered by the drafters charged with starting again.

Starting again

Identifying fundamental issues

In my research on the preparatory work done for both the Multimodal Convention and the Draft Instrument I noted that in depth consideration was not given to whether a multimodal regime should be based on the network or uniform system. Obviously the latter is more favourable and should ideally be pursued but it is predicated upon the assumption that the differing regimes for each form of transport could ultimately be adapted or woven into one. It is at this point that has perhaps not received proper consideration. The question must be asked whether the legal regimes for each mode of transport are so innately related to the nature of the corresponding mode of transport that a harmonized set of rules would not recognise the specific nuances of each form of transport?

This question should be the starting point for drafting a multimodal convention. If drafters are aware that a true uniform system would never be effective in practice and the reasons for such failure, a better framework will be available to start with, even if it means that a modified network model must be used, at least the drafters can focus on the major problems.

I believe that the two main obstacles to a uniform system being implemented are agreement on a basis for liability and monetary limits of liability. The questions that must therefore be asked are, firstly, is it possible for a single liability test to

apply to all modes of transport or are they so innately different that they require different liability tests? Secondly, is it possible to set a uniform monetary limit on liability for each mode of transport or do the risks in the different modes justify different monetary limits of liability for each mode? If the answer to either of these questions is “no”, it will be necessary to deviate from a strict uniform system.

It may seem naïve to suggest that the answers to these questions would indicate whether a uniform system is fundamentally possible, however, in defence of this approach I would argue that the other criticisms discussed above, focused on political issues, legal theory and practical application. The political disputes are well documented and were influenced by the trade objectives of the bodies involved in the drafting. The legal concerns focused on the clash of conventions and the difficulties in interpretation and application. I do not wish to suggest that these issues are not complex, it is rather my submission that they are dependant upon politics and legal ideologies reaching agreement rather than the factual possibility of whether a uniform system can be used as a base for a multimodal transport regime.

Comparing bases of liability

I now turn to considering whether it is possible for a single liability test to apply to all modes of transport or whether they are so innately different that they require different liability tests?

The Hague, Hague-Visby, Hamburg, COTIF/CIM, CMR and Warsaw system were drafted with the same basic goal in mind; to try and create an equitable risk allocation between carrier and cargo interests. Generally, the carrier surrenders a large portion of his contractual freedom by submitting to a minimum standard of liability out of which he cannot contract but in return the carrier obtains a number

of exceptions and in those cases where his liability is established, a maximum limit for compensation is agreed. In practice, this has actually been decided more by bargaining power than by economic factors, legal consideration or logic.

The background to each of these carrier liability provisions can be sourced either from roots in the continental or common law systems. The common law system of carrier liability developed under a branch of the law of bailment, which was not found in continental systems and provides the basis for the differences that developed between the systems regarding carrier liability.¹⁷¹

The common law system adopted the general rule that a carrier would be found strictly liable for damages to goods, meaning that liability could be imposed without any fault of the carrier being present.¹⁷² In addition, under common law, a carrier of goods by sea was held to give an absolute warranty of seaworthiness.

In contradistinction, a carrier's contractual liability in continental law systems was one of presumed fault or neglect in the event of damage or loss, which presumption could be rebutted by a carrier.¹⁷³ The general nature of the continental system was less severe than the common law system's strict "no fault" liability, because it was negligence based.¹⁷⁴

Under the common law system the carrier could, however, escape liability if he could prove that the cause of the damage fell within one of the accepted exceptions, which were narrowly defined, the carrier would have to prove the existence of an exception to prove there was no negligence. This entails an

¹⁷¹ De Wit, R *Multimodal Transport* 29.

¹⁷² *Ibid.*

¹⁷³ *Ibid* 33.

¹⁷⁴ *Ibid.*

objective examination which, in effect, relates only to the causation requirement, as the proof of a listed exception would mean that the only cause of the damage was something or someone else other than the carrier.¹⁷⁵

Conversely, the exception clauses developed under the continental systems were traditionally less clearly defined. If a carrier could prove that vague concepts such as “overwhelming force” or “factors beyond the control of a carrier” were the cause of the damage the carrier would escape liability. This approach simply developed into a procedure where all carrier had to prove was that he was not negligent in the causation of damage. This illustrates the basic negligence-orientated approach of continental law carrier liability.¹⁷⁶

It is, therefore, an interesting exercise to compare which systems the current regimes are based on. This would help determine whether they can ultimately be amalgamated into a single regime.

