IN THE NAME OF GOD, MOST GRACIOUS, MOST MERCIFUL

THE LIABILITY OF THE INTERNATIONAL MULTIMODAL TRANSPORT OPERATOR FOR LOSS OF OR DAMAGE TO THE GOODS CARRIED UNDER A MULTIMODAL TRANSPORT CONTRACT

BY

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A THESIS SUBMITTED FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

UNIVERSITY OF KENT AT CANTERBURY

OCTOBER 1991

DEDICATED TO:

ALL WHO SACRIFY AND DEVOTE THEMSELVES TO GOD, TO THE WAY OF ISLAM, PARTICULARLY THE GREAT LEADER OF ISLAMIC REVOLUTION,

IMAM KHOMEINI (R.A.)

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ACKNOWLEDGEMENT

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- Praise be to God, the Cherisher and Sustainer of the world. Master of the Day of Judgement.
- Thee do we worship, and Thine aid we seek.
- Show us the straight way.

I would like to offer my deepest gratitude to my supervisor, professor J. N. Adams, for his valuable advise during his supervision. Also I would like to express my thanks to Dr. ADEMUNI-ODEKE for his help and advise.

I take this opportunity to thank Dr. G. E. Djahromi who encourage me to do this work. And I thank THE BUREAU OF INTERNATIONAL LEGAL SERVICES for having sponsored me during the course.

I also wish to give my best thanks to my wife who patiently tolerated all difficulties, and even helped and encouraged me in doing this.

At the end I thank all persons who helped me, in any way, to make this possible.

ABSTRACT

Multimodal transport of goods has increasingly developed from about three decades ago when container transport system came into existence. At the present time there is no operative convention to govern different legal aspects of the international multimodal transport of goods contracts including the multimodal transport operator's (MTO's) liability for loss of or damage to the goods.

This thesis, therefore, attempts to consider the MTO's liability for loss of or damage to the goods carried under a multimodal transport contract at the present time and in the future when the 1980 United Nations Multimodal Transport of Goods Convention comes into force. Since multimodal transport operations are mainly fulfilled through the use of containers, the MTO's liability is necessarily, therefore, considered in relation to the problem caused by container transport, i.e. the container-package problem, so that a special attention is given to that problem. To shed light on the container-package problem it was thought that the best way is to consider the courts' views in some countries which have a significant role in maritime and container transportation such as the U.S.A. and the U.K.

Chapter one of this thesis deals with definition, history, aim and importance of multimodal transport of goods. The MTO's liability for loss of or damage to the goods at the present time has been considered in chapters two, three and four. Chapter five deals with some problems which can be particularly posed in relation to multimodal transport contracts. The MTO's liability for loss of or damage to the goods under the 1980 U.N. Multimodal Transport Convention is dealt with in chapter six. Chapter seven makes a

comparison between the MTO's liability for loss or damage to the goods at the present time and when the 1980 U.N. Convention comes into force. This is followed by a conclusion at the end.

INTRODUCTION

In the world of today in which different nations and countries have, through international trade, close economic and commercial relations with each other, every day a great deal of cargoes are sent from one side of the world to another.

The interests of the sellers and buyers for door-to-door transport of their goods require and have increased international multimodal transport of goods operations. This has, in turn, increased the use of containers which facilitates the transport operations of a great amount of goods particularly if the transport is multimodal, and reduces the transport costs and the possibility of loss of or damage to the goods. So multimodal transport, which is mainly fulfilled by containers, has appeared as a need for the trade world of today.

In parallel with this development of multimodal transport operations, a need was felt for a convention governing multimodal transport of goods. This was why during many years there had been some efforts by different bodies to provide such convention. And, failing to do that the International Chamber of Commerce (ICC) decided to publish its Rules for a Combined Transport Document in 1973. Finally, the United Nations Conference on Trade and Development (UNCTAD) after some years efforts prepared a draft convention on multimodal transport of goods which was then adopted on 24, May, 1980. This Convention has not yet come into force.

It seems that the most important matter in relation to multimodal transport of goods contracts, and the heart of the regulations governing them is the liability and limitation of liability of the multimodal transport operator (MTO) for loss of or damage to the goods carried under a multimodal transport contract. The purpose of this thesis is, therefore, to do a research regarding the rules relating to the MTO's liability and limitation of liability.

Since at the present time, inspite of the existence of the 1980 Multimodal Transport of Goods Convention, there is no operative convention governing different legal aspects of multimodal transport contracts including the MTO's liability, a comparative study has been carried out about the MTO's liability for loss of or damage to goods under the present and future regimes applicable to multimodal transport of goods performed under a multimodal transport contract. Also some problems which might appear in connection with the mutimodal transport contracts, and are related to the MTO's liability have been considered. One of these problems which is, *in relation to the MTO's liability* determination, of a high degree of importance is the 'container-package' problem. This is why the main discussion of chapter three has been allocated to the consideration of this problem. Another important problem in connection with multimodal transport contracts which affects the MTO's liability for loss of or damage to goods is 'the privity doctrine problem'. This has been considered in section 2 of chapter 5.

CHAPTER ONE

DEFINITION, HISTORY, AIM AND IMPORTANCE OF MULTIMODAL TRANSPORT OF GOODS

1.1 Definition of multimodal transport of goods

The expression "multimodal transport" (which is also called "combined transport"[1] or "intermodal transport) is used in contrast to the expression "unimodal transport" or "modal transport". There are several modes of transportation: sea, air and land including rail and road. If carriage of goods from the point of origin to the point of destination is only done by one mode of transportation, e.g. sea, air or land, it is called unimodal or modal transport, but if it is carried out by more than one mode of transportation, e.g. by a combination of sea and air or sea and land, it is called "multimodal transport of goods".[2] It will be "domestic multimodal transport of goods" if the points of origin and destination are located within the territory of one country, and

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[1] - The two expressions "multimodal" or "combined" are interchangeably used in this work.

[2] - See for example, C.M. Schmitthoff Schmitthoff's Export Trade, 8th ed. Stevens & Sons, London, 1986; Scrutton on Charterparties and Bills of Lading 18th ed. 1974, p. 371; Halsbury's Laws of England, 4th ed., vol. v, § 416.

"international multimodal transport of goods" if those points are located within two different countries.

Transport of goods can, therefore, be regarded as "international multimodal" if: (1) - it is carried out by more than one mode of transport and;(2) - the places of origin and destination are located within two different countries. For example if an English manufacturer in Birmingham who has sold goods to a buyer in Denver in the U.S.A. wants to ship them to the buyer's premises under one contract of carriage he has to transport them multimodally, i.e. under a multimodal transport contract the goods are carried by road from the factory to a railway station, then by rail from the railway station to a port of loading and then by sea from the port to a port in the U.S. and then by rail or/and road to the buyer's premises.

Obviously, such transit poses problems of documentation. Attempts have been made in recent years, therefore, to deal with this. In its recommendations for a combined transport document, the International Seminar on intermodal transport held at the University of Genoa in May 1972 said: Recommendation no. 1:

> "The document to which the following recommendations apply is designed to cover a contract by a combined transport operator (CTO) to procure the transport of goods between places in two different countries by at least two different modes of transport".

The I.C.C. Uniform Rules for a Combined Transport Document (Rule 2(a)) defines the term of "Combined transport" as follows:

"Combined transport means the carriage of goods by at least two different modes of transport, from a place at which the goods are taken in charge situated in one country to a place designated for delivery situated in a different country".

International multimodal transport of goods, according to UNCTAD 1975, involves:

"The transportation of goods from one country to another by two or more modes on the basis of a single contract - the multimodal transport (MT) document or contract - issued by the person or enterprise organising such services".

The 1980 United Nations Convention on International Multimodal Transport of Goods[3] has defined, in Article 1 (1), international multimodal transport as follows:

"'International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator[4] to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in

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[3] - Hereinafter is cited as the Multimodal Convention.

[4] - Article 1 (2) of the Multimodal Convention provides: "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract."

the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport."

According to this definition transport of goods can be considered as "international multimodal" if:

(1) - it is done by at least two different modes of transport; and

(2) - it is based on a multimodal transport contract; and

(3) - the places of taking in charge and delivery of goods are in two different countries.

This adds to the definition given above the extra requirement contained in (2). Article 1(3) of the Multimodal Convention provides: " '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." In accordance with the Multimodal Convention, therefore, one of the main important requirements of international multimodal transport of goods is that it should be based upon a multimodal transport contract. In other words, if our international carriage is based on a unimodal transport contract it is not regarded as international multimodal transport of goods even if the operations of pick-up and delivery of the goods which are carried out in the performance of such unimodal transport contract make our carriage in practice multimodal transport of goods. So, conventionally the definition of international multimodal transport of goods is based on a multimodal transport contract - a contract which demonstrates the multimodality of the carriage.

1.1:1 The Multimodal transport of goods contract and its various forms

Multimodal transport of goods contract is a single contract of carriage of goods upon which the goods are carried by more than one mode of transport. Such a contract is concluded either between a shipper and a single carrier whereby the carrier issues a through "start-to-finish" transport document or multimodal transport document, undertakes to perform or to procure the performance of the carriage from the point of origin to the point of destination by more than one mode of transport, and assumes responsibility for the performance of the whole carriage, or between a shipper and several successive carriers whereby each of the carriers issues a single mode transport document, undertakes to carry the goods by that particular mode, and assumes responsibility for the performance of the part of carriage carried out by him.

As seen, "There are [therefore] two main types of contract which can be described as contracts for Combined Transport",[5] i.e. (1)- multimodal transport contract between a shipper and a single carrier; (2)- multimodal transport contract between a shipper and several successive carriers. In the former, there is only one person - the carrier - with whom the shipper has to deal, whereas in the latter the cargo owner is compelled to deal with several carriers although there is just one contract.

It seems that the former type of multimodal transport contract is preferable because in the case of cargo loss or damage the shipper deals only with one carrier and there is no need to prove on which leg of transport the loss or damage occurred and which

[5] - P.G. Fitzpatrick, Combined Transport and the CMR Convention J. Bus. L. [1968] 311, at p. 314.

particular carrier is, therefore, responsible, whereas in the latter type where more than one document of transport is issued the stage at which the loss or damage occurred must be determined because each document will be under different applicable rules. "In practice, shippers are faced with many evidential difficulties in proving the time and the cause of loss or damage or even in raising doubts as to the existence of such cause",[6] and "when it proves impossible to discover at which stage the loss or damage occurred, there is no redress."[7] It is also said that the latter type "is inefficient from the international trade viewpoint."[8] This is probably why the ICC in its Uniform Rules for a Combined Transport Document preferred to use the former type of multimodal transport contract and with appearance of a new type of businessman -The Combined Transport Operator (CTO)[9] - makes him responsible against the shipper for any loss of, or damage to, goods occurring between the time of taking the goods into his charge and the time of delivery, no matter at which stage the loss or damage occurs.[10] Several years ago, the Committee on Shipping of U.N. Trade and Development Board[11] with the appearance of a new legal entity - the Multimodal Transport Operator (MTO) - considered him as a person who makes a single multimodal transport contract with the seller, charges a through freight

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[6] - B.S. Wheble, The International Chamber of Commerce Uniform Rules for a Combined Transport Document L.M.C.L.Q. [1976] 145 at p. 146.

[7] - O.C. Giles, Combined Transport, I.C.L.Q. 24 [1975] 379 at p. 379.

[8] - S. Mankabady, The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions, I.C.L.Q. 32 [1983] 120 at p. 121.

[9] - Rule 2 (b) of the ICC Uniform Rules for a Combined Transport Document.

[10] - Ibid. Rule 5 (e).

[11] - Establishment of Multimodal Transport Operators in Developing Countries, para. 9, U.N. Doc. TD/B/C 4/183 (1979).

rate,[12] and then arranges for the carriage and other services necessary to transport the goods to their destination,[13] i.e. the former type was preferred. We will, therefore, consider the former type which is more common.

1.1:2 Is carriage by pipelines or LASH system a "mode" of transport?

In modern transport the transport of goods by pipelines or LASH (Lighter Aboard Ship) system[14] have become important. A question therefore arises: should they be regarded as modes of transport?

This question is of importance because if they are regarded as modes of transport, the combination of each of them and one of the traditional modes of transport - sea, air and land transport - will be multimodal transport of goods whereas if they are not regarded as modes of transport but as means of transport,[15] such a combination will be unimodal transport of goods.

So, to answer the question one should be precise in the meaning of the terms of "modes" and "means" of transport. Their meaning should not be confused. Sea, air and

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[12] - Ibid. para. 2, 20.

[13] - Ibid. para. 2, 9. MTO and CTO are interchangably used, and there seems to be no difference between them.

[14] - In LASH system the ship does not enter into rivers and lakes but the barges which had been lifted in the ship are lifted out of the ship and continue the voyage through rivers and lakes.

[15] - There should be a distinction between "mode" and "means" of transport. Sea, air and land are modes of transport but container, pallet or ... are means of transport.

land (rail-road) are traditionally regarded as "modes" of transport whereas the methods or the arrangements which are used for transport such as container or pallet are regarded as "means" of transport.[16]

In respect of a pipeline, for example, if oil is conveyed from an inland point of country A to a seaport through a pipeline and then is carried by a ship to country B, the question is whether this transport is multimodal, or unimodal transport. Some authors are of the view that a pipeline is a mode of transport and therefore such transport is a case of multimodal transport.[17] In respect of LASH system the answer depends on whether the barges, which are lifted out of the ship and continue the voyage through rivers and lakes to the inland points, are regarded as part of the ship and the inland voyage are regarded as incidental to the sea voyage or not. If the barges are regarded as part of the ship and their voyage is, therefore, incidental to the sea voyage, the transport will be unimodal transport, otherwise it will be regarded as multimodal transport.[18]

1.1:3 The U.S. of America and various transport service options for international multimodal transport

In the United States there are three different transport service options upon which the shipments are multimodally transported to or from the U.S. They are landbridge, minibridge and microbridge.

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[16] - S. Mankabady, Supra note 8, at p. 125.

[17] - Id.

[18] - Id.

If a carrier offers a transport service upon which he carries the cargo from a foreign point (a point out of the U.S. territories) to the U.S., then transports the cargo through the U.S. and conveys it to another foreign point or vice versa, it is called landbridge service.

If a carrier offers a transport service upon which he carries a shipment from one U.S. port (e.g. by road) to another U.S. port and then continues to carry it - by, e.g. sea - to a foreign point or vice versa, it is called minibridge.

If a carrier offers a transport service upon which he carries a shipment from one inland point of the U.S., rather than a port area, to a port and continues its carriage - by, e.g. sea - to a foreign point or vice versa, it is called microbridge.[19]

Common features among these intermodal services are the issuance of a single intermodal bill of lading and the quotation of a single joint through rate.[20]

1.2 The history of multimodal transport of goods

The history of multimodal transport of goods dates back to at least 100 years.

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[19] - R.K. Miller, Land Bridge, Mini-Bridge and Micro-Bridge: A Question of Getting it Together, 17 Transportation journal 64-66 (1977); L.E. Thoung and F.M. Collison In Search of a Coherent Policy on International Intermodal Transportation, J of Mar. L. and Com. vol. 16, No. 3, (1985) p. 397.

[20] - LE.T. Thoung, supra note 20, p. 397 F.N.1.

There are some articles relating to combined transportation of goods in the CIM[21] Convention, the Convention relating to International Transport of Goods by Rail which was signed in 1895 and reviewed in 1952 and 1961, also in the 1929 Warsaw Convention relating to International Carriage of Goods by air.[22] For example, Article 31 of the Warsaw Convention states:

(1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1

(2) Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

In America this history also extends back to over a century ago when land-bridge[23] [an intermodal service] became a reality in 1869 with the joining of the Central Pacific and Union Pacific Railroads".[24] "The traditional *I.C.C.*[25] *position is that the* European exporter is being offered a complete service from origin to destination without the necessity of intervention by the exporter or consignee at any point in the course of

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[21] - CIM stands for Convention internationale concernant le transport des merchandises par chemin de fer.

[22] - Article 2 (1) of the CIM, art. 31 of the Warsaw Convention and art. 2 of the CMR Convention relating to International Carriage of Goods by Road (1956).

[23] - Landbridge was explained at p. 7.

[24] - D.C. Oliver, A Framework for an International .... I.C.C. prac's, j. vol. 50 [1983] p. 196 at p. 202.

[25] - The Interstate Commerce Commission which holds regulatory powers over rail, highways and inland waterway carriers.

transportation subsequent to turning over the shipment."[26] However "international intermodalism is generally considered as having its beginning in 1972, when the FMC[27] and the ICC[28] concurrently accepted the minibridge[29] tariffs filed by Seatrain Lines.

However multimodal transport of goods was not so common and was done rarely. Transport of goods was, therefore, to a very large extent, done through unimodal transport system until the last three decades when multimodal transport of goods was increasingly developed. It was in fact the development of technology and the creation of container transport after the World War II which changed transportation methods and caused an increasing use of intermodal containers by the late 1950s.[30] In other words, the history of the increase of multimodal transport of goods, particularly its international form, dates back to the birth of the methods of integration and consolidation of goods for carriage such as containerization and palletization,[31] and the use of containers and pallets which led to an integration between the modes of transport.[32] This is because multimodal

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[26] G.H. Ullman, Combined Transport to and from the United States, L.M.C.L.Q. 1976, p. 157.

[27] - The Federal Maritime Commission which holds regulatory powers over ocean common carriers.

[28] - See note 25.

[29] - Minibridge was explained at p. 7.

[30] - W. Driscoll, The Convention on International Multimodal of Goods, Tul. L. Rev. Vol. 57 [1982]. p. 193 at 195; UNCTAD The Economic and Commercial Implications of the Entry into of the Hambury Rules and the Multimodal Transport Convention, Report by the UNCTAO Secretariat, TD/B/C 4/315 1987 p. 7 (Part I).

[31] - P.G. Fitzpatrick, supra, note 6, p. 311; TE.T. Thoung, supra note 20, p. 397; D. Napier Multimodal Transport in Canadian International Trade, Canadian Transport Commission Research Branch, 1982, Report No. 1982/03E.

[32] - S. Mankabady, supra, note 8, at p. 137.

transport of goods is to a very large extent based on container transport It is a reality that "containerization allows a MTO [multimodal transport operator] to enter into multimodal transport contracts both with sellers who are seeking to ship fully loaded containers (full container loads or "FCL's") and with sellers who have less than full container loads ("LCL's")".[33]

It is interesting to know that Malcolm McLean[34] was the first person to introduce containers in international transport. In 1950's he loaded a few containers as deck cargo on a ship bound for Europe. This mode of transport rapidly took over the whole shipping industry, on both sides of the Atlantic.[35]

During the last three decades international multimodal transport of goods has, because of the suitability of container method of carrying cargo in multimodal transport,[36] grown[37] so much that it can be said that the history of multimodal transport of goods has during this period been tied to the history of container transport. The increasing development of multimodal transport during this period caused a modern transport document - the combined transport document - to replace the traditional transport

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[33] - J.H. Porter, Multimodal Transport, Containerization, and Risk of loss, Virginia J. of Int. Law vol. 25:1 1984 p. 171 at p. 172; MO. FILANI, Multimodal Transport ... GEO. J. vol. 2 1978 p. 414.

[34] - The president of an American trucking company.

[35] - S. Mankabady, Some legal aspects of the carriage of goods by container, I.C.L.Q. [1974] p. 317.

[36] - C.M. Schmitthoff, supra, note 2, p. 546.

[37] - W. Driscoll, supra, note 30, p. 198; see also LE.T. Thoung, supra, note 19, p. 397.

document. Accordingly the UCP had to be amended to take account of this development. Under Acticle 25 of the UCP (1983 Revision) banks will not, unless the credit stipulates otherwise, reject a transport document which bears a title such as "Combined Transport Document".

1.3 The aim of multimodal transport of goods

Since the concept of multimodal transport of goods is based on the integration of different modes of transport by the use of container transport system, the most important aim of multimodal transport of goods is to facilitate the movement of goods by reducing the transportation physical labour and total costs[38] through saving in costs and time necessary for the performance of carriage and reducing losses, damage and the danger of theft or pilferage, and therefore to obtain maximum economic benefits. This will, of course, have an important effect on international trade of goods.

The container transport system is particularly suitable for the multimodal transport of goods[39] and will be most effective if the transport units (containers) are used from the point of origin to the point of destination and are carried under a multimodal transport of goods contract[40] (door-to-door container shipment under a MTC). This is why one of

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[38] - UNCTAD, Multimodal transport and containerization, TD/B/C 4/238 Rev. 1 New York 1974 p. 6. para. 10; see also E. Schmeltzer and R.A. Peavy, Prospects and Problems of the Container Revolution, Transportation Law J. 1970 vol. 2, p. 263 at 266.

[39] - Schmitthoff, supra, note 2, p. 524.

[40] - UNCTAD, supra, note 38, p. 5, para. 5; D.C. Oliver, supra note 24, at p. 201; E. Schmeltzer, supra, note 38, at p. 265; R.K. Miller, supra, note 19, p. 64.

the results of containerization is that moving containers from door to door is increasingly being organised by the carrier who issues a through transport document.[41]

1.3:1 Reduction in the transportation total costs: through saving in costs necessary for the performance of carriage

1.3:1:1 Saving in the cargo-handling, export packing and storage in sheds costs

In unimodal transport the manufacturer's cargoes are usually delivered to a land carrier, under a land carriage contract, to carry them to a port. They are then delivered to a sea carrier, under a sea carriage contract, to carry them to a foreign port. There, they are handed over to another land carrier, upon another land carriage contract, to carry and deliver them to the buyer. As a result, the individual parcels are repeatedly loaded and unloaded which causes a high cargo-handling costs[42] whereas when a manufacturer ships his goods, through use of container and a single multimodal transport contract, from his factory, at which the goods are packed in the container, to its final destination, the cargo handling operations and costs are eliminated or reduced[43] because the cargo is not discharged from the container at the end of each mode, rather the container itself is transferred from one vehicle of transport to the next. Basically, containerization was introduced in international shipping in order to cut down the costs of maritime transport

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[41] - UNCTAD, supra, note 30, p. 7.

[42] - J. Whittaker, Containerization, 1975 p. 45-46. This kind of transport operation may also include forwarding agent, packing firms, port authorities, dock workers and customs officers. Id. at p. 45.

[43] - Schmitthoff, supra, note 2, p. 524.

mainly by reducing cargo handling costs and ship's time.[44] Multimodal transport of goods which is mainly based upon containerization will therefore reduce cargo handling costs.

Also in traditional transport the cargo, if not bulk cargo, should be properly packed so that they be suitable for export. They need full crating and other preparations for stowing in the holds of ships[45] which involves a high export packing costs. When, at the end of each mode of transportation, the packages are unloaded from the vehicle of transport, they need to be moved to a shed and stored there. This causes the costs of unloading, moving and storage in shed.[46] On the other hand in multimodal transport of goods using containers, there is no need to such proper export packing and sheds. Therefore, the export packing costs, unloading and moving costs, storage in sheds costs, moving and loading costs are eliminated or remarkably reduced.[47]

1.3:1:2 Saving in contract making costs

In the multimodal transport of goods the shipper does not need to make several contracts with different modal carriers but the goods are carried from origin to destination under a single multimodal transport contract[48] without the necessity of his intervention

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[44] - UNCTAD, supra, note 38, p. 5, para. 1.

[45] - E. Schmeltzer, supra, note 38, at p. 266.

[46] - Id. at p. 267.

[47] - Id. at p. 266, 267 ; LE.T. Thoung, supra note 19, p. 397 F.N.1.

[48] - W. Driscoll, supra note 30, at p. 204; LE.T. Thoung, supra note 19, p. 397 F.N.1.

at any stage in the course of transportation.[49]

In segmented transport of goods, however, the shipper is compelled to have a separate contract for each mode of transport which involves a high contracting and documentation costs.[50] So multimodal transport has the effect that the contracting and documentation costs are reduced.

1.3:1:3 Saving in some other costs and reduction in the danger of theft, pilferage, etc.

In multimodal transport of goods the shipper deals with one carrier - the MTO with whom he has a multimodal transport contract - rather than several different carriers. If there is any loss of or damage to his goods he will turn just to the MTO who is responsible against him for any loss or damage,[51] and it is not necessary for him to show at which stage of transport the loss or damage occurred and which carrier is responsible.[52] The costs of these steps are, therefore, saved.

Also in multimodal transport, through use of container and shorter transit time,

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[49] - Ullman, supra note 26, p. 157.

[50] - J. Whittaker, supra note 42, p. 45-6.

[51] - W. Driscoll, supra note 30, p. 204.

[52] - In unimodal transport each unimodal carrier is only responsible for the performance of the service relative to his own specific leg of the journey: UNCTAD, suppra note 38, p. 6.

there will be less damage, losses[53] and lower administrative costs.[54] The danger of theft and pilferage will be reduced[55] and any other costs necessary to unimodal transport[56] will be eliminated or reduced.

1.3:2 Reduction in the transportation total costs: through saving in time necessary for the performance of carriage

1.3:2:1 Saving in time of loading, unloading and awaiting of cargo

Due to the elimination or reduction of all manual operations necessary for loading and unloading of goods in traditional transport, the time necessary for those loading and unloading, too, will be eliminated or reduced. It is, in fact, the use of containers which permits fast loading and unloading,[57] which has brought about faster and more efficient movements of cargo from one mode of transport to another.[58] Moreover, multimodal transport of goods, through the *coordinated operations of multimodal* transport operator, either accelerates the speed of loading and unloading operation of the containers or reduces the time when the containers are awaiting the vehicle of transport at the loading points. So due to multimodal transport, the time of loading, unloading and awaiting of

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[53] - E. Schmeltzer, supra note 38, at p. 264, 268.

[54] - LE.T. Thoung, supra note 19 p. 397 F.N.1.

[55] - Schmitthoff, supra note 2, p. 524; R.K. Miller, supra note 19, p. 64; E. Schmeltzer, supra note 38, at p. 268.

[56] - Forwarding agent, packing firms, port authorities, dock workers and custom officers: see J. Whittaker, supra note 42, p. 45-6.

[57] - J.E. Bannister, Containerization and Marine Insurance, J. of Mar. L. & Com. Vol 5, 1974, p. 470; Mankabady, supra note 35, p. 317 F.N.3.

[58] - Filani, supra note 33, p. 414.

the containers will be considerably reduced.

1.3:2:2 Saving in the transport vehicle's time such as ship's time

The considerable reduction in the time of loading and unloading will cause a quicker turn-round of the transport vehicle which saves greatly the transport vehicle's time in the loading or unloading points. This is because the goods can be preloaded into containers and await e.g. the containership. When the containership arrives the containers are loaded in it in a short time, i.e. in some hours rather than days or weeks.[59] Container vessels are usually equipped with more than one set of containers, so that one can be loaded, whilst another is in transit, and a third is being unloaded.

This quicker turn-round or saving in ships' time or the greater utilization of the earning power of the ship[60] will reduce the transportation costs.[61] It is so important that we have encouraged container operators to invest in the business of multimodal transport.[62]

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[59] - J.E. Bannister, supra note 57, p. 465; E. Schmeltzer, supra note 38, p. 268.

[60] - D.E. Taylor, Problems Underwriters encounter when insuring cargo, Tul. L. Rev., vol 45, 1971, p. 1008.

[61] - Containerization was introduced in international shipping in order to cut down the costs of maritime transport mainly by reducing ... ships' time: see UNCTAD, supra note 38, p. 5. para 1.

[62] - D.E. Taylor, supra, note 60, p. 1008.

1.3:2:3 Other time savings

As said, the shipper, in multimodal transport of goods, is able to ship his goods under a single carriage contract. Therefore, he does not need to put time to enter into separate contracts with each modal carrier. Also in the case of loss or damage to his goods he will not, contrary to unimodal transport, need to spend time to show at which stage of the carriage the loss or damage occurred because the multimodal transport operator would be responsible for the loss of or damage to his goods.[63]

In brief the traditional transport system involves breaks and discontinuities which causes high transportation costs, while a multimodal transport operator can offer, through the use of containers, a coordinated transport service which is less discontinuous and more direct than the traditional international transport system;[64] i.e. an international multimodal transport operator would be able to offer shippers cheaper multimodal services than would modal carriers.[65] These savings in transportation costs between the origin and destination is a main factor which has invited carriers to invest in the business of multimodal transport.[66]

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[63] - W. Driscoll, supra note 30, p. 204.

[64] - J.H. Porter, supra note 33, p. 173.

[65] - W. Driscoll, supra note 30, p. 204; LE.T. Thoung, supra note 19, F.N.1 of p. 397; E. Schmeltzer, supra note 38, p. 270; Legal Impediments to International Intermodal transportation, National Academy of Science, Washington, D.C. 1971, p. 21.

[66] - Taylor, supra note 60, at p. 1008.

1.4 The importance of multimodal transport of goods

The importance of multimodal transport is because of its aim, its benefits and as a result because of its effects on international trade and foreign trade of countries. It will, therefore, affect the economic situation of countries.

Transportation cost is a main factor, among other factors,[67] which affect international trade of every country. When one country's goods are exported to a foreign country, the transportation cost should be added to the domestic price of those exported goods. If this price (the domestic goods price + transportation cost) is more than foreign price of the same goods, it is clear that the goods of the former country will have little or no market in the foreign country. In other words, transportation cost can have effect on the volume of the goods traded.[68]

Foreign trade is of economic importance for almost all countries. Some countries may have reliance on their foreign trade or even it may be vital for them. They should, therefore, try to keep and continue their foreign trade. To this end they should preserve foreign markets. For preserving foreign market and, therefore, continuing foreign trade, the price of exported goods at the foreign market, as stated, is of importance. The price should be such that the goods can be absorbed at the foreign market. The prices of

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[67] - Other factors such as relative abundance and relative costs of land, raw materials, labour, capital and etc. which differ from a country to another: see Legal Impediments to ...., supra note 65.

[68] - Id. p. 19.

exported goods at the foreign market depends, as seen, directly on the transportation cost of the goods to the foreign market.

One of the important factors for keeping and continuing foreign trade is, therefore, the existence of a transportation system supporting the foreign trade. Otherwise, in the case of lack of such a transportation system, the foreign trade may be faced with difficulties which will cause country's economic difficulties.

International multimodal transport of goods which, as stated, facilitates the movement of goods and reduces the transportation costs "in the form of lower rate and better services to shippers"[69] simplifies international trade.[70] Also the shipper will, with the representation of the multimodal transport document issued by an international multimodal transport operator, be entitle to receive the price of his goods[71] and should not have to wait until an on-board bill of lading is issued.

It can, therefore, be said that international multimodal transport system stimulates foreign trade[72] and has a very good effect on the economic situation of countries

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[69] - Legal impediments to international intermodal transportation, supra note 65, at p. 21; The reason for the reduction of transport costs in multimodal transport of goods system, compared with unimodal transport system, is that in multimodal transport system based upon container system, capital replaces labour which is very expensive in developed countries. Multimodal transport system is, in fact, a capital intensive transport system in which quantitative labour inputs are minimized. This system has also increased the speed and efficiency of transport. See UNCTAD, supra note 38, p. 5, para. 2.

[70] - E. Schmeltzer, supra note 38, pp. 264 & 269.

[71] - Id. p. 269; UCP of 1983, Art. 25.

[72] - Legal impediments ..., supra note 65, p. 21.

particularly for industrial countries which export, in a large amount, their surplus productions and import natural resources upon which their industries are based. The United States of America, for example, has an industry based economy. The efficiencies in the U.S.'s industries have brought about surplus productions resulting the U.S.'s economic strength in international commerce. In order to preserve and continue the economic strength in international trade and the present economic situation a) the process of these surplus productions must be maintained, find a way into international markets and be sold[73] because the export business is vital for many segments of U.S. industry;[74] b) the importation of some natural resources upon which the products are based must continue.

The use of multimodal transport systems as a transportation system in many cases in the United States of America shows the importance of multimodal transport of goods. Regarding the importance of transportation system; unitized cargo systems such as containerization and their use in through movement of goods, William T. Coleman, the U.S. former secretary of transportation, stated:[75]

> "In a world of increasing international interdependence, transportation must protect vital national interest by: (1) enabling the United States to compete effectively in the world market; (2) permitting people and freight to move at the lowest possible price, consistent with good, safe, and regular service; (3) ...."

He also stated that such systems (unitized cargo systems) have "opened vast

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[73] - D.C. Oliver, supra note 24, p. 196.

[74] - Legal impediments ..., supra note 65, p. 17.

[75] - See footnote 15 of the Oliver's Article, supra note 24, p. 199.

opportunities for more efficient through-transportation between inland points, with cargoes transferred rapidly and securely between the maritime and other modes. They have also promoted the development of new families of ocean-going vessels which, being capital rather than labour intensive, tend to reduce the competitive disadvantages of U.S. vessels."

Also D.C. Oliver, writing about the importance of transportation for a healthy economy, said:[76] "The importance of transportation has long been recognized as a vital element in a healthy. As early as 1970, President Washington encouraged the country to become less dependent upon foreign commercial vessels to ensure our economic vitality and national security". He added: "the smooth, economical, and competitive movements of goods to market will determine America's future role in world affairs". In this regard, he then referred to the importance of container transport system[77] and stated that "containerized transportation can be most effective when integrated into the "land-bridge" or 'mini-bridge" system".

A study which has been done on multimodal transport in Canadian international trade in 1982 shows the growth[78] and importance[79] of multimodal transport of goods

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[76] - D.C. Oliver, supra note 24, p. 198.

[77] - "A failure to exploit these developments [developments relating to containerization such as containership port and/or cargo handling equipments] now will result in the further demise of American seapower, ... The implementation of a total plicy based upon the concept of containerization, is in line with the traditional American strength of the 20th century, the utilization of technological developments, and the ability effectively to accumulate and deploy huge sums of capital." see D.C. Oliver, supra note 24, p. 200.

[78] - D. Napier and others Multimodal Transport in Canadian International Trade, Canadian Transport Commission Research Branch, Report No. 1982/03E 1982, p. 5; also

both in Canadian export and import trade. The study group states:[80] ".... as the data employed in the study applied to the 1979 calendar year, it is more than likely that the proportion of trade moving multimodally may have risen to some extent over the past two years especially in light of the continuing growth of the through transport concept".

This continuing growth of multimodal transport in Canadian international trade and also the great number of companies and persons involving in multimodal transport of goods throughout the world,[81] too, show the importance of this system of transportation.

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see E. Schmeltzer supra note 38, p. 263 regarding the tremendous growth in the use of intermodal containers between Europe and the U.S.

[79] - Id. p.8.

[80] - Id. p.5.

[81] - Containerization International Year Book 1988, National Magazine Co. Ltd., London, p.7.

CHAPTER TWO

THE LIABILITY OF THE INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS OPERATOR (MTO) FOR LOSS OF OR DAMAGE TO THE GOODS CARRIED UNDER AN INTERNATIONAL MULTIMODAL TRANSPORT CONTRACT

AT THE PRESENT TIME

Since so far there is no operative international convention[1] to govern international multimodal transport of goods and not much judicial or legislative guidance on the subject,[2] the regulations governing multimodal transport of goods including those relating to the liability of the MTO for loss or damage to the goods are determined by the parties to the contract[3] contractual liability regulations If, for example, multimodal transport of goods includes a sea leg and a land leg of transport, the parties to the contract may, subject to mandatory national legislation, agree that the Hague Rules, which is

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[1] - The 1980 United Nations Convention on Multimodal Transport of Goods is not yet operative. However there are some articles relating to combined transport of goods in some international unimodal transport of goods Conventions such as article 31 of the Warsaw Convention, article 2 of the CMR Convention and article 2 1 of the CIM Convention.

[2] - Chorley and Giles, Shipping Law , 1987 p. 271, E. Schmeltzer, supra chap 1, note 38, p. 285.

[3] - Schmitthoff, supra chap. 1, note 2, p 527, E Selving, The background to the Multimodal Convention, papers of a one day seminar held by Southampton University s Faculty of Law on September 12th 1980, p A6

applicable to the sea leg, apply to the land leg of the carriage as well.[4] There are some pre-prepared regulations such as International Chamber of Commerce (ICC) Uniform Rules for a Combined Transport Document which have no force of law[5] but can be incorporated in multimodal transport contracts and contractually govern different issues of the contracts including the issue of the MTO's liability for loss or damage to the goods.

However, the contractual liability regulations upon which the liability of the MTO is determined must regard the applicable international unimodal transport of goods Conventions[6] because of their mandatory character,[7] i.e. the Conventions cannot be contracted out by the contractual liability regulations.

The multimodal transport operator may, therefore, assume the extent of liability

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[4] - W. Driscoll, supra chap. 1, note 30, p. 211. But in the U.S. land carriage related to sea carriage is generally governed by the Interstate Commerce Act rather than COGSA: see Id

[5] - O.C. Giles, supra chap 1, note 7, p. 381.

[6] - Those Conventions are:

a - International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea (Hague Rules , Aug. 25, 1924, 120 L.N.T.S. 155 Amendments to the Hague Rules, known as Hague-Visby Rules, were adopted by the 1968 Brussels Diplomatic Conference on Maritime Law.)

b - Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention , Oct. 12, 1929,137 L.N.T.S.11. But International Convention Concerning the Carriage of Goods by Rail (CIM) 1952, 241 UNTS 336, and Convention on the contract for International Carriage of Goods by Road CMR , May 19, 1956, 399 UNTS 189, although mandatory, are not, as will be seen, applicable to a multimodal transport contract or a relevant leg of it.

[7] - Schmitthoff, supra chap. 1, note 2, p. 527.

for loss or damage to the goods from origin to destination under the regulations of a multimodal transport of goods contract or a multimodal transport document evidencing such a contract but he must have regard to mandatory provisions of the applicable unimodal transport of goods Conventions for loss of or damage to the goods. In other words, the MTO's liability is based on contractual basis provided that the carriers' liability systems of the applicable unimodal Conventions[8] are regarded.

Otherwise, the unimodal Conventions' liability systems, whichever is appropriate depending on the stage at which the loss or damage occurred, will govern to determine the MTO's liability. If, for example, it is known that the loss or damage to the goods occurred during carriage of the goods by sea, it is the contractual liability regulations which will determine the MTO's liability but they cannot determine his liability lower than the liability of a sea carrier imposed by the Hague or Hague-Visby Rules. If they do, the Hague or Hague-Visby Rules govern to determine the MTO's liability. In fact, the shipper is guaranteed his Hague-Rules rights against the Multimodal Transport Operator.[9] This liability-determining system is known as the network liability system. In this system there are multiple liability regimes but the liability of the MTO depends on the leg of the journey in which the loss of or damage to the goods occurs.[10] Of course, that leg may remain unknown particularly in container transport because it is very difficult to determine

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[8] - Carrier's liability for loss of or damage to the goods, under the unimodal transport of goods conventions will be considered later on.

[9] - O.C. Giles, supra chap. 1, note 7, p. 381.

[10] - Schmitthoff, supra chap. 1, note 2, p. 528; J.E. Bannister, supra chap. 1, note 57, p. 464; E. Schmeltzer, supra chap. 1, note 38, p. 283.

where damage occurred in a sealed container movement,[11] "except where the container itself is lost or sustains obvious external damage."[12]

So, to determine the MTO's liability there should be a distinction between situations where it can be ascertained at what stage the loss or damage to the goods occurred, and when it cannot.

2.1 Where the stage at which the loss of or damage to the goods occurred can be ascertained

In this situation, because of the mandatory charactor of the international unimodal transpaort of goods conventions, the international unimodal transport of goods Convention applicable to that particular stage of transport at which the loss or damage occurred must apply.[13] This is why the paramount clauses of multimodal transport contracts apply any international convention or mandatory national law that would have been applicable if the goods owner had made a separate contract with the combined transport operator for a particular stage of transport where the loss or damage occurred.[14] Therefore, if, for example, the loss or damage occurred at the sea leg of the carriage, the Hague or Hague-

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[11] - E. Schmeltzer, supra chap. 1, note 38, p. 283; Lord Diplock in his introduction on A Combined Transport Document, J. BUS. L. [1972] p. 273.

[12] - Lord Diplock, supra note 11, p. 273.

[13] - Schmitthoff, supra chap. 1, note 2, p. 528; E. Bannister, supra chap. 1, note 57, p. 464.

[14] - A. Diamond, Legal Aspects of the [Multimodal] Convention, Papers of a one day Seminar held by Southampton University's Faculty of Law on September 12th, 1980, p. C17.

Visby Rules, and if it occurred at the air leg, the Warsaw Convention will apply to determine the liability of the MTO.[15] So if according to the contract the MTO's liability for the loss or damage to the goods at a particular stage is less than the modal carrier's liability under the unimodal transport of goods convention relating to that particular stage, that unimodal convention will apply and determine the MTO's liability rather than the contractual liability regulations; and also if his liability according to the contractual liability regulations is more than the modal carrier's liability under that unimodal convention, still that particular unimodal convention will apply but permits the contractual liability regulations to determine the MTO's liability.[16]

It should be noted that the ascertainment of the stage at which the loss or damage occurred is especially important for the multimodal transport operator who does not act as an actual carrier but as a contracting carrier who sub-contracts with other carriers because he can, in turn, claim from the particular modal carrier for the stage at which the damage occurred.[17] Otherwise if "it proves impossible to discover at which stage the loss or damage occurred, there is no redress."[18]

Regarding the CMR and CIM conventions it should be noted that they have been

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[15] - Carrier's liability for loss or damage under these Conventions will be explained later on.

[16] - ".... no international convention forbids a "carrier" to accept a higher liability for loss or damage than the compulsory minimum": Lord Diplock, supra note 11, p.274; See, for example, Article IV (5) (g) of the H-V-Rs.

[17] - Chorley and Giles, supra note 2, p.372.

[18] - O.C. Giles, supra chap.1 note 7, p. 379 & 386.

accepted by most European countries, and also may have been scheduled in the domestic acts of some other countries. But they do not have, in all countries, a mandatory character. The United States, for example, is not a contracting member of those conventions. The liability of a multimodal transport operator for the loss or damage occurred on the inland U.S. segment is not, therefore, determined according to those conventions but his liability is generally "unlimited except in the event the carrier had been given permission by the ICC (Interstate Commerce Committee) to file a released rate".[19] Regarding the liability of the multimodal transport operator for loss or damage occurred on inland U.S. leg it was also recommended that "the public policy against permitting carriers to contract away all liability for cargo loss or damage should be maintained for intermodal shipments, as well as for single-mode traffic, since this provides an incentive for safe and careful service."[20]

2.2 Where the stage at which the loss or damage to the goods occurred, cannot be ascertained

In this situation, the regard must be led to the parties' contract to determine the MTO's liability. If the parties to a multimodal transport contract have agreed on a particular set of rules, such as the Hague Rules or the Warsaw Convention, then that specified regime shall apply.[21] But if they have not, it is the shipper who has to sustain

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[19] - E. Schmeltzer, supra chap. 1 note 38, p. 282; "the general rule of liability for United States land carriers is established by § 20 (11) [railroads] and § 219 [motor carriers] of the Interstate Commerce Act, 49 U.S.C. § § 20(11), 319 (1964). The same provisions give the ICC discretionary power to authorize released rates for those carriers. The ICC has exercised that power only sparingly". Id. F.N. 64.

[20] - Legal impediments to International Intermodal Transportation, supra chap. 1, note 67, p. 10, Recommendation no. 15.

[21] - Schmitthoff, supra chap.1 note 2, pp. 528-9.

the loss. However, it is often deemed that the loss has occurred at sea leg and the Hague/Visby Rules' limits, therefore, apply[22] and determine the MTO's liability against the shipper.

As said, in this situation there is no redress for a contractual MTO who has sub-contracts of carriage with modal carriers because it is for him to prove the stage at which the loss or damage occurred but its ascertainment is impossible.[23]

2.3 The MTO's liability under some transport documents for multimodal transport of goods

At present, since a number of documents for the multimodal transport of goods follow the pattern outlined by the I.C.C. Rules, either through incorporation[24] or through simple imitation,[25] it is worth, here, considering the liability of the multimodal transport operator for loss of or damage to the goods under the I.C.C. Rules. We will then consider that under container bills of lading.

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[22] - J.E. Bannister, supra, chap. 1, note 57, p. 464; A. Diamond, supra, note 14, p. C17.

[23] - O.C. Giles, supra, chap.1, note 7, pp. 379 & 386.

[24] - See, for example, the "COMBIDOC" bill issued by the Baltic and International Maritime Conference and the International Shippers' Association in 1977. It is expressly modelled on the I.C.C. Rules.

[25] - See "COMBICONBILL" issued by BIMCO in 1971, based largely on the TCM draft, a forerunner of the I.C.C. Rules; or the A.C.L. Bill which follows the Rules with some variations: Chorely and Giles, supra note 2, p. 272.

2.3:1 Under the International Chamber of Commerce (I.C.C.) Uniform Rules for a Combined Transport Document

2.3:1:1 A brief history of the I.C.C. Uniform Rules for a Combined Transport Document.

The increasing development of the international multimodal transport of goods during the post-containerization period[26] and the lack of any international convention on multimodal transport of goods caused the creation of different MT contracts and documents.[27] These differ from one another particularly as to the MTO's liability for loss or damage to the goods.[28] There was, therefore, a considerable need to a set of uniform rules for multimodal transport especially for its liability system upon which there was a divergence of views.[29]

With respect to the need to the uniform rules and the lack of any answer to that need from international treaty and legislation, it was anticipated that the persons involved in multimodal transport of goods would seek to create a set of uniform rules for through transportation.[30]

The International Chamber of Commerce (I.C.C.) which was interested in the

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[26] - W. Driscoll, supra chap. 1, note 30, p. 198.

[27] - B.S. Wheble, supra chap.1 note 6, p. 145.

[28] - Lord Diplock, supra note 11, p. 270.

[29] - Id. at p. 273.

[30] - E. Schmeltzer, supra chap. 1, note 38, p. 285.

commercial problems of combined transport had an active role with different bodies and meetings[31] in preparing a draft convention on multimodal transport of goods (TCM Convention) which was submitted to UNCTAD for further consideration.

In the meantime there was an International Seminar on Intermodal Transport at the University of Genoa in May 1972. The object of the seminar was to make some recommendations for a combined transport document so that, in the absence of an international convention, the existing differences in the laws applicable in different stages could be eliminated.[32] The seminar finally made some recommendations on matters of principle, but it did not deal with drafting details and provide an outline for the actual combined transport document.[33]

Recognising the fact that it would take time until such international convention came into force, the ICC felt it necessary to publish a set of uniform rules for a combined transport document. So the ICC with the use of relevant previous experiences and in order to give uniformity to the multimodal transport of goods contracts and documents and to avoid the development of a multiplicity of different multimodal documents, first published its Uniform Rules for a Combined Transport Document in 1973.[34] The revised

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[31] - Such as the International Institute for the Unification of Private Law (UNIDROIT) and the Comite Maritime International (CMI) which prepared a draft TCM Convention on multimodal transport of goods, the joint meetings of Inter-Governmental Consultative Organization and the Economic Commission for Europe (IMCO-ECE), and UNCTAD.

[32] - Lord Diplock, supra note 11, p. 270.

[33] - Id.

[34] - ICC Brochure 273; [1974] 29 L.M.C.L.Q.

form of the Rules was then published by the I.C.C. in 1975.[35] These were subsequently adopted by certain steamship conferences and trade associations.[36]

2.3:1:2 The liability of the CTO (MTO) for loss or damage to the goods under the I.C.C. Uniform Rules

The I.C.C. Uniform Rules have not, as stated above, the force of law but they have contractual force if they are incorporated into the multimodal transport contracts by agreement of the parties.[37] According to the 1975 I.C.C. Uniform Rules (Brochure no. 298) if the Rules are incorporated in the combined transport contract and the combined transport document states that it is issued subject to the Rules, the Rules will be applied. The Rules are subject to the mandatory provisions of international conventions and national laws where those apply.[38]

Where the Rules apply, the CTO[39] who issues a combined transport document would be liable for loss of or damage to the goods during the course of the carriage,

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[35] - ICC Uniform Rules for a Combined Transport Document (1975) Publication No. 298.

[36] - W. Driscoll, supra chap. 1, note 30, p. 199; see also note 24 supra.

[37] - Schmitthoff, supra chap. 1, note 2, p. 528; Chorley and Giles, supra note 2, p. 271.

[38] - O.C. Giles, Combined Transport, I.C.L.Q. [1975] 24, p. 381.

[39] - Under Rule 2(b) of the I.C.C. Rules "combined transport operator (CTO) means a person ... issuing a combined transport document."

whether the CTO is the actual carrier or not,[40] unless he can bring himself within one catalogue of exceptions. Rule 5(e) of the ICC Rules provides:

> "By the issuance of a CT document the CTO assumes liability to the extent set out in the Rules for loss of or damage to the goods occurring between the time of taking them into his charge and the time of delivery, and undertakes to pay compensation as set out in these Rules in respect of such loss or damage."

The extent of the liability of the CTO is determined by other provisions of the Uniform Rules. It depends on whether the stage of transport at which the loss or damage occurred can be ascertained or not. In fact the Rules operate under a network liability system rather than a uniform liability system.[41]

(1) - If the stage of transport at which the loss or damage occurred can be ascertained

As stated, the ICC Rules operate under a network liability system for determining the CTO's liability, i.e. if the mode of transport where the loss or damage occurred is known, the appropriate international convention or national law particular for that mode

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[40] - According to the introduction to the Rules whether the CTO is as a provider or as an arranger of the transport he "would be .... liable, as a principal, for loss or damage wherever it occurred during the course of the whole combined transport." So "the CTO may himself be a carrier or he may be a forwarding agent who arranges the required modes of carriage": see Chorley and Giles, supra note 2, p. 271; O.C. Giles, supra chap. 1, note 7, p. 383; B.S. Wheble, supra chap. 1, note 6, p. 146.

[41] - Under a uniform liability system the CTO is liable for loss or damage according to their contractual agreement, no matter at which stage of transport such loss or damage occurred. However, if the mode of carriage at which the loss or damage occurred can be ascertained the parties agreement should regard the carrier's liability system of the international convention relating to that particular mode because of its mandatory character. This system of liability was recommended, recommendation III 3, by the 1972 Genoa University Seminar on Intermodal Transport: See A Combined Transport Document, J. BUS. L. [1972] p. 269 at 278.

which is of mandatory character applies to determine the CTO's liability.[42] In fact, under the ICC Rules the shipper automatically enjoys the minimum protection of the mandatory provisions of the relevant international conventions and national laws (such as the Hague Rules or the Warsaw Convention provisions). The amount of liability of the CTO under an applicable international convention or national law is the same as the liability of the carrier referred to in such international convention or national law.[43]

To be precise, the CTO's liability may be determined in one of the following four rules. These rules must be applied in order.

1) The first rule for determining the CTO's liability is to have regard to the mandatory provisions of any international convention or national laws relating to the mode of carriage at which the loss or damage occurred.[44] If, for example, the goods are carried between the countries which have ratified a mandatory convention such as the Hague Rules and the goods are lost in the sea, it is the provisions of that convention which determines the CTO's liability for such a loss.