The Hague Rules and the Hague-Visby Rules, are notably different to the other conventions considered here. The Hague Rules were signed at Brussels on 25 August 1924 as a convention intended as set of rules which could be incorporated into a contract of carriage on a voluntary basis.

The Hague Rules were a compromise between shipping interests and cargo interests which ended a period which had allowed very wide ranging exclusion clauses in bills of lading.¹⁷⁷ The compromise provided for a number of compulsory duties which the shipowner could not escape whilst allowing him a sufficient number of exemptions to liability and a monetary limitation to liability.¹⁷⁸

¹⁷⁵ De Wit, R *Multimodal Transport* 42.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid* 76.

¹⁷⁸ *Ibid.*

The effect of the compromise makes the liability system difficult to classify under the continental negligence theory or the strict liability system of common law.

The carrier has an overriding obligation to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship, and to make all parts of the vessel safe for the reception, carriage and preservation of cargo.¹⁷⁹ This is the dilution of the carrier's absolute warranty of seaworthiness at common law.¹⁸⁰ Furthermore, the carrier is under a duty to properly and carefully load, handle stow and care for the goods carried.¹⁸¹ The carrier cannot exempt himself from these overriding obligations.

The carriers contractual duty is to deliver the goods at their intended destination, in the same order and condition in which they were when shipped and to do so in time, without delay. This obligation is so general that it would be recognised under both common law and continental law systems. The actual effect of the Hague Rules is that the strict duty of the carrier at common law is alleviated and substituted with duties of due diligence. The Rules do not allow the carrier to reduce his liability beyond the excepted perils and limits, which is characteristic of both the continental and common law systems. This final arrangement represents the compromise negotiated between shipping interests and cargo interests.¹⁸²

Provided a carrier has exercised the required due diligence for the above obligations he may rely on a number of excepted perils to escape liability for damage to cargo¹⁸³. The list of exceptions is referred to as the "Hague Rules catalogue", this list appears in Article 4, Section 2 of the Hague Rules. It has

¹⁷⁹ Article III, Section 1 Hague Rules.

¹⁸⁰ De Wit, R *Multimodal Transport* 80.

¹⁸¹ Article III, Section 1 Hague Rules.

¹⁸² *Ibid* 80.

¹⁸³ De Wit, R *op cit* 81.

been noted that the exceptions are a mixture of the common law and continental law exceptions.¹⁸⁴

The Hague Rules essentially creates a system of liability for negligence with a reversed burden of proof. When compared to other regimes, this system is the most difficult to catalogue. It is, however, best catalogued under the negligence theory as the overall effect of the Hague Rules resembles this system.¹⁸⁵

In the 1950's it became apparent that there were certain areas of difficulty in the Hague Rules which prompted the CMI to consider drafting amendments. The Hague Rules were subsequently amended by the Visby Protocol. The scope of the amendments were surprisingly limited and constituted not much more than a "face-lift" to the Hague Rules. It is suggested that this has been the main reason why many states have not adopted the amended version, the United States, for example, still applies the Hague Rules¹⁸⁶, in addition to its own 1936 COGSA.

The Visby Protocol did not influence the overall system of liability applied under the Hague Rules and the revised Hague-Visby Rules can be similarly classified, being an application of the negligence theory with a reversed onus of proof.

From 1970 onwards there was a movement to replace the "complicated" Hague and Hague-Visby Rules with a totally new convention, this convention was drafted under the auspices of UNCITRAL. It was signed at Hamburg in 1978 and became known as the Hamburg Rules which were met with both acclaim and criticism.

¹⁸⁴ De Wit, R *Multimodal Transport* 81.

¹⁸⁵ *Ibid* 82.

¹⁸⁶ *Ibid* 85.