2) The second rule for determining the CTO's liability is to have regard to the provisions of any non-mandatory international convention relating to the mode of transport at which the loss or damage occurred. Such provisions are applicable if the combined

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[42] - Rule 13 of the ICC Rules; see also B.S. Wheble, supra chap. 1, note 6, p. 146; Chorley and Giles, supra, note 2, p. 272; F.J.J. Cadwallader, Uniformity in the Regulation of Combined Transport, J. BUS. L. [1974] 193 at p. 198.

[43] - Last para. of R.13 of the I.C.C. Rules.

[44] - Rule 13(a).

transport document states that those provisions shall apply.[45] If, for example, the goods are carried between the countries which are members of conventions other than the mandatory conventions, like Comecon countries, and the combined transport document incorporates such conventions, then the provisions of those conventions will apply to determine the CTO's liability.

When the CTO's liability for loss or damage is determined according to the first or second rule, he will lose the protection of any exemption clause if he or his servants or agents caused such loss or damage to the goods when acting outside the terms of the contract.[46]

3) The third rule applies if there is a contract of inland waterway carriage between the CTO and a sub-carrier. It is the provisions of the contract between the CTO and the actual carrier which determines the CTO's liability. However this rule applies only if (a) neither rule 1) or rule 2) is applicable and (b) the combined transport document expressly states that such contract provisions shall apply.[47]

4) The fourth rule for determining the CTO's liability [Rules 11 and 12 of the I.C.C. Rules][48] applies when none of the above-stated three rules applies. It also determines the CTO's liability for loss or damage when the stage of transport at which

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[45] - Rule 13(b).

[46] - Last para. of R. 13 of the I.C.C. Rules.

[47] - Rule 13 (c).

[48] - Rule 13 (d).

such loss or damage occurred is not known. For this reason, it will be considered below.

(2) - If the stage of transport at which the loss or damage occurred cannot be ascertained

Under Rule 5(e) of the I.C.C. Rules, as stated, the CTO undertakes to pay compensation for the loss or damage to goods, as set out in the I.C.C. Rules. The compensation is determined by Rules 11 and 12 when the place of loss or damage is not known.[49] In order to calculate such compensation, one should refer to the value of the lost or damaged goods at the place and time they are or should have been delivered to the consignee, in accordance with the contract of combined transport.[50] The goods value is determined according to 1) the current commodity exchange price or; 2) the current market price if there is not current commodity exchange price or; 3) the normal value of goods of the same kind and quality if there is no commodity exchange price or current market price.[51]

The CTO's liability is, however, limited to 30 francs[52] per kilo of gross weight

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[49] - Rules 11 and 12 may also be used to determine the CTO's liability when the place of loss or damage is known: see Rule 13(d).

[50] - Rule 11(a).

[51] - Rule 11(b).

[52] - "Franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900": Rule 2(f). This limit is, because of gold value problem, replaced by monetary figure such as U.S. $2.50 per kilo; see A. Diamond, supra note 14, p. C18; Since none of the international unimodal transport of goods Conventions can, here, be resorted the Rules provide a maximum limit of compensation which benefits the consignor because "it gives him a minimum protection in the same way as strict-law Conventions." See Giles, supra chap. 1, note 7, p. 382.

of the goods lost or damaged, but if the consignor has declared a higher value for the goods to which the CTO has consented and this has been entered in the combined transport document, the CTO's liability will be limited accordingly.[53] Since the CTO's liability is, here, based on just weight system, rather than "per package or unit" system, the per package limitation problem or container package problem we face under the Hague/Visby Rules are, here, removed.

It should be noted that in determining the CTO's liability, the actual loss suffered by the person making the claim is of importance because if such actual loss is lower than the CTO's liability (calculated upon 30 francs per kilo of gross weight of the lost or damaged goods) or it is lower than the higher value for the goods declared by the consignor, it is the actual loss which determines the carrier's liability. Rule 11 provides: " ... However, the CTO shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim."[54]

Under the I.C.C. Rules there are, however, some circumstances in which the CTO is not liable to pay compensation in accordance with Rule 5(e). Those circumstances exist when the loss or damage was caused by a) an act or omission of the consignor or consignee, or a person other than the CTO acting on behalf of the consignor or consignee, or from whom the CTO took the goods in charge; or, b) insufficiency or defective condition of the packing or marks; or c) handling, loading, stowage or unloading of the goods by the consignor or the consignee or any person acting on behalf of the consignor

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[53] - Rule 11(c).

[54] - Rule 11.

or consignee; or d) inherent vice of the goods; or e) strike, lockout, stoppage or restraint of labour, the consequence of which the CTO could not avoid by the exercise of reasonable diligence; or f) any cause or event which the CTO could not avoid and the consequence of which he could not prevent by the exercise of reasonable diligence; or g) a nuclear incident if the operator of a nuclear installation or a person acting for him is liable for this damage under an applicable international convention or national law governing liability in respect of nuclear energy. It is the CTO who should prove that the loss or damage was due to one or more of these causes and events.[55]

These limitations of liability and defences are available for the CTO whether the action for loss or damage is brought in contract or in tort.[56] However, if it is proved that the loss or damage resulted from his act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result, he shall not be entitled to benefit the limitation of liability set out in Rule 11.[57]

If according to the combined transport contract or combined transport document evidencing such contract, the CTO's liability for loss or damage to the goods is lower than that set out in the Rules, such liability clause is null and void. But the I.C.C. Rules permit the CTO to accept higher liability for loss or damage than that set out in the Rules.[58] So, it is possible for the CTO to accept a liability for loss or damage higher

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[55] - Rule 12 of the I.C.C. Rules; F.J.J. Cadwallader, supra note 42, p. 199.

[56] - Rule 16.

[57] - Rule 17; Cadwallder, supra note 42, p. 201.

[58] - Rule 11(c) of the I.C.C. Rules.

than that set out in an appropriate international convention or national law (if the stage of transport at which the loss or damage occurred is known); or higher than that set out in the Rules (if the stage is not known).

Regarding the CTO's liability under the I.C.C. Rules, one important point is the question of a time-bar. Under the Rules all claims against the CTO should be brought within a certain time, otherwise the CTO will not be liable. That time is nine months after the goods are delivered; or should have been delivered; or the date on which the party entitled to claim has the right to treat the goods as lost in accordance with Rule 15.

2.3:2 Under container bills of lading

Apart from the I.C.C. combined transport document there are other transport documents used for multimodal transport of goods. Container bills of lading are transport documents which may be issued by carriers in the case of multimodal transport of goods.[59] These documents are subject to the Hague-Visby Rules by force of law as far as the carriage by sea is concerned since they are genuinely bills of lading. In cases where it cannot be discovered at which stage of the multimodal transport the loss of or damage to the goods occurred, normally, by the terms of the contract, the Hague-Visby Rules will apply. An example of container bills of lading is the bill used by the Atlantic Container Line known as ACL container bills of lading. ACL container bills of lading, like other container bills of lading, adopt the network liability system to determine the carrier's liability in the event of loss of or damage to the goods. Accordingly, if the mode

[59] - E. Selving, supra note 3, p. A6.

of transport at which the loss or damage occurred can be ascertained, then it is the respective international carriage convention or, in the case of lack of such international convention, the applicable national law which would apply to determine the carrier's liability. But when the stage of loss or damage cannot be ascertained, it is presumed the loss or damage to have happened during the sea carriage and the carrier's liability is, therefore, determined by the Hague-Visby Rules.[60]

[60] - J. Ramberg The Combined Transport Operator, J. BUS. L.1968 p. 139; C.M. Schmitthoff, Schmitthoff's Export Trade, Stevens & Son, London, 1986, p. 529. See also part 3 of the A.C.L. Container bills of lading relating to Carrier's responsibility.

CHAPTER THREE

THE LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR FOR LOSS OF OR DAMAGE TO THE GOODS UNDER THE HAGUE/VISBY RULES AND THE HAMBURG RULES

3.1 UNDER THE HAGUE/VISBY RULES

3.1:1 Introduction

An increase in international multimodal transportation operations has certainly increased the use of container transport.[1] "Before the advent of intermodal transportation,[2] the shipper, in transporting his goods abroad, was required to transfer his goods piecemeal through several different modes of transportation from the shipping point to the place of final delivery. This extensive handling was costly, time consuming and

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[1] - See: T.J. Armstrong, Packaging Trends and Implications in the Container Revolution, 12 J. of Mar. L. & Com. Vol. 12, No. 4, July 1981, p. 427. See also: K. Gronfors Container Transport and the Hague Rules, J. BUS. L. [1967] 298; P.G. Fitzpatrick, Combined Transport and CMR Convention, J. BUS. L. [1968] p. 311; C.M. Schmitthoff, Schmitthoff's Export Trade, 8th ed., 1986, London, p. 526; J. Ramberg The Combined Transport Operator, J. BUS. L. [1968] p. 132; J.H. Porter, Multimodal Transport, Containerization and Risk of Loss, 25 Virginia J. of Int. Law [1984] p. 171; T. Bissell, The Operational Realities of Containerization and their effect on the package limitation and the "on-Deck" Prohibition: Review and Suggestion 45 Tul. L. Rev. [1971] p. 902; S. Mankabady, Some Legal Aspects of the Carriage of Goods by Container, 23 J.C.L.Q. 1974.

[2] - Intermodal Transportation is sometimes used instead of multimodal transport.

dangerous."[3]

Containerization is a method of cargo-handling which has come into existence in the last half-century and developed particularly in the past three decades. It has an increasing role in international trade and transport,[4] because it facilitates transport operations on the one hand and, minimizes the risks to cargo from the considerable stress of an ocean voyage.[5]

Container transport, the method by which multimodal transport operations are often fulfilled, has, however, created some legal problems. For example, if a multimodal transport operation includes a sea leg governed by the Hague or Hague-Visby Rules - whether implied by contract or by law - and the container is damaged or lost during the sea leg, one of the most important problems which will occur, in relation to the liability and limitation of liability of the multimodal transport operator, is the problem of "per package limitation". The question is that whether the carrier (multimodal transport operator), who is unable to invoke any of the excepted causes of the Hague or Hague-Visby Rules,[6] can benefit from the limitation of liability mentioned in those Rules for

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[3] - T. Bissell, supra note 1, p. 910.

[4] - "In a study commissioned by the Department of Transportation, Litton systems Inc., forecast that by 1983, 80 per cent of the cargo in the North American trade that can be containerized will be carried on containerships. Containerships, 5J. Com. 1 (Dec 1968)." From T. Bissell's Article, supra note 1 p. 911 F.N. 59. Also see S. Mankabady, supra note 1, p. 317, F.N.3.

[5] - T. Bissell, supra note 1.

[6] - Article IV, rule 2 of both the H.Rs. and H.V.Rs. recites 17 excepted causes of loss for which the carrier shall not be responsible. In fact, negligence is the basis of liability

"per package" or not? "The introduction of the container into maritime industry has stimulated the courts to take a new look at the package limitation in intermodal transport."[7]

Since the network liability system is presently used in determining the MTO's liability for localised (known) loss or damage, it is essential to consider his liability under different international unimodal transport conventions relating to different modes of transport. The purpose of this chapter is, therefore, to consider the MTO's liability under international sea transport conventions, namely, the Hague, Hague-Visby and the Hamburg Rules. But since multimodal transport of goods is mainly fulfilled, as stated, through the use of containers, the MTO's liability under those conventions should be considered in relation to container transport. On the other hand, since the carrier's liability under the Hague or Hague-Visby Rules and Hamburg Rules may be based on "per package", the container-package problem may be arisen.

This chapter will, therefore, consider mainly the problem of "per package limitation" in relation to container transport, i.e. 'container-package problem' which is the main point in connection with the determination of the MTO's liability under the international sea conventions which are used, when necessary, by the network liability system.

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under the H.Rs.

[7] - T. Bissell, supra note 1, p. 911.

To this end we will examine the attitudes of some maritime industrial countries such as the United Kingdom and the United States of America on the point in question.

3.1:2 The scope in which "per package limitation" problem can be found

"Per package limitation" problem exists in relation to the transport by sea rather than the transport by land or air, because it is only the international convention relating to carriage of goods by sea (Hague or Hague-Visby rules)[8], rather than those relating to other modes of transport, i.e. land and air transport, which has provided the carrier's limitation of liability on the basis of "per package or unit". Of course, this problem arises if the carrier is entitled to limit his liability for loss of or damage to the goods. Othrwise, if he is deprived of taking advantage of the 'per package limitation' provisions of the Hague or Hague-Visby Rules, the problem does not arise.[9]

Under the international convention relating to transport of goods by rail (CIM) the

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[8] - Art.IV r. (5) of the Hague Rules and Article IV r. (5)(a) of the Hague-Visby Rules.

[9] - Article IV r. 5(e) of the Hague-Visby Rules provides:
"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." See The CHANDA, [1989] 2 Ll. Rep. p. 494 4, in which the cargo were carried on deck and damaged by bad weather. The carrier was not authorized to carry them on deck. The court held that the package-limitation clauses did not apply because the carrier was in breach of contract.The carrier was,therefore, liable for full value of the cargo damaged.

limitation of liability of the carrier is on the basis of kilogram, i.e. 50 gold francs[10] "per kilo". Under the international convention relating to carriage of goods by road (CMR), it is 25 gold francs[11] "per kilo" and under the Warsaw Convention, the convention on international carriage of goods by air, it is 250 gold francs[12] "per kilo". As seen, under the CIM, CMR and Warsaw Conventions the amount of liability of the carrier is calculated on the basis of "per kilo" limitation while under the Hague Rules[13] it is calculated on the basis of "per package or unit" limitation and under the Hague-Visby Rules,[14] it is calculated on the basis of either "per package or unit" limitation or "per kilogramme" limitation, whichever is the higher.[15]

Schmitthoff in his book[16] says: "in container transport by sea a difficult legal problem arises: is the container itself a "package" within the meaning of Article IV (5)(a)

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[10] - It is Germinal franc which consists of 10.31 gramme of gold of millesimal fineness 900.

[11] - By the carriage by Air and Road Act 1979 Section 4 of the U.K. this amount, which is in Germinal francs, has been changed to 8.33 units of account "per kilogram".

[12] - The Montreal Version (1975 Montreal Convention) will change this amount, which is in Poincare francs, to 17 units of account "per kilogram".

[13] - Art. 4 r. (5) provides: " Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling 'per package or unit', ..."

[14] - Art. IV r. (5) provides: "...., neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 10,000 francs per package or unit or 30 francs per kilogramme of gross weight of the goods lost or damaged, whichever is the higher."

[15] - These discrepancies in the amounts of liability of different carriers (land, sea, air) show that carriers of each mode of the transport are liable for widely differing amounts in respect of damage to identical cargoes.

[16] - Schmitthoff's Export Trade 8th ed. 1986, London, p. 91.

of the Hague-Visby Rules, or is each of the pieces of cargo carried in the container a separate "package" within the meaning of that provision?" He also says[17]: "As far as the transport by sea is concerned, it is important to ascertain whether the whole container or each of the individual cargoes contained therein constitutes a "package or unit" within the meaning of the Hague-Visby Rules, Art. IV (5)(a)."

So in a multimodal transport operation including a sea leg, we will face the problem of "per package limitation".

3.1:3 The importance of the resolving of the "per package limitation" problem.

The "per package limitation" problem, in relation to both the Hague and Hague-Visby Rules (H-V-Rs), arises because the meaning of "package" in those provisions is not clear.

The importance of resolving of the "per package limitation" problem appears particularly in multimodal transport operations, simply because if the problem is resolved, it will be clear that whether a container with its contents is a package within the meaning of the Hague or Hague-Visby Rules[18] or not. "The practical importance of this problem

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[17] - Id. at p. 531.

[18] - The H-V-Rs attempt to solve the problem in relation to containers, pallets or similar articles of transport, in Art. IV (5)(c) which provides:

> "where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for

is obvious. If the container is the package, the liability of the carrier is limited as indicated earlier (statutory figure, i.e. $500 per package). But if each part of its contents is a "package", and the container, e.g. carries 100 *pieces of cargo, the maximum liability* of the carrier ... would be 100 times higher than in the former case".[19] Although the H-V-Rs attempt to solve the problem, it is submitted that there are some inadequacies in it. This will be discussed later on.[20] As a result if it becomes clear that what really constitutes a Hague or H-V-Rs' package, "all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus avoid the pain of litigation".[21] In other words the extent of liability for each party can be readily ascertained so that he may fix insurance and freight rate and avoid litigation. This will be obviously essential in order to have efficient business operations.[22]

3.1:4 Application of the Hague/Visby Rules to a multimodal transport contract

To determine the MTO's liability for loss of or damage to the goods under the Hague or Hague-Visby Rules, it is first necessary to consider the application of them to a multimodal transport contract to which the MTO is a party.

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the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

[19] - C.M. Schmitthoff, supra note 1, p. 91.

[20] - See p. 132 of this thesis.

[21] - Judge Oakes in Royal Typewriters Co. v. M/V Kulmerland, 483 F. 2d 645 (1973).

[22] - G. Denegre, Admiralty - Carrier-owned shipping container found not to be COGSA "package", Tulane Law Review Vol. 56 (1982) p. 1413.

The Hague/Visby Rules do not expressly state their application to a multimodal transport contract. However, it can presumably be, from Article 1(b) of both the Hague and Hague-Visby Rules, implied that they apply to a multimodal transport contract involving a sea leg of transport and evidenced by a document of title similar to a bill of lading, so far as such contract relates to the carriage of goods by sea.

Article 1(b) of the Hague/Visby Rules provides:

> " 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea ..."

The phrase "any similar document of title, in so far as such document relates to the carriage of goods by sea" shows that that document (similar document of title) may be also related, in addition to sea carriage, to another mode of carriage such as land carriage. In other words, it shows that the phrase "contract of carriage" mentioned in Art. 1(b) would be part of a contract of multimodal transport involving a sea leg of transport, i.e. the sea leg of transport to which the Hague/Visby Rules apply.[23]

So if it is accepted that a multimodal transport document (MT document) or a through bill of lading evidencing a multimodal transport contract (MT contract) is a meaning of the phrase "similar document of title"[24] and is covered by Article 1(b), then the Hague/Visby Rules will apply only to a part of such multimodal transport, i.e. to the

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[23] - See Scrutton on Charterparties and Bills of Lading, 19th ed., Sweet & Maxwell, London, 1984,p. 428.

[24] - See The Aegis spirit [1977] I Lloyd's Rep, p. 93, at p. 97; Also see Diamond, The H-V-Rs, L.M.C.L.Q. [1978]2 p. 225 at 260-1.

sea leg of it. Scrutton is of the opinion that a bill of lading which is issued for carriage of goods partly by sea and partly by land leg (e.g. through bill of lading) is within the meaning of the phrase "similar document of title".[25] Regarding the phrase of "in so far as such document [similar document of title] relates to the carriage of goods by sea" Scrutton says:[26] "Presumably this limitation was inserted in order to provide for a case where the contract evidenced by the bill of lading is for carriage of goods partly by land and partly by sea." In other words Scrutton probably believes that the Hague/Visby Rules apply to a MT contract in so far as it relates to the carriage of goods by sea.[27] Also Diamond says that it has long been usual that all bills of lading, whether conventional or combined transport ones, adopt the Hague or Hague-Visby Rules for the sea portion of the multimodal transit.[28] Moreover, Ackner J. in the Elbe Maru referred to the affidavit of Mr. Wheble which stated: " The type of combined transport document which is often called a combined transport bill of lading is commonly used with the international movement of unitised cargo (container cargo) and in its negotiable form which is the more usual it is to my knowledge customary for it to be accepted by merchants and bankers alike as a document whereby property in the goods referred to therein can be transferred by endorsement where necessary and delivery of the document."[29] Thus if a multimodal

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[25] - Scrutton on Charterparties and ...., supra, note 23. See also Schmitthoff, supra note 1, p. 529.

[26] - Id.

[27] - Id., see also A. Muscat The Liability of Carriers Engaged in Through Carriage and Combined Transport of Goods, A Thesis in the University of Oxford, Worcester College, 1983, pp. 49-50.

[28] - A. Diamond, supra chap. 2 note 14, p.C3.

[29] - (1978) 1 Lloyd's Rep., pp. 206-7.

transport of goods contract involving a sea leg and a land leg carriage and evidenced by a MT document, is carried out between two countries which have ratified the Hague and/or Hague-Visby Rules, the Hague or Hague-Visby Rules - whichever appropriate - will apply only to the sea leg of the carriage rather than to the land leg.[30] It is to be, however, noted that if the cargo in such contract is live animals or is to be, according to the contract, carried on deck and is so carried, it is not regarded as "goods" defined in Article 1(c) of the Hague/Visby Rules, and, therefore, the Hague/Visby Rules do not apply to such contract. Also the application of the Hague or the Hague-Visby Rules to a MT contract requires the condition that the MTO can be regarded as a H/V Rs' "carrier", namely, the MTO be the owner or the charterer who enters into such a contract of carriage with a shipper.[31]

3.1:5 Period of liability of the MTO as to the sea leg of the carriage under the Hague/Visby Rules

The question now is: what is the period of liability of the MTO under the H/V Rs as to sea carriage?

The period in question is determined by Article 1(e) of the Hague/Visby Rules. It provides: " 'Carriage of Goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." So, if in an international multimodal transport operation the goods are lost or damaged between the time they are

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[30] - A. Muscut, supra note 27, p. 49.

[31] - Art 1(1) of the H/VRs.

loaded on and the time they are discharged from the ship, such loss or damage is known as one happened during the sea leg of the carriage and, therefore, the Hague or Hague-Visby Rules - whichever appropriate - will apply to determine the MTO's liability for such loss or damage.

Regarding the loading operation, it does not mean the operation taking place after the goods cross the ship's rail[32] but it starts from the time when the ship's tackle lifts the goods in order to put them on the ship.[33] Thus if the goods are damaged after they are lifted by the ship's tackle and before being put on the ship, the Hague/Visby Rules apply to determine damages. In Pyrene Co. v. Scindia Navigation Co.[34] a fire tender which was being lifted by the ship's tackle was dropped before being loaded on board and damaged. The court held that the Hague Rules applied.

Similarly, discharging operation is ended when the goods are released from the ship's tackle. In Goodwin v. Lamport and Holt[35] the court held that the goods were not discharged before they had been put into a lighter alongside. In brief the carrier's period of liability under the Hague/Visby Rules is known as "tackle to tackle".[36]

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[32] - Scrutton, supra note 23, p. 431.

[33] - See W.E. Astle, International Cargo Carriers' Liabilities, Fairplay Publication, London, 1983, p. 47.

[34] - [1954] 2 Q.B. 402; see also Stafford Allen & Sons Ltd v. Pacifies A. Co [1956] 1 Lloyd's Rep. p. 104.

[35] - (1929) 34 Ll.L.R. 192. See also the Arawa [1977] 2 Lloyd's Rep. 416; [1980] 2 Lloyd's Rep. 135.

[36] - It is submitted that the carrier's liability for such loss or damage occurred in operations done outside the "tackle to tackle" period should be governed by the law of the

It seems, however, that if transhipment is permitted and the loss or damage to the goods occurs while they are ashore waiting to be loaded on board the on-carrying vessel, the Rules will continue to apply.[37]

Therefore, with regard to the fact that multimodal transport operations are often fulfilled by the use of containers and, in container carriage the MTO usually receives the goods packed in the container at the shipper's premises and delivers them at the consignor's premises, if the loss or damage occurs before loading or after discharging operation the Hague/Visby Rules do not apply to determine the MTO's liability for such loss or damage.[38] Even the Hague/Visby Rules in Article 7 provide:

> "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea."

Now we return to the main issue, i.e. the MTO's liability for loss or damage to goods under the Hague/Visby Rules. As said the Hague/Visby Rules may apply to part of a multimodal transport contract[39] involving a sea leg of carriage, i.e. to its sea leg and determine the MTO's liability for loss or damage to goods occurred at the sea leg.

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country in which those operations were performed:see Leofold Peyrefitte, The Period of Maritime Transport, published in the Hamburg Rules on the Carriage of Goods by Sea, edited by Mankabady, 1978, Leyden, p. 125.

[37] - Mayhew Foods Ltd. v. Overseas Containers Ltd. [1984] 1 Lloyd's Rep. 317, which the voyage was carried out under a through bill of lading; Cf. Captain v. Far Eastern, [1979] 1 Lloyd's Rep. 595 which there were 2 voyages under 2 bills of lading.

[38] - UNCTAD, supra, chap. 1, note 30, p. 36.

[39] - Scrutton, supra note 23, p. 428.

The Hague/Visby Rules accepted the rebuttable principle of the carrier's non-liability for loss or damage to goods. Upon this principle if loss or damage arises or results from unseaworthiness[40] or from, at least, one of the seventeen cases listed in Article 4(2), the carrier is not liable for such loss or damage. This principle, however, will, when loss or damage arises or results from unseaworthiness, be broken and the carrier becomes liable if it is proved that the unseaworthiness is caused by want of due diligence on the part of the carrier to make the ship seaworthy,[41] and to secure that the ship is properly manned,[42] equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. This is because the carrier is, by Article 3(1), bound, before and

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[4] - See McFadden v. Blue Star [1905] K.B. p. 705-6 in which the judge, regarding unseaworthiness said: "Would a prudent owner have required that the defect should be made good before sending his ship to sea if he had known of it? If he would the ship was not seaworthy"; see also Tattersall v. National Steamship Company (1884) 12 Q.B.D; and Stanton v. Richardson (1875) 45 L.J.Q.B. 78 that the court held that if the ship was not fit for particular goods being carried by her (if it was not cargoworthy), it was unseaworthy; C.F. Elder Dempster v. Patterson (1924) A.C. 522 that the court held that bad stowage did not make the ship unseaworthy but if it endangered the safety of the ship, it might amount to unseaworthiness. Also see The Aquachann [1982] 1 Ll. Rep. 7 at 11; in which the judge said: "As I understand the authorities there are two aspects of seaworthiness. The first requires that the ship, her crew and her equipment shall be in all respects sound and able to encounter and withstand the ordinary perils of the sea during the contemplated voyage. The second requires that the ship shall be suitable to carry the contract cargo; see also Hardy Ivamy Payne & Ivamy's Carriage of Goods by Sea,12th ed., Butterworths, London, 1985, p. 101: Seaworthiness is used in its ordinary meaning and not in any extended or unnatural meaning.

[41] - Article 4(1) of the H/VRs. The burden of proving unseaworthiness is upon those who allege it: R.E. Hardy Ivamy, Carriage of Goods by Sea, 12th ed. Butlerworths, London, 1985, p. 104; Riverstone Meat Co. Pty v. Lancashire Shipping Co. Ltd, [1961] AC 807, [1961] 1 All ER 495, HL.

[42] - See Robin Hood Flour Mills v. M.N. Paterson [The Farrandoc] [1967] 2 Ll. Rep 276.

at the beginning of the voyage,[43] to exercise due diligence to (a) make the ship seaworthy, (b) properly man, equip and supply the ship, (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

Here- when loss or damage arises or results from unseaworthiness - it is the carrier[44] who must prove that he has exercised due diligence[45] regarding his duties enumerated in Article 3(1). If he can prove it, he will not be liable, but if he cannot, he will be liable for such loss or damage[46]. However, his liability will be limited, if he is not deprived of the liability limitation,[47] to a certain amount[48].

It is to be noted that not only the carrier must exercise due diligence but due diligence should also be shown by every person to whom any part of a necessary work

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[43] - The phrase "before and at the beginning of the voyage" may lead to uncertainties in interpretation for example as to when the voyage begins and whether the carrier is bound to exercise due diligence to make the ship seaworthy again at an intermediate port of call: see UNCTAD, supra, chap 1, noe 30, p. 38; see Adamastos v. Anglo Saxon (1959) A.C. 133: in consecutive voyages the shipowner has to provide a seaworthy ship at the beginning of each voyage. See also Giertsen v. Turnbull & Co. (1908) S.C. 1101; The Hermosa, [1980] 1 Ll. Rep. 638, affirmed at [1982] 1, Ll. Rep. 570.

[44] - Article 4(1) of the H/VRs.

[45] - In Charles Goodfellow Lumber Sales Ltd v. Verreault Hovington & Verreault Navigation Inc, [1971] 1 Lloyd's Rep 185, Supreme Court of Canada held that the production of a certificate of seaworthiness signed by an inspector appointed by the Department of Transport was not sufficient to discharge the burden of proof that due diligence had been exercised by the shipowner.

[46] - Paterson S.S. Ltd v. Robin Hood Mills Ltd (1937) 58 Ll.L.Rep.33.

[47] - Article 4(5)(e).

[48] - Article 4 (5) of the H/V Rs.

is entrusted. Otherwise the carrier will be liable for negligence of such person. In Riverstone Meat Co. Pty Ltd v. Lancashire Shipping Co. (The Muncaster Castle),[49] a fitter employed by ship repairers negligently refixed some inspection covers on some storm valves. Water entered the valves during the voyage and damaged the cargo. The shipowners denied liability contending that the damage was due to unseaworthiness of the vessel which resulted from the negligence of the employee of an independent contractor, and they had exercised due diligence to make the ship seaworthy by entrusting the vessel to a competent firm of ship repairers. The Appeal Court held for the shipowners. Riverstone Co. appealed. The House of Lords held that the words "exercise due diligence to make the ship seaworthy" in the Hague Rules were adopted from the American Harter Act 1893, and similar British Commonwealth states; that those words should be given the meaning attributed to them prior to the Hague Rules, that accordingly a carrier was responsible to the cargo-owner unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier's servant, agent or independent contractor, and that, therefore, the shipowners were liable for negligence of the ship repairer's fitter.

3.1:6 The amount of limitation of liability

If the Hague or Hague-Visby Rules - whichever appropriate - apply to a multimodal transport contract and the MTO is accordingly liable[50] for loss or damage occurred at

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[49] - (1961) A.C. p.807.

[50] - Apart from the circumstances named in Article 4(1) & (2) of the H/V Rs, there are other circumstances upon which the carrier is not liable for loss or damage. For example, if loss or damage results from any deviation in saving or attempting to save life

the sea leg of the carriage, he must pay damages. The amount of damages is, as said, limited[51] to a certain amount if he is not deprived of the right to limit liability[52]. However, it may be, by the agreement of the parties, increased[53] but may not be decreased[54].

Under The Hague Rules the amount of limitation of liability is calculated on the base of a single system of liability, i.e. 'per package or unit limitation', while under the Hague Visby Rules it is calculated on the base of a dual system of liability, i.e. 'per package or unit' or 'weight', whichever is the higher. Article 4(5) of the Hague Rules provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit ..... ", and Article 4(5)(a) of the Hague-Visby Rules provides: "..... neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2

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or property at sea or any reasonable deviation (Article 4(4) of the H/V Rs.); or if the suit is not brought within a certain time (Article 3(6)); or if the nature or value of cargo is knowingly misstated by the shipper in the bill of lading (Article 4(5) of the H-Rs. and 4(5)(h) of the H-V-Rs.).

[51] - It is said that the reason for this limitation is to create a balance between the rights and responsibilities of the carrier and those of the shipper. Mr Leopol Der, a cargo representative in the 1921 Conference, regarding the purposes of the per package limitation said: 1 - to protect shipowners in the case of packages of unexpected high value; 2 - to preclude shipowners from inserting clauses in their bill of lading purporting to limit liability to ridiculously low figure: see Report of the 30th Conference held at the Peace Palace, The Hague, Holland, 30 August - 3 September.

[52] - See Article 4(5) of The Hague and 4(5)(a) of The Hague Visby-Rules regarding declaration of valve and nature of the goods and Article 4(5)(e) of the H-V-Rs.

[53] - Article 4(5) of The Hague and 4(5)(g) of The Hague/Visby Rules.

[54] - Article 3(8) of the H/V Rs.

units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher"[55].

As seen, in order to calculate the MTO's liability limitation, whether under the Hague Rules or Hague-Visby Rules , one must know what the Hague/Visby Rules' 'package or unit' means. Is a container with which a MTO usually involves a Hague or Hague-Visby Rules' 'package'? Unfortunately, there is no definition of the words 'package' and 'unit' in the Hague and Hague-Visby Rules. This ambiguity causes the problem of "per package limitation" in determining the carrier's liability limitation. This problem becomes even more serious in relation to container method of carriage because we will face the container-package problem.

Therefore, in order to determine the MTO's liability limitation, two points are, I think, important which need considering. They are: 1 - the concept of the Hague/Visby Rules' 'package'; 2 - containerization and the Hague/Visby Rules' 'per package limitation': the container-package problem.

To consider these points the best way, I think, is, as stated, to refer to the opinions and attitudes of the courts of some major maritime industrial countries which are contracting parties to the Rules such as the United Kingdom and the U.S.A. on the points in question.

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[55] Of course this liability-limiting provision is applicable if the carrier is not deprived of it by his reckless act or omission referred to in Art. IV 5(e). But if the reckless act or omission of the carrier's agent or servant causes the loss or damage and the action is brought against the carrier, he will not be deprived of the right to limit his liability: see The European Enterprise, [1989] 2 Ll. Rep. p. 185.

3.1:7 Definition and meaning of the Hague/Visby Rules 'package'

Both the Hague Rules, in Article 4 r.(5), and the Hague Visby Rules, in Article IV r.(5)(a) have applied the word of 'package'. There is, however, no definition or meaning of the 'package' in either the Hague or Hague-Visby Rules. This lack of definition or meaning of the 'package' has caused difficulties for courts in different countries to make decision regarding 'per package limitation' mentioned in the Hague or Hague-Visby Rules. Here we examine the English and American courts' views of the 'package'.

3.1:7:1 English courts' views of the 'package'

The English Carriage of Goods by Sea Act 1924 (the COGSA 1924) to which the Hague Rules (the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading) have been scheduled provides, in Article 4 r.(5):

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds[56] sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading".

The Hague Rules were amended by the 1968 Brussels Protocol which is known as the Hague-Visby Rules. The English Carriage of Goods by Sea Act 1971 (The COGSA 1971) which has scheduled the Hague-Visby Rules provides, in Article IV r.(5)(a):

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[56] - This amount was changed to the sun of £200 by the British Maritime Law Association Agreement of August 1, 1950.

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 10000 francs[57] per package or unit or 30 francs per kilogramme of gross weight of the goods lost or damaged, whichever is the higher".

No definition of the word "package" is given in the English COGSA 1924 and 1971. The question is what does constitute the Hague or Hague-Visby Rules "package"?

Regarding the construction of the Hague Rules provisions Lord Atkin in the case of Stag Line v. Foscolo Mango[58] said: "In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law." And Lord Hailsham, L.C., in the case of Gosse Millerd, Ltd. v. Canadian Government[59] said: "I am unable to find any reason for supposing that the words as used by the legislatures in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine to be put upon them in the statute now under discussion." Also in the same case[60] the House of Lords, in considering the meaning of the words "in the management of the ship" in Article IV r.

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[57] - This amount was changed to 666.67 S.D.Rs. by the 1968 H-V-Rs. as amended by the 1979 Brussels Protocol.

[58] - [1932] A.C. 328 at p. 343.

[59] - [1929] A.C. 223 at p. 230.

[60] - Ibid.

(2)(a), expressly construed them according to certain decisions of the English Courts prior to 1924.

So from the post-1924 English courts' point of view, in order to interpret words used in the Hague Rules we should follow relevant legislation and certain decisions of the English courts prior to 1924 which have been taken regarding those words. Before the Carriage of Goods by Sea Act 1924, the word "package" was used in the Carriers Act 1830. In the case of Whaite v. Lancs and Yorks. Ry.[61] the court held a wagon with wooden sides to be a "package" within the meaning of the Carriers Act 1830. The word "package" was also used in the Merchant Shipping Act 1894, Section 446(1) which provides:

> "A person shall not send or attempt to send by any vessel, British or foreign, and a person not being the master or owner of the vessel shall not carry or attempt to carry in any such vessel, any dangerous goods without distinctly marking their nature on the outside of the package containing the same, and giving written notice of the nature of those goods ...."

In the case of London & North Western Ry. v. Farey,[62] the court held a motor-vehicle containing petrol to constitute a "package" within the meaning of the Merchant Shipping Act 1894, Section 446 (1).

Thus if one looks at the decision of the House of Lords in Gosse Millerd Ltd. v. Canadian Government[63] and construes the meaning of the words included in the Hague

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[61] - (1874) L.R. 9 Ex. 67.

[62] - (1920) 5 Ll.L.R. 90.

[63] - [1929] A.C. p. 223.

Rules provisions according to certain decisions of the English Courts before 1924, the meaning of the Hague Rules "package" will be clearer. However, Lord Macmillan in the case of Stag Line v. Foscolo Mango[64] said: "As these rules [Hague Rules] must come under the consideration of foreign courts it is desirable in the interest of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent data, but rather that the language of the rules should be construed on broad principles of general acceptance". Also the House of Lords in the case of Riverstone Meat Co. Pty. v. Lancashire Shipping Co.[65] as to the meaning of the "exercise of due diligence to make the ship seaworthy" mentioned in Article III r. 1 of the Hague Rules, stressed the desirability of preserving international uniformity of interpretation. Scrutton says: "So far as we know, the desirability of preserving international uniformity of interpretation has, to date, only led English courts to have regard to decisions in English-speaking jurisdictions; unless there is evidence to the contrary, the courts proceed on the basis that the broad principles of law are the same abroad as they are in England."[66]

Scrutton[67] with reference to the case of Whaite v. Lancashire and Yorkshire Ry. Co.[68] in which the court held a railway wagon with wooden sides to be a "package" says: ".... the Carriers Act 1830 contains provisions analogous to Article IV, Rule 5", and

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[64] - [1932] A.C. p. 328.

[65] - [1961] A.C. p. 807.

[66] - Leesh River Tea Co. v. British India Steam Navigation Co. [1966] 2 Lloyd's Rep. 193 at 203.

[67] - Scrutton on Charterparties, 18th ed., 1974, p. 442.

[68] - (1874) L.R. 9 Ex. 67.

concludes that: "Mere size will not prevent a thing from being a package [a Hague Rules package]." In other words Scrutton for saying the sentence of "Mere size will not prevent a thing from being a package" has regarded not only to the domestic precedents,[69] but has also regarded to decisions of, for example, American courts regarding "package" for international uniformity of interpretation because "his sentence" is not inconsistent with the American Courts' decisions. For example, in Mitsubishi International Corp. v. S.S. Palmetto State[70] the district judge held that three boxed rolls of steel weighing 32½ tons each, constituted three COGSA packages and the carrier's liability was limited to $500 per roll. The court of appeal in the same case held that size and weight were not controlling criteria; an article completely enclosed in a wooden box prepared for shipment is a "package" for the purpose of the COGSA limitation. Also in the case of Robert C. Herd & Co. v. Krawill Machinery Corp.[71] the court held that a case containing a 19 ton press constituted a "package".

It seems, therefore, the position of the English courts regarding the Hague or Hague-Visby Rules "package" (scheduled, in order, in the 1924 and 1971 COGSA) to be clear, i.e. the English courts for understanding the meaning of the Hague or Hague-Visby Rules "package" and making decisions, will regard not only to their domestic precedents but also, for the purpose of preserving international uniformity of interpretation, will no doubt have regard to decisions of American and Canadian courts as far as they are not inconsistent with the English rules or, the wording of the Rules in the relevant Act of

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[69] - Ibid.

[70] - 311 F.2d. 382 (2d Cir. 1962).

[71] - 359 U.S. 297 [1959].

those countries do not differ from the English wording.[72] However, " ... surprisingly there is no direct English authority as to their meaning [the meaning of package or unit]".[73]

Scrutton says[74] that "unit probably means the unit of enumeration shown in the bill of lading as provided by Article III Rule 3(b)". Article III Rule 3(b) of the Hague Rules says that, on the demand of the shipper, the carrier or the master or agent of the carrier must issue a bill of lading showing among other thing: "Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper". Similarly, it can probably be said that 'package' for the purpose of the Hague Rules means the packages enumerated in the bill of lading. A question is: Who does enumerate the packages in the bill of lading? It is either the shipper or the carrier to whom no objection is made by the shipper as if the shipper intends so enumeration. So it is, in fact, the shipper who enumerates the packages in the bill of lading. In other words, it can be said that it is the shipper's intent of package mentioned in the bill of lading which constitutes the Hague Rules' package for the purpose of 'per package limitation'. It can therefore be said that, no matter whatever the size it is because it has been enumerated in the bill of lading either by the demand of the shipper or by the carrier to which no objection is made by the shipper with the intention that it constitutes the package mentioned in the Hague Rules for the purpose of per package limitation.

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[72] - For example, the U.S. COGSA 1936 provides: " ... per package ... or in the case of goods not shipped in packages, per customary freight unit", which is different from the 1924 English COGSA.

[73] - Scrutton on Charterparties...., 18th ed., 1974, p. 441.

[74] - Scrutton on Charterparties...., 16th edition, 1955, P.490.

3.1:7:2 American courts' views of the 'package'

Section 4(5) of the United States Carriage of Goods by Sea Act 1936 (the 1936 COGSA) provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading ....."

Like the English COGSA, no definition of the word 'package' is given in the U.S. COGSA or in its legislative history, e.g. according to the Harter Act 1893, the parties to the contract of sea carriage were free to limit contractually the carrier's liability by a fixed valuation clause, but no definition of 'package' contained therein[75]. In the case of Standard Electeric S.A. v. Hamburg Sudamerikanische Dampfschifffahrts - Gesellschaft[76], Chief Justice Lumbard bemoaned the lack of any legislative history explaining the meaning of the word 'package'.

The American courts' views regarding the definition of 'package' are as follows:

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[75] - for example, in Reid v. Fargo, 241 U.S. 544(1916), the court held that a valuation clause limited carrier's liability for loss overboard of a $3900 automobile to $100.

[76] - 375 F. 2d 943 (2d Cir) cert denied, 389 U.S. 831 (1967).

3.1:7:2.1 Early decisions : Acceptance of a layman's definition of 'package' as a yardstick in early decisions

Early decisions of American courts attempted to give a layman's definition, a plain and ordinary meaning, to the COGSA package for the purpose of 'per package limitation'. For example, in the case of Gulf Italia Co. v. The S.S. Exiria[77], the court held that a large tractor which had partially been wrapped in waterproof paper and partially encased in wood, was not a COGSA 'package'. This decision of the court was based on a layman's definition of a 'package', i.e. a layman would not consider such a cargo as a package. On an appeal of this decision, the appeal court affirmed[78] the lower court decision and said that imposing a package limitation to such a tractor would 'hardly foster good commercial practices'. In this case, however, Judge Moore did not agree with the layman's definition of package. He said that for the purpose of per package limitation, weight, size or value of the commodity involved should not control.

The courts favouring the layman's definition of package say that, a sophisticated and technical meaning of package has never been intended by Congress to be given the COGSA package[79]. This view (plain and ordinary meaning) is consistent with the directive of Supreme Court in the case of Malet v. Riddell[80] to the effect that the

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[77] - 160 F. supp. 956 (S.D.N.Y. 1958).

[78] - Gulf Italia Co. v. American Export Lines Inc., 263 F.2d 135 (2d. Cir 1959) at 137.

[79] - See, for example, Omark Indus. Inc. v. Association Container Transport Ltd, 420 F.supp. 139, 141-2 (D. ore, 1976).

[80] - 383 U.S. 569, 571-72 (1966).

statutory language should be interpreted, where possible, in its everyday sense. In that case[81] the court said, since no specialized or technical meaning was ascribed to the word 'package', we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning. Also the court in Addison v. Holly Fruit Products, Inc,[82] held that: "Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of thing, as the ordinary man has a right to reply on ordinary words addressed to him".

3.1:7:2.2 Subsequent decisions

Subsequent decisions of American courts regarding the meaning of the COGSA 'package' were based on denying the layman's definition of 'package' and creating some criteria for understanding what constitutes a COGSA package.

(1) - Denying the layman's definition of 'package' and accepting a technical shipping industry definition of 'package'

Some other American courts have refused to give a layman's definition to the COGSA package. They believe that the word 'package' which is used in a bill of lading has to be given a technical shipping industry definition. For example, as noted above, in the case of Mitsubishi International Corp. v. S.S. Palmetto State,[83] three fully boxed rolls

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[81] - Malet v. Riddell, supra not 76; see also Bruhn's Freezer Meat v. U.S. Department of Agriculture, 438 F.2d 1332 at 1338 (8th Cir. 1971).

[82] - 322 U.S. 607, 618 (1944).

[83] - 311 F.2d 382 (2d Cir. 1962).

of steel, weighing 32½ tons each, were lost by the negligence of the carrier. The district court held that since each roll had been enclosed in a wooden case, they constituted three COGSA packages and the carrier was entitled to the limitation of per package mentioned in Section 4(5) of the 1936 COGSA, i.e. his liability limited to $500 per roll. In this case, Judge Moore writing for the Second Circuit had a good opportunity to give an opinion against layman's definition of 'package'. He observed:

> " ..... the field of admiralty law is not an area in which the layman should venture to tread even if equipped with Webster's Dictionary or Black's Law Dictionary. Black has defined a package as 'A bundle put up for transportation or commercial handling; a thing in form to become, as such, an article of merchandise or delivery from hand to hand".

Judge Moore added:

> "When Congress passed the Carriage of Goods by Sea Act (49 stat. 1207) in 1936 there had been several cases and some legislative discussion focusing attention upon the unusual concept of a 'package' as a shipping term. The facts in the Supreme Court's decision in Reid v. Fargo,241 U.S. 544, 36 S. Ct. 712, 60 L. Ed. 1156 (1916) dealing with an automobile and a crate were specifically referred to ..... the layman's conception of a 'package' as something carried under the arm from the corner grocery store is of no significance in deciding what is a 'package' in 46 U.S. C.A. § 1304 (5)".

The Appeal Court, therefore, held that for the purpose of COGSA per package limitation, size, weight of an article were not determining factors and that an article fully enclosed in a wooden box prepared for shipment constituted the COGSA package.

Also in the case of Robert C. Herd & Co. v. Krawill Machinery Corp.,[84] the Supreme Court held that a case containing a 19 ton press constituted a COGSA package.

So, having denied the layman's definition of a COGSA package, the court treated a

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[84] - 359 U.S. 297 (1959).

COGSA 'package' as a shipping term and gave an unusual meaning to the 'package'. However, lacking a congressional definition of 'package' for COGSA purposes, the Second Circuit continued to develop its meaning on a case-by-case basis since the unusual concept of a package as a shipping term ostensibly required careful examination[85].

(2) - Creating some criteria for understanding what constitutes a COGSA 'package'

(2)-1- 'Facilitation for Transport' test

The American courts then recognised that rejection of the layman's definition of package and adoption of the technical shipping industry definition not only did not solve the problem of defining a COGSA package, but caused a larger circle of cargo to be considered as a COGSA package which was inconsistent with the purpose of the COGSA. The main purpose of the enactment of the COGSA was to prevent a carrier from disclaiming any liability for his negligence by an adhesion contract and thereby to protect the shipper from the superior bargaining position of the carrier.[86] And, in fact, the Congress in order to ensure that the purpose of the Act would not be defeated, provided that any bill of lading clause attempting to lessen the carrier liability is null and void.[87]

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[85] - T. J. Armstrong, supra note 1.

[86] - Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 722-23 (2d Cir), cert denied, 375 U.S. 942 (1963). See also Leather's Best Inc. v. S.S. Mormaclynx 451 F.2d 800, 815 (2d Cir. 1971).

[87] - Section 3(8) of the COGSA provides: "Any clause ..... in a contract of carriage relieving the carrier or the ship from liability for ..... or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect".

The courts within the Second Circuit, therefore, tried to find a test to be able to recognise that what a COGSA package is. They then created the 'facilitation for transport' test.[88] This test was based on a definition of package mentioned in Black's Law Dictionary, i.e. "A bundle put up for transportation or commercial handling".[89] According to this test the court should have considered the cargo preparation to see whether it afforded the transportation of the cargo or not. In other words "any preparation which made cargo handling easier would cause that cargo to be designated as COGSA package".[90] This test was applied in the case of Aluminios Pozuelo Ltd v. S.S. Navigator[91] where the Second Circuit held that a three ton toggle press bolted to skids was a COGSA package because the skids "served primarily to facilitate delivery so as to make the press an article 'put up ..... in a form suitable for transportation or handling'"[92] In this case, Judge Moore defined a 'package' as "a class of cargo irrespective of size, shape or weight to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods".[93]

Although the basis of decision-making in Aluminious Pozuelo Ltd v. S.S. Navigator[94] was the 'facilitation for transport' test, the court also considered two other

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[88] - Van Wageningen, Interpreting COGSA: The Meaning of 'Package' 30 U. Miami L. Rev., 169 (1975).

[89] - Id, citing Black's Law Dictionary 1262 (rev. 4th edition 1968).

[90] - G. Denegre, supra note 22, p.1411.

[91] - 407 F.2d 152 (2d Cir. 1968).

[92] -Id, at 155.

[93] - Id, at 155.

[94] - 407 F.2d 152 (2d Cir. 1968).

factors which were of less importance. They were: 1 - the number of packages enumerated in the bill of lading,i.e. the bill of lading described the press as 'ONE (1) package'; 2 - the intentions of the parties to the effect that what constituted a COGSA package, i.e. the court assumed that the statement of 'ONE (1) package' indicated that the parties had intended that the three ton toggle press was considered as a COGSA package.

(2)-2 - 'Facilitation for transport plus some other main factors' test

(Standard Electerica approach)

According to this test, to recognise what constitutes a COGSA package, the court will consider some other main factors in addition to the facilitation for transport test. For example, in Standard Electerica S.A. v. Hamburg Sudamerikanische Dampfschiffahrts - Gesellschaft,[95] the shipper had made up **9** pallets, each pallet contained six cartons. The question was whether the nine separate pallets constituted the number of COGSA package for the purpose of per package limitation or the 54 cartons which were included in the pallets. The court held that because the shipper, not the carrier, had made up the pallets, "apparently for the reason of greater convenience and safety in handling",[96] the 9 pallets, rather than the 54 cartons, constituted the number of COGSA package.

Although the court, in Standard Electerica, considered the facilitation for transport test, it also considered three other main factors one of which was even deemed more

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[95] - 375 F.2d 943 (2d Cir.), cert denied, 389 U.S. 831 (1967).

[96] - Id, at 946.

important than the facilitation for transportation test.

The three other main factors were as follows:

1 - The number of units which the shipper actually hands over to the carrier and the latter can see and count them will constitute COGSA packages rather than their contents. This factor was even deemed more important than the mere fact that preparation was made for transportation, e.g. in Standard Electerica[97] the number of units which were actually handed over to the carrier and he could see and count them were just 9 pallets.

2 - Parties' intent to the effect that what constitutes a COGSA package in their contract. This can become evident by referring to shipping documents, e.g. in Standard Electerica[98] the court held that the parties had intended the pallets to be considered the COGSA packages as evidenced by various shipping documents, i.e. under the heading of 'Marks and Numbers' of the dock receipt read "1/9 #" and under number of packages it read "9 pallets". The invoice from shipper to carrier read: "Numbers of the packages: 1/9 Quantity:9".