The liability provision of the Hamburg Rules replaced the complicated liability system of the Hague-Visby Rules with a simple liability rule contained in Article 5, section 1, which states:

“The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”

This mirrors the described negligence theory. It has been argued that the system is too simple but it has found wide favour and was adopted as the preferred system of liability for the 1980 Multimodal Convention.¹⁸⁷ It is argued that the flexibility of the negligence system allows courts to draw the fundamental principles out of earlier case law to assist in clearly defining in what circumstances a carrier should be exempted from liability. In addition, it allows for new situations to be considered on their merits.¹⁸⁸

The CMR has less complicated origins than the sea carriage conventions and was a response to liability concerns of road carriers during the increased growth of international road traffic after World War II. The liability system of the CMR is based upon the negligence theory which reflects influences of certain compromises agreed between carrier and cargo interests.¹⁸⁹

¹⁸⁷ De Wit, R *Multimodal Transport* 90.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

The system holds the carrier liable for loss or damage to goods which occurs during the time they are taken into his care until delivery, unless he can prove that the loss was caused by circumstances which he could not avoid and the consequences of which he could not prevent.¹⁹⁰ The only way in which the CMR deviates from the negligence theory is by replacing the standard of reasonable care due by the carrier with one of "utmost care". This has led a number of commentators to argue that the system of liability behind the CMR is in fact one of strict liability but this approach has been widely challenged and appears to be a view held only by some German jurists.

The CMR does, however, have a rather complex distribution of proof as the negligence principle is qualified by a provision creating a presumption that where one of the listed "special risks" are present and could have caused the damage, it is deemed that this special risk was in fact the cause of the damage.¹⁹¹ The cargo claimant may however deliver proof to the contrary and place the onus back on the carrier if successful.¹⁹² These special risks are listed under Article 17, section 4 of the CMR.

The international convention for rail carriage, COTIF, is the oldest convention and the first version was published in 1890 after the commercial success of the railways became increasingly evident. The current convention has an annexure, RU-CIM¹⁹³, which sets out the liability provisions to apply when goods are damaged, referred to as "COTIF/CIM".

The CMR was used as a basis for the liability regime currently applied in COTIF/CIM, the negligence theory is thus evident. A railway carrier who has

¹⁹⁰ Article 17 and Article 18.

¹⁹¹ Article 17, section 4.

¹⁹² Article 8, section 2.

¹⁹³ This acronym is derived from the French title: *Regles Uniformes concernant le contract de transport international ferroviare des voyageurs et des bagages*.

received the goods for carriage will be liable for damage to goods which occurred between the time that the railway accepted the goods for carriage and the time of delivery.¹⁹⁴ The railway carrier will be discharged from liability if it proves that the damage was caused by circumstances it could not avoid and the consequences of which it was unable to prevent.¹⁹⁵ The standard of care incumbent on the carrier is one of utmost care, mirroring the standard of care obligation under the CMR.¹⁹⁶

The COTIF/CIM also affords the carrier the right to rely upon a list events which will be deemed to have been the cause of the damage if they can be proven, but are rebuttable by the claimant¹⁹⁷.

“The unification system is doomed to fail through its own dynamics. The most dramatic example is the Warsaw System for air carriage”¹⁹⁸

There is a lack of conformity in conventions currently regulating carriage by air carriage, referred to above as the “doom’ of unification. I would argue that the situation is not that dire.

The original Warsaw Convention, which first provided a liability regime for air carriage, was concluded in 1929 when air traffic was in its infancy and the creation of a harmonized legal regime was relatively simple. The convention initially enjoyed success and was ratified by almost every country in the world. In 1955 amendments were considered to the liability provisions which lead to a revamping of the Warsaw Convention. There has, however, been dissatisfaction

¹⁹⁴ Article 35, section 1, and Article 36, section 1.

¹⁹⁵ Article 36, section 2.

¹⁹⁶ De Wit, R *Multimodal Transport* 117.

¹⁹⁷ Article 37, section 2.

¹⁹⁸ De Wit, R *op cit* 510.

with the provisions for damage to goods in the 1955 Convention. The 1955 Convention has not been adopted by the United States and despite a proposed protocol¹⁹⁹ to amend the Convention, which was done to appease the interests of the United States, it appears unlikely that they will adopt it.²⁰⁰

The most recent protocols proposing amendments on liability provisions and limits consist of four adopted in Montreal in 1975, these have not yet come into force. The overall system, including the protocols, is referred to as the “Warsaw System”. The 1955 Warsaw Convention is the central convention and will be analysed here as it is still the most widely applied.

Despite the confusion of the above plethora of conventions and protocols, the liability system of the Warsaw Convention does give one hope as it essentially adopts the negligence theory with a reversal of the burden of proof.²⁰¹ It is, however, arguably tainted by some factors indicative of a strict liability system and its continued application of the negligence theory is threatened by the Montreal Protocol No.4 that proposes a system of strict liability for a common air carrier, a system which has thus far been avoided by all major conventions.²⁰²

In terms of the 1955 Warsaw Convention, the air carrier will be held liable for damage or loss of goods if the event causing the loss took place during the carriage by air, unless the carrier can prove that he and his servants took all necessary measures to avoid the damage or that it was impossible for them to take such measures.²⁰³

¹⁹⁹ 1971 Guatemala Protocol.

²⁰⁰ De Wit, R *Multimodal Transport* 124.

²⁰¹ *Ibid* 129.

²⁰² *Ibid* 125.

²⁰³ Article 18, section 1 and Article 20 of the Warsaw Convention.

Some of the wording contained in the negligence provisions of Article 18 and Article 20 Warsaw Convention, such as “all necessary measures” and “measures impossible to take”, is slightly different from the other liability regimes. These terms point towards the continental objective theory of strict liability as opposed to the negligence theory and some academics have argued that this points towards a very high standard of care being applied²⁰⁴, a standard possibly even higher than the CMR.²⁰⁵ The standard of care required by the carrier is, however, unevenly applied in different jurisdictions, although the bulk of the argument is that a standard of reasonable care should be applied²⁰⁶. The Warsaw convention does not provide a list of exculpatory clauses to avoid liability.

In summary, the basis upon which liability is determined under the majority of the different conventions is by application of the negligence theory with a reverse onus of proof. The Hamburg Rules, CMR and COTIF/CIM are the closest to each other in terms of their adherence to the negligence theory.

The Hague Rules, Hague-Visby Rules and Warsaw System, although falling to be classified under the negligence theory, stand a bit further away from the archetypical model of the negligence theory. The Hague and Hague-Visby Rules are removed from the archetypical model because of their complicated system and unique exceptions, and the Warsaw System because of its possible inclination towards strict liability which will be achieved if the Montreal Protocol No.4 is adopted, the Warsaw System is otherwise closer to the Hamburg Rules, CMR and COTIF/CIM than the Hague and Hague-Visby Rules.

If we were to just focus on the Hamburg, CMR, COTIF/CIM and Warsaw System, ie. leaving out the Hague and Hague-Visby Rules, the main obstacle facing

²⁰⁴ De Wit, R *Multimodal Transport* 129.

²⁰⁵ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 35.

drafters intending to harmonise the liability tests for these four regimes would be the differing standards of care and the differing “special risks” afforded under the CMR and COTIF/CIM.

The reasons for the differing standards of care do not appear to be based on the nature of the mode of transport itself. It is hard to imagine what possible different risks between the modes of transport should alter the standard of care incumbent on a carrier.

It is argued that the differing risks, if any, which may have been influential upon carriers when the regimes were drafted, are no longer present due to technological developments.²⁰⁷ For example, it was perhaps understandable that the original Warsaw Convention exempted an air carrier from liability for an error in navigation or management of the aircraft, however, due to the advancement of aeronautics, this exemption was deleted in 1955.²⁰⁸ Similarly, it is argued that ocean carrying vessels are no longer facing “an undertaking of great adventure” due to the various technological developments in shipping.²⁰⁹

The differences between standards of care in the different regimes appear not to have been based on the risks or nature of the differing modes of transport, but rather on the strength of the negotiating positions of the parties at the time of drafting.²¹⁰ There does not, therefore, appear to be a reason why the different standards of care should be maintained.

²⁰⁶ De Wit, R *Multimodal Transport* 129.

²⁰⁷ *ibid* 165.

²⁰⁸ *Ibid* 146.

²⁰⁹ *Ibid* 165.

²¹⁰ *Ibid*.

There also appears to be no reason why the “special risks” in the CMR and COTIF/CIM could be discarded at some stage, similar to the manner in which the Hague and Hague-Visby “exceptions” were dumped in the Hamburg Convention, thus allowing judges the flexibility to draw on principles established from case law to apply to differing circumstances.