3 - Non-declaration of the actual nature and value of the goods by the shipper. This shows that the shipper is willing for the number of package declared in the shipping documents to be considered as COGSA packages. In Standard Electeria the court also held that the fact that the shipper had not declared the value of the goods showed that he

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[97] - Supra, note 95.

[98] - Id.

had been happy with those number of packages declared in the shipping document as COGSA packages, otherwise he could have obtained full coverage by declaring the value of its goods and paying a higher tariff.

It is to be noted that Chief Judge Lumberb regarding package definition in Standard Electerica said:

> "Only certain general observations can be made as to the reason why 'package' was selected as an appropriate unit upon which the limitation of liability was placed in our 1936 Act, and in the English Act of 1924, which is similar. No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other and thus avoid the pains of litigation."[99]

In brief, as stated, the court in Mitsubishi International Corp.[100] denied the layman's definition of COGSA 'package' and accepted a technical shipping industry definition of COGSA 'package' in which size and weight of cargo were not determining factors. Then the courts[101] created the 'facilitation-for-transport' test upon which size and weight of cargo were not still determining factors in defining COGSA 'package', but a cargo-preparation for transportation should have been made to the cargo. In Standard Electerica approach, however, the court returned from the view that 'size and weight should not be criteria to define a COGSA package', where the court said:

> "No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that

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[99] - 375 F.2d 943 at 945.

[100] - 311, F.2d 382 (2d Cir. 1962).

[101] - Aluminious Pozuelo Ltd v. S.S. Navigator 407 F.2d 152 (2d Cir. 1968).

the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other and thus avoid the pains of litigation".[102]

However, the court's definition of COGSA 'package' as 'a fairly uniform and predictable in size which provides a common sense standard' seems to be an ambiguous and unclear one . It is not clear from this definition that how big a fairly uniform, predictable common sense standard unit can be. Moreover, as a matter of fact, a fairly uniform, predictable common sense unit in 1936 differs from that at present, with attention to the development of the transportation industry.[103] So it can be said that the Standard Electerica approach impliedly rejected the view that size and weight of cargo should not be controlling factors in the COGSA 'package' definition, although it is not clear that how big it can be. Consequently, according to the Standard Electerica approach only the visible, countable, prepared-for-transportation and fairly uniform and predictable common sense standard units which actually are delivered to the carrier and inserted in the shipping documents without any declaration of its actual value and nature are considered as COGSA packages.

- Reasoning of persons favouring the Standard Electerica approach

The persons favouring the Standard Electerica approach consider that if we do not consider the prepared-for-transportation units, which the shipper actually hands over to the carrier and the latter can see and count them, as COGSA packages but we consider their

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[102] - Standard Electerica 375 F.2d. 943 at 945.

[103] - T. Bissell, supra note 1; T. J. Armstrong, supra note 1.

contents as COGSA packages, it will give rise to some difficulties. Firstly, their contents may not qualify the 'facilitation for transportation test'. Secondly, even if their contents qualify the facilitation for transportation test, it is difficult or sometimes impossible[104] for the carrier to investigate the content of each shipment. The court in Standard Electerica said that any other definition of the word 'package' "would place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment".[105]

- Objections to the Standard Electerica approach

Tallman Bissell in his article[106] with reference to the Judge Lambard's package definition in Standard Electerica said:

> "What was supposed to be a uniform and predictable common sense standard has developed into a 'word of art' in which the layman's conception of the meaning is irrelevant and, if anything, harmful".[107]

Also Timothy J Armstrong in his article[108] said:

> "What seemed a uniform and predictable, common sense standard in 1936 became 'quite out-moded and utterly meaningless'[109] by 1968. The decline in value of dollar, as well as the advent of containerization and palletization contributed to the

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[104] - for example, when the goods are in a sealed article of transport.

[105] - Standard Electrica S.A. v. Hamburg....., 375 F.2d 943 at 947.

[106] - The operational realities of Containerization and ....., supra note 1.

[107] - Aluminious Pozuelo Ltd v. S.S. Navigator 407 F.2d 152, 1968, A.M.C. 2532, 2537 (2d. Cir 1968).

[108] - Packaging trends and implications in the container revolution, supra note 1.

[109] - Aluminious Pozuelo Ltd v. S.S. Navigator, supra note 107 at p.154.

obsolescence of 'package' as a descriptive term".

As seen, although the American courts have views and definitions regarding COGSA 'package' meaning, it is not clear that what really constitutes a COGSA 'package'.

3.1:7:3 The view of "exercising the shipper's intent of package" to determine what constitutes a COGSA package

(An unknown legislative solution)

To determine what constitutes a COGSA package, it seems to me that we should first consider the purpose of the enactment of the COGSA and then the meaning of COGSA 'package'. The main purpose of the enactment of the COGSA was to prevent a carrier from disclaiming any liability for his negligence by an adhesion contract and thereby to protect the shipper from the superior bargaining position of the carrier.[110] To achieve this purpose the Congress determined the carrier's liability $500 per 'package' and, in order to ensure that the purpose of the act would not be defeated, provided that any bill of lading clause attempting to lessen the carrier liability is null and void.[111]

If we accept the layman's conception of the COGSA package we will face the objections mentioned before, and, if we accept an unusual concept of the COGSA

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[110] - Caterpillar Overseas, S.A. v. S.S. Expeditor, 318 F.2d 720, 722-23 (2d Cir), cert. denied, 375 U.S. 942 (1963). See also Leather's Best Inc. v. S.S. Mormaclynx, 451 F.2d 800, 815 (2d Cir 1971): The purpose of S. 4(5) of the COGSA is: "to set a floor below which the carrier should not be permitted to limit his liability".

[111] - Section 3(8) of the COGSA.

'package', this will, unless the shipper intends an unusual concept of the COGSA package, give rise to a breach of the Congress purpose because the unusual concept of the COGSA package is a good defence in the hand of the carrier to limit his liability to the statutory amount of $500 when a very large article of transportation, such as a container, is lost or damaged as a result of his negligence. This will, of course, harm to the industry of containerization which has had a great role in the advancement of international trade.

To achieve the purpose of the COGSA and to develop the industry of containerization and palletization which are effective for the development of international trade, I therefore think that the best way is probably to consider the meaning of 'package' with the attention to the intention of the shipper[112] of 'package' on a case-by-case basis. This is consistent with Congress's intent of 'package' because it seems to me that for clarifying the meaning of 'package', Article III r.3(b) and Article 4(5) must be read together.

Article III r.3(b) provides that, on the demand of the shipper, the carrier or the master or agent of the carrier must issue a bill of lading showing "either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper".

The wording of " ... a bill of lading showing .... the number of packages .... as furnished .... by the shipper" shows that firstly, from the point of view of the Hague Rules scheduled in the COGSA, it is the shipper's intent of package which determines what

[112] - See p. 65 of this thesis.

constitutes a COGSA package, and secondly the unit of which the shipper has intended as a package should be really a package, i.e. it should reasonably be regarded as a package. So the shipper's intent of COGSA package for the purpose of 'per package limitation' can be cleared from the bill of lading and the carrier can be aware of it.

Thus if on the demand of the shipper the number of packages as furnished by him, are enumerated in the bill of lading issued by the carrier, those numbers will constitute the number of packages for the purpose of 'per package limitation', even if those packages are not, wholly or partially, visible or countable, e.g. they are in a container or pallet, because the shipper intends those number to be considered as COGSA package. And if the shipper has not asked for the enumeration of packages in the bill of lading and the carrier inserts the number of packages in the bill of lading to which no objection is made by the shipper, those number of packages inserted by the carrier will be regarded as the number of COGSA packages for the purpose of per package limitation because when there is no objection to what the carrier has intended as packages and inserted in the bill of lading, by the shippers, it shows that the shipper is happy with that insertion as if he (the shipper) has intended that those numbers to be considered as COGSA packages, i.e. in this case, too, it is, in fact, the shipper's intent which determines what constitutes a COGSA package. Similarly, if the shipper declare his cargo as one package but does not declare its nature or value before shipment, it will constitute one package for the purpose of the COGSA 'per package limitation', whatever its size or weight is, because the non-declaration of its nature and value by the shipper shows that he has intended and is happy that his cargo to be considered as one package for the purpose of COGSA 'per package limitation', otherwise he declares the value and nature of his cargo.

So to recognise a cargo unit as a COGSA 'package' we shall see that:

1 - What the shipper's intent of a package is. This can be cleared from the bill of lading. For example, if the number of packages have been enumerated in the bill of lading, it will show that the shipper had intended those numbers to be considered as COGSA packages;[113] and

2 - Whether the unit of which the shipper has intended as a package can really be regarded as a package, namely, can it reasonably be regarded as a package, i.e. "whether it has preparation in some way for transportation such as 'bundles', 'cartons' or the like";[114] and

3 - Whether or not there is any declaration of the actual value and nature of the cargo. Non-declaration of its nature and value by the shipper shows that he is willing for the number of packages declared in the bill of lading to be considered as COGSA

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[113] - Aluminious Pozuelo Ltd v. S.S. Navigator, supra note 94. This view that "if the number of packages have been enumerated in the bill of lading, those numbers of packages will be regarded as COGSA packages for the purpose of 'per package limitation'" has been confirmed by Article IV 5(c) of the H-V-Rs which provide: "Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit", because if the shipper intends the number of packages to be shown in the bill of lading and demands accordingly and they are enumerated in the bill of lading by the carrier according to Article III r.3(b), in fact it is the shipper's intention which causes that those number of packages are enumerated in the bill of lading and then considered as COGSA packages for the purpose of per package limitation. In other words, it can be said that it is the shipper's intention which determines what constitutes a COGSA package for the purpose of 'per package limitation'.

[114] - Binladen BSB Landscaping v. M.V. Nedlloyd Rotherdom 759, F.2d 1006 (2d Cir 1985) at 1013-14.

packages.

It should be noted that although it is, according to this view, the shipper's intention determining the number of COGSA packages for the purpose of 'per package limitation', the carrier, instead, has some rights preventing from any probable loss resulting from the inaccuracy in number of packages furnished by the shipper. They are: 1- right of not stating the number of packages in the bill of lading in certain situations; if the shipper demands that the number of packages as furnished by him, are enumerated in the bill of lading but the carrier has reasonable ground for suspecting the number of packages mentioned by the shipper or has no reasonable means of checking, e.g. the goods are in a sealed container, he has a right not to state or show in the bill of lading the number of packages furnished by the shipper.[115] 2- Right of being indemnified by the shipper in case of inaccuracy in the number of packages as furnished by him; if the shipper demands the number of packages, as furnished by him, to be inserted in the bill of lading, he must furnish the number of packages accurately otherwise he will be liable to the carrier and must indemnify the carrier.[116] So if the shipper represents the number of packages inaccurately and the shipment, for example, is lost for the carrier's negligence and the carrier pays an amount as 'per package limitation' to an entitled person other than the shipper, the shipper must indemnify the carrier against all loss, damages and expenses

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[115] - Article III (3) of the H-V-Rs.

[116] - Article III r.5 of the COGSA provides: "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of marks, number, quantity and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper".

arising or resulting from the inaccuracy in the number of packages.

This view also promotes the uniformity and predictability which is essential for the parties to the contract because when the COGSA package for the purpose of 'per package limitation' can be cleared from the shipper's intention which is cleared from the shipping documents, the parties to the contract may predict their extent of liability for loss of cargo and thereby fix insurance and freight rate.

As said the word 'package' was used in the COGSA but there is no provision to define the COGSA package. The question is that why is there no definition of COGSA package? What is evident and we can reason is that the Congress had in mind either a plain and ordinary *meaning of the COGSA package*[117] *or a specialized and technical* meaning of it[118] at the time of the enactment of the COGSA and yet it gave no definition of the COGSA package. The reason for this seems to be clear because when, by reading Articles 3(3)(b) and 4(5) together, it becomes evident that it is the shipper's intent of package mentioned in the bill of lading which determines what constitutes a COGSA package, there was no necessity the Congress to define the COGSA package as either a plain and ordinary meaning of the word 'package' or a specialized and technical meaning of the word 'package'. So it seems any attempt to show that the Congress's intent of the COGSA package is either the plain and ordinary meaning or the special and

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[117] - See for example Gulf Italia Co. v. The S.S. Exira, supra note 77; Omark Indus. Inc. v. Association Container Transport, supra note 79.

[118] - J. Moore in Gulf Italia Co. v. The S.S. Exira, supra note 77; Mitsubishi International Corp. v. S.S. Palmetto State, supra note 83; Reid v. Fargo 241 U.S. 544, 36 S.Ct. 712, 60 L.ed. 1156 (1916).

technical meaning of the word 'package' not only is useless but inconsistent with the Congress's intent which put the issue (what constitutes a COGSA package) on the shipper's shoulder and the COGSA package may, therefore, differ, with attention to the shipper's intent, from one case to another.

In brief, according to this new view, the COGSA package for the purpose of 'per package limitation' is: either what the shipper intends to be a package, if it can be reasonably regarded as a package, and the shipper demands it to be enumerated in the bill of lading without declaring its nature or value; or, in the absence of any demand by the shipper to that effect, what the carrier inserts in the bill of lading to which no objection is taken by the shipper as if the shipper has intended that that thing to be considered as a COGSA package. So size and weight have no effect in determining a COGSA package for the purpose of 'per package limitation'. A COGSA package therefore may, depending on the shipper's intent or on lack of the shipper's objection to what the carrier inserts as a package, be a small package which can reasonably be regarded as a package, or a large package to which a preparation for transportation has been made to facilitate its handling.

If we accept this new view, which seems, as said, to be consistent with the Congress's intent, we will no longer have any problem with the COGSA 'per package limitation'. Referring the shipper's intent mentioned in the bill of lading, we can easily understand what constitutes a COGSA package for the purpose of 'per package limitation'. Secondly, with the acceptance of this new view, we will achieve the main purpose of the COGSA, i.e. to protect the shipper from the superior bargaining position of the carrier. Thirdly, as the Hague Rules, scheduled in the COGSA, are the rules of an

international convention which come under the consideration of different states who are contracting parties to that international convention, we need to have an international uniformity of interpretation of the Rules to avoid any conflict of laws. Accepting this new view we will reach the international uniformity of interpretation regarding the meaning of the COGSA package. Otherwise, there will be conflicting views regarding the meaning of the COGSA package for the purpose of 'per package limitation' in different contracting states which is not desirable for an international convention. Moreover, the acceptance of this view is consistent with the 1968 Brussels Protocol (H-V-Rs) Article IV 5(c) regarding Container-package problem.[119]

It should also be noted that the English court's decision in Whaite v. The Lancashire and Yorkshire Railway Co.[120] is consistent with this new view. In this case the court held that a wagon with wooden side, but without a top, constituted a package within the meaning of the carrier Act 1830. One of the important reasons which the court pointed out for its decision was the shipper's intent of what constitutes a package while it gave no effect to the size of the package or that the package to be enclosed completely. Bramwell, B. said that the plaintiff and his foreman authorized him to describe the waggon as a package within the meaning of the Act because they said that they "had packed" the goods in the waggon, then the waggon so packed with goods was a package. Also Pollock B. said: "I think that this was a package". He reasoned: "the plaintiff says that I 'packed' the goods in my four-wheeled waggon".

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[119] - for the text of Article IV(5)(c) see supra note 17.

[120] - Supra note 61.

Now when the House of Lord in Gosse Millerd Ltd v. Canadian Government[121] construed the meaning of the words used in the Hague Rules according to certain decisions of the English courts before 1924, this shows that to understand the meaning of the COGSA package one should refer to a case before 1924 like Whaite v. Lanc. Co. in which the shipper's intent of package was important, i.e. one will conclude that in the COGSA, too, it should be the shipper's intent of package which determines what constitutes a COGSA package. This confirms the view of 'exercising the shipper's intent in order to determine what constitutes a COGSA package'.

3.1:8 Containerization and COGSA "per package limitation"

3.1:8:1 Definition of a container

Tallman Bissell in his article[122] said:

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

He also mentioned[123] the Coast Guard's proposed definition regarding container as

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[121] - (1929) AC 223; (1928) All E.R. Rep.97, HL.

[122] - The Operational Realities of Containerization and their effect on the "package" limitation and the "on deck" prohibitation: Review and Suggestions Tulane Law Review 1971 vol.45 P.910.

[123] - Id. at 910.

follows:

> "An article of transport equipment other than a vehicle or conventional packaging (that is) ... strong enough to be suitable for repeated use; specially designed to facilitate the carriage of goods by one or more modes of transport without intermediate reloading; ... fitted with devices permitting its ready handling particularly its transfer from one mode of transport to another; ... so designed as to be easy to fill and empty".[124]

To answer the question "what constitutes a container", the United States Supreme Court in the case of Japan Line v. Conty of Los Angeles[125] used the container definition which had been offered by Simon in his article - the law of shipping container [126]. There, Simon defined a container as follows:

> "A container is a permanant reusable article of transport equipment - not packaging of goods - durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, storage aboard ship, carriage, discharge from ship, movement and transfer of large number of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package individually. It functions primarily as ship's gear for cargo handling, and is usually provided by the carrier".

The court in another case[127] also said:

> "Container is a modern substitute for the hold of the vessel".

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[124] - Proposed U.S.C.G. Reg, 34 Fed. Reg. 14054 (1969), quoted in Schmeltzer & Peavy, Prospects and Problems of the Container Revolution, 1 J.Mar. L & Com. 203 (1970).

[125] - 441 U.S. 434, 436 n.1 (1979).

[126] - Cited in 5 jounal of Maritime Law and Commerce 507, 513 (1974).

[127] - Northeast Marine Term Co. v. Caputo, 432 U.S. 249, 271 (1977).

As a result, it can be said that a container is an article of transport equipment which acts as a hold of vessel rather than packaging of goods.

3.1:8:2 Is a container a meaning of COGSA package for the purpose of 'per package limitation'?

As said, one of the main problems created by container revolution was the problem of 'per package limitation' in relation to container transports so that the introduction of the container into the maritime industry has stimulated the courts to take a new look at the package limitation in intermodal transport.[128] The question before the courts has been that: is a container a meaning of the COGSA package for the purpose of per package limitation or not? Indeed answering this question is of a high degree of importance because it will promote the uniformity and predictability which is essential for the parties to the contract. The parties thereby may predict their extent of liability for loss of cargo. They also may fix insurance and freight rates and avoid any litigation.

To answer this question Tallman Bissell in his article, [129] with reference to the case of Leather's Best Inc. v. S.S. Mormaclynx[130] and to the purpose of COGSA package limitation says "it seems logical that the court should hold that the carton rather than the container was the package, since only by so holding could the court protect the

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[128] - Tallman Bissell The Operational Realities of Containerization ....., Tulane Law Review, vol.45 1971 P.911.

[129] - Id. at 914.

[130] - 313 F.supp. 1373, 1970 A.M.C. 1310 (E.D.N.Y. 1970).

shipper's right to present valid claims, and at the same time limit excessive claims in respect to small packages of great value".

In this respect Scrutton says[131]:

"The container is essentially no more than a sophisticated form of package, and it is thought that where the goods have been stowed in the container by the shipper, the carrier would be entitled to rely on a defence of "inherent vice" or "insufficiency of packing" if the goods were damaged because of some defect in the container or in the manner of stowage".

To consider the question, it seems, however, that the best way is to look at the courts' decisions in this ground.

3.1:8:2.1 American courts' views

After container revolution,[132] American courts[133] have been faced with the

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[131] - Scrutton on Charterparties ..... 19th ed., Sweet and Maxwell, London, 1986, p.385.

[132] - Container revolution caused tremendous changes in the movement of cargo. A large number of cartons can be loaded in a shipping container and then it placed in a container ship until the end of the voyage. The containerization system has simplified the cargo movement and reduced the probable damage to or loss of cargo. See Schmeltzer & Peavy, Prospects and the Problems of Containerization 1 J. of Mar. L. & Com. 203 (1970).

[133] - For the Second Circuit courts see, e.g. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d, 800 (2d. Cir.1971); Royal Typewriter Co. v. M/V Kulmerland, 483 F.2d 645 (2d Cir. 1973); Shinko Boeki Co. v. S.S. Pioneer Moon, 507 F.2d 342 (2d Cir. 1974); Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291 (2d Cir. 1974); Rosenbruch v. American Export Isbrandtsen Lines, Inc., 543 F.2d 967 (2d Cir.), cert. denied, 429 U.S. 939 (1976); Mitsui & Co. v. American Export Lines Inc., 636 F.2d 807 (2d Cir. 1981). For the district courts see, e.g., Inter-American Foods, Inc. v. Coordinated Caribbean

problem of 'per package limitation' in relation to container transports because there is no provision regarding container transport in the U.S. COGSA.

The Court of Appeal (majority) in the case of Encyclopaedia Britannica Inc v. The 'Hong Kong Producer' and Universal Marine Corporation,[134] did not reach the issue of 'per package limitation', Judge Hays, however, in his dissenting opinion, held that part of a shipment described in the bill of lading as "one metal container ... said to contain: 536 ctns. bound books" constituted a single package. In this case six containers including cartons of encyclopaedias were stowed on deck and owing to heavy weather the contents of the containers were damaged by sea water. The court of appeal (majority) held that the carrier is liable for the full amount of damages sustained. Judge Hays, however, with reference to the Standard Electerica Case[135] said:

> "The court (Standard Electerica Court) relied on the characterization of the parties, including document descriptions, the fact that it was the shipper who made up the cartons into a pallet for convenience and safety in handling, and the fact that the shipper had the option under Section 4(5) to obtain full coverage by declaring the value of the goods and paying a higher rate.
> Here the containers were delivered to the carrier by the shipper's agent already packed with the individual cartons of encyclopaedias. On the bill of lading delivered to the agent by the carrier upon receipt of the containers, the 'No. of Pkgs' and the 'Description of packages and goods' were given as, e.g. (1) one metal container No. UCC-5330 said to contain: 536 ctns. bound book'. The shipper made no objection to this description. I would thus hold that the parties intended each individual container to be considered as the functional packing unit, that considering the containers as the packages promotes uniformity and

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Transport, Inc., 313 F.supp. 1334 (S.D.Fla.1970); Sperry Rand Corp. v. Norddeutscher Lloyd, 1973 A.M.C. 1392 (S.D.N.Y. 1973); Matsushita Elec. Corp. of Am. v. S.S. Aegis Spirit, 414 F.supp. 894 (W.D. Wash. 1976); In re Norfolk, Baltimore & Carolina Line, Inc., 478 F.supp 383 (E.D.Va.1979); Croft & Scully Co. v. M/V Skulptor Vuchetich, 508 F.supp. 670 (S.D.Tex. 1981).

[134] - 422 F.2d 7, (2d Cir. 1969) or [1969]2 Lloyd's Rep.536.

[135] - 375 F.2d 943 (2d Cir), cert. denied; 389 U.S. 831 (1967).

predictability, and, accordingly, that the $500 per package limitation applies to the containers".[136]

As seen, the court in Encyclopaedia Britannica did not make any decision about the issue. Only Judge Hays held that a container constituted a COGSA package.

The decisions taken by American courts about the issue have established two conflicting theories: first, the Leather's Best Theory upon which a container is functionally part of a ship and therefore, a carrier-furnished container whose contents is fully disclosed in the bill of lading is not a 'package' for the purpose of 'per package limitation'. According to this theory, however, it is not clear whether a shipper-furnished container whose contents is not disclosed in the bill of lading is a COGSA package or not. Second, the Theory of Functional Economics upon which we have to see whether the contents of a container are functional package or not. If they are, there should be a presumption that they are COGSA packages; and if they are not, the container is presumptively a COGSA package. Those presumptions may be rebutted by the carrier or shipper by showing that the parties' intent has been otherwise for the treatment of a COGSA 'package', i.e. the functional economics theory which is in fact based on the parties' intent is not conclusive. Some severe objections were made to this theory and it was, therefore, abandoned by the Second Circuit court in Mitsui & Co. v. American Export Lines. Instead, the Leather's Best Theory was reaffirmed in Mitsui by the court. Those theories can be explained as follows:

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[136] - 422 F.2d. 7, at 20 (2d Cir. 1969).

(1) - Leather's Best Test

The question whether a container itself or its contents constitute COGSA 'package' for the purpose of 'per package limitation' was first considered in 1971 in the case of Leather's Best Inc. v. S.S. Mormaclynx.[137] In this case, 99 bales of leather were packed in a container supplied by the carrier while the carrier's truck driver watched. The carrier's agent then issued a bill of lading describing the goods as 'one container said to contain 99 bales of leather', and noted the gross weight.

In the Second Circuit, Judge Friendly went on the purpose of the COGSA for the enactment of 'per package limitation' provision and said that the purpose of Section 4(5) of the COGSA is: "to set a floor below which the carrier should not be permitted to limit his liability".[138] He then held that a cargo container was not a package for COGSA purpose.

To reach this decision Judge Friendly distinguished the Standard Electrica[139] case on the following grounds: firstly, in Standard Electrica it was the shipper who had made up the pallets whereas in Leather's Best, it was the seller who loaded the container when the carrier's driver was present; secondly, in Standard Electrica the shipping document did not indicate the number of cartons which had been included in the pallets whereas in

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[137] - See note 130.

[138] - Id at p.815.

[139] - See note 135.

Leather's Best the bill of lading indicated the number of bales included in the container; thirdly, having ignored the Judge Moore's opinion in the case of Mitsubishi International Corp. v. S.S. Palmetto State[140] to the effect that size is not controlling criterian for COGSA package, the court held that the pallets in Standard Electrica were much smaller than the container in Leather's Best.

The fact that the container in question was owned by the carrier whose use of the container resulted in large savings in handling and reloading time, particularly influenced Judge Friendly.[141] He, therefore, reasoned that a shipper should not find himself in a less favourable position as to liability simply because a carrier chose to load the shipper's cartons in a container for transport. The court explained that:[142]

> "The shipper here received a discount of 10% from the otherwise applicable tariff for services in loading and unloading in container. However, there is nothing to show that the carrier did not realize corresponding economic advantages for the container method of shipment; to the contrary, the district court was of the view that containers are 'primarily for the convenience of the carrier since they cut down handling time and can save as much as 90% of the time required for loading and unloading a vessel".

The court (Friendly, C.J.) said that "'package' is thus mere sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be contained". Equating a container, a large metal object - functionally a part of the ship, with a package, the unit in which the shipper packed the goods, lacks sense.

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[140] - 311 F.2d. 382 (2d. Cir. 1962).

[141] - 451 F.2d at 815 n.19.

[142] - Id.

So according to the Leather's Best Test, a container is not a COGSA package if: 1 - the container is owned by the carrier and he chooses to load the shipper's packed cargo in the container; and 2 - the bill of lading refers to the exact number of the cargo with the container, and not just to the container itself. In other words, carrier-furnished containers whose contents are fully disclosed in the bill of lading are not 'packages' for the purpose of COGSA 'per package limitation'.[143]

It should, however, be noted that when the shipper himself has loaded the container already and there has been no information about its contents (such as the number of cartons, bales, etc.) in the bill of lading, it cannot be said that the Leather's Best Test can apply because Leather's Best specifically left it open where the court said:[144]

> "We recognise that this distinction is not altogether satisfactory; it leaves open, for example, what the result would be if Freudenberg (the shipper) had packed the bales in a container already on its premises and the bill of lading had given no information with respect to the number of bales".

It should also be noted that when the Leather's Best Test is applied in a container case and the container is accordingly treated not to be a COGSA package, any clause of the bill of lading, related to the container case, limiting the carrier's liability to $500 with respect to the container, i.e. as much as carrier's liability for a COGSA package, will be void and null. This is because when a carrier limits his liability to $500 with respect to a container which is not treated as a COGSA package, he is in fact lessening his liability which has been determined in Section 4(5) of the COGSA, and, this is void according to

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[143] - See also the recent case of P. S. Chellaram & Co. Ltd. v. China Ocean Shipping Co., [1989] 1 Ll. Rep. 413.

[144] - 451 F.2d, 800 (2d Cir. 1971) at p.815.

Section 3(8) of the COGSA. Thus, in the case of Leather's Best [145], the lower left hand corner of the bill of lading stated in legible capital letters:

> "SHIPPER HEREBY AGREES THAT CARRIER'S LIABILITY IS LIMITED TO $500 WITH RESPECT TO THE ENTIRE CONTENTS OF EACH CONTAINER EXCEPT WHEN SHIPPER DECLARES A HIGHER VALUATION AND SHALL HAVE PAID ADDITIONAL FREIGHT ON SUCH DECLARED VALUATION PURSUANT TO APPROPRIATE RULE IN THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE TARIFF".

The court with considering the purpose of Section 4(5) of the COGSA and creation of the Leather's Best Test said that the container was not a COGSA package and Section 4(5) of the COGSA had to be read in conjunction with Section 3(8) of the COGSA which states:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this Section, or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect".

The court, therefore, held that that clause in the bill of lading limiting the carrier's liability to $500 with respect to the container is invalid and of no effect.

(2) - Functional Economic Test or functional package unit test

After Leather's Best, Judge Oakes, writing for the Second Circuit in the case of Royal Typewriter v. M/V Kulmerland,[146] tried to create a new test to determine whether

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[145] - See note 130.

[146] - 483 F.2d, 645 (2d.Cir. 1973).

a container is a package within the meaning of the COGSA or not. He created a test called 'functional economic test or functional package unit test'.

According to this test if the goods (packages or units) which have been included in the container are functional packages or units, i.e. they have been so packed or have been in such a manner as can be shipped traditionally or break-bulk and withstand ordinary accident of the voyage without any need to the container, there will be a presumption that the packages or units included in the container should be treated as COGSA packages or units rather than the container itself. This presumption can be rebutted if the carrier presents an evidence showing that the parties had intended the container to be treated as a COGSA package rather than the packages or units. On the contrary, if the goods (packages or unit), inside the container, are not functional, the container will play the role of packaging and covering. There will, therefore, be a presumption that the container itself, rather than the packages or units therein, should be treated as a COGSA package. This presumption can also be refuted but this time by the shipper because where it is proved that the shipper's units or packages are not functional, it will be the shipper who must show that why the container should not be treated as a COGSA package.

Judge Oakes in Royal Typewriter Co. v. M/V Kulmerland[147] described the functional economic test as follows:

> "Where the shipper's own packing units are functional, a presumption is created that a container is not a 'package' which must be overcome by evidence supplied by the carrier that the parties intended to treat it as such ..... when, as here, the shipper's own individual units are not functional or usable for overseas shipment the burden shifts to the shipper to show why the container should not be treated

[147] - Id.

as the 'package'".

In the Kulmerland, 350 cartons of adding machines shipped in a container. Under the heading "Number and Kind of Packages, description of goods" in the bill of lading it reads: "1 container said to contain machinery" without any reference to the number of cartons of adding machines. The question which again came up was whether the limitation of $500 damages 'per package' in the 1936 COGSA applied only to the overall container or to the cartons which were included in the container.

Judge Oakes writing for the Second Circuit said: "The first question in any container case is whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper".[148]

Using the 'functional economic test', the court in The Kulmerland said that the adding machines in the cartons had not been so packed as to be suitable for break bulk shipment. A presumption would therefore be created that the container, rather than the single-wall corrugated cartons sealed with paper tapes, was a COGSA package and it was the shipper who had to rebut the presumption by proving why the container should not have been treated as a COGSA package. The presumption could be rebutted by showing evidence to the effect that the parties had intended the cartons, rather than the container, to be treated as COGSA packages. The court held that because the shipper failed to show such evidence and the bill of lading did not show that the parties had intended the cartons to be treated as COGSA packages, then the overall container constituted a COGSA

[148] - Id. at p.648.

package.

As seen, in the 'functional economic test', the parties' intents regarding "what constitutes a COGSA package" play a very significant role to determine whether a container is a COGSA package or not.[149] The parties' intent is of such an importance and power as can rebut any contrary presumption arising from exercising the 'functional economic test'. Thus, if it is proved that packages inside a container are functional and a presumption is therefore created that they should be COGSA packages, as soon as the carrier can show that the parties intended the container to be treated as a COGSA package the presumption is rebutted and the container is regarded as a *COGSA package for the* purpose of 'per package limitation'. On the contrary, if it is proved that the packages inside the container are not functional (i.e. the container is presumptively a package) but the shipper can show that the parties intended the packages to be treated as COGSA packages, the packages will then constitute the number of COGSA packages. In this respect, the Kulmerlaend Court in its decision said:[150]

> "Only then does custom and usage in trade, parties' own charactization or treatment of the items being shipped in supporting documentation or otherwise, and any other factor bearing on the parties' intent become relevant, as in Standard Electrica or Leather's Best".

One point which should be noted is that the 'functional economic test' will not in fact lead the court to a conclusive decision but to a presumption which may either be rebutted by the shipper or carrier, whoever the burden of rebutting of the presumption is

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[149] - See also W. Tetley Per Package Limitation and Containers under the Hague Rules, Visby & Uncitral, Dalhouse Law Journal 1978, vol 4. p.985 at 987-8.

[150] - See note 146, at p.649.

on his shoulder, or, if the party fails to do so, be a basis for decision-making of the court. Judge Oakes in the case of Cameco Inc. v. S.S. American Legion[151] pointed out that the 'functional economic test' is not conclusive, it merely affects the burden of proof.

Regarding the scope of application and the advantages of the 'functional economic test', Judge Oakes, the creator and supporter of this test, said: "The 'functional package unit' test we propound today is designed to provide in a case where the shipper has chosen the container, a 'common sense test' under which all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus 'avoid the pains of litigation'".

The 'functional economic test' was employed in some cases after the Kulmerland case. For example, in Rosenbruch v. American Isbrandtsen Export Lines[152] the court, using the 'functional economic test', held that a container loaded with household goods was a COGSA package. In this case the shipper's agent loaded the container with the shipper's household goods. He stated on the bill of lading that one package or container was involved and described the contents as "used household goods".

Functional economic test was also used in Cameco, Inc. v. S.S. American Legion[153] in which corrugated cartons of tinned hams were put into a refrigerated container which was then loaded aboard the S.S. American Legion. The bill of lading issued by the carrier

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[151] - 514 F.2d 1291 (2d Cir. 1974).

[152] - 543 F.2d 967 (2d Cir.), cert. denied, 429 U.S. 939 (1976).

[153] - See note 151.

indicated the goods as "1 container said to contain:", and then the number of cartons were indicated. Using the functional economic test the court said that because the cartons could have been shipped traditionally and before the use of containers became widespread, corrugated cartons had been the form of packaging for break bulk shipments, the cartons presumptively were packages, and the carrier had to show an evidence that the parties intended to treat the container as a package. The carrier failed to do so and the court therefore held that each carton was a COGSA package.[154]

A question is that whether the functional economics test is consistent with Leather's Best or not and was the Leather's Best case decided on the basis of functional economics test or not?

An answer to this question is: although in the Kulmerland, Judge Oakes tried to show that the decision in the Leather's Best case was on the basis that the 'bales', there, could have been shipped individually and break bulk, i.e. he tried to show that the Leather's Best decision was based on the functional economic test, it should be noted that in Leather's Best test, unlike the functional economic test, the question 'whether the contents of a carrier-furnished container (e.g. cartons, bales, etc.) are functional or not' is of no importance and necessity and it is, in fact, immaterial. The important thing in the Leather's Best test is that the number of cartons or bales or .... (the contents of container) have been fully disclosed in the bill of lading which it shows the parties' intent that what constitutes a COGSA package because Judge Friendly in the case of Mitsui & Co. Ltd.

[154] - Id. at p.1299.

v. American Export Line[155] said:

> "Although the Kulmerland panel asserted that the critical fact in Leather's Best was that the bales of leather could have been shipped break bulk, nothing in the opinion suggested that the decision had proceeded on that basis, there was no evidence on the point one way or the other, and the shipper had advanced no such argument. As the lower courts and commentators recognised, the clear holding of Leather's Best was that carrier-furnished containers whose contents are fully disclosed are not COGSA package".

In the same case, Judge Friendly also said[156]:

> "If the functional economic test were consistent with Leather's Best, we would be bound to follow it here dispite the criticism it has received from commentators and other courts, ... and our own conviction that it is at odds with the language of §4(5) and the purpose of that provision and of COGSA as a whole. In fact, however, the Kulmerland test is basically inconsistent with the holding of Leather's Best".

Although, as stated above, the Leather's Best test and functional economic test are inconsistent with each other, a very brief consideration of them will make it clear that when in a carrier-furnished container case, the bill of lading discloses full contents of the container, the result will almost be the same whether the Leather's Best test or the functional economic test is exercised for decision-making. This is because if the court wants to follow Leather's Best, the contents of the container (e.g., cartons or bales, ...) will constitute the number of packages for the purpose of the COGSA 'per package limitation'. The best authority for this proposition is the Leather's Best case[157] itself.

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[155] - 1981 A.M.C. 331 (2d. Cir. 1981) at p.449.

[156] - Id, at p.449.

[157] - See note 130.

And if the court wants to follow the functional economic test, it will face with the question whether the contents of the container are functional or not. Depending on the answer is positive or negative, the court will follow one of the following two ways:

Firstly, if they are functional, a presumption will be created that they (the contents of the container) are COGSA packages which the carrier must show an evidence to rebut that presumption. It is unlikely that the carrier can do so because the number of cartons which have been stated in the bill of lading show that the parties intended that the cartons constitute the COGSA packages and this confirms the created presumption. The court will, therefore, hold that the number of the cartons (the contents of the container) will constitute the number of packages for the purpose of the COGSA 'per package limitation' (i.e. the same result as in Leather's Best). The authority for this proposition is the case of Cameco Inc. v. S.S. American Legion[158] in which the corrugated cartons of tinned hams were put into a refrigerated container. The bill of lading stated the number of cartons which had been put into 1 container. Using the functional economic test, the court said that the cartons are functional and presuptively packages.Because the carrier could not show any evidence to reject the presumption the court held that each carton was a package. Judge Oakes in this case said:

> "Here, the bill of lading specifically set forth the number of cartons of tinned hams and the respective number of tins and weight per tin in each carton, unlike the one container said to contain machinery in the Kulmerland case or the one container said to contain household goods in the Rosenbruch case. Here as in Leather's Best, ... the bill of lading described the goods as one container 's/t/c' a specific number of cartons or bales etc."

[158] - See note 151.

We can see that the court in American Legion, even using the functional economic test, refused to apply the package limitation to the container and in fact reached a result which would have reached if had applied Leather's Best because in American Legion, like the Leather's Best case, there was a carrier-furnished container which its contents were fully disclosed in the bill of lading. In fact, the American Legion case was much nearer to the Leather's Best case than the Kulmerland case, firstly, because of the above words of Judge Oakes himself; secondly, Judge Friendly in the Mitsui[159] said that, unlike Kulmerland, Cameco, Inc. v. S.S. American Legion was entirely consistent with Leather's Best.

Secondly, if they (the contents of the container e.g. cartons, bales etc.) are not functional, there would be a presumption that the overall container is a package. Here, it is the shipper who must show an evidence to reject that presumption. It is likely that the shipper can do so because the number of cartons which have been stated in the bill of lading show that the parties intended the cartons, rather than the container, to constitute the COGSA package. And because the parties' intent in the functional economics test has a very high power, it will reject the created presumption. The court will, therefore, probably hold according to the parties' intent, that the number of cartons will constitute the number of packages for the purpose of the COGSA 'per package limitation', i.e. the same result as in Leather's Best.

Generally speaking, it can be said that the use of the functional economics test for finding out whether a container or its contents constitute COGSA packages includes two

[159] - 1981 A.M.C. 331 (2d. Cir. 1981) at p.450.

steps: The first step is that whether the contents of the container are functional packages or not. If they are, there should be a presumption that they are COGSA packages; and if they are not, the container is presumptively a COGSA package. The second step is that the court will consider that whether the presumption is rebutted or not. In rebuttal of the presumption, the parties' intent that what constitutes a COGSA package plays a very significant role. If the presumption is not rebutted, the court will decide according to that presumption, and if it is rebutted the court will decide according to the parties' intent.

But in Leather's Best test, the court will consider whether the contents of the carrier-furnished container have been fully disclosed in the bill of lading or not. If they have, the contents (e.g. number of cartons, bales .....) will constitute the number of COGSA packages. However, in a carrier-furnished container case which the bill of lading fully discloses the contents of the container, the result will be the same whether the court exercises the functional economics test or the Leather's Best test, although exercising the functional economic test needs to go in a way further than Leather's Best test. For example, in the case of Du Pont de Nemours International S.A. v. S.S. Mormacvega,[160] 38 pallets packed in one container. The bill of lading described the shipment as '1 container said to contain 38 pallets resin synthetic liquid'. The question before the court was whether the container constituted a COGSA package or the pallets for the purpose of the COGSA 'per package limitation'. There was no dispute as to the accuracy of the shipper's declaration. The Second Circuit court citing both Kulmerland and Leather's Best held that 38 pallets, rather than the container, constituted 38 COGSA packages. The reason why the court cited both Kulmerland (functional economic test) and Leather's Best

[160] - The Mormacvega [1973] 1 Lloyd's Rep. p. 267; (1970) A.M.C. 2408.

(Leather's Best test), it seems to be that with applying whether the functional economic test or Leather's Best test the result would be the same, i.e. the number of COGSA packages would be 38.

Another example is the already-mentioned case of Cameco v. American Legion,[161] a carrier-furnished container case which the bill of lading disclosed the full contents of the container. Judge Oakes, using the functional economic test held that the contents (the cartons inside the container) constituted COGSA packages. In this case, the court would have certainly reached to the same decision if it had applied the Leather's Best Test because firstly, Judge Oakes himself said: "Here .... unlike to Kulmerland case .... as in Leather's Best, ... the bill of lading described the goods as one container 's/t/c' a specific number of cartons or bales, etc.", and secondly, Judge Friendly in the Mitsui case[162] said that unlike Kulmerland, Cameco v. S.S. American Legion was entirely consistent with the Leather's Best.

- Some severe critics to the 'functional economics test'

It is objected firstly that the functional economics test may in practical application cause confusion both during party negotiations and at trial because it creates questions of proof regarding 'being functional or not being functional', the result of which is unworkable problems; and secondly, cause economic waste because the shipper

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[161] - See note 151.

[162] - 636 F.2d. 807 (2d. Cir. 1981).

encourages or even forces to over-pack the cargo in the container to be able to prove that the contents of the container are functional and therefore, they are presumptively COGSA packages which is obviously an economic waste[163] because the use of container transport does not need to over-packing. In fact, the functional economics test effectively penalizes shippers who avail themselves of more economical packaging made possible through containerization.[164]

The functional economics test has been also criticized that can hardly be applied as a 'common sense test' under which 'all parties, concerned can allocate responsibility for loss at the time of contract', and purchase additional insurance if necessary.[165] The functional economics test "will not work as a practical matter and does not afford the predictability needed for the parties to allocate responsibility for loss at the time of contract and to purchase the necessary insurance. The court seems to have overlooked, unfortunately, a very basic fact of containerization: that when the carrier receives a sealed container for shipment, it has no way of knowing how the goods inside are packed, and so the shipowner will not be able to predict his limitation. The shipper on the other hand,

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[163] - See De Orchis, The container and the package limitation - the search for predictability, 5 J.of Mar. L. & Com.251 (1974); Simon Latest developments in the law of shipping containers, 4 J.of Mar. L. & Com. 441 (1973); G. Denegre Admiralty - carrier-owned shipping container found not to be COGSA package, 56 Tulane Law Review 1409 [1982].

[164] - Judge Beeks in Matsushita Electric Corp. v. S.S. Aegis Spirit, 414 F.Supp. 894 (W.D. Wash. 1976), in which 601 cartons of electrical equipments were loaded into containers. The carrier supplied the containers and the bill of lading disclosed the number of the cartons within the containers. Id. at p. 898.

[165] - Judge Oakes, creator and supporter of the functional economics test, in the Kulmerland case said: "The 'functional package unit' test .... is .... a 'common sense test' under which all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary".

will not be able to obtain the benefit of a limitation based on each carton in the container unless he first packs the goods in export type boxes an obvious economic waste".[166]

As seen, the functional economics test emphasises on the parties' intent in determining a COGSA package. It has been also criticised for this emphasis. The critics say that in determining a COGSA package, one should look at Congress's intent rather than the parties' intent. Parties' intent should not be a factor in a COGSA package determination. In fact, it can be said that the parties' intent is of a contractual character while COGSA liability-limiting provisions (such as Article 4(5)) are of mandatory character which the latter must prevail the former. If parties intend a large re-usable metal container to be treated as a package, they are in fact making the COGSA liability-limiting provision of Article 4(5), which an ordinary and plain meaning should be given to the word 'package', useless, i.e. contractual agreement prevails the mandatory provision. In Matsushita Electric Corp. v. S.S. Aegis Spirit,[167] Judge Beeks cited the case of Hartford Fire Insurance Co. v. Pacific Far East Line[168] in which the court had said: "Since no specialized or technical meaning was ascribed to the word 'package', we must assume that Congress had none in mind and intended that this word be given its plain, ordinary meaning". He then said[169]: "The undoubted objective of 46 U.S.C. § 1304 (5) was to establish a minimum floor below which carriers subject to the act could

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[166] - De Orchis The Container and Package Limitation - The Search for Predictability, 5 J. Mar. L. & Com. 251 (1974).

[167] - 414 F.Supp. 894 (W.D. Wash. 1976).

[168] - (1974) 1 Lloyd's Rep. 359.

[169] - Matsushita ...., at p.904 - 5.

not reduce their liability for cargo damage. If carriers alone, or even carriers and the shippers together are allowed to christen something 'package' which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable". Judge Beeks then added[170] : "it is not the parties' characterization of the shipment, but the court's interpretation of the statute that controls". In this case, Judge Beeks criticised the functional economics test and said if the parties were able to allot liability simply by defining a container as a package, the liability-limiting provisions would be rendered useless. He reasoned that a large re-usable metal container, at least when the container is owned and supplied by the carrier, is closer to 'detachable stowage compartment of the ship' than to a package as the word is traditionally used and ruling it as a package would distort the plain and ordinary meaning of the word 'package'.

Also, in the case of Mitsui & Co. Ltd. v. American Export Line,[171] Judge Friendly in the Second Circuit court said: "...it [the functional economics test] has received [criticism] from commentators and other courts, ... and our own conviction that it is at odds with the language of § 4(5) and the purposes of that provision and of COGSA as a whole". He pointed out the opinion of Judge Beeks in Matsushita Electric Corp. v. Aegis Spirit[172] and those of other district courts which did not use the functional economics test in a container case. The purpose of provision 4(5) of the COGSA, as Judge Friendly in Leather's Best said and Judge Beeks agreed with it in the Aegis Sprit, is "to set a floor below which the carrier should not be permitted to limit his liability". According to the

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[170] - Id., at 905.

[171] - 1981 A.M.C. 331 (2d. Cir. 1981); 636 F.2d. 807 (2d. Cir. 1981).

[172] - 414 F.Supp. 894 (W.D. Wash 1976).

functional economics test, there is a possibility that a container be treated as a COGSA package. If so, the carrier's liability will be reduced to $500. The test has been, therefore, accused of being pro-carrier in its emphasis on the relatively slight benefits enjoyed by the shipper in using simple packaging, since the brunt of savings are experienced by the carrier[173].

Regarding the critisism to the parties' intent, Judge Beeks also said[174]:

> "A further undesirable side effect of a rule upon the parties' intentions is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill of lading can never be sure what the shipper and carrier 'intended' to treat as a package, except to the extent that said intent can be deduced from the four corners of the bill itself. Bills of lading, though, are hardly appropriate vehichles for such expressions of mutual intent, because their contractual terms are commonly the product of unilateral draftsmenship by the carrier incorporating largly self-serving provisions".

Another critisism to the functional economics test is that the test does not consider the possibility of the 'customary freight unit' applying to goods shipped in a container without any packaging. In Mitsui the Second Circuit court noted this defect and said:

> "The Kulmerland test [functional economics test] simply does not take into account the important possibility that goods shipped in such containers with packaging insufficient for break bulk shipment might be 'goods not shipped in packages'".[175]

It is worth being noted that Judge Oakes, the creator of the functional economics test,

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[173] - G. Denegre Admiralty - Carrier-owned Shipping Container found not to be a COGSA package, 56 Tul. L. Rev. p.1415 F.N. 31 (1982).

[174] - Matsushita ... v. Aegis ..., 414 F.Supp 894 (W.D. Wash. 1976).

[175] - 636 F.2d at 818-19.

himself in the case of Mitsui & Co. v. American Export Lines[176] accepted some limitations of the test where he said: " ... the functional economics test of Kulmerland does not function well ... in the realm of container shipping, where the bill of lading specifies the contents, the ship's container should not be deemed a package - even presumptively only - irrespective of how the goods within it are packed".

- Is the functional economics test still alive?

As said, after the Kulmerland case the functional economics test was during a number of years applied in some cases and received some severe objections. It was finally abandoned by the Second Circuit court in Mitsui & Co. v. American Export Lines.[177]

Before the test was abandoned there had been conflicting approaches of the Second Circuit courts to the package controversy, i.e. the Leather's Best approach according to which a container was not a COGSA package but functionally part of the ship; and the functional economics test that a container could be treated as a COGSA package. These conflicting approaches caused some disarray in the relevant law because some courts followed the Leather's Best approach and some the functional economics approach.

In the case of Matsushita Electric Corp. v. S.S. Aegis Spirit,[178] which came before

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[176] - 1981 A.M.C. 331 (2d. Cir. 1981) at 346; 636 F.2d 807 (2d. Cir. 1981).

[177] - Id.

[178] - 414 F.Supp 894 (W.D. Wash. 1976).

the District Court for the Western District of Washington, Judge Beeks, speaking for the court, criticised and refused to use the functional economic test. He said: "a test for determining whether a container is a package must reflect the realities of the maritime industry of today while remaining faithful to the express language and legislative policy embodied in the pertinent COGSA provisions."[179] He then assumed that Congress had given a plain and ordinary meaning to the term package rather than a specialised and technical meaning. Pointing out the functional economics test, Judge Beeks, therefore, criticised the view that the parties' intent as evidenced by the bill of lading[180] should have no effect on a COGSA determination because by defining a container as a package the Congress's intent of COGSA package would be rendered useless. He also objected that the Kulmerland "presumption violates the salutary rule that courts should, whenever possible, foster good commercial practices and, accordingly, refrain from creating disincentives to mercantile economization".[181] Judge Beeks then rejected and refused to use the functional economics test. Instead, he used the Leather's Best approach and reasoned that a large reusable metal container is closer to 'detachable stowage compartments of the ship' than to a package as the word is traditionally used.

This refusal of using the functional economics test by Judge Beeks, an experienced admiralty lawyer before his appointment to the bench, and by the district courts of other

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[179] - Id. at 903-904.

[180] - Judge Beeks also said that the bill of lading is an unacceptable place to search for the parties' intent because the carrier usually drafts the document and can slant the contractual terms in its favour. Id. at 905.

[181] - Id at 904.

circuits[182] helped Judge Friendly more in Mitsui to conclude the inadequacies of the functional economics test and therefore abandoned it.

In Mitsui & Co. v. American Export Lines,[183] the Second Court consisting of Judge Oakes, Judge Feinbery and Judge Friendly re-evaluated the functional economics test and again dealt with the package problem particularly in respect to large carrier-furnished containers. This case involved two separate shipments which were shipped aboard the S.S. Red Jacket, a containership owned and operated by American Export Lines. One of which was 1834 tin ingots which was shipped to Mitsui and Co. The shipper had packed and sealed the containers which to be delivered to the consignee unopened in Japan. The ingots were put in the containers in stacks of fifteen which called 'bundles' on the bill of lading although they were not banded or strapped together. Before containerization, the evidence showed that the break bulk of this shipment had been first bundled and strapped with metal strap and then placed in the vessel's hold.[184] The bill of lading indicated the number of bundles put in the container. The Mitsui case first came before the district court. The district court, using the functional economics test and parties' intent as evidenced by the bill of lading, held that each bundle of ingots was a package within the meaning of § 4(5) and Mitsui was therefore entitled to recover an amount of $62,000.

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[182] - See, e.g. in Fifth Circuit courts the cases of: 1 - Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc., 313 F.Supp. 1334 (S.D.Fla.1970). 2 - Cia. Panameria de Seguros, S.A. v. Prudential Lines, 416 F.Supp. 641 (D.C.Z. 1976); and in Forth Circuit courts the cases of: 1 - Yeramex International v. S/S Tendo, 1977 A.M.C. 1807 (E.D.Va. 1977); 2 - In Re Norfolk, Baltimore and Carolina Line, 478 F.Supp. 383 (E.D.Va. 1979).

[183] - See note 155 supra.

[184] - 1981 A.M.C. at 335-337.

The full value of the ingots was $369,404,40. Both Mitsui and American Export Lines appealed. The case went to the Second Circuit court where Judge Friendly took again the opinion which he had taken in Leather's Best[185] that containers are functionally part of the ship. The majority agreed with. Judge Friendly regarding the inconsistency of the functional economics test with the COGSA said: "If the functional economics test were consistent with Leather's Best, we would be bound to follow it here despite the critisism it has received from commentators and other courts ..... and our own conviction that it is at odds with the language of § 4(5) and the purposes of that provision and of COGSA as a whole."[186] The court quoted with approval the Judge Beek's opinion that "technological advancements .... do not warrant a distortion or artificial *construction of* the statutory term 'package'",[187] and accepted that the COGSA package should be given a plain and ordinary meaning rather than a specialised and technical meaning being consistent with the parties' intent. This acceptance of the Second Circuit court that parties' intent should have no effect on the determination of the COGSA package undermined the parties' intent - the focus of the functional economics test upon which the test has been based. Even Judge Oakes, the creator of the functional economics test accepted the inadequency of the test where he said:[188]

> "But I have at all times .... been aware of Judge Feinberg's statement in his dissent in Standard Electrica .... that 'certainly at the expense of legislative policy and equity is undesirable and often turns out to be ephemeral', and Judge Friendly's most perceptive opinion in this case, coupled with that of Judge Beeks in Matsushita Electric Corp. v. S.S. Aegis Spirit ...., referred to and quoted at

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[185] - 451 F.2d 800 (2d. Cir. 1971).

[186] - 1981 A.M.C. at 346.

[187] -636 F.2d at 820, or Matsushita v. Aegis Spirit, 414 F.Supp. at 907.

[188] - 1981 A.M.C. at 352.

lenghth by Judge Friendly, have persuaded me that the functional economics test of Kulmerland does not function well and had better be abandoned. In the realm of container shipping, where the bill of lading specifies the contents, the ship's container should not be deemed a package - even presumptively only - irrespective of how the goods within it are packed. I therefore am joining in the abandonment of the Kulmerland-Cameco test, noting only that the results of neither case would be changed by virtue of today's decision".

Thus the death knell of the functional economics test was sounded in the Mitsui case by the Second Circuit court.

(3) - Courts' decisions after the abandonment of the 'Functional Economics Test'

(3)-1- Courts decisions in Mitsui and some other cases

It seems that district courts and appeal courts followed the *Second Circuit courts'* decision in Mitsui[189] in which the functional economics test was abandoned and the Leather's Best test was affirmed. In this respect some cases will be explained later on, but a question arises is that: did the Second Circuit court's decision in Mitsui solve the container-package problem generally? And can we say that, according to Mitsui, a cargo container is never a COGSA package?

The answer is 'no'. The decision taken in Mitsui was not a general decision governing container-package limitation problem in general. It was about 'carrier-furnished containers where the bill of lading enumerates the number of packages or units included

[189] - 636 F.2d 807 (2d Cir. 1981).

in the container', i.e. exactly similar to what had been decided in the Leather's Best case. In other words, the holding of Leather's Best was not expanded and the unanswered questions by Leather's Best, such as 'is a shipper-furnished container a COGSA package when the bill of lading does not show the contents in the container?' left again undecided. The Mitsui Court expressly stated that the factual variations left unanswered by Leather's Best were leaving for future determination[190].

Some writers[191], however, believe that the Judge Friendly's analysis of the container-package problem in Mitsui seems to favour the proposition that a cargo-container is never a COGSA package. Their reasons are: the Mitsui's Court's reliance on Matsushita in which Judge Beeks assumed that Congress had given a plain and ordinary meaning to the term 'package'; and that Judge Beeks's opinion that "technological advancements, whether or not foreseeable by the COGSA promulgators, do not warrant a distortion or artificial construction of the statutory term 'package'"[192] was quoted with approval in Mitsui.

This reasoning and the conclusion that Mitsui favours the proposition that a cargo container is never a COGSA package, with respect, seems not to be correct because firstly, although Judge Beeks, in Matsushita gave those opinions, he immediately continued that "a ruling that these large re-useable metal pieces of transport equipment

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[190] - Id. at 821.

[191] - See, e.g. G.Denegre Admiralty - Carrier-owned shipping container found not to be COGSA 'package', Tulane Law Review vol. 56 p.1409 [1982].

[192] - Matsushita 414 F.Supp 894 at 907.

qualify as COGSA packages - at least where, as here, they were carrier-owned and supplied - would amount to just such a distortion[193]". He just gave his opinion regarding carrier-furnished containers and left the other containers, such as shipper-furnished containers, for future determination where he said[194]: " .... while the result reached herein (a container is ship's transport equipment rather than a COGSA package) seems satisfactory in all cases where the carrier furnishes the containers, the appropriate application of the COGSA package limitation to containers owned by a shipper or any person other than the carrier such as a freight forwarder must await future determination". Secondly, Judge Friendly in Mitsui - a carrier-furnished container case - expressly refused to extend the holding of Leather's Best where he said:

> "Nothing said here, of course, covers the situation in which the bill of lading does not show how many separate packages or units there are."[195]

He also, with reference to Leather's Best,[196] said:

> " .... we left open the possibility that there might be some instances where a container might be the package, e.g. when the shipping documents, like those in Standard Electrica, gave the carrier no information as to the contents".[197]

So, we can simply understand that these analysis of Judge Friendly not only do not seem to favour the proposition that 'a cargo container is never a COGSA package', but they seem to favour the proposition that a cargo container might be a COGSA

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[193] - Id.

[194] - Id. at 909.

[195] - 636 F.2d 807 at 821 n. 18.

[196] - 451 F.2d 800 (2d. Cir. 1971).

[197] - 636 F.2d 807 (2d Cir 1981).

package. Thirdly, the Mitsui court cited the 1968 Brussels Protocol,[198] as a support for its understanding of COGSA's language and purposes; where the court said:

> "Where a container, pallet or similar 'article of transport' is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such articles of transport shall be deemed to be the number of packages or units; if, on the other hand, the bill of lading does not show how many separte packages there are, then each 'article of transport' shall be deemed a package or unit".

The court then added:[199]

> "Even if the language and purpose of COGSA left us in doubt as to whether carrier-furnished container whose contents are disclosed should be treated as packages, the interest in securing international uniformity would thus suggest that they should not be so treated".

This citation of the 1968 Brussels Protocol by the Mitsui court suggests that if the shipper-prepared bills of lading do not show the number of packages or units in the container, the carrier will have a rationale to argue that the container is a COGSA package. In other words, this citation seems to be contrary to the proposition that 'a cargo container is never a COGSA package'.

So the Mitsui court did not solve the container-package problem generally. The court, however, reaffirming the Leather's Best holding, made a development to the Leather's Best approach, i.e. the court made it clear that if in a carrier-furnished container, the

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[198] - Also, earlier, the court in Inter-American Foods, Inc. v. Coordinated Caribbean Transport, Inc., 313 F.Supp. 1334 (S.D.Fla.1970), a container case, had largely relied on the 1968 Brussels Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and held that each carton constituted a package under § 4(5). Id at 1337-39.

[199] - 636 F.2d 807 at 820.

container's contents have been enumerated in the bill of lading, but they do not qualify to be regarded as packages, neither the container nor the contents are COGSA packages. The carrier's liability limitation is, therefore, based on customary freight unit[200] upon which the freight has been calculated or on the bill of lading-defined unit rather than on the container as a package.

After the Mitsui case, the Fifth Circuit faced the container-package problem in the case of Allstase Insurance Co. v. Inversioners Navieras Imparca[201] in which the carrier-owned container was loaded with 341 cartons of electrical goods by the shipper's employee at his warehouse. The bill of lading stated the shipment as "one 20ft. container with 341 cartons". On delivery, it was discovered that a number of cartons were missing. The district court held the container to be a 'package'. The plaintiff appealed. The Fifth Circuit court after a review of the container-package problem followed the Leather's Best holding which had been reaffirmed in Mitsui, and reversed the district court's decision. The court said: "we believe that the rule developed in Mitsui and Leather's Best is the best judicial solution, in the absence of a legislative solution". The court did not expand the Second Circuit rule because the facts of the Allstate case fall squarely within the facts and holding of Leather's Best and one of the two decisions rendered in Mitsui[202]. To reach its decision the court reasoned that the Section 4(5) of COGSA was enacted to

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[200] - Previously the court in Cia Panamena de Seguros, S.A. v. Prudential Lines, 416 F.Supp. 641 (D.C.Z. 1976), had reached the decision which if the packages inside the container did not qualify to be COGSA packages, e.g. they be smaller than those shipped break bulk, the carrier's liability limitation was based on customary freight units.

[201] - 646 F.2d 169 (1981).

[202] - Id. n.2.

prevent the carrier's power of superior bargaining and "to set a reasonable figure below which the carrier should not be permitted to limit his liability".[203]

Container package problem also came up in the case of Croft and Scully Co. v. M/V Skulptor Vuchetich[204] in which 1755 cases of soft drinks were loaded in a carrier-furnished container by the shipper's employee and was delivered to the carrier. The carrier-prepared bill of lading described the container's contents as follows: "20 ft. container stc:[205] 1755 CASES DELAWARE PUNCH". The container negligently was dropped by the stevedore's employees before it was shipped and as a result the cases of soft drinks were damaged. The plaintiff brought an action against the stevedore. The district court held the container to be a package and relying on the Himalaya Clause[206] in the bill of lading held that the stevedore's liability was limited to $500. The plaintiff, Croft & Scully, appealed. The Fifth Circuit court, speaking through Judge Brown, citing Leather's Best, Mitsui and Allstate, held that Allstate governed and reversed the district court's decision. The court once again held that a carrier-furnished container whose contents had been stated in the bill of lading was not a COGSA package.

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[203] - Id. at 171.

[204] - 664 F.2d 1277 (1982).

[205] - In maritimes 'stc' stands for 'said to contain'.

[206] - for an explanation as to Himalaya Clause see Brown & Root v. M/V Reisander, 648 F.2d 415 5th Circuit 1981.

- The Role of Parties' intents when COGSA has Contractual Force

It is worth being noted that the role of parties' intents in determining a COGSA package where the COGSA provisions have its own force (law force) is entirely different from where they just have contractual force by being incorporated in a contract of carriage evidenced by the bill of lading. If they have law force on the contract, the parties' intents have, as stated, no effect on COGSA package determination. For example, in Mitsui[207] the COGSA provisions had law force. The Second Circuit court abandoned the functional economics test which had been based on the parties' intents. The court held that the Congress's intent rather than the parties' intents should have effect on COGSA package determination. If, on the other hand, they have contractual force on the contract, the parties' intents have effect on COGSA package determination. However, if it can not be cleared that what the parties really intended to be treated as a COGSA package, but the bill of lading states the contents of the container and its number, allstate governs.[208] For example, in Croft & Scully Co. v. M/V Skulptor Vuchetich ,[209] the COGSA provisions had contractual force rather than law force because the forklift accident occured in the yard and not on the vessel and the incident did not therefore come within COGSA paragraph 1(e) which says:" The term 'carriage of goods' covers the period from the time

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[207] - See note 155.

[208] - See note 201.

[209] - 508 F.Supp. 670 (S.D. Tex. 1981); 664 F.2d 1277 (1982).

when the goods are loaded on to the time when they are discharged from the ship".[210] But clause 1 of the bill of lading gave a contractual force to the COGSA provisions governing the contract of carriage before the goods were loaded on the ship and after they were discharged from the ship and throughout the entire time the goods were in the custody of the carrier. The 5th Circuit court, therefore, with reference to some cases,[211] said:

> "Thus, its provisions (the COGSA provisions in Skulptor) are merely terms of the contract of carriage which, like any other contractual terms, call out for judicial interpretation in case of dispute".

The Fifth Circuit Court then said: "In Pannell v. United States Lines Co., 263 F.2d 497, 498 (2d. Cir.), cert. denied, 359 U.S. 1013 [79 S.Ct. 1151, 3 L.Ed. 2d 1037] (1959), the Second Circuit held that when COGSA does not apply ex proprio vigore, effect should be given to the parties' definition of package even if that definition is contrary to that which would control if COGSA were directly applicable." The court, therefore held:

> "We find nothing in the bill of lading to indicate that the contracting parties intended some special meaning of the term "package". Since Croft & Scully included information about the contents of the container and their number, Allstate governes."

In conclusion, according to the Skulptor case, if the COGSA provisions have a

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[210] - See Pan American World Airways v. California Stevedore & Ballast Co., 559 F.2d 1173, 1177 n.5 (9th Cir. 1977), cited in Croft .... v. M/V Skulptor,: (COGSA applies 'from the time the ship's tackle is hooked onto the cargo at the port of loading until the time when the cargo is released from the tackle at the port of discharge').

[211] - Commonwealth Petrochemicals, Inc. v. S/S Puerto Rico, 607 F.2d 322, 1979 A.M.C. 2772 (4th Cir. 1979); Also in Pannelli, 263 F.2d at 498, 1959 A.M.C. at 936, the court explained: "where a statute is incorporated by reference its provisions are merely terms of the contract evidenced by the bill of lading".

contractual force, a carrier-furnished container whose contents and their number have been shown in the bill of lading should not be treated as a package if the bill of lading does not indicate the parties' intent of the term "package". Otherwise the parties' intents of the term 'package' prevails. Thus, if the parties intend, in the bill of lading, the container to be treated as a package, then the container will be regarded as a package even if it be contrary to the time when COGSA has a law force.[212]

In 1983, the container package problem came up in the case of Vegal v. Compania Anonima Venezolana De Navegacion, 720 F.2d 629 (11th Cir. 1983). There the court used the Allstate rule that "if a shipper places its packages of goods in a container furnished by the carrier and discolses the number of packages in the container to the carrier in the bill of lading or otherwise, each pacakage or unit within the container constitutes one package for purposes of COGSA's five hundred dollar limitation of liability." In other words, the container package problem was not solved and the unanswered question of: "is a container a COGSA package if a shipper loads the container and the bill of lading does not show the number of packages in the container?" was left unanswered.

In 1981, the case of Smythgreyhound v. M/V Eurygenes[213] came up in the Second Circuit Court of Appeal. In this case the plaintiff's cargo which were consisted

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[212] - Pannell v. United States Lines Co. 263 F.2d 497, where the Second Court held that when COGSA does not apply ex proprio vigore, effect should be given to the parties' definition of package even if that definition is contrary to that which would control if COGSA were directly applicable.

[213] - 666 F.2d 746.

of cartons of stereo equipment packed in containers supplied by the carrier and delivered to him. The terms of COGSA were incorporated in the bill of lading and had contractual force. Bill of lading specified both the number of containers and the number of cartons. The district court held that the plaintiff's recovery was limited to $500 per container. The plaintiffs appealed. The Second Circuit Court, using the Mitsui holding, refused to hold a shipping container to be a COGSA package and held that the cartons in the containers which were shown in the bill of lading constituted the number of "packages". The Second Circuit Court in its decision said: "Mitsui and our decision today will put carrier interests on notice that the container will not be considered the COGSA "package" where the bill of lading discloses the contents of the container. This does not mean that the parties cannot agree between themselves that the container will be the COGSA "package", especially in cases where COGSA does not apply ex proprio vigore. Rather, we hold today that in the absence of clear and unambiguous language indicating agreement on the definition of "package", then we will conclusively presume that the container is not the pacakge where the bill of lading discloses the container's content." In other words if there is a clear agreement between the parties that the container is treated as a COGSA pacakge, the court might consider the container as a COGSA package even if its contents have been disclosed in the bill of lading.

Although the Second Circuit Court in Smythgreyhound has used the Mitsui holding, we can see two new points in the Second Circuit Court's decision in the Smythgreyhound case. firstly, according to Matsushita and Mitsui, where COGSA has law force and applies ex proprio vigore, the parties' intents or agreement on the definition

of "package" should have no effect on the container package determination,[214] whereas according to Smthgreyhound, the parties' intents and agreement on the definition of package, if indicated clearly and unambiguously, has a very important role and effect on the container-package determination. Secondly, the Smythgreyhound's decision has developed the Mitsui general rule. According to Mitsui, a carrier-supplied container whose content has been indicated in the bill of lading is not treated as a COGSA package, whereas according to Smythgreyhound, a container, whether supplied by the carrier or not, whose content has been shown in the bill of lading will not be considered as a COGSA package absent a clear agreement between the parties to that effect.

In 1982 when the case of Allied International American Eagle Trading Corporation v. S.S. "Yang Ming"[215] came up in the Second Circuit court, the court gave its view as to container-package determination that "the courts must examine the parties' contractual agreement". In other words the court, once again, contrary to the Matsushita case, gave effect to the parties' intents as to container package determination. The court in its dicta said: "Because of their size and their function in the shipping industry, containers are ordinarily not considered "packages". But when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the "package" shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package ... At base the court must

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[214] - Judge Beeks in Matsushita (414 F. supp. 894), quoted with approval in Mitsui, criticized the "functional economics" test by pointing out that the parties' intent, as evidenced by the bill of lading, should have no effect on a COGSA determination. The court noted that the liability-limiting provisions would be rendered useless if the parties were able to allot liability simply by defining a container as a package.

[215] - 672 F.2d 1055 (2d. Cir. 1982).

examine the parties' contractual arrangement .... in container cases, the courts must look askance at an agreement which purports to define a container as a "pacakge" because the result of such a limitation can be ludicrous ... until there is a legislative revision of the $500 package limitation, the parties must abide by the contracts expressed in the bill of lading."

(3)-2- Binladen approach regarding 'container-package' problem

In 1985 in the case of Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdom[216] the Second Circuit Court faced the peoblem "is a container a COGSA package if the bill of lading fails to disclose to the carrier the number of packages in the container?" which had been left unanswered in Mitsui, Allstate, Smythgreyhound, etc. For applying Section 4(5) to containerized shipments the court identified four basic principles of which some have been based upon the parties' contractual agreement. The four principles are as follows: first, "the touchstone of our analysis should be the contractual agreement between the parties, as set forth in the bill of lading."[217] Second, the term "package" means "the result of some preparation [of the cargo item] for transportation ... which facilitates handling but which does not necessarily conceal or completely enclose the goods."[218] Third, since a container is functionally part of the vessel, a container cannot be a COGSA package absent "a clear agreement between the parties to that effect,

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[216] - 759 F 2d 1006 (2d. Cir. 1985).

[217] - Id. at 1012.

[218] - Id.

at least so long as 'its contents and the number of pacakges or units are disclosed'".[219] Fourth, "absent an agreement in the bill of lading as to packaging of the cargo, goods placed in containers and described as not separately packaged will be classified as 'goods not shipped in packages'".[220] As to the very significant role of the parties' intents the court then said: " ... nothing precludes the parties from agreeing in their contract (the bill of lading) that each container shall constitute a package". To answer the noted problem the court said: "When a bill of lading specifies the number of containers but does not reveal the number of packages inside, the only certain figure known to both parties is the number of containers being shipped. In such event the carrier cannot be charged with knowledge of whether the container is filled with packages, with unpackaged goods, or with some combination ...", and held that: "when the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of "goods not shipped in packages", maximum damages in such a situation then are $500 per container, irrespective of the contents." The court then added: "Any other interpretation would prevent the carrier from accurately assessing its potential liability at the time it contracts to transport the goods".

The Second Circuit court in Binladen also answered the question reserved in Mitsui's footnote 18 and in Smythgreyhound, i.e: is a container a COGSA package if the bill of lading lists only the number of containers under "No. of Pkg's" and describes the cargo in terms of items that cannot reasonably be understood as packages? The Binladen

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[219] - Id.

[220] - Id.

court held that "we are satisfied, notwithstanding our traditional reluctance to treat a container as a COGSA package, that the terms of the bill of lading should govern; if it lists the container as a package and fails to describe objects that can reasonably be understood from the description as being package, the container must be deemed a COGSA package. This rule not only accords with the 1968 Brussels Protocol,[221] but has the virtue of certainty". The court noted that if the shipper intends to rely on the description portion of the bill of lading to disclose to the carrier the number of COGSA "packages" in a container, that description must indicate "the number of items qualifying as packages (i.e. connoting preparation in some way for transport), such as "bundles", "cartons", or the like."[222]

So, in answering this question, too, the court has regarded to the parties' intent that whether they have treated the container as a package.

Court of Appeals for the Eleventh Circuit in the case of Hayes-Leger Associate inc. v. M/V Oriental Knight,[223] a container case, followed the Binladen case. The Eleventh Circuit court after mentioning the four basic principles, which were identified

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[221] - The 1968 Brussels Protocol provides in pertinent part:

> "where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package of unit."

[222] - The Binladen, 759 F.2d 1006 at 1013-14.

[223] - 765 F.2d., 1076 (1985).

in Binladen for applying Section 4(5), said:

> "The net effect of these principles can be summarized in the follwoing two rules: (1) when a bill of lading discloses the number of COGSA pacakges in a container, the liability limitation of Section 4(5) applies to those packages; but (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of Section 4(5) applies to the containers themselves." The court added that: "In our view these two rules represent a reasonable method for applying Section 4(5) to the developing area of containerized shipping. As the Second Circuit noted, the rules comport with the 1968 Brussels Protocol and provide much-needed certainty. Uniformity is also an important consideration, since vessels often travel between different jurisdictions. We therefore adopt the rules announced by the Second Circuit in the Binladen BSB Landscaping."

- **Objections to the Binladen approach regarding container-package problem**

Regarding container-package problem the court in the case of Smythgreyhound v. M/V Eurygenes,[224] said: " ... the parties can agree between themselves that the container will be the COGSA 'package'", and in the case of Allied International ... v. S.S. Yang Ming[225] said: "the courts must examine the parties' contractual agreement." The basis of decision-making in the case of Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdom,[226] regarding container-package problem, is based on the clear agreement of the parties mentioned in the bill of lading to the effect that what constitutes a COGSA package for the purpose of per package limitation.

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[224] - 666 F.2d. 746 (1981).

[225] - 672 F.2d. 1055 (2d. Cir 1982).

[226] - 759 F.2d. 1006 (2d Cir. 1985).

This decision-making, although seemingly consistent with the 1968 Brussels Protocol and provides uniformity, can be severely objected because it is on the base of parties' intents.

The parties' intent upon which the parties' agreement is made cannot have any effect in determining what constitutes a COGSA package for the purpose of per package limitation when the COGSA rules have its own force (law force) on the contract because the COGSA liability-limiting provision is of mandatory character while the parties' agreement is of contractual character. Since mandatory provision prevails the contractual provision, it is, therefore, the Congress' intent which should have effect on the COGSA package rather than the parties' intents. In Mitsui & Co. v. American Export Lines[227] the Second Circuit court accepted that the parties' intent should have no effect on the determination of the COGSA package and thereby undermined the parties' intents upon which the functional economics test was based. Instead the Mitsui court held that it was the Congress's intent which should have effect on the COGSA package. Also in Matsushita Electric Corp v. S.S. Aegis Spirit[228] Judge Beeks, who held that the Congress's intent of COGSA package was its plain and ordinary meaning of the word 'package', said "it is not the parties' characterization of the shipment, but the court's interpretation of the statute, that controls". He reasoned that "The undoubted objective of 46 U.S.C. § 1304(5) was to establish a minimum floor below which carriers subject to the act could not reduce their liability for cargo damage. If carriers alone, or even carriers and the shippers together, are allowed to christen something 'package' which distorts or

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[227] - 636 F.2d. 807 (2d Cir 1981).

[228] - 414 F. supp. 894 (W.D. Wash. 1976).

belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable."

In the parties' agreement on "what constitutes a COGSA package" there is both the shipper's intent and the carrier's intent. When these intents reach a common point and accommodate with each other, the parties' agreement on "what constitutes a COGSA package" is concluded. According to the Binladen approach "The touchstone of our analysis should be the contractual agreement between the parties, as set forth in the bill of lading".[229]

With respect to the fact that the parties' agreement, according to the Binladen, is set forth in the bill of lading and "the bill of lading is an unacceptable place to search for the parties' intent because the carrier usually drafts the document and can slant the contractual terms in its favour",[230] and to the fact that shippers are sometimes inevitable to send their shipment, there is a possibility that the shipper's intent of the COGSA package, at the time of concluding an agreement, is not a real and independent intent but depends wholly on the carrier's intent of the COGSA package. This will create a possibility for the carrier to treat a, e.g. container as a COGSA package and the shipper, because of the lack of independent intent, follows him. The carrier, therefore, in fact, limits his liability to $500 per container. Accepting the Binladen approach, the court will not be able to declare this limitation of liability as void in accordance with Article 3(8)

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[229] - 759 F.2d. 1006 (2d Cir. 1985) at 1012.

[230] - Judge Beeks in Matsushita Electric Corp. v. S.S. Aegis Spirit 414 F. Supp. 894 at 905.

of the COGSA (the Article guaranteeing the execution of Article 4(5) and therefore, the achievement of the COGSA purpose) because according to the Binladen approach the parties' agreement mentioned in the bill of lading has effect on the COGSA package determination. The result of the acceptance of the Binladen approach would probably be not to achieve the purpose of the COGSA, i.e. to protect the shipper against the superior bargaining contract of the carrier.

So I conclude that it should be the Congress's intent which should have effect on the COGSA package determination rather than the parties' intent. If the Congress's intent of the COGSA package cannot easily be cleared from the COGSA Rules, this is not a good reason to refer to the parties' agreement as to the COGSA package in order to clarify the meaning of COGSA package because, doing so, we will, as said, not achieve the COGSA purpose. The court, therefore, should try either to find the Congress's intent of the COGSA package for the purpose of per pacakge limitation or to interpret the statute in order to find the meaning of the COGSA package so that to achieve the purpose of the COGSA.

It seems to me that the best way to understand what constitutes a COGSA package is probably the way of "exercising the shipper's intent of the package". This way which, I think, satisfies the purpose of the COGSA has already been mentioned.[231]

[231] - See pp. 77 & 134 of this thesis.

3.1:8:2.2 English courts' views

English courts have not yet been faced with the problem of "per pacakge limitation" in relation to container transports. So there is not any decision made by them so far. However, the United Kingdom Carriage of Goods by Sea Act 1971 (the U.K. COGSA, 1971) has scheduled the 1968 Brussels Protocol[232] (Hague-Visby Rules) which attempt to solve the problem of "per pacakge limitation" in relation to container transports.

Article IV 5(c) of the Hague-Visby Rules provides:

> "Where a container, pallet or similar article of transport is used to consolidate goods, the number of pacakges or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

So it seems that English courts will, wherever the 1971 COGSA applicable, apply this container clause (Art. IV 5(c)) if they face the problem in question, i.e. when a bill of lading discloses the number of packages or units as packed in an article of transport, the liability limitation of Section IV 5(a) applies to those packages or units rather than the article of transport itself; and when a bill of lading, for example, fails to disclose the number of packages or units as packed in an article of transport, the liability limitation of Section IV 5(a) applies to that article of transport rather than the packages or units therein.

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[232] - The 1968 Brussels Protocol to the Hague Rules came into force in the United Kingdom on June 23, 1977, and the Carriage of Goods by Sea Act 1971 was implemented on the same day.

Although the United States of America has not yet accepted the Hague-Visby Rules and American courts are, therefore, acting according to the 1936 U.S. COGSA, we can see that the recent decisions made by the American courts,[233] about the problem in question, comport with the container clause mentioned in Art. IV 5(c) of the Hague-Visby Rules. This will of course cause uniformity which is of an important consideration because vessels often travel between different jurisdictions so that there is the possibility of conflict of laws.

It is, however, submitted that there are inadequacies in Art. IV 5(c). For example, Scrutton[234] has numbered some difficulties which the court may in due course have to consider such as:

(1) What articles of transport are "similar to" containers and pallets?

(2) What precisely is meant by "used to consolidate" goods?

(3) In what circumstances is the number of packages "enumerated in the bill of lading as packed" in the container?

It is to be noted, in the Hague-Visby Rules, that the "per package limitation" problem in relation to container transports arises when the shipper, whose container damaged or lost, desires to recover damages on the base of the "per package or unit" system. In this event the court has to go on the container clause, Art IV 5(c), to see whether the container itself constitutes a package or the packages inside the container

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[233] - The Second Circuit court in Binladen, supra, 759, F.2d. 1006 (1985); the 11th Circuit court in Hayes ... v. M/V Oriental Knight 765 F.2d. 1076 (1985).

[234] - Scrutton on Charterparties and Bills of Lading,19th ed. London, 1984, p. 455.

constitute packages for the purpose of "per package limitation". Otherwise, if the shipper desires to recover damages on the base of weight system, an amount per kilogramme of gross weight of the goods lost or damaged, the "per package limitation" problem in relation to the container will never arise, and the court can calculate the shipper's damages according to the gross weight of the goods inside the container because Article IV (5)(a) of the Hague-Visby Rules scheduled in the 1971 COGSA provides:

> "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher."

In the Hague-Rules the carrier's liability limitation was only based on the "per pacakge or unit system", a system upon which the shipper could recover damages on a fixed amount per package or unit, whereas in the Hague-Visby Rules there are two systems for the calculation of the carrier's liability limitation, one is based on the "per package or unit", i.e. the same as the Hague Rules' system of the carrier's liability limitation, and the other one is based on the weight system. The carrier's liability limitation is the one which is higher. To calculate which one is the higher the court needs to know the number of packages or units of the cargo damaged or lost. Before the 1968 Brussels Protocol, knowing the number of packages in relation to container cases was a problem because, as said, there were different interpretations as to whether the container or its contents constituted COGSA packages. It seems that this problem was solved by the container clause mentioned in Article 4(5)(c) of the 1968 Brussels Protocol. In other words we can say that the container clause was enacted to light the number of packages in container cases and consequently to make it easily possible to calculate which amount

is the higher in accordance with Article 4(5)(a) of the 1968 Brussels Protocol.

3.1:8:2.3 The view of "exercising the shipper's intent of package" and the problem of COGSA "per package limitation" in relation to the containerization and palletization.

As stated,[235] the problem of COGSA "per package limitation" (what constitutes a COGSA package for the purpose of "per package limitation") may be resolved by using the view of "exercising the shipper's intent of package". This view may be also helpful in order to solve the problem of the COGSA "per package limitation" in relation to containerization and palletization. According to this view it is the shipper's intent of package mentioned in the bill of lading which determines whether the container itself or its inside packages constitute COGSA packages for the purposes of COGSA "per package limitation."

Thus, if the number of packages included in the container are enumerated in the bill of lading, whether by the shipper's demand or the carreir himself enumerates those packages to which no objection is made by the shipper as if the shipper has intended that enumeration, those numbers will constitute the number of packages for the purpose of COGSA "per package limitation", even if those packages are not, wholly or partially, visible or countable, because it is the shipper's intent of package determining what constitutes a COGSA package. And, if the shipper has not asked for the enumeration of packages, included in the container or pallet, in the bill of lading and, therefore, the number of packages inside the container or pallet has not been enumerated in the bill of

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[235] - See p. 77 of this thesis.

lading, but just the number of such a container or pallet, which is visible and countable for the carrier, is enumerated in the bill of lading, either by the carrier to which no objection is made by the shipper or by the shipper's demand, the number of container or pallet will constitute the number of packages for the purpose of COGSA "per package limitation". This is because when the shipper does not demand the enumeration of the packages placed in the container or pallet but just demands the enumeration of containers or pallets, or when there is no demand for the enumeration of either the inside packages or the containers and the carrier enumerates the number of containers as packages to which no objection is made by the shipper as if he (shipper) has intended that enumeration to be shown in the bill of lading, it shows that the shipper is happy with the enumeration of the containers or pallets and with considering them as COGSA "packages" for the purpose of "per package limitation".

It should be noted that:

1 - This view is, like the Binladen approach (but without having its objections), consistent with the container clause[236] mentioned in the Hague-Visby Rules. According to this view "the enumeration of packages in the bill of lading" mentioned in the container clause should be done by the shipper or the carrier to which no objection is made by the shipper because the container clause of the H-V-Rs should be read with Article 4(5)(a) which, in turn, should be read with Article 3(b)(c) of the H-V-Rs.[237] Doing so, we will reach the result that was

[236] - Article 4(5)(c) of the Hague-Visby Rules.

[237] - See pp. 77 & 78 of this thesis.

previously mentioned, i.e. it is the shipper's intent of package mentioned in the bill of lading which determines what constitutes a H-V-Rs package.

2 - This view is consistent with the Judge Friendly's opinion that "...we left open the possibility that there might be some instances where a container might be a package,"[238] because according to this view, too, a container may be regarded as a COGSA package.

3 - This view comports with the decision made in the Leather's Best case because the Leather's Best court would have reached a decision like the Leather's Bests's decision if it had had regard to "the shipper's intent of package mentioned in the bill of lading".

4 - This view is preferable to the Binladen approach based upon the parties' agreement as to what constitutes a COGSA package because it is not open to the same objections as the Binladen approach mentioned before,[239] i.e. it is the shipper who, independent of the carrier's intent of the COGSA package, specifies the package which may constitute a COGSA package for the purpose of "per package limitation".

If this view is, therefore, accepted in relation to the container-package problem,

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[238] - J. Friendly's opinion in Mitsui with reference to Leather's Best.

[239] - See p. 127 of this thesis.

in addition to its advantages mentioned before,[240] it will, unlike the Leather's Best and Mitsui decisions which did not solve the problem generally, solve the container-package problem in general.

A question which arises is that if the shipper enumerates the number of container and packages included therein in the bill of lading but the items of cargo which he has intended to be packages cannot reasonably be regarded as packages, what will constitute a COGSA package according to the view of "shipper's intent"?

Although, according to this new view, it is the shipper's intent which determines a COGSA package, the shipper, as suggested above,[241] is not free to choose any item of cargo as a package. He should choose an item of cargo as a package which can reasonably be considered and qualifies as a package like bundles, cartons.[242] So if the shipper lists items of cargo included in a container as "packages" and enumerates them in the bill of lading but they cannot reasonably be regarded as "packages", they will not constitute the number of COGSA packages. It seems that the container, too, should not be regarded as a COGSA package because the mere mention of those items of cargo as "packages" in the bill of lading by the shipper would clearly suggest that the shipper has not meant the container to be regarded as a package. Therefore, according to this view, in a situation like this, neither the container nor the items of cargo included therein can be regarded as COGSA packages. The carrier's liability limitation should be, therefore,

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[240] - See pp. 83 & 84 of this thesis.

[241] - See p. 81 of this thesis.

[242] - See the Binladen, supra note 216, p. 1013-14.

calculated in an alternative way mentioned in the Hague or Hague-Visby Rules scheduled in a domestic act. In the Mitsui case, although the court reaffirmed the Leather's Best approach, it reached a similar view regarding a carrier-furnished container whose contents cannot be regarded as packages. The court made it clear that if in a carrier-furnished container whose contents have been enumerated in the bill of lading the contents do not qualify to be regarded as pacakges, neither the container nor the contents are COGSA packages and the carrier's liability limitation is based on customary freight units[243] upon which the freight has been calculated rather than on the container as a package.

Another question which arises is that if goods not shipped in packages are loaded into containers and the shipper enumerates the number of containers in the bill of lading and states in it "goods not shipped in packages", will the containers constitute the number of COGSA packages or not, according to the view of "the shipper's intent"?

If the shipper enumerates just the number of containers as, e.g., two packages in the bill of lading without any such description, there is no doubt that the number of containers, i.e. two, will constitute the number of COGSA packages for the purpose of "per package limitation" and the carrier's liability is limited to the statutory limit, e.g. $500 per container according to the 1936 U.S. COGSA. But if the shipper, in addition to the enumeration of containers in the bill of lading, mentions the phrase of "goods not shipped in packages", this shows that the shipper would certainly enumerate the number of packages if his goods could be shipped in packages. Using the phrase of "goods not

[243] - 'Customary freight unit' has been used in the 1936 U.S. COGSA upon which the carrier's liability limitation may be calculated.

shipped in packages", the shipper, in fact, declares that he intends to mention the number of packages in the bill of lading but he cannot because of the nature of the goods which are not usually shipped in packages. In other words, the mere mention of the phrase of "goods not shipped in packages" would suggest that the shipper has not intended the container to be a COGSA package.

So, in a situation like this, it seems that, according to the view of "the shipper's intent", neither the container nor its contents are COGSA packages. The carrier's liability limitation should, therefore, be calculated in accordance with another alternative way mentioned in the Hague or Hague-Visby Rules, whichever appropriate, as they have been scheduled in a domestic act of contracting states.

3.2 UNDER THE HAMBURG RULES

3.2:1 A brief history about the Hamburg Rules[1]

Although the Hague Rules were remarkably successful, their ambiguities and inadequacies such as the carrier's "per package or unit limitation" of liability, i.e. 100 sterling gold value[2] on the one hand, and the development of shipping technology such as the introduction of containers, which caused the container-package problem to which the Hague Rules did not provide a solution so that it resulted in different decisions in different countries,[3] on the other hand,[4] brought about the signing of the 1968 Protocol - an amendment to the Hague Rules which had been drafted by the CMI. This which is known as the Hague-Visby Rules[5] came into force in June 1977 and has, as of 31 Dec. 1987, unlike the Hague Rules which has 91 Contracting Parties, just 19 Contracting

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[1] - Regarding a detailed history of the Hamburg Rules see: Selving An Introduction to the Hamburg Rules, Transporti Maritimi No. 18 - 1979 (1978); Tetley, The Hamburg Rules - A Commentary ..., [1979] L.M.C.L.Q.1; Moore The Hamburg Rules, 10, J. Mar. L. & Com. 1 (1978).

[2] - S. Mankabady, Comments on the Hamburg Rules, published in The Hamburg Rules on the Carriage of Goods by Sea, edited by S. Mankabady, 1978.

[3] - J.C. Moore, supra note 1, at p. 3.

[4] - A. Diamond A legal analysis of the Hamburg Rules, Lloyd's of London Press, 1978; UNCTAD Secretariat Report The Economic and Commercial Implications of the Entry into force of the Hamburg Rules and the Multimodal Transport Convention, part 1, 1987, p. 7 (TD/B/C. 4/315).

[5] - Another conference was organized in Dec. 1979 to consider the monetary system of the limitations stated in these Rules, which resulted in an amendment which changed the unit from "Poincare" gold franc to Special Drawing Rights (SDR).

Parties which means they are not in force "wordlwide".[6]

Although the 1968 Protocol made important amendments to the Hague Rules and created new provisions such as the "container clause", they were quite few, particularly in respect of the carrier's liability so that it appeared that the Protocol had failed to bring the Hague Rules up to date.[7]

Later when the United Nations Organisation considered the Hague/Visby Rules, it found out they not to meet: a) the demands of modern developments with respect of cargo handling and documentary practices;[8] b) the needs of economic developments of the developing countries because they were favourable to shipowners rather than cargo owners who are mainly nationals of developing countries.

Therefore, in order to update the Hague Rules and its amendments, and to achieve a fairer balance in the allocation of risks, rights and obligations in the rules on liability between the carriers and the shippers,[9] the United Nations decided to review the Hague Rules and to produce a new convention on carriage of goods by sea to replace the Hague/Visby Rules. After a considerable lengthy discussion, the UNCITRAL Working Group, who had undertaken to review the Rules, represented its draft convention on carriage of goods by sea. The draft was adopted by UNCITRAL and was then submitted

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[6] - UNCTAD, supra note 4, pp. 8-9.

[7] - A. Diamond, supra note 4, p. 2.

[8] - UNCTAD, supra note 4, p. 10 para. 26.

[9] - Ibid. p. 4.

to a United Nations diplomatic conference held in Hamburg in March 1978. The draft convention was with slightly amendements adopted by the Conference and was known as the 1978 Hamburg Rules.[10]

The Hamburg Rules have not yet come into force. By their terms they will not come into force until one year passes from the deposit of the instrument of ratification or adherence by the twentieth State. Article 30(1) of the Hamburg Rules provides: "This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession".

Since, as of 26 October 1989, seventeen States have ratified or adhered to the Convention[11] and it is likely that they[12] will come into force in near future, it is worth considering the multimodal transport operator's liability for the loss of or damage to goods under the Hamburg Rules.

3.2:2 Application of the Hamburg Rules to a multimodal transport contract

Since the Hamburg Rules are intended to govern carriage of goods by sea contracts, they do not apply to a multimodal transport contract. However, a multimodal

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[10] - The detailed reasons of the revision of the Hague/Visby Rules have come in the UNCTAD report: UNCTAD TD/B/C. 4/ISL/6.

[11] - UNCTAD, supra note 4, part 2, p. 61.

[12] - The Hamburg Rules, like the Hague Rules, are mandatory regimes of law: Article 23 of the Hamburg rules; see H.M. Kindred From Hague to Hamburg: International Regulation of the Carriage of Goods by Sea, Dalhousie Law J., 1983, Vol. 3, at p. 593.

transport contract involving a sea leg of transport is deemed by the Hamburg Rules[13] to be a contract of carriage by sea in so far as it relates to the carriage by sea, i.e. the sea leg of such a multimodal transport contract is subjected to the Hamburg Rules.[14]

Article 1(6) of the Hamburg Rules provides:

> "'Contract of carriage by sea' means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purpose of this convention only in so far as it relates to the carriage by sea".

As a result a multimodal transport operator (MTO) who concludes such a multimodal transport contract seems to be a Hamburg Rules' carrier in so far as his contract relates to the carriage by sea because Article 1(1) of the Hamburg Rules defines 'carrier' "as any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper." In other words, the Hamburg Rules' "definition of carrier" would include a MTO who concludes a multimodal transport contract involving a sea leg of transport.[15]

As seen the definition of "carrier" in the Hamburg Rules is very general. Unlike

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[13] - Art. 1(6) of the Ham. Rs.

[14] - "The Hamburg Conference decided to subject the sea part of a multimodal transport operation to the Hamburg Rules": UNCTAD, supra note 4, p. 31; kindred, supra note 12, at p. 593; A. Diamond, supra chap 2 note 14, p. C30 note 3; Article 2(1) of the Ham. Rs. provides: "The provision of this Convention are applicable to all contracts of carriage by sea ...". As seen, unlike the H/V Rs which bill of lading is important, types of document used in maritime transport is not important. See Aljazayeri, infra chap, note 32, p. 152.

[15] - UNCTAD, supra note 4, at p. 29; A. Diamond, supra chap 2 note 14, p. C8; Jackson, Conflict of conventions, infra chap. 6 note 65 ,p. G4.

the Hague/Visby Rules,[16] the carrier does not need to be a shipowner or a charterer. It suffices that a person contracts with the shipper to transfer his goods by sea.

So the Hamburg Rules, if they ever come into force, would apply only to the sea leg of a multimodal transport contract[17] to determine the MTO's liability for the loss of or damage to goods occurring during the carriage by sea.

It should, however, be noted that the Hamburg Rules will apply to the sea leg of a multimodal transport contract if it is between two different states and if:

a) - the port of loading as provided for in the contract of carriage by sea[18] is located in a Contracting State; or

b) - the port of discharge as provided for in the contract of carriage by sea[18] is located in a Contracting State; or

c) - one of the the optional ports of discharge provided for in the contract of carriage by sea[18] is the actual port of discharge and such port is located in a Contracting States; or

d) - the bill of lading or other document evidencing the contract of carraige by sea[18] is issued in a Contracting State; or

e) - the bill of lading or other document evidencing the contract of carriage by sea[18] provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract[19].

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[16] - Under the Hague/Visby Rules (Art. 1(a)) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper. However it is not clear that this definition of carrier is illustrative or exhaustive.

[17] - Kindred, supra note 12, at p. 593.

[18] - The phrase of "contract of carriage by sea" can be replaced by "contract of multimodal transport involving carriage by sea" because such a multimodal transport contract is deemed by the Hamburg Rules to be a contract of carriage by sea in so far as it relates to the carriage by sea.

[19] - Article 2(1) of the Ham. Rs.

3.2:2:1 Deck cargo and live animals carriage under a multimodal transport contract and applicability of the Hamburg Rules

Multimodal transport contracts are most often fulfilled through using containers. "Over half of the World's containers are transported on deck rather than under deck".[20] A question therefore arises is: if the cargoes carried under a multimodal transport contract involving a sea leg of transport, are accordingly carried on deck or are live animals, do the Hamburg Rules apply to that multimodal transport contract or not?

To answer this question, it should be said that the scope of application of the Hamburg Rules is much wider than that of the Hague/Visby Rules. Unlike the Hague/Visby Rules' provisions which expressly exclude live animals and deck cargo,[21] the Hamburg Rules' definition of goods includes live animals and deck cargo[22] because it is merely illustrative and does not purport to define all types of goods.[23] So the question should be answered positively and the Hamburg Rule will apply to such a multimodal transport contract.

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[20] - UNCTAD, supra note 4, p. 9, para.20.

[21] - Art. 1(c) of the H/V Rs. provides: "Goods includes goods, wares ... except live animals and deck cargo which by contract of carriage is stated as being carried on deck and is so carried."

[22] - Article 1(5) of the Ham. Rs.; see G.F. Chandler A Comparison of COGSA, the Hague/Visby Rules and the Hamurg Rules, J. of Mar. L. & Com. vol. 15, No. 2, 1984, p. 240.

[23] - UNCTAD, supra note 4, p. 31.

3.2:3 The period of liability of the carrier under the Hamburg Rules

Unlike the Hague/Visby Rules which provide a period of "tackle to tackle" [24] as the period of the carrier's liability,[25] the Hamburg Rules adopted a broader period of liability by extending maritime transport, i.e. a period during which the carrier is in charge of the goods at the port of loading, during the carriage by sea, and at the port of discharge[26] (a period of port to port).[27] If therefore, the loss or damage to goods occurs, due to different operations necessary to the carriage of goods by sea such as cargo handling operation, at the port of loading (before the goods are loaded on the ship) or at the port of discharge (after the goods are discharged from the ship) while the carrier is in charge of them, the Hamburg Rules will govern to determine the carrier's liability for the loss or damage.[28] In brief, the carrier's period of liability is "port to port" if during which he is in charge of the goods. However, since the carrier is deemed to be in charge of the goods from the time he has taken over them until the time he has delivered

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[24] - Art. 1(e) of the H/V Rs. provides: " 'carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship." See Pyrene Co. v. Scindia Navigation Co. [1952] Q.B. 402; Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd. [1974] S.C.R. 933. So if the loss or damage to the goods occurs prior to loading or after discharge, it is not governed by the H/V Rs. In which case the parties may agree regarding the carrier's liability: Art. 7 of the H/V Rs; see also W.E. Astle The Hamburg Rules, Fairplay, 1981, London, p. 95.

[25] - In practice, however, carriers often accept responsibility for a period beginning from the time they take charge of goods. This particularly happens with respect to container carriage which the containers are delivered to them at the shippers' premises or container station out of the port of loading: see L. Peyrefitte The period of Maritime Transport published in The Hamburg Rules on the Carriage of Goods by Sea, edited by Mankabady, 1978, Leyden, p. 125.

[26] - Art. 4(1) of the Ham. Rs.

[27] - UNCTAD, supra note 4, p. 11, para 30; Kindred, supra note 12, at p. 595.

[28] - Diamond The division of liability as between ship and cargo ... under the New Rules proposed by UNCTAD, 1977, L.M.C.L.Q, p. 49; L. Peyrefitte, supra note 25, at 126.

them,[29] there may be an interpretation that the "port to port" period can be limited to the "tackle to tackle" period[30] when the carrier takes over the goods at the tackle for loading and becomes in charge of them and delivers the goods at the tackle for discharge and discharges of being in charge of them because in which case the carrier has not been in charge of the goods at the ports of loading and discharge.

Therefore, regarding the period of the carrier's liability covered by the Hamburg Rules two points are of importance: 1 - period of being in charge of the goods; 2 - places of being in charge of the goods for the carrier's responsibility to be covered by the Hamburg Rules.

(1) - Period of being in charge of the goods

The period during which the carrier is in charge of the goods is important because the carrier's period of liability depends on it and any loss or damage to the goods occurring out of that period is not covered by the Hamburg Rules. To determine the period during which the carrier is in charge of the goods, the commencement and end of the period must be known. Article 4(2) of the Hamburg Rules makes them clear. Accordingly, the period commencement is the time at which the goods are taken over by the carrier, his servant or agent from the shipper or a person acting on his behalf; and the period ends at the time at which the goods are delivered to the consignee or are placed at the disposal of the consignee according to the contract, local law, or usage of the

[29] - Art. 4(2) of the Ham. Rs.

[30] - Kindred, supra note 12, p. 596.

particular trade applicable at the port of discharge.[31]

A question, here, is: when does "taking over the goods by the carrier happen?" The Hamburg Rules do not give an answer to this question. However, it is submitted that since the carrier has the right to check the contents of the consignment before taking charge of the goods and cannot be forced to accept goods without any knowledge of their quality, taking over the goods commences from the moment when the carrier exercises or is able to exercise his right of checking the cargo.[32] In fact the carrier with taking over the goods, takes charge of them and is responsible for them because he is the only person who can exercise effective supervision and control over the goods.[33]

Thus if the loss or damage to goods occurs before the commencement or after the end of that period, the carrier's liability is not governed by the Hamburg Rules because the carrier has not been in charge of the goods at the time of the occurrence of the loss or damage.

The question now is: is the carrier's liability for loss or damage to the goods governed by the Hamburg Rules if the loss or damage occurs at any time during the period at which he is in charge of the goods? An answer to this question (negative or positive answer) depends on the places at which the loss or damage occurs and at which

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[31] - Art. 4(2)(b)(ii) of the Ham. Rs.