This reasoning leads me to conclude that the liability tests of the Hamburg, CMR, COTIF/CIM and Warsaw System can practically be combined into a single liability test. An obstacle is, however, created by the inclination of the Warsaw System to apply a strict liability test. Fortunately, the Montreal Protocol No.4 has not yet been widely adopted and one would hope that jurists would realize that there appears to be no reason why a strict system of liability should be adopted into aviation law.

Combining the liability tests of the Hague and the Hague-Visby Rules into a uniform liability test is a more daunting task. The clash of the Hague, Hague-Visby and Hamburg Rules is enough to make one feel a little sea-sick. Drafters of the Hamburg Rules have been particularly disappointed as it was expected that they would come into force quite soon when they were drafted. This was one of the reasons that the Hamburg rules were used as a base, and in some clauses copied identically, for the Multimodal Convention.²¹¹

The differences between the Hague and Hague-Visby Rules and the other conventions discussed above makes it clear that it is the least suitable to be used as a base for Multimodal carriage, in retrospect it is understandable that the Draft Instrument was headed for failure, although one must sympathise with the CMI who initially only set out to harmonise the legal regimes at sea.

²¹¹ De Wit, R *Multimodal Transport* 165.

As the optimal system for carrier liability has been said to be a system of simple liability for negligence with a reversal of the burden of proof²¹², as applied in the Hamburg Rules, it would facilitate the adoption of a uniform multimodal regime if such a system could be prevalent or adopted at sea. There is no doubt that the Hamburg rules draw shipping liability provisions closer to the liability provisions of other modes of transport.

Whether a single liability test can be expected to harmonise all modes of transport would, therefore, seem to depend on maritime interests sorting out the clash of conventions at sea. The adoption of the Hamburg Rules or a new system founded on the negligence theory would be the ideal step towards ultimately facilitating a single liability test for a multimodal transport regime.

Without going into a debate on the merits of the respective regimes for sea carriage, there appears to be enough support for the favourability of the Hamburg Rules at sea. This would not discard the wealth of case law built up under the Hague Visby Rules as the principles from specific scenarios can be considered within the flexible application of the Hamburg Rules.

Comparing the limits of liability

The second consideration is whether it is possible to set a uniform monetary limit on liability for each mode of transport or whether the risks in the different modes justify different monetary limits of liability for each mode.

²¹² *Ibid* 219 and Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 34.

The Hague Rules has few provisions for compensation of loss or damage to goods. If the sea carrier is found to be liable for loss, his liability is limited to £100 per package or unit, referred to as an unbreakable limit²¹³, unless a declaration has been entered on the bill of lading by the shipper in which case the carrier will be liable for the declared amount.²¹⁴

The Hague-Visby Rules are more comprehensive than the Hague Rules, they provide that the amount of damages are to be determined by the value of the goods at the port of discharge.²¹⁵ Monetary limits are set at 666.67 SDR per package or unit or 2 SDR per kilogram, whichever is the higher. This limit can be broken if there was an act or omission by the sea carrier, done with intent to cause damage, or recklessly and with knowledge that damage would probably result.²¹⁶

The Hamburg Rules have a higher limit of liability; 835 SDR per package, or other shipping unit, or 2.5 SDR per kilogram of gross weight whichever is the higher.²¹⁷ These limits can, similar to the Hague-Visby Rules, be broken if there was an act or omission by the sea carrier, done with intent to cause damage, or recklessly and with knowledge that damage would probably result.²¹⁸

Under the CMR a carriers liability for loss of goods is limited to 8.33 SDR's per kilogram²¹⁹, this limit may be broken by agreement between the parties.²²⁰ The carrier will also lose his right to limit if the loss was caused by willful misconduct of the carrier.

²¹³ De Wit, R *Multimodal Transport* 88.

²¹⁴ *Ibid* 83.

²¹⁵ Article IV, section 5.

²¹⁶ Article IV, section 5.

²¹⁷ Article 6 and 26 Hamburg Rules.

²¹⁸ Article 8, section 1, Hamburg Rules.

²¹⁹ Article 23, section 3, CMR.

²²⁰ Article 24 CMR.