[32] - H.R. Aljazayery, The Maritime Carrier's liability under the Hague Rules, Visby Rules and Hamburg Rules, a thesis for PHD degree, faculty of law, University of Glasgow, October 1983, p. 126.

[33] - Mankabady, The Hamburg Rules, Infra, note 60, p. 50.

he is in charge of the goods. This point is now considered.

(2) - Places of being in charge of the goods under the Hamburg Rules

In order to determine the period of responsibility of the carrier under the Hamburg Rules, knowing the places at which the carrier is, under the Hamburg Rules,in charge of the goods is important because the carrier's liability for any loss or damage occurring out of those places is not governed by the Hamburg Rules. Under Article 4(1) of the Hamburg Rules the carrier's period of responsibility is a period during which he is in charge of the goods at the port of loading, during the carriage, and at the port of discharge. As seen there is a limitation regarding the places of being in charge of the goods which affects the carrier's period of liability under the Hamburg Rules. This is because the Convention makers intended to limit the application of the Hamburg Rules to the carriage of goods by sea so that it does not interfere with multimodal transport, i.e. its application does not extend to other means of transport.

Thus if the loss or damage to the goods occurs at a place before the port of loading or after the port of discharge, the Hamburg Rules' period of responsibility does not cover it and the carrier's responsibility is not, therefore, governed by the Hamburg Rules even if the carrier had taken over the goods before the port of loading and been in charge of them at the place of loss or damage[34] or had been in charge of them even after the port of discharge until the place of loss or damage because this "being in charge" is not the same "being in charge" under the Hamburg Rules which is "being in charge" at

[34] - UNCTAD, supra note 4, p. 36 para 1.

the port of loading, during the carriage, and at the port of discharge. Article 5(1) of the Hamburg Rules makes this point clearer where it provides: " the carrier is liable for loss resulting from loss of or damage to the goods, ... if the occurrence which caused the loss, damage... took place while the goods were in his charge as defined in art. 4..." It means that if loss or damage to the goods occurred at the port of loading, during the carriage, or at the port of discharge while they were in the carrier's charge, the Hamburg Rules govern and determine the carrier's liability. Otehrwise, if loss or damage occurred out of those places the Hamburg Rules will not have any application to determine the carrier's liability.

In brief the carrier's liability period is from the time he is in charge of the goods at the port of loading until the time he is in charge of them at the port of discharge. However two points should be noted. First, if the carrier must, according to the law or regulation of the port of loading or discharge, hand over the goods to port authorities or other third person before shipment or after discharge and is not free to choose such a facility, his period of being in charge of the goods ends[35] by doing so and he is not, therefore, liable for the loss or damage to the goods occurring in those circumstances[36] although it occurred at a time between the time of taking over and delivery of the goods and at the port of loading or discharge. Second, the carrier is, under Article 23(2) of the Hamburg Rules, allowed to extend that period of responsibility by extending the place of taking over or delivery of the goods so that the extended period of liability covers the loss or damage occurred due to operations done before the port of loading or after the port of

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[35] - Art. 4(2) (b) (iii) of the Hamburg Rules.

[36] - UNCTAD, supra note 4, at pp. 36-7.

discharge.[37]

3.2:3:1 The period of the multimodal transport operator's (MTO's) liability as to the sea leg of carriage under the Hamburg Rules

Since under Article 1(6) of the Hamburg Rules, a multimodal transport contract involving a carriage by sea is deemed to be a contract of carriage by sea in so far as it relates to the carriage by sea, and the Hamburg Rules' "definition of carrier" would, as said,[38] include a MTO who concludes a multimodal transport contract involving a sea leg of transport, the MTO's period of liability as to the sea leg of the carriage seems to be the same as the sea carrier's period of liability under the Hamburg Rules which was already mentioned, i.e. the period during which the MTO is in charge of the goods *at the port of loading, during the carriage, and at the port of discharge.* The question, however, is: with regard to the fact that in such a multimodal transport contract the MTO may also be in charge of the goods before the port of loading or after the port of discharge (e.g. taking over the goods is done before the port of loading and not at there or delivery of the goods is done after the port of discharge and not at there), from what time is the MTO in charge of the goods as to the sea leg of transport? And when is it (his being in charge of the goods as to the sea leg) over? In other words, when is the commencement and end of the period during which the MTO is in charge of the goods as to the sea leg of transport?

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[37] - UNCTAD, supra note 4, p. 36.

[38] - See pp. 142 & 143 of this thesis.

This question seems to be of importance because the determination of the MTO's liability for the loss or damage to the goods depends on its answer.

Although the Hamburg Rule deems such a multimodal transport contract to be a carriage by sea contract in so far as it relates to the carriage by sea, it is silent with regard to the answer to that question.

To answer that question it seems that we should consider three different situations as follows:

(1) - Where the multimodal transport contract begins with a sea leg of carriage, continues and ends with, e.g. a land leg of carriage. In this situation, since the carriage begins with a sea leg, the period in question clearly starts to run according to Article 4(1) and 4(2)(a) of the Hamburg Rules, namely, from the time he has taken over the goods at the port of loading from (i) the shipper or a person acting on his behalf; or (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment. However, the period may, as said above,[39] start to run, with the consent of the MTO, from the time the MTO has taken over the goods at a place before the port of loading, such as the shipper's premises, so that the carriage between the shipper's premises and the port of loading is, although inland carriage, covered by the Hamburg Rules as part of the performance of the sea carriage. In the case of a full container load (FCL) for example, which an empty container is normally given to the shipper to load his cargoes, the MTO may take over the full

[39] - See p. 150 of this thesis, F.N. 37

container from the shipper at his premises. In which case the period of the MTO's responsibility starts to run from the time of taking over the goods at the shipper's premises[40] because the carriage between the shipper's premises and the port of loading, although inland carriage, is a part of the sea leg of carriage. So if the container is damaged after leaving the shipper's premises and before getting the port of loading, the MTO's liability will be governed by the Hamburg Rules.[41]

Regarding the end of that period, however, Article 4(2) (b) (i) and (ii) of the Hamburg Rules seem not to be suitable because the MTO does not deliver the goods, according to that Article, at the port of discharge but at the end of the land leg of the carriage. The period in question, therefore, seems to end once all operations relating to the sea leg of the carriage at the port of discharge are over because such a multimodal transport contract is deemed to be a sea carriage contract in so far as it relates to the sea carriage.[42] In other words, it is clear that when all operations relating to the sea carriage end, the multimodal transport contract can be no longer deemed to be a sea carriage contract and therefore, the MTO is no longer in charge of the goods as to the sea leg of the carriage.

But Article 4(2)(b)(iii) of the Hamburg Rules seems to be appropriate to determine the end of the period in question. Accordingly if the MTO is bound, pursuant to law or regulations applicable at the port of discharge, to hand over the goods to an authority or

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[40] - Mankabady the Hamburg Rules, infra, note 60, p. 51.

[41] - Aljazayery, supra note 32, p. 128.

[42] - See Article 1(6) of the Ham. Rs.

other third person, his period of being in charge of the goods as to the sea leg of carriage is finished by doing so.

(2) - Where the multimodal transport contract begins with a non-sea leg, e.g. a land leg, continues and ends with a sea leg of carriage. In this situation, it is clear that the goods are not taken over at the port of loading but they are taken over before it, i.e. at the beginning of the land leg. According to Article 4(2)(a) of the Hamburg Rules once the carrier takes over the goods from the shipper, he is in charge of them. Under Article 4(1) of the Hamburg Rules, merely being in charge of the goods is a necessary but not a sufficient condition for the Hamburg Rules to govern the carrier's responsibility for the goods. The Hamburg Rules will govern the carrier's liability for the goods if: 1) the carrier is in charge of the goods; and 2) this "being in charge of the goods" is at the port of loading, during the carriage or at the port of discharge. In this situation, therefore, once the MTO takes over the goods from the shipper at the beginning of the land leg of carriage, he becomes in charge of them. But the question is: when will he be in charge of them as to the sea leg of carriage? It seems the period during which the MTO is in charge of the goods as to the sea leg of transport starts to run when the goods reach at the port of loading because under Article 4(1) of the Hamburg Rules, it is the very first time - and not before that - the carrier's responsibility is governed by the Hamburg Rules. It is, of course, clear that when the goods reach the port of loading the MTO is still in charge of the goods because he has taken over and become in charge of the goods before they reach the port of loading, i.e. from the beginning of the land leg, and since the sea leg of transport is, here, a continuation of the land leg, his being in charge of the goods clearly continues until and after the port of loading.

The end of the period in question will clearly be governed by Article 4(2)(b) of the Hamburg Rules, i.e. when the MTO has delivered the goods: (i) by handing over the goods to the consignee, or ..., because the multimodal transport contract will be ended by the sea leg of the carriage. However the period in question may, with the consent of the MTO, be extended[43] and ends at the time he has delivered the goods to the consignee at a place after the port of discharge, such as the consignee's premises, so that the carriage between the port of discharge and the consignee's premises, although inland carriage, is covered by the Hamburg Rules as part of the performance of the sea carriage.

(3) - Where the multimodal transport contract begins with a non-sea leg, e.g. a land leg, contines with a sea leg and ends with a land leg of carriage. In this situation, the period during which the carrier is in charge of the goods as to the sea leg starts to run when the goods reach the port of loading, as stated in situation (2) because it is at that time -and not before - when the MTO becomes in charge of the goods as to the sea leg and his liability for the goods is covered by the Hamburg Rules' Article 4(1); and the period ends at the port of discharge when all operations relating to the sea leg of carriage are finished;[44] or when the MTO is bound, pursuant to law or regulations applicable at the port of discharge, to hand over the goods to an authority or other third party at the port of discharge because it is, as stated in situation (1), at that time when he is no longer in charge of the goods as to the sea leg and his liability for the goods is not covered by the Hamburg Rules' Article 4(1).

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[43] - Art. 23(2) of the Ham. Rs.

[44] - See p. 152 of this thesis.

3.2:4 The MTO's liability for loss or damage to the goods under the Hamburg Rules

As already argued,[45] a MTO who concludes a multimodal transport contract involving a sea leg of transport is a Hamburg Rules's carrier in so far as his contract relates to carriage by sea. Therefore, the MTO's liability for loss or damage occurring during the sea leg of carriage is the same as the sea carrier's liability for such a loss or damage. So it suffices that we consider the carrier's liability under these Rules.

Under the Hamburg Rules the carrier's liability is based, except in the cases of live animals,[46] or when loss results from fire,[47] measures to save life or reasonable measures to save property at sea,[48] on the principle of presumed fault or neglect of the carrier. Under this principle, if loss or damage to the goods occurred during the carrier's period of responsibility,[49] the carrier is presumptively liable for it. This presumption is, however, rebuttable, i.e. if the carrier can prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences, he will not be liable for the loss or damage.

To balance this principle of presumptive liability, the carrier has a limitation of liability, i.e. his liability will be limited to an amount mentioned in the Hamburg Rules. However, he may be deprived of the limitation under certain circumstances which we will

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[45] - See pp. 142-3 of this thesis.

[46] - Article 5(5) of the Ham. Rs.

[47] - Article 5(4) of the Ham. Rs.

[48] - Article 5(6) of the Ham. Rs.

[49] - Article 4(1) of the Ham. Rs.

consider later on.

3.2:4:1 The carrier's liability limitation for loss of or damage to the goods

The Hamburg Rules,[50] like the Hague Rules,[51] establish limits on the carrier's liability for loss of or damage to the goods but with respect to the changes which happened in the shipping industry after the establishment of the Hague Rules. They aim to create a fairer balance of commercial risks and legal duties in contractual relations between carriers and cargo owners.[52] So if the Hamburg Rules apply to the sea leg of a multimodal transport, the loss of or damage to the goods occurs at the sea leg, the consignee gives a notice of the loss or damage according to Article 19 and brings a suit against the MTO within the 2 year time bar period,[53] and the MTO is accordingly held liable[54] for the loss or damage, he is entitled to limit, if he is not deprived of the right of limit,[55] his liability. The unit of limits used in the Hamburg Rules' liability limitation system is, however, different from that in the Hague Rules.[56]

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[50] - Art. 6(1)(a).

[51] - Art. 4(5) of the Hague Rules; for the reasons of the use of "limits on the carrier's liability" see: W. Tetly, Per package limitation and containers under the Hague Rules, Visby and UNCITRAL, Dalhousie law Journal, 1978, at 686.

[52] - Kindred, supra note 12, p. 604.

[53] - The Hamburg Rules, Art. 20.

[54] - Under the Hamburg Rules the list of 17 defences available for the carrier under Hague Rule, except for fire, has been eliminated but if the carrier can prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurance causing the loss or damage and its consequences, he will not be liable: Art 5(1).

[55] - See "Loss of limit" at p. 167 of this thesis.

[56] - Under the Hague Rules the unit of limits upon which the carrier's liability limitation is calculated is "per package or unit" regardless of its weight (single liability limitation system).

The Hamburg Rules are based on a dual system of liability limitation. In the Hamburg Conference to which the UNCITRAL draft convention was presented there was a discussion of the carrier's liability system.

Some countries[57] favoured a system based on weight alone because of "the simplicity of administration, the ambiguities and resulting friction in any 'package' system and the necessity to accommodate intermodal carriage system in the future",[58] whereas some others[59] favoured a system based on two alternatives - a dual system of liability limitation, i.e. "package or unit", and "weight"[60] - because of "the disadvantages of the weight system respecting low value - high weight cargoes, as well as the difficulty of establishing weight in partial loss or broken package cases."[61] Finally the Hamburg Conference accepted a dual system of liability limitation.[62]

Article 6(1)(a) of the Hamburg Rules provides:

> "The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of art. 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher."

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[57] - Developing countries such as Nigeria; for their reasoning see Sweeney, The UNCITRAL Draft Convention, Part 2, 7 J.M.L.C. 1976, p. 327; Sweeney Article 6 of the Ham. Rs. published in Comments on the Ham. Rs. edited by Mankabady, 1978, p. 155.

[58] - Id. p. 155.

[59] - Such as the U.K., the U.S.A. and the U.S.S.R.; for their reasoning see: Ibid.

[60] - Mankabady, Limits of Liability (Article 6), Published in S. Mankabady, The Hamburg Rules on carriage of goods by sea, A. W., Sijthof, Leyden/Boston, 1978, p. 62.

[61] - Sweeney, supra note 57, p. 155.

[62] - Id. p. 160.

As seen the unit of limits under the Hamburg Rules are "package or shipping unit" and weight. This test is clearly applicable when the goods are carried in packages or as shipping units and their weight is known. So if a MTO carries cargoes of certain weight in packages or other shipping units and they are lost or damaged during the sea leg of the multimodal transport, his liability limitation account will be calculated on the base of both "per package or other shipping unit" which the maximum liability is 835 units of account per package or other shipping unit lost or damaged, and "weight" which is 2.5 units of account per kilogramme of gross weight of the goods lost or damaged. Of these amounts whichever is the higher constitutes his liability. Where, however, the weight of the lost or damaged goods is unknown, the package or shipping unit will be the only applicable test, and, where the nature of the cargo is in a manner which are not usually carried in packages or as other shipping units, such as bulk cargo like grain, the weight test will clearly be beneficial to the shipper.[63]

To calculate the above amount, however, one needs to know what constitutes the package or unit.

- **"Shipping Unit"**

The Hamburg Rules used the words "shipping unit" to remove any uncertainty which was caused by the word "unit" used in the Hague/Visby Rules.[64] Shipping unit

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[63] - Mankabady, supra note 60, p. 62.

[64] - E.R. Hardy Ivamy, "Units" and "Customary Freight Units" in the Carriage of Goods by sea, the Modern Law Rev., 1960, p. 198; Scrutton on Charteparties and ..., 18th ed., 1974, p. 442; Mankabady, The Limitation of the carrier's liability Journal of Arab Maritime transport Academy,

means a physical unit of cargo as received by the carrier from the shipper.[65] Accordingly, a package, too, can evidently be regarded as a "shipping unit" as the Hamburg Rules use the phrase "... or other shipping unit" which means that a package too, is a shipping unit from the Hamburg Rules point of view. In order to avoid repetition the Convention makers did not, therefore, use the phrase of "shipping unit" after the word of 'package' but they used the phrase "other shipping unit" which means a shipping unit which is not regarded as 'package' like an unboxed car or tractor. Under the Hague/Visby Rules it is not completely clear that whether the unit means "shipping unit" or "freight unit", i.e. the unit upon which the freight is calculated such as tonne. This is why some believe that the Hague/Visby Rules' "unit" means "shipping unit"[66] while some others believe that it means "freight unit"[67]. These different views, of course, result in different limitation amounts, and an uncertainty which is resolved by the Hamburg Rules.[68]

1977, p. 30.; E. Berlingieri, Under 1924 Brussels Convention, "unit" is measures of limitation only when goods are not shipped in packages, unit means freight unit not shipping unit, J. of Mar. L. & Com., vol. 2, 1970, p. 431.

[65] - Aljazayeri, supra note 32, p. 196.

[66] - See, for example, Temperley Carriage of Goods by Sea Act 1924, London, 1927, p. 79 where he said: "The natural interpretation of the word "unit" in the phrase "package or unit" appears to be that it has been added in order to cover parts of a cargo in general way similar to package, but not strictly included in that term". Also see the Canadian case of Falconbridge Nickel Mines v. Chimo Shipping Ltd. (1973)2 Lloyd's Rep. p. 469; [1974] S. C. R. 933.

[67] - W. Tetley Mari ime Cargo Claim 2nd ed., Toronto, 1978, p. 438; Also the 1936 COGSA of U.S. has expressly used "customary freight unit". So American Courts' understanding of the word "unit" is "customary freight unit": see, for example the cases of Hardford Fire Insurance Co. v. Pacific Far East Line Inc., (1974)1 Lloyd's Rep. p. 359; Freedman & Stater v. Tofevo (1963) A.M.C. p. 1525.

[68] - Wilson, The Hamburg Rules, p. 147.

- **"Package"**

Like the Hague/Visby Rules there is no definition of the word "package" in the Hamburg Rules. As noted,[69] the lack of any clear definition of the word "package" in the Hague Rules on the one had, and the introduction of containers and pallets on the other hand, caused problems in determining the carrier's liability limitation. An important example, as seen, is container-package problem which resulted in confusion and conflict - through different interpretation of "package" - in the court decisions in different countries. Since containers have a significant role in transporting goods internationally, the Hague Visby-Rules tried to solve the container-package problem by producing a container clause.[70] Likewise the Hamburg Rules attempt to solve the container-package problem.

- **"Container-package" problem and the Hamburg Rules**

As said, the Hamburg Rules have adopted a dual system of liability limitation, i.e. "package or other shipping unit" and "weight". *The adoption of this system will* inevitably be followed by *the container-package problem because in order to calculate the* carrier's liability limitation upon such system, *it should be evident whether a container* is a package or not.[71]

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[69] - When we considered the meaning of "package" *in the H/V Rs. see p. 60 of this thesis.*

[70] - Article 4 (5)(c) of the H-V-Rs.

[71] - Mankabady supra not 60, p. 62; Sweeney, supra note 57, p. 157.

In the Hamburg Conference there were various proposals. The Japanese delegation, for example, proposed that there should be a distinction between the shipper-packed containers and the carrier-packed containers which attracted no support and was subsequently withdrawn. The general agreement was that the container clause of the Hague-Visby Rules should be used as the basis of the new clause.[72] Therefore, the Hamburg Rules were based on the Hague-Visby Rules, Article 4(5)(c). However, there might be some situations where the Hamburg Rules apply to them when the Hague-Visby Rules would not have applied.

According to Article 4(5)(c) of the Hague-Visby Rules where a container is used to consolidate goods the number of packages or units enumerated in the bill of lading shall be deemed the number of packages or units for the calculation of the carrier's liability. Namely the number of packages or units packed in the container will be deemed the number of packages or units for the calculation of the carrier's liability limitation if only and only these numbers have been enumerated in the bill of lading. In other words if no bill of lading is issued and the number of packages or units are enumerated in another document evidencing the contract of carriage by sea, this situation seems not to fall within Article 4(5)(c) of the Hague Visby Rules.

In order to deal with such a situation in which a formal bill of lading - a bill of lading complying with the Convention - is not issued but the number of packages or other shipping units are enumerated in another document evidencing the contract of carriage by

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[72] - Sweeney, supra note 57, p. 158; see also De Gurse The Container clause in article 4(5) of the 1968 Protocol to the H/V Rs. 2 J. of Mar. L. and Com. 131 (1970).

sea, the Hamburg Conference decided to add the words "if issued, or otherwise in any other document evidencing the contract of carriage by sea"[73] after the words "enumerated in the bill of lading" of the Article 4(5)(c) of the Hague-Visby Rules.

So Article 6(2) of the Hamburg Rules reads as follows:

"For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this Article the following Rules apply:

a) Where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit."

As seen, the problem of container-package is also answered by the Hamburg Rules but in a more comprehensive context than the Hague-Visby Rules because the Hamburg Rules also solve that problem even when no bill of lading is issued but another document evidencing the contract of carriage by sea is issued. Accordingly there could be two different situations for calculating the carrier's liability limitation.

(1) - If a bill of lading has been issued

In this situation, the base of calculating the carrier's liability limitation upon

[73] - These words were the proposal made by the Scandinavian Nations: See Sweeney, supra note 57, p. 160.

package or other shipping unit, is the enumeration or non-enumeration of the container's contents in the bill of lading. No matter that any other document has enumerated them because according to Article 6(2) of the Hamburg Rules bill of lading is of prime importance in calculating the carrier's liability limitation. In case of issuance of a bill of lading the cargo owner is not allowed to calculate the carrier's liability limit according to the enumeration or non-enumeration of the container's contents in any other document evidencing the contract of carriage by sea. In this situation three different states are possible for calculating the maximum limit:

1- If the bill of lading does not enumerate what is contained in the container, the container is one shipping unit.

2- If the bill of lading enumerates the contents of the containder individually, each of the packages inside the container is a unit.

3- If the bill of lading enumerates certain packages or units plus general cargo included in the container, each of the packages is a unit and the general cargo is another unit.[74]

(2) - If no bill of lading has been issued

Here the carrier's liability limitation is calculated in accordance with the enumeration or non-enumeration of the container's contents in a document other than bill of lading evidencing the contract of carriage by sea. In this situation, too, there are three

[74] - Mankabady, S., The Hamburg Rules on the Carriage of Goods by Sea, Layden/Boston, 1978, pp. 63-64.

possibilities for calculating the carrier's liability limit as to "package or shipping unit":

1- If such a document has not enumerated the contents of the container, the container is regarded as one shipping unit.

2- If such a document has enumerated the contents of the container, each of the enumerated packages or shipping units is regarded as one package or shipping unit.

3- If such a document has enumerated the number of packages and units plus general cargo contained in the container, those numbers +1[75] are regarded as the number of packages or units for the purpose of "per package or other shipping unit" liability limitation.

Now the question is: if a MTO issues a multimodal transport document,[76] evidencing a multimodal transport contract involving a sea leg, what is his liability limitation, under the Hamburg Rules, for the lost or damaged container at the sea leg of the transport?

With regard to Article 6(2) of the Hamburg Rules and the above exposition, it seems that such a multimodal transport document is within the phrase "any other document evidencing the contract of carriage by sea" mentioned in Article 6(2)(a) of the Hamburg Rules because when according to Article 1(6) of the Hamburg Rules such a

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[75] - The general cargo contained in the container is regarded as one unit because they have not been enumerated in such document: Art. 6(2)(a).

[76] - Multimodal transport document is a document which is issued in the case of a multimodal transport of goods: see Schmitthoff, supra chap. 1, note 2, p. 528.

multimodal transport contract is deemed to be a contract of carriage by sea in so far as it relates to the carriage by sea, evidently the document which evidences that multimodal transport contract will evidence the deemed contract of carriage by sea, too, i.e. the multimodal transport document which evidences the multimodal transport contract will evidence the deemed contract of carriage by sea, too.

So if the number of packages or other shipping units contained in the container are enumerated in the multimodal transport document, those number of packages or shipping units will constitute the number of packages or shipping units for the purpose of calculating the carrier's liability limit under Article 6(1); and if the contents of the container are not enumerated in the multimodal transport document, the whole goods inside the container will be regarded as one shipping unit.

Another point which should be noted is that the Hamburg Rules regard a container itself, if supplied by the shipper,[77] as goods[77] rather than as part of the hold of a ship.[78] So if the container itself is damaged or lost the carrier may be responsible for the damage. In which case the container itself will be considered as one separate shipping unit. This is a point to which the Hague-Visby Rules have not dealt with. Article 6(2)(b) of the Hamburg Rules provides: "For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this Article the following rules apply: (b) in cases where the article of transport itself has been lost or damaged, that article of transport, if

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[77] - Article 1(5) of the Ham. Rs.; UNCTAD, supra note 4, p. 41.

[78] - Mankabady, supra note 60, p. 62; cf. The Leather Best, 313 F.supp. 1373, 1970 A.M.C. 1310 (E.D.N.Y. 1970).

not owned or otherwise supplied by the carrier, is considered one separate shipping unit."

Although it seems that the Hamburg Rules have answered the problems arising from containerization more comprehensively than the Hague-Visby Rules, they have, like the Hague-Visby Rules, some ambiguous terms which may result in difficulties for the courts. As Scrutton[79] points out the difficulties which the court may in due course have to consider include:

1) What articles of transort are "similar to " containers and pallets?

2) What precisely is meant by "used to consolidate" goods?

3) In what circumstances is the number of packages "enumerated in the bill of lading as packed" in the container?

3.2:4:2 Loss of the right to limit responsibility

As has already been mentioned, the MTO's liability,[80] under the Hamburg Rules,[81] for loss or damage to goods which occurs during the sea leg of the carriage is limited to 835 units of account per pacakge or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged whichever is the higher. However this limitation may, under certain circumstances, be lost and the MTO becomes, therefore, fully liable.

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[79] - Scrutton on Charterparties, 19th ed. 1984, London, Sweet & Maxwell, p. 455.

[80] - See p. 159 of this thesis.

[81] - Article 6(1)

Article 8(1) of the Hamburg Rules which is similar to Article 4(5)(e) of the Hague-Visby Rules does not allow the carrier, under certain circumstances, to invoke the limitation of liability provided for in article 6 paragraph 1 of the Convention. It provides:

> "The carrier is not entitled to the benefit of the limitation of liabiity provided for in art. 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result."

So once it is proved that the loss or damage to the goods resulted either from the MTO's act or omission done "with the intent to cause such loss or damage", or from his act or omission done recklessly and with knowledge that such loss or damage would probably result, the MTO is deprevied of the right to limit liability.

The phrase "with the intent to cause such loss or damage" seems to be clear and does not cause any problem of interpretation. However the words "recklessly" and "knowledge" need clarifying. Thus the questions before us are: what precisely is meant by "recklessly"? what kind of knowledge is necessary to suffice and satisfy the Article?

It seems to me that the carrier's act or omission is done recklessly if he does it with an indifference regarding its consequences. Here the carrier - by such an act or omission - has no intent to cause any loss or damage but he is so indifferent about its consequences that those consequences, whatsoever they are - even loss of cargo, are not important to him. In fact, unlike negligence which the carrier neglects a wrong act or omission that he commits, he (reckless carrier) does not neglect such an act or omission

and knows that it is being done but he does not think about the consequences of his act or omission and they are not important to him. This is why some believe that reckless is more than negligence. Devlin J., for example, held[82] that "recklessly ... means something more than negligence ... it means deliberatly running an unjustifiable risk." also Lord Justice Diplock[83] said: "it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligence; it must be at least reckless."

In this respect Diamond[84] believes that the carrier's act or omission is done recklessly if (i) the carrier has a high degree of subjective knowledge that damage will probably occur, but, nevertheless he commits that act or omission; or (ii) he deliberatly shuts his eyes to a means of knowledge which would have produced such a realisation, and commits that act or omission.

It seems, however, that the Convention makers did not believe that "recklessly" must involve one of the two ingredients mentioned by Diamond because if they believed so, Article 8(1) does not need to contain the phrase "and with knowledge that such loss, damage or delay would probably result" after the word "recklessly".

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[82] - A.E. Reed & Co. Ltd. v. London & Rochester Trading Company Ltd., (1954)2 Lloyd's Rep. p. 463; see also Horabin v. B.O.A.C. (1952) 2 All ER 1016 at 1020.

[83] - Fraser v. B.N. Furman [1967] Vol. 2 Lloyd's Rep. p.1 at p. 12.

[84] - A. Diamond, The Hague-Visby Rules (1978) 2 L.M.C.L.Q. p. 225 at 246.

Regarding the meaning of "recklessly" it is also worth referring to the cases[85] come up upon Article 25 of the Warsaw Convention because Article 8(1) of the Hamburg Rules has been based on that Article. Article 25 of the Warsaw Convention, however, as will be seen, has used the phrase of "wilful misconduct" instead of the phrase of "an act or omission ... done with intent to cause such loss ... or recklessly and with knowlege that such loss ... would probably result."

The second question was: what kind of knowledge is necessary to suffice and satisfy Article 8(1)?

In this regard Lord Denning, M.R. in the case of Compania Maritima San Basilio v. the Oceanus Mutual Undertaking Association,[86] said:

> " ... and when I speak of knowledge, I mean not only positive knowledge, but also the sort of knowledge expressed in the phrase *'turning a blind eye'*."

It is to be mentioned that the carrier's (the MTO's) servant or agent against whom an action is brought may also be deprived of his right to limit liability recognised by Article 7(2) of the Hamburg Rules. Article 8(2) of the Hamburg Rules provides:

> "*Notwithstanding the provisions of para. 2 of art. 7, a servant or agent* of the carrier is not entitled to the benefit of the limitation of liability provided for in art.

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[85] - See the cases which will be stated regarding Art. 25 of the Warsaw Convention. See also Horabin v. B.O.A.C. (1952) 2 All. E.R. 1016 at 1020 in which Barry J. said that wilful misconduct is "wholly different in kind from mere negligence ... however gross that negligence may be." Also Ackner J in Rustenberg v. Pan American World Airways Inc. (1977) 1 Lloyd's Rep. 564 at 569 said "wilful misconduct goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be ..."

[86] - (1976)2 Lloyd's Rep. p. 171.

6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result."

Nevertheless, it is not clear, under the Hamburg Rules, that if the loss or damage results from an act or omission of the carrier's (the MTO's) agent or servant done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result, but the action is brought against the carrier (or the MTO), whether the carrier loses his right to limit or not[87].

Regarding the MTO's liability for loss or damage to goods there are some other points which are of importance and worth consideration.

3.2:4:3 The MTO's liability for deck cargo lost or damaged, under the Hamburg Rules

As was said above, multimodal transport operations are most often carried out by the use of containers, and nowadays more than half of the world's containers are *transported on deck rather than under deck.*[88] *Thus it is of a high degree of importance* to consider the carrier's liability for deck cargo, e.g. containers, lost or damaged, under the Hamburg Rules.

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[87] See European Enter prise, [1989] 2 Ll. Rep. 185, in which the court held that the 'carrier' of Art. IV 5(e) of the H-V-Rs. (which is similar to Art. 6 of the Ham. Rs.) should not be given a restrictive meaning and reckless act or omission of his agent or servant should not deprive the carrier from taking benefit of the liability-limiting provisions of the H-V-Rs.

[88] - UNCTAD, supra note 4, p. 9 para 21.

Fortunately "the Hamburg Rules greatly contribute to clarification as to when the carrier will be entitled to carry goods - particularly containers - on deck."[89] Accordingly, the carriage of deck cargo - mainly containers - falls subject to special arrangement, within the scope of application of the Hamburg Rules.

The Hamburg Rules,[90] unlike the Hague Rules,[91] permit the carrier to carry cargo on deck provided that such carriage is in accordance with an agreement with the shipper or, with the usage of the particular trade or, is required by statutory rules or regulations.[90] This is because the risks of the sea and weather causing loss of or damage to on-deck cargo are clearly much greater than the risks to under-deck cargoes.

The Hamburg Rules have, therefore, special provisions determining the carrier's liability for loss or damage to deck cargoes. The Hamburg Rules' principle of presumed fault or neglect is also, here, exercised. The carrier's liability for loss or damage to deck cargo can be as follows:

(1) - If the carrier has been entitled to carry the goods on deck

If the carrier is entitled, according to Article 9(1), to carry the cargo on deck, his liability for loss or damage to deck cargo is determined according to Articles 5, 6 and 8

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[89] - UNCTAD, supra note 4, p. 43.

[90] - Article 9(1) of the Hamburg Rules.

[91] - The carriage of deck cargo falls outside the scope of application of the Hague Rules. With the introduction of containers and their carriage mainly on deck, it seemed necessary that the carrier's liability for on-deck carriages is determined by a convention relating to carriage of goods by sea, which the Hamburg Rules did it.

of the Hamburg Rules,[92] just like his liability for loss or damage to under-deck cargoes, i.e. under Article 5(1) he is presumptively regarded to be liable for the loss or damage but he is entitled to prove that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence causing the loss or damage and its consequences. If he can prove it, he will not be liable for the loss or damage, but if he cannot, his liability will be limited, if he is not deprived of the right to limit responsibility under Article 8, to the amount mentioned in Article 6 which was previously explained.

(2) - If the carrier has not been entitled to carry the goods on deck

The carrier is not entitled to carry the goods on deck if the carriage on deck is contrary to the provisions of Article 9(1),[93] or is contrary to express agreement for carriage under deck.

(2)-1 If the on-deck carriage is contrary to the provisions of Article 9(1)

In this situation, the liability of the carrier is governed by Article 9(3) of the Hamburg Rules upon which if the loss or damage solely results from the carriage on deck, the carrier will be liable for it but is not entitled to benefit the defence mentioned in Article 5(1). Nevertheless his liability will be limited, if he is not deprived of the right

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[92] - UNCTAD, supra note 4, p. 43.

[93] - Article 9(1) provides:
"The carrier is entitled to carry the goods on deck **only** if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations."

to limit liability by Article 8, to the amount mentioned in Article 6.

(2)-2 if the on-deck carriage is contrary to express agreement for carriage under deck

Here, the carrier's liability is governed by Article 9(4) of the Hamburg Rules. Accordingly, the carrier's act is deemed to be an act within the meaning of Article 8(1). He is not therfore, entitled to the benefit of the limitation of liability provided for in Article 6[94] and becomes fully liable for the loss or damage.

In brief, the carrier's liability for loss or damage to deck cargo is as follows: in situation (1) it is just like his liability for loss or damage to under-deck cargo; in situation ((2)-1) he is deprived of the defence mentioned in Article 5(1) but may use the limitation of liability of Article (6); in situation ((2)-2) he is even deprived of the limitation of liability of Article (6) and becomes fully liable.

3.2:4:4 The MTO's liability for live animals under the Hamburg Rules

The Hamburg Rules, unlike the Hague/Visby Rules, define live animals as goods.[95] Live animals carriage falls within the scope of the Hamburg Rules which have special provisions to determine the carrier's liability for the loss or damage to them.[96]

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[94] - Article 8 of the Hamburg Rs; G.F. Chandler, A comparison of "COGSA", the H/V Rs and the Hamburg Rules, J. of Mar. L. & Com. 1984 Vol. 15 No. 2 p. 233 at p. 266.

[95] - Article 1(5) of the Ham. Rs.

[96] - Art. 5(5) of the Ham. Rs.

Unlike the general principle of the carrier's fault or neglect adopted by the Hamburg Rules, the Hamburg Rules adopted another principle regarding the carrier's liability for loss or damage to live animals, namely, the rebuttable presumption of the carrier's non-fault or neglect. Upon this principle if the loss of or damage to live animals results from any special risks inherent in that kind of live animal carriage, it is not regarded the carrier's fault or neglect. The carrier is not, therfore, liable if he proves that the loss or damage resulted from such risks.

In order to prove this it suffices that the carrier shows that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case the loss or damage could be attributed to such risks.[95]

This principle is, however, rebuttable by proving that the loss of or damage to the live animals resulted from the carrier's, his servants' or agents' fault or neglect. Here, the burden of proof rests on the cargo interests.[97] If the cargo interest can prove such fault or neglect of the carrier, his servants or agents, then the ordinary rules on liability set forth in Article 5(1) will apply,[98] and the carrier's extent of liability will be determined according to Article 6 or 8, whichever appropriate, which was already explained.

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[97] - UNCTAD, supra note 4, p. 43.

[98] - UNCTAD, supra note 4, p. 39.

3.2:4:5 Fire and the MTO's liability for loss or damage occurred at the sea leg of transport

Loss or damage caused by fire is another exception to which the general principle of the carrier's presumed fault or neglect mentioned in Article 5(1) of the Hamburg Rules does not apply[99]. But, like live animals cargoes, the rebuttable presumption of the carrier's non-fault or neglect mentioned in Article 5(4) of the Hamburg Rules applies to it. Upon this principle if loss or damage to the goods results from fire, the carrier is not presumptively liable for such loss or damage. This principle is, however, rebuttable and the carrier will be liable *if it is proved that:*

1 - the carrier's, his servants' or agents' fault or neglect caused the fire; or

2 - the loss or damage resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.[100]

Here the burden of proof rests on the cargo interest[101]. If he can prove, at least, one of the two facts mentioned in the preceding paragraph, the carrier will be liable for such loss or damage and the extent of his liability will be determined according to Articles 6 or 8, whichever appropriate, which were already explained.

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[99] - UNCTAD, supra note 4, p. 39.

[100] - Article 5(4) of the Ham. Rs.

[101] - Article 5(4) of the Ham. Rs.

3.2:4:6 Unit of account

Since the monetary limit of the carrier's liability under Article 6 of the Hamburg Rules is in terms of "unit of account", it is important to have an idea about what the "unit of account" is.

Article 6(3) of the Hamburg Rules provides: "Unit of account means the unit of account mentioned in art. 26." According to Article 26 of the Hamburg Rules the unit of account is, in most cases, Special Drawing Rights (SDR) as defined by the International Monetary Fund[102] (IMF). SDR is the International Monetary Fund's new artificial unit of account consisting a trade-weighted basket of five strong currencies of which one or two decrease in value the other would increase so that the SDR value would remain nearly stable. Its value is calculated according to the IMF rules and can be determined daily from financial journals in most places.[103]

The reason that the Hamburg Rules chose the SDR as unit of account were: 1 - the startling changes in the value of gold since 1971 whereby the Poincare franc, used in the Hague-Visby Rules[104] was no longer a guarantee against wild swings of value; 2 - the expectation that the adoption of the SDR in international conventions would reduce some of the worst effects of single national inflation caused by unusual economic

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[102] - Chorley & Giles, Shipping Law, 7th ed. 1980 p. 250; Les ward The SDR in Transport Liability Conventions: Some Clarification, J.M.L.C (1981) 1 p. 2; see also pp. & of this thesis.

[103] - Sweeney, supra note 57, p. 153.

[104] - The 1978 amendment to the H-V-Rs also changed the H-V-Rs units of account to the SDR.

conditions.[105]

The Hamburg Rules, however, permit units of account based on gold for those countries not members of IMF like the Soviet Union and other states of centrally planned economies.[106]

Depending on the situation of different countries, Article 26 accepts, in fact, two kinds of units of account:

(1) - The Special Drawing Rights (The SDR)

(2) - The Poincare franc

(1) - The SDR

The SDR is used as the Hamburg Rules' unit of account for the countries which are member of the I.M.F. or the countries which are not members of the I.M.F. but their law does not prohibit the application of the provisions of paragraph 1 of Article 26 including the SDR. However the method of conversion of the SDR units into national currencies of the two different types of countries is different. According to Article 26(1), the conversion of the SDR units into a national currency will be according to the value of such currency at the date of judgment or the date agreed upon by the parties. For a member country, the value of her national currency in terms of the SDR will be calculated

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[105] - Sweeney, supra note 57, p. 153; Mankabady supra note 60, p. 113.

[106] - Sweeney, supra note 57, p. 153.

according to the method of valuation applied by the IMF; but for such a non-member country the value of her national currency in terms of the *SDR will be calculated in* a manner determined by that country.

By adopting the SDR as the unit of account, the Hamburg Rules achieve the maximum possible uniformity[107] since determining the exact limitation amount through the conversion of gold francs into national currency is very difficult[108] because there is no longer a fixed relationship between national currencies and gold[109] and national currencies are generally no longer quoted in gold and, therefore, there is no formal way of getting from gold franc to national currency.

(2) - The 'Poincare' franc

The gold 'Poincare' franc is used as a unit of account of the Hamburg Rules for the countries which are not members of the IMF and whose law does not permit the application of the provisions of paragraph 1 of Article 26 including the SDR. In other words, the Hamburg Rules permits these countries to fix the Hamburg Rules' unit of account in terms of gold franc,[110] i.e. the same unit of account used in Article 4(5)(d) of the Hague-Visby Rules.

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[107] - UNCTAD, supra note 4, p. 60.

[108] - Chandler, supra note 94, p. 270.

[109] - UNCTAD, supra note 4, p. 59.

[110] - Article 26(2) & (3) of the Hamburg Rules; UNCTAD supra note 4, p. 59.

Although the Hamburg Rules accept the Poincare franc as a unit of account for a certain countries, notwithstanding lack of a fixed relationship between national currencies and gold, Article 26(4) leave it to the Contracting States' discretion to convert the amounts expressed in franc Poincare into their national currency in such a manner as to correspond as closely as possible to the same real value for the liability limits set forth in Article 6 of the Hamburg Rules.[111]

Article 26 (2), (3) and (4) provide:

> 2 - Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of para. 1 of this Article may, at the time of signiture, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as:
>
> 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.
>
> 3 - The monetary unit referred to in para. 2 of this Article corresponds to sixty five and half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in para. 2 into the national currency is to be made according to the law of the State concerned.
>
> 4 - The calculation mentioned in the last sentence of para. 1 and the conversion mentioned in para. 3 of this Article is to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in art. 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to para. 1 of this Article, or the result of the conversion mentioned in para. 3 of this Article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in para. 2 of this Article and whenever there is a change in the manner of such calculation or in the result of such conversion.

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[111] - UNCTAD, supra, note 4, p. 59-60.

CHAPTER FOUR

THE LIABILITY OF THE MTO FOR LOSS OF OR DAMAGE TO THE GOODS UNDER INTERNATIONAL CONVENTIONS RELATING TO AIR, ROAD AND RAIL CARRIAGE OF GOODS

4.1 UNDER THE INTERNATIONAL AIR CARRIAGE OF GOODS CONVENTION(S)

A convention for the unification of certain rules relating to international air carriage was signed in Warsaw in 1929 which was then known as "the 1929 Warsaw Convention". The creation of such a convention had seemed to be necessary since most flights had international character, and problems arising from a "conflict of laws" would be inevitable.[1] In order to come into force it needed to be ratified by five of the High Contracting Parties.[2] Gradually almost every country in the world ratified the 1929 Convention.[3] Over the years, however, it became apparent that it required amendment.[4] So the 1929 Warsaw Convention has been amended by subsequent conventions as follows:

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[1] - See P.B. Keenan & etc. Shawcross and Beaumont on Air Law, Butterworths, London, 1966, Vol. 1, pp. 420, 25; See also Per Green, L.J. in Grein v. Imperial Airways Ltd. (1937) 1 K.B. 50 at 74-7.

[2] - Article 37 (2) of the Warsaw Convention. Here, Art. 32(2), High Contracting Party means "State": see Halsbury's Statutes 4th ed., Butterworths, London, 1987, p.38.

[3] - J. Ridley, The Law of the Carriage of Goods by Land, Sea and Air, 6th ed, Shaw and Sons, London, 1982, p. 235.

[4] - C.M. Schmitthoff,Schmitthoff's Export Trade, 8th ed., London, Stevens and Sons, 1986, p. 533.

(a) A convention signed at Hague in 1955. It is known as "the 1955 amended convention".

(b) A convention held at Guadalajara in 1959.

(c) A convention held at Montreal in 1975 where certain Protocols were signed.

Since the Warsaw Convention is, as will be seen, applicable to the air leg of a multimodal transport as far as the carriage by air is concerned, and cannot be, because of its mandatory character, contracted out by the parties to a multimodal transport contract, it is the convention which determines the MTO's liability for the loss or damage occurs at the air leg of a multimodal transport. In other words, under the present regime of "network liability system" which preserves the Warsaw Convention, the MTO's liability for air loss or damage is determined by the Warsaw Convention.

As the MTO's liability for air loss or damage to the goods under the Warsaw Convention is the same as the air carrier's liability for loss or damage to the goods under the Warsaw Convention, I will, here, consider the international air cargo carrier's liability limitation in the case of loss or damage to the goods carried by him under:

- the Warsaw Convention of 1929 to which some countries have still adhered;
- the 1955 amended Convention which has been ratified by some countries and has force of law in those countries; and
- the Montreal Convention of 1975 which may come into force in future.

4.1:1 Under the 1929 Warsaw Convention

The Warsaw Convention which regulates the liability and limitation of liability for international air carriage of passenger and cargo, is the result of two international conferences held in Paris in 1925 and Warsaw in 1929.[5] In the Warsaw Convention the carrier's liability limitation was of a high degree of importance. Firstly because the most important purpose of the Warsaw Convention was to limit the international air carrier's liability when personal injury or property damage occurs in order to develop the infant airline industry through attracting investment capital. The Convention's drafters thought that if there was not any limitation of liability for the carrier, no investor would invest to air line industry for the fear of a single catastrophic. In return the Convention makes the carrier presumptively liable unless he proves that he and his agents or servants have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.[6] Secondly, the Warsaw Convention's liability limitation was an important factor for which some countries such as the United States decided to ratify the Warsaw Convention.[7] When, in 1965, the United States gave a notice of denunciation of the

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[5] - A.F. Lowenfeld and A.I. Mendelsohn The United States and the Warsaw Convention 80 Harvard Law Review, 1967, p. 498.

[6] - D. Davenport,Tort - Liability Limitation Under Warsaw Convention, J. of Air L. & Com. 1984, Vol. 50, pp. 155-83; P.J. Elmlinger Franklin Mint v. TWA: A response to the Warsaw Convention's gold-based liability limit problem, Law and Policy in International Business, 1983 Vol. 15 pp. 1009-36; Lowenfeld fc Mendelsohn, supra, note 5, pp. 499-500. See also L. Kreindler, Aviation Accident Law,1983, pp. 11-12.

[7] - Hull, the U.S. Secretary of State, in his report about the Warsaw Convention to the Senate, in 1934, stated:

"It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance

Warsaw Convention, according to article 39 of that Convention, it emphasized that the sole reason for the notice of denunciation was that the liability limitations for personal injury or death were too low.[8] "The Convention's authors promulgated the Convention to establish uniform rules insuring adequate and reliable recovery for injury to persons or property and to protect the infant airline industry from ruinous damage suits."[9] However, the liability-limiting provisions of the Warsaw Convention have produced the most controversy and litigation,[10] and it is said that there is no longer need to liability-limiting provisions.[11] Also there is a growth of judicial hostility towards the liability limitations of the Warsaw Convention in the American courts.[12]

In any event, irrespective of whether the liability-limiting provisions of the Warsaw Convention are necessary to be continued in the present conditions of the airlines industry, the Warsaw Convention's liability-limiting provisions, which limits the liability of international cargo carriers, are here considered because they are still in force in many of the countries which ratified them.

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rates, with the probable result that there would eventually be a reduction of operating expenses, for the carrier and advantages to travellers and shippers in the way of reduced transportation charges." See Lowenfeld & Mendelsohn, supra, note 5, p. 499-500.

[8] - T.J. Dolan, Warsaw Convention Liability Limitations: Constitutional Issues, North Western J. of International Law and Business, 1984, vol. 6, p. 896-929, cited in CAB (Civil Aeronautics Board) Order No. E-23680, 31 Fed. Reg. 7302 (1966). The U.S. withdrew the notice of denunciation in return for the airlines' signatures to the Montreal Agreement. Id.

[9] - J.D. Simpson, Air Carriers' Liability Under the Warsaw Convention after Franklin Mint v. TWA, Washington and Lee Law Review, 1983, vol. 40, p. 1463.

[10] - P.J. Elmlinger, supra note 6, p. 1009.

[11] - D. Davenport, supra note 6.

[12] - R.B. Jeffrey, The Growth of Americal Judicial Hostility Towards the Liability Limitation of the Warsaw Convention, Journal of Air Law and Commerce, 1983, Vol. 48, pp. 805-34.

4.1:1:1 The applicability of the liability-limiting provisions of the Warsaw Convention to a carriage contract

To apply the Warsaw Convention's liability-limiting provisions to a carriage contract there should be four conditions satisfied. They are as follows:

(1) - the Warsaw Convention itself apply to that contract; and

(2) - according to the Warsaw Convention an action for damages can be brought; and

(3) - according to the Warsaw Convention the carrier must be liable in the first place; and

(4) - according to the Warsaw Convention the carrier must not be deprived of taking advantage of the liability-limiting provisions.

(1) - The Warsaw Convention apply to the contract

It is clearly evident that one of the requisites is that the Warsaw Convention itself applies to the contract. So enforcing the Warsaw Convention's liability-limiting provisions to a carriage contract requires the applicability of the Warsaw Convention to that contract.[13]

Articles 1 and 2 of the 1929 Warsaw Convention are about the application of the Convention. Article 1 (1) provides:

> "This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

[13] - See for example, Corocraft Ltd v. Pan American Airways Inc., [1969] 1 Q.B. 616; or Collins v. British Airways Board, [1982] 1 All E.R. 302.

For the meaning of "international carriage", article 1(2) provides:

> "For the purpose of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within territories of two High Contracting Parties, or within the territory of a single High Contracting Party,[14] if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purpose of this Convention."

So if the place of departure or the place of destination or both of them are situated in countries not adhering to the Convention, the Convention will not apply to that carriage because it does no mean international carriage according to article 1(2) of the Warsaw Convention. However "Some argued that the definition of international transportation in the Convention did not make sense - that transportation from a contracting state to any place outside that state should be governed by the Convention, at least as to claims brought in that state."[15]

Regarding the applicability of the Warsaw Convention to an air carriage contract which is performed by several successive air carriers, attention should be paid to the

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[14] - High Contracting Party means a state whose ratification of or adherence to the Convention has become effective and whose denaunciation thereof has not become effective. (Halsbury's Statutes 4th ed., London, Butterworths, 1987, p. 88); as to ratification of the Convention, see article 37 of that Convention.

[15] - Lowenfeld & Mendelsohn, supra note 5, p. 503 which cited, for example, Beaumont, Some Problems Involved in Revision of the Warsaw Convention, 16 Journal of Air Law and Commerce, p. 14, 1949.

parties' intent as to whether they have regarded the carriage as a single operation[16]or not. If they have, the carriage is deemed as an undivided one, i.e. the place of departure is considered the place in which the first carrier has loaded the cargo and the place of destination is regarded the place in which the last carrier has unloaded the cargo, no matter that the carriage is under a single contract or a series of contract.[17] So when, in such a carriage, the places of departure and destination are clear, it would be, according to article 1(2) of the Convention, easy to determine whether it is an international carriage or not. If it is recognised to be international carriage and the Warsaw Convention is consequently applicable, mere performance of one contract or more within a territory subject to the sovereignty, suzerainty, mandate or authority of the High Contracting Party in which the place of departure or destination is situated does not negate the international character of the carriage.[18]

On the other hand if the parties have not regarded the carriage as a single operation, it is not deemed as an undivided carriage for the purpose of the Warsaw Convention.[19] It seems that, in such successive air carriages, each part of the carriage

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[16] - See P.B. Keenan Shawcross and Beaumont on Air Law, supra note 1, pp. 404, 406; Grey v. American Airlines Inc. (1950), U.S. AV.R. 296; also American court in Felsenfeld v. Sabena, (1962) U.S. AV.R. 575, at p. 575 said: "the Plaintiff's rights under the Warsaw Convention are determined not by the flight which makes part of the trip but by the entire contract of carriage."

[17] - Article 1(3) of the Warsaw Convention provides: "A carriage to be performed by several successive air carriers is deemed, for the purpose of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whetehr it had been agreed upon under the form of a single contract or of a series of contracts ..." see the case of Rotterdamsche Bank V.B.O. A.C. [1953] 1 Weekly L. Rep. 498.

[18] - Article 1(3) continues to provide: ".... and it does not lost its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party".

[19] - Article 1(3) of the Warsaw Convention.

should be considered as a separate carriage, i.e. the places of departure and destination for each part should be determined and it is then, accordingly, considered that which part of the carriage is an international carriage for the purpose of the Warsaw Convention.

Article 2 of the Warsaw Convention provides:

(1)-This Convention applies to carriage performed by the State[20] or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

(2)-This Convention does not apply to carriage performed under the terms of any international postal convention.

(1)-1- In applicability of the Warsaw Convention, is the existence of document of cargo carriage necessary?

Although the carrier has the right to require the consignor to make out and hand over to him a document which is called an "air consignment note",[21] the absense, irregularity or loss of such a document does not affect the validity of the contract or the operation of the Convention rules.[22] So if a contract of air cargo carriage has the conditions necessary to be governed by the Warsaw Convention, the Convention will apply to that contract even if it has no air consignment note or its air consignment note

[20] - According to the Additional Protocol to the Convention, however, the High Contracting Parties have the right to declare at the time of ratification or of accession that this paragraph shall not apply to international carriage by air performed directly by the State.

[21] - Article 5(1) of the Warsaw Convention.

[22] - C.M. Schmitthoff, supra, note 4, p. 529; see also article 5(2) of the Convention.

is irregular or lost.[23] It should, however, be noted that the applicability of the Warsaw Convention to such a carriage contract shall be subject to the provision of Article 9,[24] i.e. in particular circumstances,[25] which will be mentioned later on,[26] the carrier is deprived of the Convention provisions excluding or limiting his liability.

(1)-2- Continuity of the applicability of the Warsaw Convention to carriage contracts including a null provision

If an air cargo carriage contract, being governed by the Warsaw Convention, includes a provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Warsaw Convention, that provision alone is null rather than the whole contract so as the applicability of the Warsaw Convention continues. In other

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[23] - Article 5(2) or the Convention provides:

"The absence, irregularity or loss of this document (air consignment note) does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention."

[24] - See Article 5(2), supra, note 23. *Article 9 of the Convention provides:*

"If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Article 8(a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provision of this Convention which exclude or limit his liability."

Article 8(a) to (i) and (q) provides: "The air consignment note shall contain the following particulars:- (a) the place and date of its execution; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the consignor; (e) the name and address of the first carrier; (f) the name and address of the consignee, if the case so requires; (g) the nature of the goods; (h) the number of the packages, the method of packing and the particular marks or numbers upon them; (i) the weight, the quantity and the volume or dimensions of the goods; (q) a statement that the carriage is subject the rules relating to liability established by this Convention.

[25] - For "the particular circumstances" see Articles 9 and 8, supra, note 24.

[26] - See p. 204 of this thesis.

words, it is not correct to say that because one provision of the contract is null under the Convention, then the whole contract is null and the Warsaw Convention does not apply to it. Article 23 of the Warsaw Convention provides:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the *nullity of the whole contract*, which shall remain subject to the provision of this Convention."

(1)-3- Applicability of the Warsaw Convention to Combined Carriage[27]

In the case of a combined carriage, which includes an air leg of transport, the question is whether the Warsaw Convention is applicable to that air leg of the combined transportation or not. The 1929 Convention considered such a situation and provided if that air leg of the combined transport falls within the terms of Article 1 of the Convention, it will apply only to that air leg of carriage.

Article 31(1) of the Warsaw Convention provides:

> "In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1."

Since Article 1 of the Warsaw Convention as amended by the Guadalajara Convention provides for a contracting carrier and such a "carrier" is a person who as a principal makes an agreement for carriage governed by the Warsaw Convention, the MTO is, as a result, a Warsaw Convention carrier.

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[27] - It is sometimes called multimodal transport. They have alternatively been used in this work.

So the Warsaw Convention will even apply to a combined carriage including an air leg of transport so far as the carriage by air is concerned and if that air carriage is an international one for the purpose of the Convention.[28]

(1)-4- Circumstances in which the Warsaw Convention does not apply

If air carriage cannot be regarded as international as defined in the Convention, the Convention does not apply to it. There are also some circumstances in which the Warsaw Convention does not apply to the contract of air cargo carriage even if it falls within the conditions laid down in Article 1. Those circumstances are as follows:

1 - If the air cargo carriage is performed neither by the State nor by legally constituted public bodies.[29]

2 - If the air cargo carriage is performed under the terms of an International Postal Convention.[30]

3 - If the carriage by air is performed either by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, or in extraordinary circumstances outside the normal scope of an air carrier's business.[31]

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[28] - A. Diamond, supra chap. 1, note 14, p. C8; see also Articles 1 and 2 of the Guadalajara Convention, 1961.

[29] - Article 2(1) of the W/C.

[30] - Article 2(2) of the W/C.

[31] - Article 34 of the W/C. In Pannels et al. v. Sabena (1950) U.S. AV.R. 367, the court decided that a carriage was performed by way of experimental trial by air navigation undertakings if two conditions satisfied: (1) the flight must constitute a trial flight, that is, there must be the possibility of

4 - If a gratuitous carriage is not performed by an air transport undertakings.[32]

5 - If air carriage falls within the Additional Protocol to the Warsaw Convention which has been signed by the State. The Additional Protocol provides:

> "The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of accession that the first paragraph of article 2 of this Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority."

The phrase "performed directly by the State" means that the State itself performs the transportation. The court in the case of Jane Ross et al v. Pan American Airways, Inc. (1949) U.S. AV.R. 168, held that although the United States Army bought the appellant's ticket, her transportation was on an aircraft which was owned, operated and controlled by the defendent.

In conclusion, the applicability of the Warsaw Convention to air cargo carriage depends on the carriage contract evidenced by the air consignment note.[33] If according to the contract made by the parties, the places of origin and destination (regardless of breaks, transhipment or the number of consecutive contracts or successive carriers)[34] are situated either within the territories of two High Contracting Parties, or within the territory

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unknown difficulties; and (2) the flight must be over a new air route: see Shawcross & Beaumont ..., supra note 1, p. 402.

[32] - Article 1(1) of the Warsaw Convention: for the definition of "an air transport undertaking" see P.B. Keenan, Shawcross and Beaumont on Air Law., supra note 1, p. 409.

[33] - Article 11 of the Warsaw Convention.

[34] - If the carriage has been regarded by the parties as a single operation (Art. 1(3) of the W/C), and "if in such a contract there are several legs on the journey, the particular leg of the journey on which an accident occurs is not relevant to a determination whether the Convention is applicable": see Lowenfeld & Mendelsohn, supra, note 5, p. 501.

of a single High Contracting Party with an agreed stopping place outside that State, the 1929 Warsaw Convention will, except the circumstances mentioned before, apply.[35]

Here, two points deserve to be noted. First, if in an international air carriage as such there is miscarriage of goods, it does not deprive the carriage of its international character and the Warsaw Convention, therefore, applies to it.[36] In the case of Rotterdamsche Bank N.V. and Another v. British Overseas Airways Corporation and Another,[37] a cargo of 2000 gold sovereigns was supposed to be carried by a number of successive carriers from Amsterdam to Djibouti. First from Amsterdam to Cairo, second from Cairo to Asmara and then from Asmara to Djibouti. The cargo was duly carried from Amsterdam to Cairo and was there transhipped to be carried on to Asmara. At Asmara the cargo was not transhipped and left on board the aircraft and carried on to Aden where they were stolen and had never recovered. In fact there was an over carriage or a miscarriage. The plaintiffs contended that when the second defendents (one of the successive carriers) failed to discharge the goods at Asmara and negligently permitted them to go on to Aden *there was a deviation from the contractual voyage. They* submitted that that fundamental departure from the contractual voyage entitled them to repudiate the contract of carriage which thus became deprived of its international character and so no longer subject to the terms of the Convention.[38] The judge said: "... I cannot see anything in the Act or the Convention which enables me to say that such over carriage

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[35] - C.M. Schmitthoff, supra note 4, p. 537.

[36] - Shawcross and Beaumont on Air Law, supra note 1, p. 414.

[37] - [1953] 1 Weekly Law Report (W.L.R.) p. 498.

[38] - Id. at p. 502.

or miscarriage of the goods, as here occurred, deprived the carriage of its international character so as to remove it entirely from the ambit of the Convention".[39] The court held that the carriage was an international carriage according to the Warsaw Convention and the over carriage or miscarriage of the goods did not deprive the carriage of its international character.[40]

Second, the applicability of the Warsaw Convention does not depend on the shipper's residence or nationality, or on which air line performs the carriage. So the question "whether the airline which performed the carriage belongs to a country which is a member of the Convention" is irrelevant.[41] In an American case[42] concerning passenger carriage the accident occurred on a flight from Havana to Miami performed by Cubana Airlines. Cuba was not a party to the Warsaw Convention, but since plaintiff's decedents were on a round trip from Maiami to Havana and return, the Convention was held applicable.

(2) - According to the Warsaw Convention an action for damages can be brought

As was said above, in applying the liability-limiting provisions of the Warsaw Convention to a particular carriage leg, one of the requisites is that the Warsaw

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[39] - Id. at p. 502.

[40] - Id. at p. 498.

[41] - Lowenfeld and Mendelsohn, supra note 5, p. 501.

[42] - Glenn v. Compania Cubana de Aviation, 102 F.supp. 631 (S.D. Fla. 1952).

Convention itself applies to the same carriage. This requisite is the main one upon which the others are based. In other words, although this applicability of the Warsaw Convention to the same carriage leg is necessary, it is not enough to apply the liability-limiting provisions. The second requisite is, therefore, that the action for damages can be brought to court according to the conditions and limits set out in the Warsaw Convention because otherwise, if it cannot be brought, the application of the liability-limiting provisions is meaningless.

Article 24 of the Warsaw Convention provides:

> "In the cases covered by Articles 18[43] and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."

The conditions and limits which have been set out in the Warsaw Convention are as follows:

1 - The person entitled to delivery of the goods must complain to the carrier after the discovery of the damage.[44] Receipt of cargo by him without complaint is prima facie evidence of delivery in good condition;[45] and

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[43] Article 18 of the Warsaw Convention makes the carrier liable for damage sustained in the event of the destruction or loss of, or of damage to, any goods if the occurrence which caused the damage so sustained took place during the carriage by air.

[44] "damage" applies, also, to the loss of cargo: Fothergill v. Monarch Airlines [1981] A.C. 251.

[45] Warsaw COnvnetion, Article 26(2) and (1); C. M. Schmitthoff, supra note 4, p. 535; D. M. Sassoon, Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons J. of Mar. L. & Com., 1972, Vol. 3 p. 769.

2 - This complaint must be made, in writing, to the carrier and within seven days from the date of receipt of the cargo[46] if there is no fraud on part of the carrier.[47] If the goods have not arrived, within seven days after the date on which they should have arrived.

3 - An action for damages must be brought within two years which is reckoned from the date on which the goods have arrived or the aircraft ought to have arrived at the destination or from the date on which the carriage stopped. Otherwise the right to damages shall be extinguished.[48]

4 - An action for damages must be brought, at the option of the plaintiff, before the court which has jurisdiction, i.e., the court which has been situated either where the carrier is ordinarily resident, or has principal place of business, or has a place through

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[46] Art. 26(3) and (2) of the Warsaw Convention; Schmitthoff, supra note 4, pp. 535, 541; Sassoon, supra note 45, p. 769; see also the case of Fothergill v. Monarch Airlines Ltd. [1981] A. C. 251; [1980] 2 All E.R., H.L. in which the plaintiff complained, in writing, to the carrier about the damage which had occurred for his suit case immediately after his arrival. But he did not complain regarding the partial loss of its contents until four weeks later. The Court of Appeal held that on purposive construction of Article 26(2), 'damage' included partial loss of the baggage, and accordingly the plaintiff should have complained of such partial loss within 7 days of the date of receipt of the baggage.

[47] Art. 26(4) of the Warsaw Convention; see P. B. Keenan Shawcross & Beaumont on Air Law, supra note 1, p. 430.

[48] Art. 29 of the Warsaw Convention; see Schmitthoff, supra note 4, p. 535; Sassoon, supra note 45, p. 769; Ray B. Jeffrey, supra note 12, p. 809; P. B. Keenan Shawcross & Beaumont on Air Law, supra note 1, p. 438.

which the contract has been made, or situated at the place of destination.[49]

5 - An action for damages can be brought subject to the carrier's liability limits mentioned in Article 22. But such limits of liability may be deleted under some circumstances.[50]

6 - In the case of loss of cargo, the consignee is not entitled to enforce *against the* carrier the rights which flow from the contract of carriage unless the carrier admits the loss of cargo or the cargo has not arrived at the expiration of seven days after the date on which the cargo ought to have arrived.[51] So if the carrier does not admit the loss of the cargo, the consignee has no right to bring an action against the carrier before seven days after the date on which the cargo should have arrived. This can be, however, varied by the express provisions in the air consignment note.[52]

7 - If a cargo carriage is performed by a number of successive carriers and falls within the conditions laid down in the third paragraph of Article 1; in the case of destruction or loss of or damage to the goods, it is only the consignor who can bring an action against the first carrier and it is only the consignee who can bring an action against the last carrier. Also the consignor or consignee can bring an action against the carrier

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[49] Art. 28(1); Sassoon, supra note 45, p. 769; R.B. Jeffrey, sura note 12, p. 809; Lowenfeld & Mendelsohn, supra note 5, p. 522, which cited the case of Bowen v. Port of N. Y. Authority, 8, AV. Cas. 18,043 (N. Y. Sup. Ct. 1964).

[50] For example Articles 9 and 25 of the Warsaw Convention.

[51] Art. 13(3).

[52] Art. 15(2).

who performed the carriage during which the destruction, loss or damage took place.[53] So the consignee cannot bring an action against the first carrier and the consignor cannot bring an action against the last carrier unless either it is proved that the destruction, loss of or damage to the goods occurred when the goods were in their possession, or the consignee and the consignor are the same. However, the consignor and the consignee are the only persons who have right of action.[54]

So it seems that the carrier can get rid of any liability arising from Article 18 or Article 22 of the Warsaw Convention for ever[55] or at least for some time[56] if he shows that the action cannot be brought to the court under the conditions and limits set out in the Warsaw Convention.

In Rotterdamsche Bank v. B.O.A.C. and Another,[57] there were a number of successive carriers to carry the goods from Amsterdam to Djibouti. The goods were stolen during carriage while in the custody of second defendant, Aden Airways Ltd. The plaintiff

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[53] Warsaw Convention, Art. *30(1) and (3); see also Lowenfeld & Mandelsohn, supra* note 5, p. 499, F.N.7.

[54] Schmitthoff, supra note 4, p. 535.

[55] If, for example, the carrier shows that the action has been time- barred. See Shawcross and Beaumont on Air law, supra note 1, p. 430.

[56] If, for example, the carrier shows that the court has no jurisdiction. See Id., at p. 430.

[57] [1953] 1 W.L.R. p. 498; see also the American case of McCarthy v. East African Airways Corp., 13 Av. Cas. 17,385 (S.D.N.Y. 1974), in which the plaintiffs were precluded by the court, under article 28(1) of the Convention, from maintaining suit in the United States because that was not the place where the defendant was ordinarily resident, nor was that his principal place of business or where the defendant had sold the ticket. Also that was not the place of destination mentioned in the ticket.

brought an action for damages in respect of the loss to an English Court against the first defendant, British Overseas Airways Corporation, and the second defendant, Aden Airways Ltd. Aden Airways took out a summons to supersede the writ as against them on the grounds that the court has no jurisdiction to entertain the claim against them. The court held that it had no jurisdiction to entertain the claim against Aden Airways because they were ordinarily resident in Aden, where they had their principal place of business. They could only be sued, according to Article 28(1) of the Convention, either at Aden or at Djibouti, which was the place of destination according to the contract. The writ and all subsequent proceedings in the action against them must be set aside.

Regarding the intepretation of 'ordinarily resident' mentioned in the Warsaw Convention Article 28(1), it should be noted that if a corporation has merely a branch office in a foreign country, it is not ordinarily resident within the jurisdiction of that foreign country. In Rothmans of Pall Mall v. Saudi Arabian Airlines Corporation[58] the plaintiff brought an action against S.A.A.C., whose principal place of business was outside England, on the grounds that the defendant had an office in London and they were, within the meaning of Article 28(1), ordinarily resident within the jurisdiction. The defendant objected to the court's jurisdiction. The court rejected the plaintiff's contention and held that on the true construction of Article 28(1) of the Convention, a foreign corporation was not 'ordinarily resident' within the jurisdiction if it merely had a branch office there ... the writ and service would be set aside.

[58] [1980] 3 All E.R. 359.

(3)- According to the Warsaw Convention the carrier must be liable in the first place

Assuming that the first two requisites are complied with, i.e. the Warsaw Convention is applicable to the carriage and an action can accordingly be brought to court, the third requisite for applying the Warsaw Convention's liability-limiting provisions is that the carrier is liable, i.e. he cannot avail of any of the Conventional defences or any of contractual defences which do not conflict with the Warsaw Convention's provisions. Otherwise if he is not liable, the question of liability limitation will never arise.

Regarding the liability of the air cargo carrier article 18(1) of the 1929 Convention provides:

> "The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air."

For the meaning of the period of the carriage by air Article 18(2) and (3) provides:

> (2) "The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."
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> (3) "The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air."

As seen, the air cargo carrier is presumptively liable in the event of destruction,

loss of or damage to the goods if it occurs during the carriage by air.[59] The principle of liability is based on negligence.[60] In other words the Warsaw Convention creates a presumption upon which any accident results from the carrier's negligence, but this presumption is rebuttable by the carrier through the defences mentioned in the Warsaw Convention.[61] Instead of this presumptive liability, the Convention provides a quid pro que to the carrier,[62] i.e. the carrier has the right to use specified defences[63] and even if the carrier fails to invoke those defences and is known liable, his liability is limited in an amount[64] if he is not deprived of taking advantage of the liability-limiting provisions.

- Defences available to cargo carriers

The defences to the cargo carrier are as follows:

1 - The cargo carrier is not, according to Article 20(1) and (2) of the Warsaw Convention, liable if he can prove: (i) - that the damage was occasioned by a) - negligent pilotage; or b) - negligence in the handling of the aircraft; or c) - negligence in

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[59] C. M. Schmitthoff, supra note 4, p. 535; Sassoon, supra note 45, p. 768; G. F. FitzGerald, The Four Montreal Protocols, J. of Air L. & Com. Vol. 42, 1976, p. 282.

[60] Lowenfeld & Mendelsohn, supra note 5, p. 500.

[61] R. B. Jeffrey, supra note 12, p. 808.

[62] Dawn Davenport, supra note 6, p. 159.

[63] C. M. Schmitthoff, supra note 4, p. 535; Lowenfeld & Mendelsohn, supra note 5, p. 519.

[64] M. Sassoon, supra note 45, p. 765.

navigation; and (ii) - that in all other respect, he and his agents have taken all necessary measures to avoid the damage,[65] or that it was impossible for him or them to take such measures.

In the case of Grein v. Imperial Airways Ltd.,[66] Greer L. J. interpreted the phrase 'necessary measures' as the measures which were reasonably necessary to avoid the damage.

2 - If the right to damages is extinguished by not bringing an action within 2 years as pointed out in Article 29, this is a good defence to the carrier that the right to damages has been time-barred.[67]

3 - As said the carrier's liability attaches if the cause of damage occurred during the period of the carriage by air as defined by Article 18(2) and (3). So if the cause of damage occurred at a time out of that period, this seems to be a good defence for the carrier to escape liability.[68]

4 - Apart from the above defences available to cargo carriers, Article 33 of the Warsaw Convention, where appropriate, can be good defences for the carrier to escape

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[65] Schmitthoff, supra note 4, p. 536. This defence was abolished by the Hague Protocol 1955 and "is never used because ... to raise this defence for cargo might give rise to unlimited liability under Article 25": Schmitthoff, supra note 4, p. 540.

[66] [1937] 1 K.B. 50, at 69-71; see also Chisholm v. British European Airways (1963) 1 Lloyd's Rep. p. 626; P. B. Keenan, supra note 1, p. 442.

[67] P. B. Keenan, supra note 1, p. 454.

[68] P. B. Keenan, supra note 1, p. 451.

liability. It provides:

> "Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Convention."

So a carrier is free not to enter into a contract of carriage. If a carrier is, however, compelled to enter into a contract and a damage arises from an accident which has occurred during the carriage by air, he seems to have a good defence to relieve himself of liability, i.e. he can say that under Article 33 of the Warsaw Convention he was free not to enter into the contract but he was compelled to do so.

Similarly a carrier is free to make any regulation in the contract provided that it is not in conflict with the Convention's provisions. So any such regulation, if it is a defence, can be used as a defence for the carrier.[69]

In conclusion, the air cargo carrier, under the Warsaw Convention, is presumptively liable but can benefit of some defences. As soon as he fails to invoke the defences available to him, he is known liable and entitled to avail of the liability limitation if he is not deprived of taking advantage of the Warsaw Convention's liability-limiting provisions.

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[69] C. M. Schmitthoff, supra note 4, p. 536, 540.

(4)- According to the Warsaw Convention the carrier must not be deprived of taking advantage of the liability-limiting provisions[70]

In applying the Warsaw Convention's liability-limiting provisions to a carriage contract, the fourth requisite is that the carrier is entitled to avail himself of the liability-limiting provisions. Under specified circumstances the carrier may lose the benefit of limited liability.[71] The carrier, for example, cannot take advantage of the Convention provisions excluding or limiting his liability when he accepts goods while no air consignment note has been made out, or when there is an air consignment note but it does not contain all the particulars set out in Article 8(a) to (i) inclusive and (q) of the Warsaw Convention.[72]

Article 8(a) to (i) and (q) provides:

> "The air consignment note shall contain the following particulars:
> (a) the place and date of its execution; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping place in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the consignor; (e) the name and address of the first carrier; (f) the name and address of the consignee, if the case so requires; (g) the nature of the goods; (h) the number of the packages, the method of packing and the particular marks or number upon them; (i) the weight, the quantity and the volume or dimensions of the goods; (q) a statement that the

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[70] See, for example, the recent case of S.S. Pharmaceutical Co. Ltd. & another v. Qantas Airways Ltd., [1989] 1 Ll. Rep. p. 319, in which, although the carriers were liable i.e. the fist three requisites were available, the liability-limiting provisions of the Warsaw Convention did not apply because the defendants were deprived of taking advantage of them. The court held that: "on the evidence the defendants' conduct was reckless;...the plaintiffs had satisfied the test prepounded by art. 25 and the defendants were not entitled to limit their liability."

[71] G. F FitzGerald, supra note 59, p. 278.

[72] Article 9 of the Warsaw Convention: see also Schmitthoff, supra note 4, p. 539; P. B. Keenan, supra note 1, p. 456.

carriage is subject to the rule relating to liability established by this Convention".[73]

There was an ambiguity in the English text of Article 8(i) of the Convention. It was not clear what particulars of Article 8(i) must be given in the air consignment note. The French text of Article 8(i) of the Warsaw Convention was clearer. In the French text of Article 8(i) the word for "and" was omitted, the word for "quantity" being followed by a comma. The Court of Appeal in Corocraft Ltd. v. Pan American World Airways Inc.[74] followed the original French text and concluded that only one of these particulars need be given. In that case the plaintiffs delivered a carton of jewellery valued at £1,194 to the carrier for carriage by air from New York to London. The carriage was governed by the 1929 Warsaw Convention. The space for "Dimensions or Volume" was left blank in the air waybill. The carton was stolen by an employee of the defendants carrier. The plaintiffs sued for the value of the jewellery. The defendants contended that their liability was limited to £19 under Article 22(2) of the Warsaw Convention. The plaintiffs contended that the right to limit was excluded under Article 9 of the Warsaw Convention because the air waybill did not contain the volume or dimensions of the goods as required by Article 8(i). The Court of Appeal held that the French text of the 1929 Convention should prevail in the case of any inconsistency with the English test in the 1932 Act and it should be interpreted so as to make good commercial sense. So, Article 8(i) did not require the 'volume' or 'dimensions' to be stated in the waybill unless it was necessary or useful to do so. In this case it was not and the defendants were entitled to the limitation

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[73] See the case of Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd., [1966] 2 Q.B. 306; Seth v. B.O.A.C., [1964] 1 Lloyd's Rep. 268.

[74] [1969] 1 Q.B. 616.

of liability.

In addition there are some provisions in Article 25 of the Warsaw Convention under which the carrier is not entitled to avail himself of the Warsaw Convention's liability-limiting provisions, and loses the benefit of the limits.[75]

Article 25 of the 1929 Convention provides:

(1) "The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability. If the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct."

(2) "Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

In this article the important thing is the concept of 'wilful misconduct'.[76] In the U.K. and the U.S.A. the courts have been called upon to consider it in several cases. In Horabin v. B.O.A.C.[77] the judge concluded that misconduct, especially in the context of

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[75] C. M. Schmitthoff, supra note 4, p. 535; R. B. Jeffrey, supra note 12, p. 808; P. B. Keenan, supra note 1, p. 430.

[76] The term 'wilful misconduct' is not used in the 1955 amended Warsaw Convention.

[77] See, for example, Horabin v. B.O.A.C.,[1952] 2 All E.R. 1016, in which the judge said: "to be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully ... and yet persist in so acting ... regardless of the consequences or ... with reckless indifference as to what the results may be."; Rustenburg v. Pan American World Airways Inc.,[1977] 1 Lloyd's Rep. 564 in which the judge siad: "it is common ground that 'wilful misconduct' goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be ..."; Tuller v. KLM (1961, 292 F.2d 775); see generally N. R. McGilchrist, Wilful Misconduct and the Warsaw Convention, L.M.C.L.Q.,

the relatively hazardous business of air travel, might constitute no more than a minor breach of regulation. Such a misconduct will become 'wilful' if it is shown that "the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effects of what he was doing on the safety of the aircraft and of the passengers". The judge in an American case[78] said:

> " 'Wilful' ordinarily means intentional; that the act that was done was that the person doing it meant to do. But the phrase 'wilful misconduct' means something more than that. It means that in addition to doing the act in question, that the actor must have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequences probably would be and had gone ahead recklessly despite his knowledge of those conditions."

In S.S. Pharmaceutical Co. v. Qantas Airways Ltd.[79], the carriers put the plaintiffs' cargo which were some cartons of medicines in uncovered place although the weather forecast for that day indicated showers with occasional thunderstorms and the cartons had been marked that the goods in the cartons would be damaged if exposed to water. The goods were damaged by rain water. The court regarding the reckless conduct of the carriers said that "Qantas [the defendants] paid no particular attention, took no particular care. To have cargo, which is particularly vulnerable to damage by rain, and leave it exposed to the elements without particular precautions, is reckless."

1977, p. 359.

[78] Froman v. Pan American Airways Inc (284 App. Div. 935); see also Ritts v. American Overseas Airlines (1949), U.S. Av. R. 65; see B. Keenan, supra note 1, p. 424-430.

[79] [1989] 1 Ll. Rep. p. 319.

In brief when the four foregoing requisites are available, the carrier's liability can be limited by applying the liability-limiting provision of the Warsaw Convention.

4.1:1:2 The amount of limitation of damages

If there is not a special declaration of the value of the goods at the time of delivery made by the consignor, the carrier's liability is limited to a sum of 250 gold francs per kilogram.[80] These francs are deemed to refer to French Poincare francs consisting of 65.5 milligrams gold of millesimal fineness 900. The amount of limitation may be converted into any national currency in round figures.[81] But if the consignor, at the time of handing over the cargo to the carrier, makes a special declaration[82] of the value of the goods at delivery and pays a supplementary sum, if the case so requires, the carrier's maximum limit of liability is a sum at most equivalent to the declared sum. However if the carrier can prove that the actual value of the goods at delivery is less than the declared sum he will not be liable to pay a sum equivalent to the declared sum.[83] Even those maximum limits of the air carrier's liability, i.e. 250 gold francs per kilo, arise only if the claimant can prove damage to that extent.[84] In other words in the case of non-

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[80] Article 22(2). It is sometimes called '250 Poincare gold francs'; G. F. FitzGerald, supra note 59, p. 278.

[81] Article 22(4) of the Warsaw Convention.

[82] Regarding 'special declaration of the value of the goods' see P. B. Keenan, supra note 1, p. 453; see Westminster Bank, Ltd. v. Imperial Airways Ltd., [1936] 2 All E.R. 890; Mayers v. K.L.M. (1951)), U.S. Av. R. 428.

[83] Article 22(2) of Warsaw Convention.

[84] C. M. Schmitthoff, supra note 4, p. 535.

declaration of the goods' value "the carrier's maximum liability is limited to the actual damage or to 250 Poincare francs per kilo whichever is the lesser amount."[85]

A question is: can the amount of *limitation of liability* be reduced or contracted out of? The answer is 'no' because any provision tending to fix a lower limit than that which is laid down in the Warsaw Convention is null and void.[86] Also any clause of the contract or any agreement entered into before the damage is occurred by which the parties purport to infringe the rules laid down by the Warsaw Convention is null and void.[87]

Another question is: can the court award, in addition to the limits of Article 22, the whole or part of the legal costs incurred by the plaintiff? There is nothing in the Warsaw Convention to provide as to the legal costs incurred by the plaintiff. Some believe that the legal costs should not be a part of air law and certainly should not be an appropriate subject for an international treaty but they are awarded as a matter of course,[88] i.e. the losing party should pay for the costs of litigation including the legal costs incurred by the winning party. According to this view, the answer is, therefore, yes, whereas the chairman of the United States delegation in the 1955 Hague Conference explained that it was well known that attorney's fees and other expenses of a trial absorbed a great part of the compensation so that the sum actually received was often much less than the limit provided.[88]

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[85] D. M. Sassoon, supra ntoe 45, p. 769.

[86] Warsaw Convention, Art. 23; C. M. Schmitthoff, supra note 4, p. 535.

[87] Id. Art. 32.

[88] Lowenfeld & Mendelsohn, supra note 5, pp. 507-8.

4.1:1:3 To whom the limitation of damages applies

(1) - To the carrier

Under the 1929 Warsaw Convention it is the carrier whose liability is limited and, therefore, the limitation of damages applies to him. But there is no definition of the word 'carrier' in the 1929 Convention. Some take the view that the carrier is the person who contracts, as principal, to perform the carriage[89] (contracting carrier); but others take the view that the carrier is also the person who actually performs the carriage whether or not he has contracted to perform it. Therefore, if in a carriage the person who contracts with the consignor and the person who actually performs the carriage are not the same, it is not clear which one should be regarded as 'the carrier' as defined by the 1929 Convention, and which one can avail himself of the Convention's liability-limiting provisions.

It is submitted that because Article 1 paragraph 2 of the 1929 Convention gave a paramount importance to the contract made by the parties, the carrier is contracting carrier, i.e. the person who contracts as a principal, to perform the international carriage or the person who is a successive carrier within the meaning of the Convention. If this conclusion is correct the result would be that the actual carrier, if he is not also the contracting or successive carrier, is not entitled to avail himself of the Convention's liability-limiting provision.[90]

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[89] Drion, Limitation of Liabilities in International Air Law (1954), pp. 134-5.

[90] P. B. Keenan, surpa note 1, pp. 417-8; cf. C. M. Schmitthoff, supra note 4, p. 537 upon which the actual carrier, too, is entitled to avail of the Warsaw Convention's liability-limiting provisions.

This problem was solved by the 1961 Guadalajara Convention[91] in which the definition of the contracting carrier, actual carrier and the applicability of the rules of the Warsaw Convention to them have been determined. Therefore, if in a carriage the contracting carrier and the actual carrier are not the same, the actual carrier's liability limitation is also 250 gold francs per kilogram and this amount cannot be exceeded by reason of any act or omission of the contracting carrier. Also it cannot be exceeded by reason of any special agreement entered into by the contracting carrier or any special declaration of value which has been made to the contracting carrier unless the actual carrier has agreed.[92]

(2) - To the carrier's servant or agent

If an action is brought against a servant or an agent of the carrier acting within the scope of his employment, there is nothing in the 1929 Convention to provide that that servant or agent can claim the benefit of the limitation of damages applicable to the carrier.[93]

The question, therefore, is: how would the 1929 Warsaw Convention operate in such a situation?

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[91] In 1961 a supplementary convention to the Warsaw Convention, for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier, was signed at Guadalajara in Mexico. It is known as the Guadalajara Convention.

[92] C. M. Schmitthoff, supra note 4, p.537.

[93] But according to Art. 25A of the 1955 amended Convention the carrier's agents or servants are entitled to claim the benefit of the limitation of liability provided that they prove that they acted within the scope of their employment.

There are different views regarding the applicability of the limits in Article 22 to servants and agents of the carrier. Some experts believe that they are applicable to the carrier's agents or servants. But some contend that they are not applicable to them and the agents or servants can be sued separately in tort or delict without limit.[94] In this respect there are some cases which have been decided differently. In Pierre v. Eastern Airline Inc. & Foxworth,[95] the U.S. District Court of New Jersey decided that the Convention did not extend to servants. In another American case,[96] however, the U.S. Second Circuit Court determined that Article 22 protected the carrier's employee and held that the plaintiff may not recover greater damages from the employee than the plaintiff could recover from the carrier.

According to Section 4 of the English Carriage by Air Act 1962, the carrier's agents or servants acting within the scope of their employment can claim the benefit of the limitation of damages even if the carriage is governed by the 1929 Convention if their liability have arisen out of an occurrence before the day on which Article 25A of the first schedule of the Carriage by Air Act 1961 comes into force.[97]

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[94] K. M. Beaumont The Warsaw Convention of 1929, as amended by Protocol signed at the Hague, J. of Air Law and Com., vol. 22, 1955, p. 419.

[95] (1957), U.S. Av. R. 431.

[96] Reed, 555 F.2d. at 1081; see also Wanderer v. Sabena and Pan Am. Airways Inc., (1949), U.S. Av. R. 25 and Chutter v. K.L.M. & Allied Aviation Service Corp., (1955), U.S. Av. R. 250, in them the U.S. Court held that the Convention's liability limitation applies to the agents of the carrier.

[97] See Halsbury's Statutes, supra note 14, p. 48; Schmitthoff, supra note 4, p. 537.

Because there is doubt that whether the 1929 Convention's exclusion or limitation applies to the carrier's servants or agents, carriers usually contract with passengers or consignors that their agents or servants should benefit from the exclusion or limitation which applies to the carriers themselves.[98]

(3) - To the successive carrier

A successive carrier[99] may avail himself of the limitation of damages. If the contract of air carriage is performed by several successive carriers and is, according to Article 1, paragraph 3 of the Warsaw Convention, known as an international air carriage, each carrier who accepts the goods is subject to the rules set out in the Convention. Article 30(1) of the Convention provides:

> "In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carriers who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage so far as the contract deals with that part of the carriage which is performed under his supervision."

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[98] P. B. Keenan Shawcross & Beaumont on Air Law, 1966, vol. 1, pp. 416-7. See, for example, New Zealand Shipping Co. v. M. Satterthwaite & co. [1974] 1 All E.R. 1015 (P.C.), in which the court reached the result that 'where the initial parties to a contract exempt third parties [such as their agents, servants or independent contractors] from liability those third parties may attract the benefit of an exemption clause by performance of the contract":see Current Law Year Book, 1974, London Sweet & Maxwell Ltd., para. 3532.

[99] For the meaning of 'successive carrier' see P. B. Keenan Shawcross and Beaumont on Air Law, 1966, vol. 1, p. 410.

4.1:1:4 What problems there are with the Warsaw Convention's liability-limiting provisions

One of the problems with the liability-limiting provisions of the Warsaw Convention is related to the basis on which the amount of limitation of liability of the carrier ought to be assessed. Under Article 22(2) of the Warsaw Convention, in the case of damage to part of the goods or partial loss of the goods, it is not clear whether the yardstick of the calculation of the carrier's liability limits is the total weight of the damaged or lost goods which forms part of the whole goods, or the total weight of the whole goods (damaged and undamaged goods). Article 22(2) just provides: "in the carriage of ... goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, ...", it does not provide 'per kilogram of what'? It does not provide whether the carrier's liability limits is 250 francs per kilogram of the total weight of the damaged or lost goods or the total weight of the whole goods.

In an English case, Data Card Corp. v. Air Express International Corp.,[100] the above problem came up. In this case a consignment of eight packages with a gross weight of 3132.5 kg. was delivered to the carrier to carry from Minneapolis to London. While the cargo was being loaded onto the road hauling vehicle, at Heathrow Airport, one of the packages was dropped from a forklift truck, and was seriously damaged. Its weight was 659 kg. The plaintiffs sought damages against the defendants carriers. They (the plaintiffs) contended that the total weight of the whole cargo covered by the air waybill should be a basis for the calculation of the carrier's liability limits. They reasoned that the only

[100] [1983] 2 All E.R. 639; [1983] 2 Lloyd's Rep. 81.

weight which the Warsaw Convention was concerned with is the weight of the whole cargo in article 8(i), and therefore the carrier's liability limits is 250 francs per kilogram of the total weight of the whole cargo. They also reasoned that the carrier could avoid such liability limits by insisting on separate air waybills for each package according to Article 7 of the Warsaw Convention.[101]

The defendants contended that the weight of the damaged cargo should be a basis for the calculation of their liability limits. They reasoned that Article 22(2) was to be read as saying '250 francs per kilogramme per package', by reason of the words 'the package' which came later in the same sentence of Article 22(2). They also reasoned that it was more natural and reasonable to limit liability to the weight of damaged cargo than to the weight of the whole cargo listed on the air waybill.[102]

Bingham, J., in his judgment, rejected the plaintiff's contention and said:

> "The word '250 francs per kilogramme' do, I accept, pose the question, 'per kilogramme of what?', but the natural and grammatical answer derived from the clause itself seems to me to be 'per kilogramme of the package which was handed over to the carrier'. A requirement that the limit should be calculated *by reference* to goods neither lost nor damaged would, as it seems to me, require express language or clear implication which are not to be found in the paragraph."[103]

He also, regarding the alternative contention of the plaintiffs that the 'affected weight' should be a basis for assessment of damages, said that:

"This was ... the solution adopted by the Hague amendment to the Warsaw

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[101] [1983] 2 All E.R. p. 639 at p. 642; the plaintiffs alternatively contended that the damages were to be calculated by reference to goods which had neither been damaged nor lost.

[102] Ibid. at p. 642, f&g.

[103] Ibid. at 643, h to e.

Convention. I find nothing whatever in the wording of the unamended Warsaw Convention, in the travaux preparatories of the Warsaw Convention, in any authority or in any academic writing to suggest that Article 22(2) in its unamended form was intended to have the meaning which it later bore after being amended at the Hague. I regard this contention as quite unarguable."[104]

Regarding the contention of the plaintiff as to Article 7 of the Warsaw Convention Bingham, J. said:

"Moreover, it seems to me very unlikely that the draftsmen of the Convention intended carriers to be fully protected by the limitation of liability available to them under the Convention only if they went through the bureaucratic, costly, and time-wasting procedure of issuing or insisting on separate air waybills for each package of cargo."[105]

The English court, therefore, held that *Article 22(2) of the Warsaw Convention* limits a carrier's liability for loss of, or damage to the package which forms part of a consignment of cargo to 250 francs per kilogramme of the lost or damaged package rather than of the total consignment of which the lost or damaged package forms a part, or of the part of the total consignment which has its value affected by the loss of or damage to the package.[106]

Apparently this problem had not been raised in the English courts before Data

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[104] Ibid., at p. 644, h; this problem was solved under the 1955 Hague amended Convention; There, under Article 22(2)(b), the total weight of the lost or damaged cargo is a basis for determining the amount of the carrier's liability limit. But if the loss of or damage to a part of the cargo affects the value of other packages covered by the same air waybill the total weight of such package(s) shall also be taken into consideration in determining the liability limit of the carrier.

[105] Id. at 643, h.

[106] Id. pp. 639, 643 e to g and 644 h.

Card. Bingham J. said, "there was a striking dearth of authority on the point at issue".[107] But an American court, the Superior Court of the District of Columbia, had dealt with the problem in Norwood v. American Airline Inc.[108] to which Bingham J. pointed out in Data Card. It seems that the American court has reached a different conclusion from the English court, i.e. according to the American court, the carrier's liability limits for loss of or damage to a package is 250 francs per kilogramme of the total consignment. In Norwood v. American Airlines Inc.[109] a package was delivered to the defendant carrier. An article which formed part of the package was stolen. The defendant carrier contended that the financial limit of his liability should be calculated by reference to the weight of the article which was stolen. The court rejected the defendant's contention and decided that the carrier's liability limit in Article 22(2) was to be assessed with reference to the total weight of checked baggage.

It seems that the Data Card approach in which Bingham J. gave a natural and grammatical construction to Article 22(2) of the Warsaw Convention is commonsense and acceptable. Moreover, it seems to be very unlikely that the draftsmen of the Warsaw Convention, who intended to limit the carrier's liability in Article 22(2), intend to make him liable for a cargo which was neither lost nor damaged. However, it is not clear whether the Data Card approach will be adopted by the courts of appeal in the U.K. or not.

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[107] Id. at 644.

[108] 1980 U.S. Av. R. 1854.

[109] Id.

Another problem with the 1929 Warsaw Convention's liability limit provisions is related to the conversion unit. This has been come up in several cases in different countries. Article 22(4) of the Warsaw Convention provides:

> "The sums mentioned above (the sums in terms of franc) shall be deemed to refer to the French franc consisting of 65.5 milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures."

As seen, under the Warsaw Convention, the carrier's liability limit is assessed on the basis of gold. This gold-based liability limit is convertible into any national currency in round figures. However there is nothing in the Warsaw Convention to provide a conversion unit upon which the gold-based liability limit of the carrier can be converted into a national currency.[110] In other words the enforcement of the Warsaw Convention requires the existence of a conversion unit and the lack of the conversion unit in the Warsaw Convention is a problem with it. The authors of the Warsaw Convention did not contemplate that such problem would arise from the use of gold because the official price and the free market price of gold were virtually the same in 1929.[111]

The problem was in fact created in the 1960's, when the free market price of gold outpaced the official price of gold.[112] Prior to 1960's, since the free market price

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[110] The 1955 Hague amended Convention provided:
"Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgement". We can see that, even here, the 'gold value' yardstick was to be ascertained. See N. R. McGilchrist, What is a Poincare gold franc worth? L.M.C.L.Q. 1982, p. 164.

[111] J. D. Simpson Air Carriers' Liability under the Warsaw Convention after Franklin Mint v. T.W.A. Washington and Lee Law Review, 1983, vol. 40, pp. 1471-2.

[112] Prior to 1960's free market gold price stabilized at the same value as official gold price; see Heller The Value of the Gold Franc - A Different Point of View, 6.J. of Mar. L. & Com. 73, at 81.

stabilized near the official price of $35.00 per ounce with little help from world governments[113] there was not any problem regarding a conversion unit for the conversion of the gold-based liability limit of the carrier into a national currency.

In the late 1960's, because of a considerable private gold buying, the free market price of gold went up so that the governments were unable to stabilize it with the official price of gold.[114]

Although members of the International Monetary Fund (IMF), an organization which was created at the Bretton Woods Conference,[115] were to maintain a 'par value' for their currency,[116] we see that by 1973 there was a clear violation of the Bretton Woods system, i.e. "many of major trading nations had failed to maintain a fixed par value for their currency and were allowing their currencies to fluctuate at the free market price."[117]

To solve this problem the IMF replaced gold as a basis for the international monetary system with a unit of account known as the Special Drawing Right (the SDR).[118]

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[113] D. Davenport, supra note 6, p. 166; see generally Heller, supra note 112.

[114] D. Davenport, supra note 6, p. 166; see generally Heller, supra note 112, p. 81.

[115] A Conference concerning the international monetary policy held in 1944.

[116] D. Davenport, supra note 6, p. 166; Simpson, supra note 111, p. 1472.

[117] D. Davenport, supra note 6, p. 167.

[118] The SDR is defined as the average value of a specific basket of currency from IMF countries. Until 1981, the value of the SDR was based on a basket of sixteen currencies. On January 1, 1981, the number of currencies in the basket was reduced to five: the U.S. dollar, the West German mark, the French franc, the Japanese yen and the English pound

Prior to the 1960's when free market price of gold stabilized at the same value as official price, courts had no problem in converting the gold-based liability limit of the carrier into a national currency. But when the free market price of the gold outpaced its official price and the parties to the Convention did not replace gold with another thing to determine the air carrier's liability,[119] the courts faced a difficulty of an appropriate conversion unit. The question was: 'what is the appropriate conversion unit under the Warsaw Convention?' Is it the free market price of gold or the official price of gold or the exchange value of the French franc or the SDR? The courts reached different decisions in this regard. Of course "the judiciary's inability to select a standard unit of conversion frustrates the purpose of the Warsaw Convention since the Convention's authors drafted Article 22 to insure uniform limitations of carriers' liability."[120]

Some courts reasoned that the free market price of gold should be the conversion unit of the Warsaw Convention because the Warsaw Convention was "intended to provide stable and consistent limits of liability not subject to the vagaries of fluctuating exchange rates as between national currencies"[121] and that is why the Poincare gold franc was

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sterling. Ward, The SDR in Transport Liability Conventions: Some Clarification 13 J. of Mar. L. & Com. 1,2 (1981); A.F. Lowenfeld, The International Monetary System, 2nd ed., Matthew Bender, 1984.

[119] Simpson, supra note 111, p. 1467.

[120] Id., at p. 1470.

[121] N. R. McGilchrist, What is Poincare Gold Franc Worth? L.M.C.L.Q. 1982 pp. 164-165; Simpson, supra note 111, p. 1471; see H. Drion Limitation of Liability in International Air Law 1 (1954) at 183: (Warsaw Convention authors selected gold as Convention's unit of conversion to avoid effects of devaluations that would result from using national currencies to calculate liability limits); or see Heller The Warsaw Convention and the 'Two-Tier' Gold Market, 7 Journal of World Trade Law, 126, at 129 (1973) which says "Warsaw authors chose gold as unit of conversion because of gold's

adopted as the monetary unit. In other words the official price of gold, as a conversion unit, is not consistent with the purpose of the Convention which was to set "liability limitation that would keep step with inflation."[122]

In Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways,[123] for example, a blood chemistry analyser weighing some 1860 pounds was forwarded from Brazil to Texas. During the carriage the cargo was damaged. The plaintiff sued the carrier. The case was brought to an American court. The American court first, after the demise of the official price of gold in the United States,[124] faced the problem of determining an appropriate conversion unit for converting the carrier's gold-based liability limits into United States dollars.[125] To determine the proper conversion unit the court considered two factors, i.e. 1 - the last official price of gold in the U.S.; 2 - the current free market price of gold,[126] and noted the history of the Warsaw Convention's liability limit and

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stability and tendency to reflect real value".

[122] T. J. Dolan Warsaw Convention Liability Limitations: Constitutional Issues, North Western J. of Int. L. & Bus., Vol. 6, 1984, p. 902 with citation of the case of TWA v. Franklin Mint 104 S.Ct. 1776 (1984).

[123] 531 F. supp. 344 (S.D.Tex. 1981); see the case of Reed, 555 F. 2d at 1089.

[124] When the International Monetary Fund (the IMF) replaced gold with the SDR, the United States Congress passed the Bretton Woods Agreement in 1976 accepting the SDR. United States dollar was no longer defined in terms of gold. Par Value Modification Act was repealed and there was no longer an official gold price in the United States as of April 1, 1978. The last official gold price which had been determined by the Civil Aeronautics Board (CAB) was $42.22 per ounce equal to a liability limit of $9.07 per pound of cargo. D. Davenport, supra note 6, pp. 188-9.

[125] The problem had not previously been considered by any American court. Simpson, supra note 111, p. 1482. See also McGilchrist, The Gold Franc in United States After Franklin Mint v. T.W.A., 1982 L.M.C.L.Q. 281 at 282 (in Boehringer the matter was considered on the basis of first impression).

[126] 531 F. supp. 344 (S.D. Tex. 1981) at 349.

the lack of judicial precedent as to the appropriate conversion unit.[127] Ely, C. J., as to the history of the Article 22(4) of the Warsaw Convention said:

> "The drafters used gold as the unit of reference, instead of pegging the limits to some particular national currency like the dollar or pound, to avoid fluctuations in currency value and problems that might be caused by unilateral action by the government whose currency was used in the liability clause - in short, the drafters looked to the gold's stability and its tendency to reflect real values better than currency."

Because an official gold price no longer existed in the United States the court reasoned that the Convention's authors would not approve the use of a fictitious gold price to convert Article 22 into national currencies, and there was nothing in the Warsaw Convention's history to support position that courts should use last official price to calculate carrier's liability limits.[128] The court therefore dismissed two memoranda[129] of the CAB (Civil Aeronautics Board) and held that the free market price of gold was the only proper conversion unit, i.e. $400 per ounce.[130]

Also there are some other decisions in favour of the free market price of gold in

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[127] Id. at 349-53.

[128] Id. at 352.

[129] 1980 memorandum of the CAB recommended that CAB use free market gold price as Convention's unit of conversion because official gold price did not exist. (See Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limit, at 4-5 (Mar. 18, 1980)). But 1981 CAB memorandum recommended that CAB continue using last official gold price as Convention's unit of conversion because last official gold price effectuates Convention's purpose to provide stable liability limitation. (See the same Bureau, Memorandum on Warsaw Convention Liability Limit, at 5 (May 20, 1981)).