The COTIF/CIM mirrors the rules and procedures of the CMR in determining liability limits, although the actual limitation is higher, set at 17 SDR per kilogram.²²¹

The Montreal Convention limits compensation to 17 SDR per kilogram. Under the Warsaw Convention the air carriers liability is limited to £14 per Kilogram.²²² This limit may be broken if the carrier or his servants and agents have acted with the intent to cause damage, or recklessly and with knowledge that damage would result.²²³

There is, therefore, greater disharmony when comparing the monetary limits of each regime to each other than when comparing the liability tests of each regime. I would submit that the influences on the former are far more technical and varied than the influences on the latter. Factors influencing liability limits include; insurance companies, marketing reasons, perceived risks and policy.

Liability limits in the Montreal Convention have recently been increased because of marketing pressures. They were previously perceived to be too low²²⁴ and were increased when carriers were advised by insurers that higher limits could be insured at reasonable cost.²²⁵ Conversely, the situation is different on the road, a 2001 report concluded that for intra-EU transportation there was seldom any incentive to litigate the liability limit because the average cargo value of goods transported by road was quite low.²²⁶

²²¹ Article 40, section 2, COTIF/CIM.

²²² Article 22, section 2, Warsaw Convention.

²²³ Article 25 Warsaw Convention as amended by 1955 Hague Protocol..

²²⁴ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 39.

²²⁵ *Ibid* 39.

²²⁶ *Ibid* 39.

The premiums set by insurers, which have an influence on setting limits of liability, are determined on a very mathematical basis and a wide range of factors are considered including the perceived risks of the mode of transport. Although I have argued that perceived risks, if any, should not have a place in determining the system of liability to be applied, it is quite understandable that they would be considered for premium calculation purposes. The general value of goods transported by road, air, rail or sea would also be considered when calculating premiums. It is, therefore, hard to imagine how a uniform limit could be calculated independently for each mode of transport.

It has been argued that it would, in any event, be inappropriate to impose uniform limits because individual states or groups of states should be free to vary the limits for reasons of policy to, for example, encourage the carriage of goods by rail rather than road and thus influence their economies.²²⁷

It would seem that the answer to whether it is possible to set a uniform monetary limit on liability for each mode of transport is more problematical than unifying the differing liability tests because of the wide range of influential factors. It is no wonder a final figure was not inserted in the Draft Instrument!

Conclusion

I have argued that, provided a liability regime is agreed for sea carriage and provided the Warsaw System does not adopt a strict liability approach for damage, a single liability test could be adopted for the differing modes of carriage. I have also argued that it will be difficult to agree a single monetary limit for liability.

²²⁷ Clarke, M "A conflict of conventions: The UNCITRAL / CMI draft transport instrument on your doorstep" (2003) 9 *The Journal of International Maritime Law* 36.

I would, therefore, suggest that the closest drafters can get to a uniform system is one that allows a deviation from the uniform system for differing liability monetary limits of liability, depending on the mode during which damage occurs.

Perhaps proposed limits could be inserted in a uniform convention and parties could be given the choice to insert their own to override the set limits. Certain minimums could also be set for each leg to ensure that the system is not abused. The problem one spots straight away though, is that we are faced with a return to devising a set of rules where the localisation of damage cannot be determined. At least drafters can concentrate their efforts on trying to solve this problem.

As the only deviation from a pure uniform system would be provisions relating to liability limits, such a convention would be sufficiently based on the uniform system to allow the principle of "transferring risk from cargo interests to multimodal transport operators" to take place under a single transport contract. The risks of determining what limits would apply when the locality of damage cannot be confirmed would, therefore, rest with the multimodal transport operator.

I would submit that this is the goal that drafters should set their sights on as such a set of rules would, if widely adopted, go a long way to reducing the unpredictability borne by multimodal transport operators and would be healthy for the industry in long run.

Conclusion

I believe that the most important point discussed above was the requirement for a "compelling need" to be present before a convention is attempted. It appears that this need was not strong enough when the Multimodal Convention and the Draft Instrument were drafted, leading to their failure.

What this highlights is that the multimodal transport industry is ultimately responsible for the possible success of a multimodal convention and will have to rally to the cause. Once this “compelling need” is established it can hopefully also bring momentum to a uniform regime for sea carriage being adopted, which is an important step to uniformity. Drafters will then be able to plan a new convention drawing on the lessons taught by the failings and successes of the Multimodal Convention and the Draft Instrument.

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