[130] 531 F. supp. 344 at 352-3 (S.D. Tex. 1981). See also the recent case of S.S. Pharmaceutical Co. v. Qantas Airways Ltd., [1989] 1 Ll. Rep. 319 in which the court held that the free market price of gold was the appropriate conversion unit of the Convention

different countries. For example, the decision of the Athens Court of Appeal in the case of Zakoupolos in Feb. 1974 (256/74 3rd Dept.); the decision of the Milan Court of Appeal in the case of Cosida v. British Airways on June 24, 1981; the decision of the Indian Court in Sanghi v. Kuwait Airlines Corp., Bangalore, 1978).[131]

On the other hand there are some decisions of courts in favour of the official price of gold as the Convention's conversion unit. For example, the Netherlands Supreme Court's decision in 1972 in the case of Hornlinie A.G. v. Societe Nationale Petroles Aquitaine (7 Europe trans. L.933); the decision of the French Court of Appeal in 1980 in Pakistan International Airelines v. Compagnie Air Inter S.A..[132] Also in the United States, American Courts, before the repeal of the Par Value Modification Act by Congress in 1978 and demise of the official gold price, consistently used the official price as a conversion unit for converting the gold-based liability limit of the carrier.[133] In Sadie Olshin v. El Al Israel Airlines,[134] the court used the official price of gold to calculate the carrier's liability limit under Article 22(4) and held the defendant's liability limit to be $700 whereas the actual damages equalled $1,100,000.[135] But with demise of the official gold price, gold became "an ordinary commodity subject to market price

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[131] Cited in McGilchrist, supra note 121, p. 169.

[132] Cited in McGilchrist, supra note 121, p. 166.

[133] Simpson, surpa note 111, p. 1472.

[134] 15 Av. Cas (CCH) 17, 463 (S.D.N.Y. 1979).

[135] Also see Danzinger v. Compagnie Nationale Air France, 16 Av. Cas (CCH) 17, 261, 17, 264 (S.D.N.Y. 1979); Berguido v. Eastern Air Lines, 369 F. 2d 874 (3rd Cir 1966) in which the court using the official gold price limited the defendant's liability to $8300 whereas the actual damages equalled $375,000).

fluctuations".[136] American courts have referred to different standards as a proper conversion unit of the Convention, i.e. the free market gold price,[137] the current exchange value of the French franc,[138] and the last official price of gold.

In In re Air Crash Disaster at Warsaw, Poland[139] on March 14, 1980 all members of an American boxing team were killed. Plaintiffs brought suit against Polskie Linie Lotniczee (LOT) to recover damages.[140] To determine damages the court had to specify the appropriate conversion unit. It should be noted that the court did not distinguish personal injury cases from cargo case when considering the Convention's conversion unit.[141] The plaintiffs contended that the proper conversion unit was the free market gold price[142] whereas the defendants claimed that the proper conversion unit was the exchange value of the current French franc or the SDR.[143] Neither party argued for the last official gold price. The court, however, took it into consideration when it was

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[136] Simpson, supra note 111, p. 1467.

[137] See Boehringer ... v. Pan Am. World Airways, supra note 123; Reed, supra note 123.

[138] In Kinney Shoe Corp. v. Alitalia Airlines, 15 Av. Cas (CCH) 18,509 (S.D.N.Y. 1980), without giving any reason, the court held the current exchange value of the French franc to be an appropriate conversion unit.

[139] 535 F. supp. 833 (E.D.N.Y. 1982).

[140] Id., at 834.

[141] Id., at 839.

[142] Id., at 839: the plaintiffs reasoned that: 1 - with the use of the fluctuating free market price of gold, Article 22 liability limitation could response to inflation; 2 - the American attempts to raise liability limit shows that the United States sought liability limits that response to inflation; etc.

[143] Id., at 840-2.

considering the proper conversion unit for calculating the carrier's liability limit. Unlike the Boehringer court, the court rejected use of the free market price of gold as a proper unit of conversion because it would contradict the purpose of the Convention which was to provide stable and consistent liability limitations.[144] The court also rejected the SDR and the exchange value of the current French franc as proper conversion units because liability limitation of Article 22 is still on the basis of gold. To arrive its decision the court also reasoned that the authors of the Warsaw Convention intended courts to limit the carrier's liability with reference to a constant gold price maintained by the parties to the Convention. The court, therefore, held that because the United States had established the official gold price to determine the relationship of United States' dollar and currencies of all other nations using a similar standard of conversion, the application of the last official gold price to limit LOT's liability effectuated the authors' intentions to provide uniform liability limitations; so the last official gold price was the proper conversion unit.[145]

When the issue of conversion unit came up in Maschinenfabrik Kern, A.G., v. Northwest Airlines,[146] the court reasoned that because the Civil Aeronautics Board (CAB) was the governmental agency most intimately concerned with the carrier's liability

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[144] Id., at 842-3.

[145] There are some other American cases in which the court held that the last official gold price was the proper conversion unit. For example, see Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc., (Cal. super. Ct., San Francisco, Aug. 25, 1982); Deere v. Deutsche Lufthansa Aktiengecellschaft, No. 81C 4726 (N.D.Ill. Dec. 30, 1982) in which the court said that the last official price of gold most nearly effectuated the Convention's purpose to provide fixed and definite liability limitations.

[146] 562 F. supp. 232 (N.D.Ill. 1983).

limits under the Warsaw Convention and the CAB had approved of the use of the last official price of gold to convert Convention's liability limits by allowing carriers to continue to calculate liability limits with reference to the last official price of gold and the public had notice that the courts might use the last official gold price as a conversion unit of the Convention, the last official price of gold should be enforced as a proper conversion unit.[147] The court, however, stated that the executive and legislature should authorize application of any conversion unit other than the last official gold price.[148]

An important American case as to the Convention's proper conversion unit which has so far come up is Franklin Mint Corp. v. Trans World Airlines (TWA)[149] in which the defendant carrier lost the cargo during the carriage from Philadelphia to London. Both parties agreed that TWA was responsible. To determine the carrier's liability limits in terms of United States dollar the only problem was the Convention's proper conversion unit. In the District Court TWA claimed that its liability should be converted into the United States dollar by the use of either the last official gold price or the SDR established by the IMF or the exchange value of the current French franc.[150] But Franklin Mint contended that the proper conversion unit was the free-market gold price.[151] The District Court of New York held that because the Civil Aeronautics Board (CAB) supported the

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[147] Id., at 239-40.

[148] Id., at 239.

[149] 525 F. supp. 1288 (S.D.N.Y. 1981).

[150] Id., at 1289.

[151] Id.,

last official price of gold,[152] that conversion unit "comes as close as anything to constituting a governmental interpretation of the Article 22 limitation."[153]

On an appeal by Franklin Mint the Second Circuit Court of Appeal[154] stated that there was a strong argument against each of the alternative units. It said:

> "The last official price of gold is a price which has been explicitly repealed by the Congress ... It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creation of the IMF, modified by that body and having no basis in the Convention. The French franc is simply one domestic currency subject to change by the unilateral act of a single government."[155]

The Appeal Court said that the enforcement of the Warsaw Convention required a conversion unit and since there was no conversion factor specified by law and courts lack the power to select a new unit of conversion it was impossible for the court to enforce the Warsaw Convention.[156] The court, therefore, affirmed the district court's result but held that the Warsaw Convention would prospectively be unenforceable in the United States, i.e. after sixty days from the issuance of the court's mandate.

On a final appeal by TWA, there were two questions before the United States Supreme Court.[157] First, whether the 1978 repeal of the Par Value Modification Act

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[152] See the 1981 CAB Memorandum, supra note 129.

[153] 525 F. supp. 1288 at 1289 (S.D.N.Y. 1981).

[154] Id., at 306.

[155] 690 F. 2d 303 (2nd Cir. 1982).

[156] Id., at 306, 311.

[157] 104A S. Ct. 1776.

rendered the Convention's cargo liability limit unenforceable in the United States? Second, if the question (1) is answered 'no', what is the appropriate conversion unit of the Convention?

The Supreme Court unanimously held that the liability limits of the Convention were enforceable in the United States and the repeal of the Par Value Modification Act in 1978 did not render them unenforceable.[158] Regarding the proper conversion unit the majority held that the last official price of gold is the appropriate one, i.e. $9.07 per pound liability limit.

To reach the decision as to the proper conversion unit of the Convention the Supreme Court noted the Convention's purposes and the reasons why the drafters of the Convention linked the Article 22 liability limits to gold.

The Supreme Court found that the first purpose of the Warsaw Convention, the most obvious purpose, was to set some limit on carrier's liability for lost cargo.[159] Setting a stable, predictable and internationally uniform limit that would encourage the growth of fledgling airline industry,[160] was the second purpose of the Warsaw Convention. To achieve this second purpose the framers of the Convention "chose an

[158] Id., at 1783.

[159] Id., at 1784.

[160] Id.

international, not a parochial, standard, free from the control of any one country",[161] i.e. a limit based on gold. The Supreme Court reached the conclusion that the last official price of gold, i.e. $9.07 per pound liability limit, determined by the CAB, "is certainly a stable and predictable one on which carrier can rely",[162] and on the contrary, tying the Convention's liability limit to today's gold market price would fail to effect any purpose of the Convention's framers and would be inconsistent with well-established international practice.[163]

Another purpose for the link of Article 22 liability limit to gold, the court said, might have been that the drafters wanted to link the Convention to a fixed and constant value "that would keep step with the average value of cargo carried and so remain equitable for carriers and transport user alike".[164] In other words, inflation of a particular country has had no effect on the liability limit of Article 22.

The Court recognized that in an inflationary economy the use of the last official gold price, i.e. a fixed dollar-based liability limit, in the long term, might not be consistent with this purpose of the Convention.[165] The Court, however, concluded that because (1)

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[161] Id. at 1785 - see generally Heller, The Value of the Gold Franc - A Different Point of View, 6 J. of Mar. L. & Com. 73, 94-5 (1974); Asser, Golden Limitation of Liability in International Transport Conventions and the Currency Crisis, 5 J. of Mar. L. & Com. 645, 664 (1974); Lowenfeld and Mendelsohn, supra note 5, at 499; H. Drion, supra ntoe 121, at 183.

[162] Id.

[163] Id., at 1779.

[164] Id., at 1786.

[165] Id. at 1786.

the contracting parties to the Convention, including the United States, in the first fifty years of its operation, had allowed the value of liability limit as measured by the free market price of both gold and other commodities to decline substantially and this could be useful for construing a "contract" among nations;[166] (2)"despite of the demise of the gold standard, the $9.07 per pound liability limit retained since 1978 has represented a reasonably stable figure when converted into other western currencies",[167] the $9.07 per pound liability limit "in the light of international practice, cannot be inconsistent with the purposes of the Convention and the shared understanding of its signatories."[168]

Therefore, although the Supreme Court in Franklin Mint v. TWA held that the last official price of gold determined by the CAB was the proper conversion unit, it recognized that in the long term the last official gold price, i.e. $9.07 per pound liability limit, may fail to achieve the Convention's purpose.[169]

- **General Solution to the 'Convention's Conversion Unit' Problem**

It seems that because this problem is an international problem which the courts of the Convention signatories may be faced with, it should be solved internationally rather

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[166] Id. at 1785-6.

[167] Id. at 1786.

[168] Id. at 1787.

[169] Id. at 1785 where the court said "... in the long term, effectuation of the Convention's objective of international uniformity might require periodical adjustment by the CAB of the dollar-based limit to account both for the dollar's changing value relative to other western currencies and, if necessary, for changes in the conversion rates adopted by other Convention signatories".

than by one particular signatory. The 1975 Montreal Protocol No.4 sought to solve the problem which provided the carrier's liability limit according to the SDR. It is expected with the ratification of that Protocol by nations, as enough, the problem of conversion unit to be solved. But the question is: now that the Warsaw Convention is still enforceable rather than the Montreal Convention what is the correct answer to the problem of conversion unit?

As stated, there is nothing in the Warsaw Convention to provide a conversion unit for converting the carrier's gold-based liability limit into a national currency. However because the Convention, Article 22(4), permits the conversion of the carrier's gold-based liability limits into 'any national currency' by the Convention's signatories, it seems that it is for the Convention's signatories who should provide such a conversion unit in their legislation or otherwise for doing the conversion. For example in the United States "the task of converting the Convention's liability limit into 'any national currency' ... delegated to the CAB under the Federal Aviation Act *1958 (FAA)*"[170] *which determined the* official price of gold until 1978. However the Convention's signatories, in order to achieve the unification required by the Convention, must have regard, when choosing an appropriate conversion unit, to the Convention's purposes which linked the carrier's liability limit to gold. Otherwise if each of the Convention's signatories chooses a conversion unit irrespective of the Convention's purposes as to linking liability limits to gold, the purposes of the Convention will never be attained.

The express language of Article 22(4) shows that the Convention's drafters linked

[170] Id. at 1780.

the carrier's liability limit to the French franc of 1929 which was, at that time, equal to 65.5 milligrams gold, i.e. the French franc which consists of 65.5 milligrams gold of millesimal fineness 900 rather than today's French franc. In other words the carrier's liability limits was linked to gold and became, in fact, gold-based liability limits rather than French franc-based liability limit.

The drafters linked the carrier's liability limits to gold because they wanted to create a fixed and stable limit. And gold, unlike national currencies, was able to create this. In other words, they wanted to effectuate the second purpose[171] of the Convention which was "to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry".[172]

Another reason for this connection may have been "to link the Convention to a constant value that would keep step with the average of cargo carried so remain equitable for carriers and transport users alike".[173] Gold was therefore chosen as the constant value because, unlike national currencies, was able to be such a constant value which keep step with inflation and inflation has had no effect on the liability limits of the carrier.

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[171] The first purpose was to limit the carrier's liability.

[172] T.W.A. v. Franklin Mint, U.S. Supreme Court (1983) 104A, pp. 1784-5; See also Boehringer v. Pan Am. World Airlines, supra note 123; Deere, supra note in which the court stated that the Convention's purpose was to provide fixed and definite liability limitations; In Re Air Crash Disaster at Warsaw, Poland; see generally Heller,supra note 112, at pp. 94-95; Asser, supra note 161, at pp. 645, 664; Lowenfeld and Mendelsohn, supra note 5, at 499; H. Drion, supra note 121, at 183.

[173] TWA v. Franklin Mint 104A S. Ct. 1776 (1983) at 1786.

It seems that the free market price of gold cannot be a proper Convention's conversion unit firstly because it seems to be unable to effectuate the Convention's purpose of providing a stable, predictable and internationally uniform limit as reaching that purpose requires a stable and predictable conversion unit, and the free market gold price cannot be considered as a stable conversion unit. The United States Supreme Court in TWA v. Franklin Mint[174] said: "Since gold is freely traded on an international market its price always provides a unique and internationally uniform conversion rate. But reliance on the gold market price would entirely fail to provide a stable unit of conversion on which carriers could rely. To pick one extreme example, between January and April 1980 gold ranged from about $490 to $850". The Court also said[175]:

> "Far from providing predictability and stability, tying the Conversion to the gold market would force every carrier and every air transport user to become a speculator in gold, exposed to sudden and unpredictable swings in the price of that commodity."

Secondly, gold with the free market price cannot be a constant value which keeps step with inflation. The U.S. Supreme Court in TWA v. Franklin Mint,[176] considered the operations of the Convention's signatories during many years even after the late 1960s when there were both the free market gold price and the official gold price. The court said: "The indisputable fact is that between 1934 and 1978 the signatories, by common if unwritten consent, allowed the value of the liability limit as measured by the free market price of both gold and other commodities to decline substantially, even while the official price of gold was formally maintained." This, namely, considering the operations

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[174] Id. at 1786.

[175] Id.

[176] Id. at 1786-7.

of the Convention's signatories in relation to the Convention, can be useful for construing the Convention among signatory nations. So, as a result of this consideration we can say that the shared understanding of the Convention's signatories as to the constant value to which the Convention should be linked and which keeps step with inflation is not the gold with free market price. The Supreme Court also reasoned that because "since 1978 gold has been only 'a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure ...'[177], tying the Convention's liability limit to the free market price of gold would no longer serve to maintain a constant value of carrier's liability."[178]

Thirdly, the most obvious purpose of the Warsaw Convention was to limit the carrier's liability and, therefore, to protect the airline industry.[179] Against this limitation of liability the carrier is presumptively liable[180] and therefore the burden of proof that the damage was not occasioned during his carriage is on the carrier's shoulder.[181] Limitation of liability, as it defines itself, as it can be understood from Article 22(2) of the Warsaw Convention, with attention to the carrier's presumptively liability and with the attention to the aim of the Convention's drafters of providing limitation of liability which was to

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[177] Lowenfeld Aviation Law, Documents Supplement, 2d ed., M. Bender, New York, 1981.

[178] TWA v. Franklin Mint, 104A, S. Ct. (1983) p. 1787.

[179] Lowenfeld & Mendelsohn, supra note 5, p. 499; TWA v. Franklin Mint 104A, S. Ct. (1983) at p. 1784.

[180] Art. 18 of the Warsaw Convention; D. Davenport, supra note 6, pp. 159-160.

[181] See for example Boehringer v. Pan Am. World Airline, supra note 123, in which the defendant carrier failed to prove that the damage was not occasioned during the cargo was in his charge. The court held the carrier to be liable although there was no direct evidence showing the cargo was damaged during its carriage by the carrier.

protect the infant airline industry and develop international air transportation,[182] means a liability less than the whole liability as to the lost or damaged cargo or at most equal to that when, e.g. the cargo is low price and heavy weight or the consignor has made a special declaration of the value at delivery and has paid a supplementary sum to the carrier. Now if we calculate the carrier's liability limit on the basis of the free market price of gold as the conversion unit, the amount of his liability limitation will often be more than the whole value of the lost or damaged cargo which can be decline to an amount equal to the whole value of the lost or damaged cargo. It is unlikely and unreasonable that a situation like this had been intended by the Convention's drafters as limitation of liability because when the carrier's liability limitation becomes equal to the whole price of the cargo or equal to the whole claim of the plaintiff, except where the cargo is low price and heavy weight or where the consignor has made special declaration of the value at delivery and has paid a supplementary sum to the carrier, this means there is no limitation of liability. This is inconsistent with the most obvious purpose of the Convention, and, naturally the aim of protecting the airline industry will not be effectuated. For example, in Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airlines,[183] Pan Am., the defendant, was presumptively liable under Article 18 of the Warsaw Convention and the burden of proof that the damage was not occasioned during the air carriage was on its shoulder. Because Pan Am. failed to prove that, it

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[182] T. J. Dolan, Warsaw Convention Liability Limitation: Constitutional Issues, Northwestern J. of International Law and Business, 1984, vol. 6, p. 899; see the case of In re Air crash in Bali, Indonesia, 462 F. supp. 1114 (C.D.Cal. 1978), rev'd, 684 F. 2d 1031 (9th Cir. 1982).

[183] 531 F. supp. 344 (S.D.Tex. 1981). See also Maschinenfabrik Kern. A.G. v. Northwest Airline, 562 F.supp. 232 (N.D.Ill. 1983), in which if the court had converted the carrier's gold-based liability limit with regard to the free market gold price, the plaintiff could have recovered the full value of the cargo.

became prima facie liable under the Warsaw Convention. The plaintiff's claim was for $34,054.04. The last official price of gold determined by the CAB was $9.07 per pound liability limit which had been included in their contract of carriage. The free market price of gold was $400 per ounce or approximately $86.00 per pound.[184] The court after considering the free market gold price and the last official price of gold held the free market price as the proper conversion unit. In this way Pan American was known liable for $160,000.00 which was much more than the claim of the plaintiffs. This amount was lessened to an amount equal to 34,054.04. This does not seem to be the Convention's liability limitation, does it?

As said, the Convention's framers set a limit on carrier's liability as the Convention's purpose but instead of this carrier's liability limitation they set a quid pro que in favour of the shipper or passenger, i.e. they made the carrier presumptively liable.[185] In Boehringer the court considered that the carrier was presumptively liable and held the carrier to be liable, but it did not consider the other side of the coin, i.e. the Convention's purpose which was to set a limit on carrier's liability, a quid pro que provided by the Warsaw Convention.

Also it may be said that the official price of gold, too, cannot be regarded as a Convention's conversion unit because the international monetary system is no longer based on gold, the price of gold is no longer fixed by law, and therefore, there is no

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[184] Id. at 353.

[185] Articles 17, 18, 20 and 21 of the Warsaw Convention; D. Davenport, supra note 6, p. 159.

longer an official price of gold.[186]

The solution to this problem (lack of an official gold price), it seems, to be the last official price of gold, as the United States Supreme Court in TWA v. Franklin Mint rightly held. Nevertheless the gold with the last official price may fail, in the long term, to be the constant value that keeps step with inflation, and also may fail, in the long term, to effectuate the Convention's purpose of international uniformity.[187] The solution to this problem, it seems, to be either doing a periodical adjustment of the last official price of gold with attention to: 1- the inflation rate, 2- the SDR , which has been adopted by some Convention's signatories[188] as the conversion unit for converting the Convention's liability limit into national currencies,[189] and 3 - if necessary, the conversion units adopted by other Convention's signatories; or accepting the SDR [190] itself which is as a new foundation for international monetary system. For the acceptance of the SDRs as

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[186] Like J. Stevens, the dissent in TWA v. Franklin Mint supra note 181, p. 1794.

[187] TWA v. Franklin Mint, supra note 178, p. 1787.

[188] See the Hamburg Rules for example.

[189] FitzGerald, The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air, 42 J. of Air Law & Com. 233, 277 (1976).

[190] J. Ridley, supra note 3, p. 248: the SDR is a 'currency basket' made up of five currencies, as follows:

currency	weighting	Amount in Units
U.S. Dollar	42%	$ 0.54
German DMarks	19%	Dm 0.46
£ Sterling	13%	£ 0.071
French Franc	13%	Ff 0.74
Japanese Yen	13%	Yen 34.0

the Warsaw Convention's conversion unit there is, it seems, no problem from the point of view of the Convention because the Convention, according to Article 22(4), gave the option to its signatories to choose any conversion unit which is not inconsistent with its purposes and effectuate them. The SDRs seems to be able to effectuate the Convention's purposes. In Franklin Mint Corp. v. Trans World Airlines,[191] Trans World Airlines argued for the SDRs, the last official price of gold in the United States, or the exchange value of the current French franc. The district court held in favour of the last official price of gold but it further stated that if they "[w]ere ... writing on a clean slate ... they would find the arguments in favour of the ... [SDR] most persuasive."[192] The SDR is made up of five currencies and is daily re-calculated by the IMF. If the value of one of the five currencies falls, the value of the others usually rise so that it is a stable unit.

4.1:2 Under the 1955 Amended Convention

As stated the 1929 Warsaw Convention was amended by the 1955 Hague Protocol.[193] The amendments were made because there were "numerous obscurities in, and omission from, the Warsaw Convention".[194] The Legal Committee of the

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[191] 525 F. supp 1288 (S.D.N.Y. 1981).

[192] Id. at 1289. Also in S.S. Pharmaceutical Co. v. Qantas Airways Ltd., [1989] 1 Ll. Rep. 319, Rogers J., who gave his judgment in favour of the 'free market gold price' as the conversion unit, said: "To me the next most satisfying alternative and one which would most closely sustain the intention of the framers of the Convention is the SDR alternative."

[193] Hereafterin is cited as the amended Convention.

[194] P. B. Keenan, Shawcross and Beaumont on Air Law, supra note 1, p. 43; K. M. Beaumont, infra ntoe 200, p. 414.

International Civil Aviation Organization (ICAO) prepared a draft of a protocol to amend the Warsaw Convention. A conference of forty-four countries was held at Hague in September 1955 to bring the Warsaw Convention up to date with modern commercial needs. The conference, after considering the ICAO proposed draft, adopted a protocol to the Warsaw Convention which consisted of some amendments and additions to it. Because of the ratification of the amended Convention by some States it came into force on August 1, 1963.[195]

4.1:2:1 The applicability of the liability-limiting provisions of the amended Convention to a carriage contract

The liability-limiting provisions of the amended Convention, like those of the 1929 Warsaw Convention, are of a great importance. In order to apply the liability-limiting provisions specified in Article 22 of the amended Convention *to a carriage contract, the* same four conditions as already[196] mentioned for the applicability of the liability-limiting provisions of the Warsaw Convention to a carriage contract must be satisfied, i.e. the amended Convention's liability-limiting provisions apply to an air leg of a carriage contract if:

(1)- the amended Convention itself apply to that contract; and

(2)- according to the amended Convention an action for damages can be brought; and

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[195] Id. at pp. 44 & 336. Ratification by thirty States was required for coming into force of the amended Convention: see K. M. Beaumont, The Warsaw Convention of 1929, as amended by the Protocol signed at the Hague, on September 28, 1955, J. of Air. L. & Com. Vol. 22, p. 414; see also J.A. Cabranes, Limitations of Liability in International Air Law : The Warsaw Convention and Rome Conventions Reconsidered, I.C.L.Q., vol. 15, 1966, p. 66o; the U.S.A. have not yet ratified the 1955 amended Convention: G. F. FitzGerald, infra note 236, p. 278.

[196] See p. 185 of this thesis.

(3)- according to the amended Convention the carrier is liable; and

(4)- according to the amended Convention the carrier is not deprived of taking advantage of the liability-limiting provisions.

The discussion about the international air cargo carrier's liability limitation in the event of loss of or damage to cargo under the amended Convention is largely similar to that under the Warsaw Convention which was previously considered. In order to avoid repetition, I will consider only some of the differences.

(1)- Regarding the applicability of the 1955 amended Convention to an air carriage

Articles 1 and 2 of the amended Convention concerning with the application of the amended Convention are nearly the same as Articles 1 and 2 of the 1929 Warsaw Convention.[197] The definition of *'international carriage' in both the original Warsaw* Convention and the amended Convention is the same. A question, therefore, is: what international carriage is governed by the 1929 Warsaw Convention and what is governed

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[197] See K. M. Beaumont, suprar note 200, p. 415; Article 1 of the amended Convention provides:

> "(1) This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.
> (2) For the purpose of this Convention, the expression international carriage means ...
> (3) Carriage to be performed by several successive air carriers ..."

Article 2 provides:

> "(1) This Convention applies to carriage performed by the State or by legally constituted public bodies ...
> (2) This Convention shall not apply to carriage of mail and postal package."

by the amended Convention? The answer is that it depends on whether or not those Conventions have been ratified by the countries between which the carriage takes place. For example, if the international carriage is between two countries which have both ratified the amended Convention, that will be an international carriage as defined in the amended Convention and is, therefore, governed by it. But if the international carriage is between two states, both of which have ratified the 1929 Warsaw Convention, and none or only one of them has ratified the amended Convention, that carriage will be an international carriage as defined in the 1929 Warsaw Convention and is, therefore, governed by it.[198]

Unlike the 1929 Warsaw Convention, which does not apply to an international carriage by air performed by way of experiment with the view to the establishment of a regular line of air navigation,[199] the amended Convention applies to that kind of international carriage because there is nothing in the amended Convention to exclude it.[200]

The circumstances to which the amended Convention does not apply are nearly the same as those to which the Warsaw Convention does not apply[201] but there are some changes as follows:

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[198] J. Ridley, supra note 3, p. 228: to understand what amounts to international carriage see, Grein v. Imperial Airways Ltd. [1937] 1 K.B. 50; [1936] 2 All E.R. 1258; Rotterdamsch Bank N.V. v. B.O.A.C. [1953] 1 All E.R. 675; [1953] 1 W.L.R. 493.

[199] Art. 34 of the Warsaw Convention - see p. 191 of this thesis.

[200] B. P. Keenan, supra note 1, p. 340.

[201] See p. 201 of this thesis.

1 - the amended Convention does not apply to carriage of mail and postal packages[202] whereas the 1929 Warsaw Convention does not apply to carriage performed under the terms of any International Postal Convention.[203] "This was changed to include all mail and postal package without qualification."[204]

2 - if air carriage is performed in extraordinary circumstances outside the normal scope of an air carrier's business, the amended Convention, unlike the 1929 Warsaw Convention, applies to that carriage except the provisions of Article 3 to 9 inclusive relating to documents of carriage.[205]

3 - according to Article 5(2) of the amended Convention, like that of the 1929 Convention, the existence or the validity of the contract of carriage is not affected by the absence, irregularity or loss of the air waybill and nevertheless the applicability of the amended Convention to the contract continues, but this continuation of applicability is subject to the provision of Article 9 of the amended Convention; which is somehow different from Article 9 of the 1929 Convention. Article 9 of the amended Convention provides:

> "If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph (2)."

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[202] Article 2(2) of the amended Convention.

[203] Article 2(2) of the 1929 Warsaw Convention.

[204] K. M. Beaumont, supra note 200, p. 415.

[205] Article 34 of the amended Convention; see P. B. Keenan, supra note 1, p. 340.

Article 8, paragraph (c), provides:

> "The air waybill shall contain a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to cargo."

As seen, Article 8 of the 1929 Warsaw Convention, which had numerous obligatory parts and ambiguities,[206] was replaced by simple provisions in Article 8 of the amended Convention. In the absence, irregularity or loss of an air waybill, the amended Convention still continues to apply to the contract of carriage but the carrier shall, as provided in Article 9, lose the benefit of the provisions of Article 22, paragraph (2).

(2)- Regarding the conditions and limits under which an action for damages can be brought[207]

The conditions and limits set out in the amended Convention under which an action can be brought to court are similar to those set out in the 1929 Warsaw Convention[208], but in the case of damage the person entitled to delivery has a right to deliver his written complaint to the carrier within fourteen days, instead of 7 days under the 1929 Convention, from the date of receipt of the cargo.[209] If he fails to deliver a

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[206] See p. 205 of this thesis.

[207] Article 24(1) of the amended Convention is exactly the same as that of the 1929 Warsaw Convention. It provides: In the case covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

[208] See pp. 194-7 of this thesis.

[209] Article 26(2) of the amended Convention. C. M. Schmitthoff, supra note 4, p. 543.

written complaint to the carrier within that 14 days no action can, in the absence of any fraud on the carrier's part, be brought against the carrier.[210]

(3)- Regarding the carrier's liability and the defences available to him

The amended Convention's Article 18 relating to the liability of the carrier for loss of or damage to goods is exactly the same as Article 18 of the 1929 Warsaw Convention. However, the defences available to the carrier under the amended Convention are different from those mentioned under the 1929 Warsaw Convention.[211] The important differences are:

1 - Article 20(2) of the Warsaw Convention has been omitted in the amended Convention. So the defence that 'the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation is no longer available to the carrier.

2 - Article 23(2) of the amended Convention is an entirely new one which enables the carrier to a new defence by including a provision in the contract that he is not liable where loss or damage is caused by the inherent defect, quality, or vice of the cargo carried.[212] Article 23(2) provides:

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[210] Article 26(4) of the amended Convention.

[211] See p. 201 et seq of this thesis.

[212] C. M. Schmitthoff, supra note 4, p. 543.

"Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice[213] of the cargo carried."

Paragraph (1) of Article 23 provides, in part:

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void ..."

So if the carrier can avail himself of this defence and is not known liable or his liability, by such a defence, be lower than that which is laid down in the amended Convention, the application of liability-limiting provisions of Article 22 are of no use.

3 - As stated before, if the person entitled to delivery fails to complain about the damage done to cargo to the carrier within 14 days from the date of the receipt of the goods. This is a good defence for the carrier that no action can be brought against him.[214]

Apart from these differences the cargo carrier's defences under both the 1929 Warsaw Convention and 1955 Convention are the same.

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[213] As to the meaning of 'inherent defect, quality or vice', see Halsbury's Laws, 3rd ed., vol. 4, p. 145; Scrutton on Charter parties and Bills of Lading 19th ed., Sweet & Maxwell, London, 1984, p. 226.

[214] Article 26(4) of the amended Convention.

(4)- Regarding the carrier's deprivation of taking advantage of the liability-limiting provisions

It was already said that one of the conditions for the application of liability-limiting provisions of Article 22 of the amended Convention is that the carrier is entitled to avail himself of those liability-limiting provisions. Otherwise if he is deprived of taking advantage of them, they will not apply to limit his liability.[215] The amended Convention modified the circumstances under which a carrier would lose the protection of liability limitations. For example, as already mentioned,[216] the carrier may, under Articles 9 and 8(c) of the amended Convention, lose the benefit of the liability-limiting provisions of Article 22, paragraph (2) of the amended Convention in which case they do not apply *to limit his liability.*

Also according to the provisions of Article 25 of the amended Convention (which is a new article in the 1955 Convention) the carrier may be deprived of using the liability-limiting provisions of Article 22. If he is deprived, those provisions of Article 22 do not apply to limit his liability. Article 25 of the amended Convention expressly provides:

> "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly[217] and with knowledge that

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[215] See note 72 of this chapter.

[216] See pp. 242-3 of this thesis; see C. M. Schmitthoff, supra note 4, p. 542.

[217] As to the meaning of "recklessly", see the English case of Goldman v. Thai Airways International Ltd.,[1983]3 All E.R. 693, [1983] 1 W.L.R. 1186, C.A., in which

damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

As we have seen, Article 25 of the 1929 Warsaw Convention has been deleted and this is a new article in the amended Convention. This was done to eliminate the difficulties which resulted from the Warsaw Convention's term 'wilful misconduct' which is ambiguous in many countries. This new Article (Article 25) in fact includes the definition of 'wilful misconduct' in common law countries which excludes 'gross negligence'.[218] According to Article 25 the carrier may be deprived of using liability-limiting provisions of Article 22 not only for his act or omission but also for his agent's or servant's act or omission if it is proved that he was acting within the scope of

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the English Court held that in determining whether an act or omission had been done "recklessly" the court must consider the nature of the risk involved and moreover the reckless act or omission has to be done with knowledge that damage would probably result. The test of recklessness is subjective, the court held. See also N. R. McGilchrist, Article 25: an English Approach to Recklessness, L.M.C.L.Q., 1983, p. 488.

[218] K. M. Beaumont, supra note 195, p. 418; as to the meaning of 'wilful misconduct', for example, Barr J. in Horabin v. B.O.A.C. [1952] 2 All E.R. 1016 at 1019-1022 said:

"Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. The will must be a party to the misconduct and not merely a party to the conduct of which the complaint is made ...To establish wilful misconduct on the part of [the] pilot, it must be shown, not only that he knowingly (and in that sense wilfully) did the wrongful act, but also that, when he did it he was aware that it was a wrongful act, i.e. that he was aware that he was committing misconduct ... to be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be."

his employment.[219]

4.1:2:2 The amount of limitation of damages

The amount of limitation of damages, in the case of cargo damage, under the amended Convention is the same as that under the 1929 Warsaw Convention, i.e. 250 francs per kilogramme unless the consignor has made, at the time of delivery of the goods to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.[220] But, unlike the 1929 Warsaw Convention, there are some circumstances in the amended Convention upon which the carrier is able to relieve himself of this amount of limitation of damages or to fix a lower limit than that amount of limitation of damages by putting an appropriate provision in the carriage contract.[221]

Another point is that Article 22(4) of the amended Convention, unlike the 1929 Warsaw Convention,[222] made it clear that the court can award, in addition to the amount of limitation of damages, the whole or part of the legal costs incurred by the plaintiff if the amount of damages awarded by the court exceeds the sum which the carrier has offered in writing to the plaintiff within the time specified in that Article. So if the sum

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[219] As to the scope of agents' employment see Halsbury's Laws, 3rd ed., vol. 25, p. 1021 et seq; see the cases of Daniels v. Whetstone Entertainments, Ltd. [1962] 2 Lloyd's Rep. p. 1 (C.A.); Ilkiw v. Samuels [1963] 2 All E.R. 879, C.A.

[220] Article 22(2)(a) of the amended Convention.

[221] Article 23(2) of the amended Convention; see pp. 244-5 of this thesis.

[222] See p. 209 of this thesis.

offered by the carrier to the plaintiff, in writing and within specified time in Article 22(4), is more than the amount of the damages awarded by the court, the carrier will escape liability for the plaintiff's legal costs.[223] Article 22(4) provides:

> "The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later."

4.1:2:3 To whom the limitation of damages applies

In this respect, the discussion is similar to that set out above in relation to the 1929 Warsaw Convention.[224] The 1955 amended Convention provides that the limitation of damages applies to the 'carrier' but it again does not provide any definition of the 'carrier' referred to therein.[225]

The amended Convention, however, makes it clear that if an action is brought against the carrier's agent or servant, he shall be entitled to avail himself of the limits of liability which the carrier himself is entitled to invoke under Article 22 if the agent or

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[223] P. B. Keenan, supra note 1, p. 500; K. M. Beaumont, supra note 195, p. 418.

[224] See p. 210 of this thesis.

[225] Article 22(2) of the amended Convention; p. 210 of this thesis; Schmitthoff, supra note 4, p. 539.

servant proves that he acted within the scope of his employment.[226] This, as was noted above,[227] was not clear under the 1929 Warsaw Convention.

4.1:2:4 What problems there are with the amended Convention's liability-limiting provisions of Article 22

Under the 1929 Warsaw Convention it is not, as was said above,[228] clear that, in the case of damage to or loss of part of the goods, whether the total weight of the damaged or lost goods is a basis for the calculation of the carrier's liability limits, or the total weight of the whole goods covered by the air waybill relating to the damaged or lost cargo. This problem was solved under the amended Convention so that the carrier's liability limit is assessed according to the total weight of the damaged or lost cargo unless the loss of or damage to that part of cargo affects the value of the whole cargo covered by the same air waybill in which case, the total weight of the whole cargo is a basis for the calculation of the carrier's liability limits.[229] Article 22(2)(b) *of the amended* Convention provides:

> "In the case of loss, damage or delay of part of ... cargo, or any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the ... cargo, or of an object contained therein, affects the value of other packages covered by the same ... air waybill, the total weight of such

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[226] Article 25A(1) of the amended Convention; Schmitthoff, supra note 4, p. 542.

[227] See p. 211 of this thesis.

[228] See p. 214 of this thesis.

[229] P. B. Keenan, supra note 1, p. 513; C. M. Schmitthoff, supra note 4, p. 541.

package or packages shall also be taken into consideration in determining the limit of liability."

However, the problem of conversion unit, which was available under the 1929 Warsaw Convention and was considered above,[230] is left unsolved under the amended Convention too. Article 22(5) of the amended Convention provides:

"The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currency at the date of the judgement."

As seen, although the amended Convention provides that conversion of the amount of liability limits into a national currency must be according to the gold value of such a currency at the date of the judgment, it is not clear whether that conversion should be according to the free market gold value of such a currency or according to the official gold value of such a currency at the date of the judgment. This problem was not solved in the amended Convention because at that time, 1955, as was noted above,[231] the free-market price and the official price of gold were nearly the same and there was no need for the amended Convention to make a distinction between free market gold value and official gold value of national currencies. Solution to this problem is the same solution

[230] See p. 218 etc. of this thesis.

[231] See p. 219 of this thesis.

which was already[232] mentioned.

Another problem is created when the air waybill does not contain the weight of the cargo carried. Article 8 of the amended Convention, unlike Article 8 of the 1929 Warsaw Convention, does not provide that the air waybill shall contain the weight of the goods. With regard to the fact that for the calculation of the carrier's liability limits, in the case of loss of or damage to the cargo or part of the cargo, the court needs to know the weight of the damaged or lost cargo,[233] the absence of the weight of the cargo in the air waybill may cause some problems in the calculation of the amount of damages.

4.1:3 Under the 1975 Montreal Convention (Protocol no.4 relating to cargo carriage)

The 1975 Montreal Convention (consisting of four Protocols) amended the 1929 Warsaw Convention as had previously been amended by the 1955 Hague Protocol, the 1971 Guatemala City Protocol[234] and supplemented by the Guadalajara Convention.[235] *These Protocols of which Protocol no. 4 is related to international air cargo* carriage were adopted by the Interational Conference held in Montreal during the period September 3

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[232] See p. 237 of this thesis.

[233] Article 22(2) of the amended Convention.

[234] The 1971 Guatemala City Protocol is intended to amend the Warsaw Convention by subjecting the carriage of passengers and baggages to the principle of absolute liability of the carrier.

[235] This supplementary convention is for the unification of certain rules relating to international air carriage performed by a person other than the contracting carrier.

to 25, 1975. This conference convened under the auspices of the International Civil Aviation Organization (ICAO). The ICAO Legal Committee prepared draft articles which incorporated a system of strict liability and presented it to the Conference.[236]

Although the 1975 Montreal Convention is not yet in force,[237] it is worth considering the international air cargo carrier's liability limitation under that Convention because it has solved some problems available in the 1929 Warsaw Convention and in the 1955 amended Convention, and has been scheduled in Acts of some countries[238] and may, therefore come into force in future.

4.1:3:1 The applicability of the liability-limiting provisions of the 1975 Montreal Convention to a carriage contract

In order to apply the liability-limiting provisions of Article 22 of the 1975 Montreal Convention to a cargo carriage contract the three following conditions should be satisfied:

(1)- that the 1975 Montreal Convention itself apply to that contract; and

(2)- that according to the Montreal Convention an action for damages can be brought; and

(3)- that according to the Montreal Convention the carrier must be liable in the first place.

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[236] See G. F. FitzGerald The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air, J. of Air Law & Com., vol. 42, 1976, p. 273.

[237] The date of writing, i.e., Jan. 1991.

[238] For example, Schedule 1 of the English Carriage by Air and Road Act 1979.

(1) - that the 1975 Montreal Convention apply to that contract

Articles 1 and 2 of the Montreal Convention are concerned with its application. They are nearly the same as Articles 1 and 2 of the 1955 amended Convention which were already[239] discussed and there is no necessity to be repeated.

The definition of 'international carriage' in the 1929 Warsaw Convention, in the 1955 amended Convention and the 1975 Montreal Convention is the same. A question is: if there is an international air carriage, which of those conventions governs that carriage? The answer is the same as already given,[240] i.e. if the international carriage is between two countries which have both ratified the 1975 Montreal Convention, that will be an international carriage as defined in the 1975 Montreal Convention and is, therefore, governed by the Montreal Convention if it comes into force.[241] But if the international carriage is between two states both of which have ratified the 1955 amended Convention and none or only one of them has ratified the Montreal Convention, that carriage will be an international carriage as defined in the 1955 amended Convention and is, therefore governed by it. Similarly if the international carriage is performed between two states both of which have ratified the 1929 Warsaw Convention whereas none or only one of them has ratified the 1955 amended Convention or the 1975 Montreal Convention, that carriage will be an international one as defined in the 1929 Warsaw Convention and is governed

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[239] See p. 240 of this thesis.

[240] See pp. 240-1 of this thesis.

[241] Because the 1975 Montreal Convention has not yet come into force, no international carriage is governed by it.

by it.

Unlike the 1929 Warsaw Convention[242] and similar to the 1955 amended Convention, the 1975 Montreal Convention applies to an international carriage by air performed by way of experimental test by air navigation undertakings with the view to the establishment of a regular line of air navigation because there is nothing in the 1975 Montreal Convention to exclude it. It should be also noted that if an international air carriage, as defined in the Montreal Convention, is performed in extraordinary circumstances, outside the normal scope of an air carrier's business, that carriage shall be subject to and governed by the Montreal Convention and only Articles 3 to 8 relating to carriage documents shall not apply to that contract.[242]

Also in the case of carriage of cargo, if the carriage documents do not comply with the provisions of Articles 3 to 8 relating to document of carriage, the existence and validity of the carriage contract shall not be affected by that non-compliance and the Montreal Convention shall, therefore, apply to that carriage contract.[243] In other words, the Montreal Convention, unlike the 1955 amended Convention, does not deprive the carrier of the rules relating to limitation of liability because of non-compliance of the carriage document with some provisions of Articles 5 to 8.

There are, however, some circumstances in which the 1975 Montreal Convention does not apply to the carriage contract. They are as follows:

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[242] Article 34 of the 1929 Warsaw Convention, see p. 201 of this thesis.

[243] Id., Article 9.

1 - if the carriage cannot be regarded as international as defined in the Montreal Convention.[244]

2 - if the air cargo carriage is performed neither by the State nor by legally constituted public bodies.[245]

3 - if the carriage is a carriage of postal items.[246]

4 - if the carriage is gratuitous carriage not performed by an air transport undertaking[247] even if it is international as defined in the Montreal Convention.

5 - if the carriage falls within the Additional Protocol to the 1975 Montreal Convention which has been signed by the State.[248]

(2) - that according to the Montreal Convention an action for damages can be brought

In order to apply the liability-limiting provisions of the Montreal Convention, the second evident condition is that an action for damages can be brought to the court according to the conditions and limits set out in the Montreal Convention. These conditions and limits are nearly similar to those set out in the 1955 amended Convention

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[244] Id., Article 1(2).

[245] Id., Article 2(1).

[246] Id. Article 2(3). However Article 2(2) of the Montreal Convention provides: "in the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations". See also G. F. FitzGerald, supra note 236, p. 320.

[247] Id., Article 1(1).

[248] The Additional Protocol to the 1975 Montreal Convention is exactly the same as the Additional Protocol to the 1929 Warsaw Convention or to the 1955 amended Convention: see p. 192 of this thesis.

which were already mentioned.[249] Article 24(2) of the Montreal Convention, Protocol No.4 provides:

> "In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention ....Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."

As seen the principle of the limitation of liability of the carrier in all circumstances which give rise to the liability is so important that an action for damages can only be brought subject to it.

(3)- that according to the Montreal Convention the carrier must be liable in the first place

It is clear that if a carrier is not liable, the application of the liability-limiting provisions of Article 22A of the Montreal Convention will never arise. Article 18(1),(3) and (4) of the Montreal Convention relating to the liability of the carrier in the event of the destruction, loss of, or damage to cargo is the same as Article 18(1),(2) and (3) of the 1955 amended Convention.[250] However, the defences available to the air cargo carrier under the Montreal Convention are different from those mentioned under 1955 amended Convention. The main differences are as follows:

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[249] See p. 243 of this thesis. In addition, unlike the 1955 amended Convention, an action against air carrier cannot be brought by the sender or addressee of a mail or postal package (Article 2(2)): see G. F. FitzGerald, supra note 236, p. 320; also see Moukataff v. B.O.A.C. [1967], 1 Lloyd's Rep., in which the sender of mail successfully recovered damages from B.O.A.C.

[250] See p. 244 of this thesis.

1- Under Article 20 of the 1955 amended Convention the carrier can be relieved of liability arising from the delay of, destruction, loss of or damage to goods if he proves that he and his agents or servants have taken all necessary measure to avoid the damage or that it was impossible for him or them to take such measures, whereas under Article 20 of the Montreal Convention the carrier cannot, except when the damage is occasioned by delay, be relieved. Article 20 of the Montreal Convention provides:

> "In the carriage of passengers, baggage and cargo, the carrier shall not be liabe for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures."

So, it can be said that if damage occurred because of the destruction, loss of or damage to cargo, the carrier will be liabe even if he can prove that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures because he has no such a defence under the Montreal Convention. In other words the carrier's defences, under Article 20 of the Montreal Convention, has been more restricted and his liability has become more strict.

2- There are some new defences in Article 18(2) of the Montreal Convention to the air cargo carriers. Article 18(2) provides:

> "However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:
>
> (a)-inherent defect, quality or vice of that cargo; (b)-defective packing of that cargo performed by a person other than the carrier or his servants or agents; (c)-an act of war or an armed conflict; (d)-an act of public authority carried out in connection with the entry, exit or transit of the cargo."

3- In Article 21(2) of the Montreal Convention there is a new defence to the air cargo carrier upon which he may be wholly or partly exonerated from his liabilty. Article 21(2) provides:

> "In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage."

Apart from the above mentioned differences the cargo carrier's defences under both the 1955 amended Convention and the Montreal Convention are the same. If the international air cargo carrier fails to use the above defences and is, therefore, liable, then the liability-limiting provisions of Article 22A of the Montreal Convention apply and he will be, therefore, entitled to avail himself of them.

It should be noted that unlike the 1929 Warsaw Convention and the 1955 amended Convention, there is no provision in the Montreal Convention which deprives the carrier of taking advantage of the Montreal Convention's liability-limiting provisions.[251] So, As soon as the carrier is held liable, the Montreal Convention's liability-limiting provisions apply to limit his liability.[252] In brief it can be said that the 1975 Montreal Convention is a new system based on strict liability of the carrier which is coupled with an

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[251] Article 9 of both the 1929 Warsaw Convention and the 1955 amended Convention which deprive the carrier of using the liability limits has been changed in the Montreal Convention. Also Article 25 of both the 1929 Warsaw Convention and the 1955 amended Convention have been removed in the Montreal Convention.

[252] G. F. FitzGerald, supra note 236, p. 315.

unbreakable limit.[253] However, the consignor has the possibility to make a special declaration of interest in delivery at destination under Article 22A.

4.1:3:2 The amount of limitation of damages

Article 22A(1),(2) and (3) of the Montreal Convention, Protocol No. 4, relate to the amount of limitation of damages in the event of cargo damage. They are nearly the same as Article 22(2),(4) and (5) of the 1955 amended Convention,[254] but the main difference is the change of unit of accounts. The unit of accounts used in the Montreal Convention is in terms of the Special Drawing Rights (SDRs)[255] rather than Poincare gold franc. Accordingly the amount of limitation of damages is a sum of 17 SDRs per kilogramme unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.[256] But, like the 1955 amended Convention, there are some circumstances in Article 23(2) of the Montreal Convention upon which the carrier is able to relieve himself of this amount of the limit or to fix a lower limit than that amount of the limit by putting an appropriate provision in the carriage contract. Article 23(1) and (2) provides:

(1)- "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which

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[253] Id., pp. 304 et.

[254] See p. 245 of this thesis.

[255] See p. 237 of this thesis; see also G. F. FitzGerald, supra note 236, p. 323 et.

[256] Article 22A(1)(a) of the Montreal Convention, Protocol no. 4.

shall remain subject to the provisions of this Convention."

(2)- "Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."

4.1:3:3 To whom the limitation of damages applies

The question now is: who can avail himself of the limitation of damages?

(1) - The carrier

Article 22 A(1)(a) of the Montreal Convention provides:"In the carriage of cargo, the liability of the carrier is limited to a sum of 17 SDRs per kilogramme...", i.e. the limitation of damages applies to the carrier. However, the Montreal Convention, like the 1929 Warsaw Convention and the 1955 amended Convention, does not make any definition of 'the carrier' referred to therein. A question, therefore, is whether if an international carriage by air is performed by a person other than the contracting carrier, can he avail himself of the limitation of damages?

The answer, it seems, can be given in affirmative because the Guadalajara Convention - Supplementary Convention to the Warsaw Convention for the unification of certain rules relating to international carriage by air performed by a person other than contracting carrier - is in force and accordingly the actual carrier[257] is subject to the

[257] Article I(c) of the Guadalajara Convention provides: ""actual carrier" means a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, perform the whole or part of the carriage ..."

rules of the Warsaw Convention,[258] and because the Montreal Convention is not a new convention but some Protocols which are amendments to the Warsaw Convetion. So, for the application of Article 22A of the Montreal Convention,Protocol No.4, to international carriage by air performed by a person other than contracting carrier we should refer to the appropriate convention, i.e. the Guadalajara Convention which we can conclude that the limitation of damages applies to the actual carrier too.

(2) - The carrier's agents or servants

The limitation of damages also applies to the carrier's agents or servants when an action is brought against them provided that :

1 - The action arises out of damage to which the Montreal Convention relates; and

2 - the servant or agent can prove that he acted within the scope of his employment.

So, once a carrier's agent or servant is held liable and it is proved that he acted within the scope of his employment, he is entitled to avail himself of the limits of liability which the carrier himself is entitled to invoke under Montreal Convention whatever the damage resulted from, because there is no provision in the Montreal Convention which deprives such a servant or agent of taking advantage of the Montreal Convention's liability-limiting provisions.[259]

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[258] Article II of the Guadalajara Convention 1969.

[259] Article 25A(3) of the 1955 amended Convention which deprives the carrier's servant or agent of taking advantage of liability limitation if it is proved that the damage resulted from his act or omission done with intent to cause damage or recklessly with

4.1:3:4 What problems there are with the Montreal Convention's liability-limiting provisions of Article 22A

As stated, one of the problems with the 1929 Warsaw Convention was the problem of conversion unit which remained unsolved even in the 1955 amended Convention. This problem was solved in the Montreal Convention which placed the SDR[260] as a new unit of account instead of the Poincare gold franc.

The lack of an indication of the weight of consignment in the air waybill, under the 1955 amended Convention, may cause some problem in the calculation of the amount of damages. This problem was also solved in Article 8(c) of the Montreal Convention providing that both the air waybill and the receipt for the cargo must contain an indication of the weight of the consignment.

In brief, it seems that the problems with the 1929 Warsaw Convention and the 1955 amended Convention have been solved under the 1975 Montreal Convention, but, what problems there are with the Montreal Convention itself, we have to wait to see.

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knowledge that damage would probably result, has been deleted in Montreal Convention.

[260] See p. 260 of this thesis.

4.2 UNDER THE INTERNATIONAL ROAD CARRIAGE OF GOODS CONVENTION (CMR)

International carriage of goods by road increased in the period following the Second World War so that a need for an international convention on such carriage unifying the road carrier's liability was felt. The CMR Convention - Convention on the Contract for the International Carriage of Goods by Road - was therefore signed in 1956.[1] In order to know the MTO's liability under the CMR we should first consider whether or not the CMR applies to a multimodal transport contract or its road leg.

4.2:1 Application of the CMR Convention to a multimodal transport of goods contract (MTC)

Article 1(1) of the CMR provides :

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[1] CMR is made from the initials of its French title, i.e. Convention relative au Contract de Transport International de Marchandises Par Route. It was signed at Geneva on 19 May 1956, (399 U.N.T.S. 189), and came into force in Oct. 1961. It is, in fact, a Convention of European Countries because only European countries have accepted it. The Contracting Parties are: Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, Hungary, Italy, Luxembourg, The Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia: see M. A. Clarke International Carriage of Goods by Road: CMR, Stevens & Sons, London, 1982, p. 1; C. M. Schmitthoff, Schmitthoff's Export Trade, Stevens & Sons, London, 1986, p. 547; C. A. Bonner, British Transport Law by Road and Rail,1974, p. 115; W. E. Astle, International Cargo Carriers' Liabilities, Fairplay Publications, 1983, p. 113; Donald, CMR: An Outline and its History, [1975] L.M.C.L.Q. pp. 420- 21; S. Zamora, Carrier Liability for Damage or Loss to Cargo in International Transport, Am. J. of Comparative Law, vol. 23, 1975, p. 431; see also Roland Loewe, Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR),(1976) E.T.L. 311. The full name of CMR in English is: The Convention on the Contract for the International Carriage of Goods by Road.

"This Convention shall apply to every contract for the carriage of goods by road in vehicles[2] for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries[3], of which at least one is a Contracting country, irrespective of the place of residence and the nationality of the parties."

This Article needs very close consideration in order to understand whether a multimodal transport of goods contract is subject to CMR or not. It may be argued that the CMR Convention applies to a multimodal transport of goods contract since "there is nothing in the convention to indicate that, where a contract of carriage is to be performed partly by road and partly by other means of transport, this in itself results in the contract not being one for the carriage of goods by road in terms of article 1, paragraph 1. In fact the convention [by Article 2(1)] implies the contrary."[4] But I am of the opinion that the CMR does not apply to a multimodal transport of goods contract (MTC) because, as will be seen, the express statement of Article 1(1) that the CMR applies "to every contract for

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[2] Article 1(2) of the CMR provides: "For the purposes of this Convention, 'vehicles' means motor vehicles, articulated vehicles, trailers and semi-trailers as defined in Article 4 of the Convention on Road Traffic dated 19th September 1949". The mentioned Article 4 provides:

" 'Motor vehicle' means any self-propelled vehicle normally used for the transport of persons or goods upon a road, other than vehicles running on rails or connected to electric conductors.
'Articulated vehicle' means any motor vehicle with a trailer having no front axle and so attached that part of the trailer is superimposed upon the motor vehicle and a substantial part of the weight of the trailer and its load is borne by the motor vehicle. Such a trailer shall be called a 'semi-trailer'.
'Trailer' means any vehicle designed to be drawn by a motor vehicle." See Halsbury's Statutes, 4th ed. vol. 38 pp. 164-5.

[3] A country's dependencies are to be regarded as part of that country. They cannot be regarded as different countries from that country: Chloride Industrial Batteries Ltd. & other v. F.& W. Freight Ltd., [1989] 2 Ll. Rep. 274.

[4] P. G. FitzPatrick, Combined Transport and the CMR Convention J. Bus. L. [1968] p. 311, at 313.

the carriage of goods by road..." has the effect of excluding the application of the CMR to a MTC. Further the Convention, by Article 2(1), does not imply its application to a MTC because the CMR, by Article 2(1), applies, as will be seen, to the multimodal transport performed under a contract of carriage by road rather than under a contract of multimodal transport.

In Article 1(1) the main point to notice is the words "contract for the carriage of goods by road". What is evident and obvious from Article 1(1) is that the application of the CMR has been tied with the 'contract for road carriage' rather than contract for the carriage by other means, e.g. by sea or by a combination of road and other means (multimodal transport). Further there is no provision in the Convention to provide that the CMR applies to multimodal transport contracts. Therefore, the CMR, by Article 1(1), applies only to contracts of international carriage of goods by road. It does not apply to a contract of international carriage of goods by a combination of various modes of transport, i.e. a multimodal transport contract as a whohe.

Now the question is: if a MTC involves a road leg of transport, does the CMR apply to the MTC so far as it relates to the road leg? If the road leg does not cross international boundaries, then it is unlikely that the CMR applies to that leg of transport.[5] Even if the road leg crosses international boundaries there is no provision[6] to that effect in the CMR Convention. Some believe that it is not clear that the CMR does not apply

[5] A. Diamond, supra chap 2, note 14, p. C2.

[6] For example, a provision which provides a MTC involving a road leg is deemed to be a contract of carriage by road in so far as it relates to road carriage.

to the road leg of a multimodal transport contract.[7] But it seems to me that the answer should be given in negative because a contract of multimodal transport has a nature quite different from that of a contract of road transport. A multimodal transport contract is an agreement between parties on the carriage of goods, for example, partly by road and partly by a mode other than road while a road transport contract is an agreement between parties on the carriage of goods by road. In fact the MTC is a single contract which must be viewed as a whole. Although it includes two different modes of carriage,e.g. road and sea modes of carriage, it cannot be divided into two contracts, e.g. a contract of road carriage and a contract of sea carriage, because, as stated, it is naturally one single contract. Professor E. Selving says[8]: "The prevailing view so far has been that the multimodal contract is a new and distinct type of contract of carriage, which must be distinguished from the various contracts for unimodal carriage. Moreover it is not justified by construction to split up the multimodal contract into several unimodal contracts, one for each of the segments of the multimodal carriage. Hence, as long as the unimodal conventions apply only to contracts for carriage by a particular mode of transport, the multimodal contract falls outside their scope, and a new multimodal convention does not conflict with the existing unimodal conventions. This view was also expressed in a report prepared at the request of the UNCTAD Secretariat for submission to the IPG and subsequently endorsed by a broad majarity of the IPG and the diplomatic conference." Therefore, since it is not possible that a road carriage contract is derived from the MTC by its being divided into two contracts, the CMR does not apply to the road leg of the multimodal transport contract.

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[7] See, for example, P. G. FitzPatrick, supra note 4.

[8] E. Selving, supra chap. 2, note 3, p. A17.

4.2:2 Application of the CMR Convention to multimodal transport (roll on - roll off traffic)

Article 2(1) of the CMR Convention provides:

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

The CMR Convention, by Article 2(1), applies, in my opinion, to such multimodal transport which is performed, within certain circumstances of Article 2(1), under a contract of transport by raod rather than under a contract of multimodal transport. Although the transport intended by Article 2(1) is multimodal transport, it is deemed to be international carriage by road if the goods are not unloaded from the road vehicle.[9] Such multimodal transport, or more precisely, such deemed international carriage by road is, therefore, performed under a contract of carriage by road to which the CMR applies.

In William Tatton & Co., Ltd. v. Ferrymasters Ltd. & another[10], an English case, there was a contract of international carriage of goods by road from Cheshire to Italy to which the CMR Convention and the Carriage of Goods by Road Act 1965 applied. Although the contract was a road carriage contract but the carriage had to be performed multimodally,i.e. partly by sea and partly by raod (through roll on - roll off traffic). The question is: when carriage has to be performed multimodally, as in William Tatton case,

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[9] J. Ridley, The Law of the Carriage of Goods by Land, Sea and Air, 6th ed., Shaw & Sons, London, 1982, p. 57.

[10] [1974] 1 Lloyd's Law Rep. p. 203; See also Ulster Swift v. Taunton, [1977] 1 Lloyd's L. Rep. 346; Thermo Engineers Ltd. v. Ferrymasters Ltd.,[1981] 1 Lloyd's L. Rep., p. 200.

how can it be taken under an international carriage by road which "is defined as being carriage of goods by road from a place in one state to a place in another state, if either of these two states is a party to the Convention"[11],so that it is applied by the CMR, Article 2(1)?

The only answer is that the court in William Tatton[12] should have accepted that the multimodal transport mentioned in Article 2(1) of the CMR was deemed, by Aricle 2(1), to be a carriage by road. This answer confirms the view that the multimodal transport mentioned in Article 2(1) is a special one which is deemed to be carriage by road and thus can be taken under a contract of carriage by road.

In fact, Article 2(1) should not be read separately from Article 1(1). It is not correct to say that the CMR, by Article 2(1), applies to a contract of multimodal transport. It seems to me that Article 2(1) should be read together with Article 1(1). By Article 1(1), the CMR applies to a contract of carriage by road. Article 2(1) deems a particular kind of multimodal transport to be carriage by road in order to bring it under a contract of road carriage mentioned in Article 1(1). Article 2(1) then provides the application of CMR to such road carriage. Without Article 2(1) it was not clear that such multimodal transport would be road carriage. In other words, Article 2(1) is, I think, a supplement to Article 1(1). Further, that Article 2(1) deems such multimodal transport as road carriage, and that it does not use the word 'contract' show its depedency on Article 1(1). It seems that if the Convention maker had intended any other contract of carriage, than road carriage contract mentioned in Article 1(1), in relation to Article 2(1), they would have certainly

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[11] J. Ridley, supra note 9, p. 57.

[12] [1974] 1 Lloyd's Law Rep., p. 203.

mentioned it. As stated, it is clear from William Tatton that the multimodal transport of Article 2(1) contemplates performance under a road carriage contract. This shows that the CMR, by Article 2(1), too, applies to a contract of carriage rather than the carriage itself. Since the word 'contract' is not used in Article 2(1), Article 2(1) is, therfore, dependant on Article 1(1) and should be read together.

In fact Article 2(1) makes the possibility that a part of the road carriage contract mentioned in Article 1(1) can be performed by a mode of transport other than road if the goods remain unloaded in the road vehicle. So it can briefly be said that the multimodal transport mentioned in Article 2(1) is a multimodal transport performed under a road carriage contract and not under a multimodal transport contract because :

1- The CMR Convention, as its name suggests, is concerned with contracts for carriage by road.

2- By Article 2(1), the whole journey (e.g. partly by road and partly by sea) is deemed to be international carriage by road if the goods remain unloaded in the road vehicle.[13] This deemed road carriage,i.e. multimodal transport of Article 2(1), can be taken under a road carriage contract. This is shown by cases such as William Tatton.[14]

3- By Article 2(1), the goods not having been unloaded from the road vehicle is a condition for the CMR to apply to the whole journey (road leg and other leg, e.g. sea

[13] J. Ridley, supra note 9, p. 57.

[14] [1974] 1 Lloyd's L. Rep., 203.

leg).[15] The reason of the use of this condition by the convention makers was, I think, that they became able to deem the whole journey (e.g. road part and sea part) to be carriage by road (just as if the road vehicle with its load is, while on a ship for example, itself moving on a road towards its destination) so that the deemed road carriage can be taken to be under a contract of road carriage and consonant with Article 1(1). This was why they provided[16] that if any loss, damage or delay in delivery of the goods occurring during the carriage by the other means (means other than road) of transport was caused by an act or omission of the carrier by road the CMR applies to determine the carrier's liability,[17] but if it was caused by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall not be determined by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone have been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport.[18] In fact the CMR combined transport provisions "established a network system of liability: if it is proved that the damage or loss occurred by reason of the carriage by another mode of transport, the liability of the carrier by road shall be determined by the rules of liability prescribed by

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[15] J. Ramberg, The Combined Transport Operator, J. Bus. L. (1968), 132 at 135.

[16] See Article 2(1) of the CMR.

[17] See, for example, Ulster Swift v. Taunton [1977] 1 Lloyd's Law Rep. 346.

[18] See, for example, Thermo Engineers Ltd. v. Ferrymasters Ltd. [1981] 1 Lloyds L. Rep. 200; J. Ramberg, supra ntoe 15, p. 135.

law to that mode[Art.2(1)]".[19]

4- No mention of multimodal transport contracts is made in Article 2(1). This plus the above second and third reasons show that Article 2(1) must have been written in accordance with Article 1(1), namely, it should be read in the light of Article 1(1) concerning with contracts of road carriage. It was not, therefore, necessary 'the contract of carriage by road' to be repeated in Article 2(1).

5- Apart from the above reasoning that the CMR applies to multimodal transport performed under a road carriage contract rather than under a contract of multimodal transport, it should be noticed that Article 2(1) has much more scope for multimodal transport performed under a road carriage contract (such as roll on - roll off traffic which usually fall within the scope of application of the CMR)[20] than for multimodal transport performed under a multimodal transport contract because even if we accept that the CMR, by Article 2(1), applies to multimodal transport performed under multimodal transport contracts, it will be of little use because such multimodal transport is often fulfilled by containers which are usually lifted from the road vehicle and placed in a modular container ship so that they cannot fall within the scope of Article 2(1)[21]. Since it is very unlikely that the Convention makers intended an article with so little practical application, Article 2(1) must surely apply to multimodal transport performed under a road carriage

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[19] S. Zamora, supra note 1.

[20] William Tatton, supra note 14; Ulster Swift, supra note 17; Thermo Engineers, supra note 18.

[21] J. Ramberg, The Combined Transport Operator, J. Bus. L. (1968), 132 at 135.

contract.

In conclusion, the CMR applies to every contract of carriage of goods by road under which either the whole journey is performed by road from a place in one state to a place in another state of which at least one is a contracting state (as in Article 1(1)), or deemed road carriage (multimodal transport of Article 2(1)) is performed, i.e. partly by road and partly by other means so that the road vehicle - without the goods being unloaded - is carried on another vehicle of the other means, e.g. on a ship. The CMR does not apply to multimodal transport under a multimodal transport contract. In recognising whether or not the CMR applies to multimodal transport, therefore, one should make a distinction between the multimodal transport performed under a multimodal transport contract and the multimodal transport performed under a contract of road carriage. To the former the CMR does not, as stated, apply whereas to the later, under certain circumstances, it applies.

4.2:3 The liability of the MTO for loss or damage to goods under the CMR

Since, as said, the CMR does not apply to a multimodal transport contract nor does it apply to the road leg of a multimodal transport contract involving a road leg of transport, and the multimodal transport of Article 2(1) of the CMR performed under a road carriage contract falls out of the scope of this study,[22] the CMR cannot determine conventionally the MTO's liabilty for loss or damage to goods occurring during road leg

[22] The scope of this study is the liability of the MTO for loss or damage to goods occurring during multimodal transport which is performed under a multimodal transport contract.

of multimodal transport which is performed under a multimodal transport contract. Therefore, the parties to such contract are not bound to regard the mandatorily applicable character of the CMR and can contract it out. However the parties may agree that the CMR applies contractually to determine the MTO's liability for loss or damage occurring during road leg of the multimodal transport as parties using the ICC Combined Transfer Docuemnt have in fact agreed on ICC rules for the road leg loss or damage.

4.2:3:1 The basis of liability under the CMR

Under the CMR, in case of loss of or damage to the goods the carrier is presumptively liable[23] unless he proves that he is exempted from liability under Article 17(2) or entitled to use the defences mentioned in Article 17(4). If he can prove it is then presumed that it was so caused (Article 18(2)). If the cause of loss or damage cannot be ascertained, it is the carrier who bears the loss.[24] In other words the CMR carrier's basis of liability is - like the CIM, Warsaw Convention, Hamburg Rules and the Multimodal Transport of Goods Convention - a 'rebuttable presumption of liability of the carrier'. This presumption of liability derives from Article 17 making the carrier liable for any loss or damage to the goods from the time when he takes over the goods until the time of delivery. Article 17(1)[25] provides:

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[23] Van Ryn, A New Step in the Creation of a Law Relating to Transport: The Convention of 1956 on International Transport of Goods by Road (C.M.R.) 1 Eur. Trans. L. 638 at 654 (1966); Rodiere, The Convention on Road Transport, 6 Eur. Trans. L. 2, 10 (1971).

[24] Id., at 660.

[25] This Article corresponds to Article 27(1) of the CIM.

"The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

However, under Article 17(2) the carrier is not liable if the loss, damage was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid[26] and the consequences of which he was unable to pervent.

According to Article 18 it is for the carrier to prove that he is exempted from liability, under one of the grounds of Article 17(2). If the carrier can do so the burden of proof will shift to the plaintiff to prove that the loss or damage was not, in fact, caused by one of the Article 17's grounds.

Although the CMR Convention is generally, as stated, based on the presumption of the carrier's liability, there are, however, two points which should be noted. First, the CMR is sometimes based on strict liability of the carrier. For example, the carrier is strictly liable for loss or damage caused by the deficient condition of the vehicle of transportation. Article 17(3) provides that the carrier shall not be relieved of liability becaue of the defective condition of the vehicle which he uses to perform the carriage, or

[26] The court in Thermo Engineers and Anhydro A/S v. Ferrymasters [1981] 1 All E.R. 1142 held that the phrase 'where loss, damage or delay caused through circumstances which the carrier cannot avoid' is to be given its liberal meaning; the word 'were not to be construed as meaning which the carrier cannot reasonably avoid'.

because of the wrongful act or neglect of the person from whom he has hired the vehicle, or of this person's agents or servants. Second, there are some circumstances in which the principle of the carrier's non-liability prevails. Articles 17(4)(f) and 18(5) provide that the carrier shall not in any circumstances be liable for loss or damage caused by the special risks involved in the carriage of livestock, provided that the carrier proves he took "all steps normally incumbent on him in the circumstances", and that he complied with any special instructions issued to him.

4.2:3:2 The limits of liability under the CMR

Here, like other international carriage conventions, there is a limitation on the carrier's liability. This liability limit is on the base of 'per kilogramme' and there is no alternative of, for example, 'per package or unit'. So the 'package limitation' problem we have examined in the Hague or Hague-Visby Rules does not arise here.

The amount of limitation is 25 gold francs[27] per kilogramme of gross weight. Article 23 provides that the damages recoverable for total or partial loss of the goods shall be calculated according to the value of the goods at the place and time when they were accepted for carriage. So if the CMR carrier is held liable,[28] his liability will be limited,

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[27] In order to remove the difficulty arising from frequent changes in the gold value which was already explained, this limitation amount has been changed to other units by some countries. For example, by the English Carriage by Air and Road Act 1979, it has been changed to 8.33 SDR units of account per Kilogramme of gross weight.

[28] Apparent loss or damage must be notified to the carrier at once and at least upon the receipt of the goods (Article 30), and in case of non- apparent loss or damage, the notice should be given within seven days after delivery (Article 30(1). Otherwise, failure to do this is prima facie evidence that the goods were delivered in good condition and the

if he is not deprived of the benefit of the liability-limiting provisions,[29] to 25 gold francs per kilogramme of gross weight of the goods lost or damaged if the value of the lost or damaged goods at the place and time when they were accepted is higher than this limitation amount. Otherwise if that value is lower than the limitation amount, that value is recoverable as damages, i.e. the carrier's liability never exceeds the total value of the lost or damaged goods.

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carrier may be known unliable. Also an action against the carrier must be brought within a certain time, otherwise it will be time-barred. Under Article 32(1)(a)(b), it is one year from delivery, or in case of non-delivery, from the 30th day after the expiry of agreed time limit, or where no such limit exists, from the 60th day after the date on which the goods were taken over by the carrier.

[29] The liability-limiting provisions do not apply if the carrier, his servants or agents, have been guilty of wilful misconduct. Regarding the carrier's agents or servants it should be in the course of their employment.

4.3 UNDER THE INTERNATIONAL RAIL CARRIAGE OF GOODS CONVENTION(S)

One of the oldest international carriage of goods conventions is that concerning carriage of goods by rail of October 14, 1890 (CIM).[1] This convention has been amended in 1924, 1952, 1961, 1970. The original parties to the CIM were Austria, Hungary, Belgium, France, Germany, Italy, Luxemburg, the Netherlands, Russia and Switzerland. Then, other European and non-European (North Africa, Middle East) governments became parties to the Convention.[2] Finally, the CIM appears in a new convention, the Convention concerning International Carriage by Rail (COTIF) of 1980, as its appendix B. All European countries, except the Soviet Unions, and some Asian and African countries are parties to the COTIF.[3]

4.3:1 Under the International Convention Concerning Carriage of Goods by Rail (CIM)

It should be first considered whether the CIM Convention applies to a multimodal transport contract or not, because if it does not apply to such contract, it cannot determine the MTO's liability.

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[1] The acronym 'CIM' stands for 'Convention internationale concernant le transport des marchandises par chemins de fer' which is the French title of the Convention.

[2] Haenni, Carriage by Rail, 12(2) Encyclopaedia of Comparative Law 115 (1973).

[3] C. M. Schmitthoff, Schmitthof's Export Trade, 8th ed., Sweet & Maxwell, London, 1986, p. 546.

4.3:1:1 The application of the CIM Convention to a multimodal transport contract

Article 1(1) of the CIM Convention provides:

> "This convention shall apply ... to the carraige of goods consigned under a through consignment note made out for carriage over the territory of at least two of the Contracting State and exclusively over lines included in the list complied in accordance with Article 59."

As seen the express statement of Article 1(1) is that the CIM applies to the carriage performed under a contract. Now the question is: what mode of carriage, under what kind of transport contract is governed by the CIM? Is multimodal carriage under a multimodal transport contract governed by the CIM?

As the name of the Convention suggests and as it is understood from Articles 1(1) and 2(1) of the CIM Convention, it is carriage by rail which is, under certain circumstances, governed by the CIM Convention. However, by Article 2(1) of the CIM, multimodal carriage, carriage by rail and road or sea, may also be governed by the CIM Convention if 1) the road or sea service is complementary to the rail carraige and; 2) on that road or sea line which the complementary service is performed international traffic is carried. So the CIM Convention may apply either to carriage by rail or to multimodal carriage of which the main leg of carriage is rail carriage.

The next question was: under what kind of transport cotnract is the rail carriage or multimodal carraige performed? On one hand under Article 8(1) of the CIM, as soon

as the forwarding railway has accepted the goods for carriage together with the consignment note, the contract of carriage comes into existence. On the other hand, it is quite clear that the goods will not be consigned unless they have been already accepted by the railway for carriage together with the consignment note. In other words, that the goods are consigned by railway shows that the railway has already accepted them together with the consignment note and, therefore, the carriage is performed under a contract of carriage by rail which has, according to Article 8(1), come into existence.

Therefore, when Article 1(1) of the CIM says "This convention shall apply ... to the carriage of goods consigned under a through consignment note ...", the consignment of the goods by a rail carrier shows the acceptance of the goods together with the consignment note by him which shows the coming into existence of a contract of rail carriage. In other words, 'contract of carriage by rail' can be implied from Article 1(1). So it can be said that the CIM Convention, by Article 1(1), applies to the carriage of goods peformed under a contract of carriage by rail evidenced by a through consignment note.[4]

The implied statement of Article 1(1) that the CIM applies to the carriage of goods performed under a rail carriage contract, therefore, shows that the CIM does not apply to

[4] The consignment note becomes evidence of the contract when the forwarding railway puts its stamp in the appropriate box. See Article 8(3); also see J. Ridley, The Law of Carriage of Goods by Land, Sea and Air, 6th ed., Shaw and Sons, London, 1982, p. 74.

the carriage of goods performed under a multimodal transport of goods contract.[5] Further,"it would seem that the CIM Convention only applies to 'railways' and that it does not apply to others who may contract to carry goods on a transit which will or may be by rail."[6]

Moreover, there is nothing in the Convention to provide the applicability of the CIM to a multimodal transport contract. Also it seems that the CIM does not even apply to a multimodal transport contract involving a rail leg of transport as far as it relates to the rail leg because firstly, that rail leg is not performed under a rail carriage contract evidenced by a consignment note but under a multimodal transport contract; secondly a multimodal transport contract is a single contract which must be viewed as a whole and a rail carriage contract may not, therefore, be derived from it;[7] Thirdly no provision in the CIM suggests the contrary. However, as stated, it is to be noted that Article 2(1) of

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[5] Professor Erling Selving says:
"It [an international unimodal convention such as the CIM] applies [to a multimodal transport contract] at least as a matter of contract. Whether it applies as a matter of law is, I think, a question of some difficulty and uncertainty. I have seen no case specially solving this question. One may argue that the multimodal transport contract is a separate type of contract and therefore does not fall within the existing conventions ... The question has never been pinpointed because of contracting practices." E. Selving, infra, note 7; see also Id. at p. A17, para 1.

[6] A. Diamond, supra chap. 2 note 14, p. C35 note 15; see specially Article 26.

[7] Professor Erling Selving who for over six years was deeply involved with the drafting and adoption of the MT Convention says:
"The prevailing view so far has been that the multimodal contract is a new and distinct type of contract of carriage, which must be distinguished from the various contracts for unimodal carriage. Moreover, it is not justified by construction to split up the multimodal contract into several unimodal contracts, one for each of the segments of the multimodal carriage." The Background to the Convention, one day seminar in Southamption University, 1980, p. A17; See also W. Driscoll & P. B. Larsen The Convention on International Multimodal Transport of Goods, Tulane L. Rew., 1982, Vol. 57, p. 208.

the CIM includes provisions concerning multimodal transport which is, as will be seen, performed under a rail carriage contract rather than a multimodal transport contract.

4.3:1:2 The application of the CIM Convention to multimodal transport

By Article 2(1), the CIM allows the Contracting States to register regular road or shipping services in the list of lines referred to in Artilce 1(1) if those services are complementary to railway services.

Article 2(1) of the CIM provides:

> "Regular road or shipping services which are complementary to railway services and on which international traffic is carried may, in addition to services on railway lines, be included in the list referred to in Article 1 ..."

It is quite evident that Article 2(1) is a supplement to *Article 1(1)*. *Article 1(1)* just provides that the CIM applies to the carriage of goods exclusively carried over lines included in the list complied in accordance with Article 59. But it does not specify 'the lines' which can be included in the list complied in accordance with Article 59. Article 2(1) makes it clear what lines can be included in the list referred to in Article 1(1). Accordingly 'the lines' referred to in Article 1(1) not only can be railway lines but they can also be road or shipping services provided that they are complementary to services on railway lines. So it can be said that the CIM may apply to a multimodal transport if the service on railway lines can, in any case, be considered as the main service of the carraige, otherwise the CIM does not apply to such multimodal transport.

As seen, the CIM, by Article 1(1), applies to the carriage of goods performed under a rail carriage contract. Article 2(1) does not create a contract to which the CIM applies, but it allows the rail carriage of Article 1(1) to be extended by a road or sea carriage if the road or sea carriage is complementary to the railway carraige. In other words, Article 2(1) provides for multimodal transport to which the CIM applies. A question now is: if Article 2(1) does not create a contract, under what contract of carriage is the multimodal transport of Article 2(1) carried out?

It seems that since Article 2(1) is a supplement to Article 1(1), it should be read together with Article 1(1) rather than separately. Therefore, the multimodal transport of Article 2(1) is to be performed under a through consignment note evidencing a rail carriage contract; i.e. under a rail carriage contract, i.e. the complementary road or sea leg of the multimodal transport is also performed under a rail carriage contract. In other words, it can be said that sea or road carriage which is complementary to rail carriage is deemed to be rail carriage so that it can be taken under a rail carriage contract. This is why the obligations and rights of the carriers operating such multimodal transport services of Article 2(1) for complementary road or sea carriage will be, always subject to such derogations as necessarily results from those forms of transport, the same obligations and rights which are special to the rail carriers, and the rules on liability and damages provided by the CIM remain unaffected. Article 2(2) of the CIM provides that the undertakings operating such services (multimodal transport services of Article 2(1)) shall be subject to all the obligations imposed and enjoy all rights conferred on railways by this convention, but always subject to such derogations as necessarily result from the different forms of transport. However the rules on liability and damage provided by the CIM

remain unaffected.[8]

In brief the CIM, by Article 1(1) and 2(1), applies to the carriage of goods, whether just by rail or by rail to which a complementary road or sea carriage is connected, under a rail carriage contract evidenced by a through consignment note if that carriage is carried out over the territories of at least two of the Contracting State and exclusively over lines included in the list complied in accordance with Article 59. In other words, the multimodal transport which is performed under a multimodal transport contract is not governed by the CIM.

4.3:1:3 The liability of the MTO for loss or damage to goods under the CIM

As said, the scope of this study is the liability of the MTO for loss or damage occurring during multimodal transport performed under a multimodal transport contract. The CIM Convention cannot determine the liability of such MTO since, as stated, it does not apply to a multimodal transport contract, nor does it apply to multimodal carriage of goods performed under a multimodal transport contract, nor does it apply to the rail leg of a multimodal transport contract involving a rail leg of transport.

The question, therefore, is: how can the MTO's liability for loss or damage

[8] Article 27 of the CIM provides some provisions regarding the liability of railway carriers. However in multimodal transport involving a rail and a sea leg of carriage, Article 63 of the CIM permits each Contracting State to add certain exemptions from liability in addition to those already provided in Article 27. They are: negligence in the navigation of the ship, unseaworthiness which is not due to the lack of due diligence, fire, perils of the sea, saving life or property at sea and on-deck carriage.

occurring during rail leg of a multimodal transport contract, be determined?

As stated it seems that the mandatorily applicable character of the CIM does not bind the parties to such contract to regard the CIM provisions since the CIM is, as reasoned, applicable neither to the multimodal transport contract nor to its rail leg. The parties can, therefore, contract out the CIM if they wish, or choose it to govern the rail leg of their contract contractually. So, it is up to the parties to choose the CIM law to determine the MTO's liability for such loss or damage as they choose it if they use the I.C.C. Rules for a Combined Transport Document.

4.3:1:3.1 The basis of liability under the CIM

As stated, the original CIM Convention of 1890 has been amended several times. However the carrier's basis of liability provisions remained unchanged, like those of 1890 Convention.[9] The basis of liability is, as clearly understood from Article 27, based on the presumed liability of the carrier, that is, in case of loss or damage occurring between taking over and delivery of the goods the carrier is presumptively liable for the loss or damage to the goods. Article 27(1) of the CIM provides:

> "The railway shall be liable for exceeding the transit period, for total or partial loss of the goods, and for damage to the goods between the time of acceptance for carriage and the time of delivery."

This presumption is, however, rebutted if the carrier proves that the fault of the claimant (cargo-owner), inherent vice of the goods or circumstances beyond his own

[9] S. Zamora, supra note 1, at p. 423.

control caused the loss or damage. Article 27(2) provides:

> "The railway shall, however, be relieved of this liability, if the exceeding of the transit period or the loss or damage was caused by any wrongful act or neglect on the part of the claimant, by instructions given by the claimant other than as a result of any wrongful act or neglect on the part of the railway, by inherent vice of the goods (decay, wastage, etc.) or by circumstances which the railway could not avoid and the consequences of which it was unable to prevent."

Also, there are some other exceptions in Article 27(3) upon which the carrier is relieved from the presumed liability if he shows that the loss or damage was caused by one of the risks in Article 27(3). If he can prove it he is no longer presumptively liable but it is presumed that the damage or loss was so caused (i.e. by one of the risks in Article 27(3)) in which case the burden of proof is shifted to the claimant to prove the contrary,[10] i.e. it is for the claimant to show that the goods were adequately packed or properly loaded, or that the loss or damage was not caused by a 'special risk inherent in' one of the exceptions of Article 27(3), but by some other cause. *Article 27(3) provides:*

> "The railway shall be relieved of this liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:
>
> (a) carriage in open wagons ...;
> (b) absence or inadequacy of packing in the case of goods which, by their nature, are liable to wastage or damage when not packed or when not properly packed;
> (c) loading operations carried out by the sender or unloading operations carried out by the consignee ...; ... loading in a wagon which has a defect apparent to the sender;
> (d) completion by the sender, the consignee or agent of either, of the formalities required by customs or other administrative authorities;
> (e) the nature of certain kinds of goods which particularly exposes them to total or partial loss or damage, especially through breakage, rust, spontaneous decay, desiccation or wastage;
> (f) forwarding under an irregular, incorrect or incomplete description, of articles not accepted for carriage [or accepted only under certain conditions] ...;

[10] Article 28(2).

(g) carriage of livestock;
(h) carriage of consignments which ... must be accompanied by an attendant ...

4.3:1:3.2 The limits of liability under the CIM

In order to protect the rights of shipper, and, in return to the presumption of carrier's liability, the CIM sets, like other international carriage conventions, a limitation on the carrier's liability. This limit of liability is, like the CMR and Warsaw Convention, based on 'per kilogramme'. Once the carrier is held liable,[11] his liability is limited to a certain amount if he has not been deprived of the benefit of the liability-limiting provisions. This liability limit is calculated according to Articles 31 and 33. Under Article 31, the limitation amount is 100 gold francs[12] per kilogramme of the gross weight of the goods lost or damaged which is converted to currency at the rate prevailing on the date that payment is made. However, this limitation amount is not absolute. It can either go up to the full value of the cargo if there is a 'declaration of interest in delivery' by the shipper, in which case there will be an increased freight charge,[13] or go down if the

[11] Under Article 46(2)(c), in case of apparent loss or damage the carrier must be noticed at once and at least upon the receipt of the goods, and under Article 46(2)(b) in case of non-apparent he must be noticed within seven days after delivery. Otherwise, it is prima facie that the goods were delivered in good condition and the carrier may be known unliable. Also unde Article 47(1) and 2(a)(b) of the CIM, an action against the carrier must be brought within one year from delivery, or in case of non- delivery, from the 30th day after the expiry of the transit period. Otherwise it will be time barred and the carrier is not liable for.

[12] The monetary unit used in the CIM is 'germinal franc' which is defined as the "gold franc weighing 10,31 of a gramme and being of millesimal fineness 900": see Article 57(1) of the CIM.

[13] Article 36.

carrier reduces the freight charges.[14]

It should be noted that this limitation of '100 gold francs per kilo' is used if the value of the lost or damaged goods is higher than that limit, otherwise if it is lower the carrier's liability will be equal to the goods value, i.e. the carrier's liability never exceeds the value of the goods.

This amount of 100 gold francs remained unchanged until the 1961 amended Convention. It was a relatively high limitation in proportion to the limitation amount imposd by other carriage conventions. This was why there were some proposals regarding the reduction of the CIM carrier's liability limitation amount at the 1970 Conference. The 1970 amended Convention,[15] therefore, reduced that limitation amount to 50 gold francs per kilogramme.

4.3:2 Under the Convention Concerning International Carriage by Rail (COTIF)

COTIF is a new convention on international carriage by rail. It was signed at Berne on May 9, 1980 and contains two sets of uniform rules. First, Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (Appendix A of COTIF (CIV)). Second, Uniform Rules concerning the Congract for International Carriage of Goods by Rail (Appendix B of COTIF (CIM)). The CIM Convention was, therefore, included in COTIF as its Appendix B.

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[14] Article 35.

[15] This Convention entered into force in 1975.

The principal purpose of COTIF is to create a uniform law system applicable to international carriage by rail between Member States.[16] However if our international carraige, in addition to rail leg of carriage, includes a road or sea leg of carriage, COTIF, which has principally been created to govern international carriage by rail, will govern that international multimodal transport.[17] Article 2 of COTIF provides:

> 1."The principal aim of the organisation shall be to establish a uniform system of law applicable to the carriage of passengers, luggage and goods in international through traffic by rail between Member States, and to facilitate the application and development of this system."
>
> 2."The system of law provided for in 1 may also be applied to international through traffic using in addition to services on railway liners, land and sea services and inland waterways."

Appendix B of COTIF (CIM), like the CIM Convention, applies, in addition to carriage of goods by rail, to multimodal transport performed under a rail carriage contract rather than under a multimodal transport contract. Article 1(1) of CIM (Appendix B of COTIF) prvoides: "... , the Uniform Rules [CIM] shall apply to all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two States and exclusively over lines or services included in the list provided for in Article 3 and 10 of the Convention", and Article 11(1) provides:

> "The contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage together with the consignment note ..."

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[16] Article 2(1) of COTIF.

[17] Article 2(2) of COTIF.

With a reasoning similar to that mentioned regarding the CIM Convention, the carriage mentioned in Article 1(1) of CIM (Appendix B) is a carriage performed under a carriage by rail contract, and Article 2(2) of COTIF should be read together with Articel 1(1) of CIM (Appendix B). It can, therefore, be concluded that the carriage mentioned in Article 2(2) of COTIF (multimodal carriage) should be performed under a carriage by rail contract rather than under a multimodal transport contract.

So COTIF, like the CIM Convention, cannot determine the MTO's liability for loss or damage occurring during multimodal transport performed under a multimodal transport contract.

CHAPTER FIVE

INTERNATIONAL MULTIMODAL TRANSPORT CONTRACTS AND SOME PROBLEMS RELATING TO THE MTO'S LIABILITY

5.1 Conflict of laws problem

International conventions on particular subjects are usually drawn up and ratified by contracting parties in order to remove problems of conflict of national laws among those contracting parties. However, the possibility of conflict laws will still exist even if those conventions are fully implemented.[1]

Since in respect of the rules governing international multimodal transport contracts there is not yet, as I said, any operative convention, "a regulation of the liability of the multimodal transport operator has to be provided on a contractual basis."[2] A question, therefore, arises is: what law will govern the validity of the international multimodal transport contract? This question shows that there is always the possibility of existence of conflict of national laws problems in relation to international multimodal transport

[1] C.M. Schmitthof,Schmitthoff's Export Trade, 8th ed., Stevens & Sons, London, 1986, p. 173.

[2] Id. p. 527.

contracts. So to examine the rules governing international multimodal transport contracts we have to consider the conflict of laws problem and solve it.

To solve this problem we have to determine the proper law of the contract through the rules of private international law,[3] i.e. national laws. To this end, some questions may arise such as: if the parties to such contract intend expressly or impliedly their contract to be governed by a law of a country (by a particular proper law), is this choice of proper law by the parties valid? And if so, to what extent do the parties to such international contract have a free choice as to the determination of the proper law of their contract? If the proper law of such contract is not expressed by the parties, nor can be inferred from the circumstances of the contract, how will it be ascertained?

To answer these questions we have to consider the following:

5.1:1 What is the proper law of a contract?

So far as English law is concerned Dicey and Morris[4] state a definition based upon many leading cases.[5] The definition is:

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[3] Id. p. 173

[4] Dicey and Morris on the conflict of laws, llth ed. Vol. 2, London, 1987, Stevens and Sons Ltd., p. 1161

[5] Robinson v. Bland (1760) 2 Burr. 1077; Hamlyn v. Talisker Distiller, [1894] A.C. 202; Mount Albert Borough Council v. Australasian, etc. Assurance Building Society Ltd. [1938] A.C. 224 (P.C.); Vita Food Products Inc. v. Unus Shipping Co. Ltd., [1939] A.C. 277 (P.C.); Re Helbert Wagg & Co. Ltd. [1956] ch. 323; Re United Railways of Havana, etc. Warehouses Ltd.,[1960] ch. 52 (C.A.), affd. [1961] A.C. 1007; Compagnie Tunisienne de Navigation S.A. v. Compagnie d'Armement Maritime S.A [1971] A.C. 572; Amin Rasheed

"The term 'proper law of a contract' means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection."

Another definition of 'proper law of a contract' can be found in Cheshire and North's Private International Law,[6] which states:

"The 'proper law of the contract' is a convenient and succinct expression to describe the law that governs many of the matters affecting a contract. It has been defined as 'that law which English or other court is to apply in determining the obligations under the contract'."[7]

Lord Simonds in Bonython v. Commonwealth of Australia[8] said:

"The proper law of the contract is the system of law by reference to which the contract was made or that [in the absence of such reference the system of law] with which the transaction had its closest and most real connection."

In brief the proper law of a contract is a system of law which governs that contract. But it should be noticed that there may be a situation in which many aspects, not all aspects, of a contract are to be governed by the law of one country and just one or few aspects of that contract are to be governed by the law of another country.[9] "Not only may the parties agree that different contractual issues should be governed by different laws, but even where there is no such agreement the circumstances may sometimes require

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Shipping Corp. v. Kuwait Insurance Co. [1984] A.C. 50.

[6] 10th ed. by P. M. North, London, 1979, Butterworths, p. 195.

[7] Mount Albert Borough Council v. Australasian, etc., supra, not 5.

[8] [1951] A.C. 201, 219. See also Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd., [1970] A.C. 583.

[9] P. M. North, Cheshire & North's Private Int. Law, supra, note 6, p. 195.

different questions to be submitted to different laws."[10]

The question, therefore is: if one or few aspects of a contract are to be governed by the law of country A, and all other aspects of that contract are to be governed by the law of country B, which law will be the proper law of the contract?

The court in Re United Railways of the Havana and Regla Warehouses,[11] said: "The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole."

Cheshire[12] says :

> "... it can be said that in *all cases there is a primary system of law, called the* 'proper law of the contract', which usually governs most matters affecting the formation and substance of the obligation."

To be more precise in defining 'the proper law of a contract', it may be, therefore, said that when different aspects of a contract are to be governed by different law,[13] the

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[10] Id. p. 196.

[11] [1960] ch. 52, at p. 92; [1959]1 All, E.R. 214, at p. 234; Weckstorm v. Hayson, [1966] v. R. 277.

[12] Cheshire & North's Private Int. Law, supra note 6, p. 196.

[13] Although "the court will not readily and without good reason split a contract in this respect" Cheshire, supra note 6, p. 196 with reference to Kahler v. Midland Bank , [1950] A.C., p. 24, at p. 42.

system of law that governs most aspects of the contract is called 'the proper law of the contract', rather than the system of law which governs just one or few aspects of the contract.

It is, therefore, to be noticed that when there is a dispute as to one aspect of a contract, the question of 'what law governs the contract?' - although its answer will determine the proper law of the contract which governs most aspects of the contract- is not necessarily a conclusive question whose answer covers and governs all aspects of the contract[14] because if the aspect in question is one of the aspects governed by the proper law, the answer to that question will cover that aspect as well but if the aspect in question is not one of the aspects of contract governed by the proper law, the answer to that question will not cover that aspect.

The decisive question, therefore, seems to be: what law governs the particular aspect of the contract upon which there is a dispute? Because if that particular aspect is one of the many aspects governed by the proper law of the contract, the answer to the question will be a law which is the proper law of the contract, and if that particular aspect is not one of the many aspects governed by the proper law of the contract, the answer will be a law, rather than the proper law of the contract, which governs that *particular aspect* of the contract[15], i.e. in either case, whether the aspect in question is one governed by the proper law or not, there will be an answer which covers that aspect.

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[14] But when all aspects of a contract are to be governed by one law, that question will be conclusive because its answer, i.e. the proper law, will cover all aspects of the contract.

[15] Cheshire and North's Private International Law, supra note 6, p. 195.

It should be noticed that if a part of a law of a country is incorporated into a contract, it will be regarded as term or terms of that contract and does not necessarily mean that that law is to be regarded as the proper law of that contract.[16] However it may be a factor upon which the proper law may be determined.[17] If a law of a country is chosen as the proper law of a contract, any change in the law of that country made between the time of the conclusion of the contract and its performance should be regarded and will bind the parties[18] whereas if a part of a law of the country is incorporated in that contract the parties will not be bound by any change in that law because that part of that law is regarded as contractual term or terms.[19]

In conclusion, 'the proper law of a contract' can be defined as: 'a system of law which governs either all aspects or most aspects of the contract'. In the later situation one or few aspects of the contract may be governed by a law which does not necessarily mean

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[16] in Rederi A/B 'Unda' v. W. W. Burdon & Co. Ltd. (1937) L1.L.R. 95, 99(C.A.), the proper law of the contract (a charterparty made in English form) was English law, but, the owners (one party of the contract) undertook that the ship shall be equipped subject to Swedish law, for the carriage of grain cargoes. Here, to this extent Swedish law was incorporated in the English contract and is as contractual terms and not the proper law of the contract.

[17] Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] A.C. 50, at 69 per Lord Wilberforce.

[18] The court in Re Helbert Wagg & Co. Ltd., supra note 5, p. 341, rejected an argument that "the parties intended that only German law as it stood in 1924 (at the time of the loan) should govern their relationship."

[19] Dicey and Morris, supra note 4, p. 1180.

that that law should be regarded as the proper law of the contract as a whole.[20]

5.1:2 How to test every conflict of laws system

To answer the question of 'to what extent do the parties to an international contract have a free choice as to the determination of the proper law of their contract?' we have to test conflict of laws rules in different legal systems.

In order to test every conflict of laws system we have to consider whether the courts of a particular legal system which has no connection with the contract - apart from the choice of law clause by which it has been chosen as the proper law of the contract - will give effect to the choice of law clause or not. If they will, it means that, under that particular legal system, the parties to an international contract are free to choose any proper law they wish. Otherwise the parties are not free to choose any law as their contract's proper law.

In this respect we will consider the conflict of laws rules under the English legal system and the American legal system, i.e. the rules which the English or American courts apply when they face the task of determining the proper law of an international contract.

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[20] See for example, Re United Railways of the Havana and Regla Warehouses, supra, note 11.

5.1:2:1 English conflict of laws rules for determination of the proper law of a contract[21]

According to English law the decisive factor to determine the proper law of a contract is the intention of the parties to that contract. The parties to a contract are free to choose expressly any law they wish to govern their contract.[22] "English common law generally favours a wide party autonomy."[23]

Willes, J. in Lloyd v. Guilbert[24] said:

> "In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter."

Lord Wright in Vita Food Products Inc. v. Unus Shipping Co.[25] said:

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[21] It should be noted that Contracts (Applicable Law) Act was enacted on 26 July 1990 and came into force in the United Kingdom on 1 April 1991. This Act has scheduled the 1980 Rome Convention (The EC Convention on the law applicable to contractual obligation). The Convention applies when there is conflict situation between the laws of the Member States and also when it is between the laws of a Member State and a non-Member State. Under Art. 3(1) of this Convention the proper law of a contract is the law intended by the parties to the contract (i.e. freedom of the parties as to choice of law), and if the parties have not chosen a law as the proper law, the law with which their contract is mostly closely connected will be the proper law (Art. 4(1) of the Convention). These principles are the same principles developed by the English courts as we will see above. See C.M. Schmitthoff, Schmitthoff's Export Trade, 9th ed., Stevens & Sons, London, 1990, pp. 222-3.

[22] P. M. North, supra noe 6, p. 199 with reference to Gienar v. Meyer (1796), 2 Hy. Bl. 603; Schmitthoff, supra note 1 p. 176.

[23] Parrot in the article of Law and Practice, p. 6 international sales agreement; also see Dicey and Morris, supra note 4, p. 1169.

[24] (1865), L.R.1 Q.B. 115, at pp. 120-121.

[25] [1939] A.C. 277 (P.C.); see also Greer v. Poole (1880)5 Q.B.D. at p. 274 in which there was an express choice of French law clause. French law was held to be the proper law

"It is now well settled that by English law the proper law of the contract is the law which the parties intended to apply."

In this case the bill of lading embodied a clause stating that the contract should be governed by English law. Apart from this choice of law clause, English law had not any connection with the contract. The shipper contended that since there was nothing to connect the contract in any way with English law, the choice of English law clause failed. But Judicial Committee of the Privy Council rejected this contention and held that English law governed the contract on the basis that English law (conflict of laws rules) gave effect to a clear express choice of law of the parties. Lord Wright said, "Connection with English law is not, as a matter of principle, essential".

Cheshire and North state[26]: "Most of the countries of the European continent eschew anything in the way of a rigid test and, instead, adopt the doctrine of autonomy under which the parties are free to choose the governing law, though divergent views obtain on the question whether their freedom is absolute or is restricted to the choice of a law with which the contract is factually connected".

Schmitthoff[27] says: "According to English law, a contract is governed by the law

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of the contract; Re Helbert Wagg & Co. Ltd. [1956] ch. 232 in which German law was held to be the proper law of the contract because there was an express choice of German law clause.

[26] Cheshire and North's Private International Law, supra, note 6, pp. 196-7.

[27] Schmitthoff's Export Trade, supra note 1, p. 173.

which the parties intend to apply to their agreement". The court in Vita Food[28] said: "[it is a] fundamental principle of the English rule of conflict of law that intention is the general test of what law is to apply".

This parties' intention to choose the proper law of their contract may be express[29] or implied.[30] As stated 'The parties may expressly select the law by which it [their contract] is to be governed,[31] but, where there is no express choice of the proper law, the court will determine whether there is an implied choice of law in the parties' contract or not. To this end the court may consider some circumstances. For example, it may consider the jurisdiction clause of the contract upon which the parties agree that any disputes arising from the contract should be submitted to the courts of a particular country, and holds that the law of that country should be the proper law. This is based on the principle of qui elegit judicem elegit ius.[32] Or the court may consider the arbitration clause of the contract and hold that the law of the country in which the arbitration takes place is the proper law of the contract. Previously if the only connection of a system of law with a contract was the arbitration clause of the contract, the courts took it as a

[28] [1939] A.C. 277, 299 (P.C.)

[29] Cheshire and North, supra note 6, p. 299; Dicey and Morris, supra note 4, p. 1168.

[30] Cheshire and North, supra note 6, p. 203; Dicey and Morris, supra note 4, p. 1182; see the case of The Castle Alpha, [1989] 2 Ll. Rep. p. 383 regarding the proper law of the contract.

[31] Cheshire and North, supra note 6, p. 199.

[32] Id. p. 203.

powerful implication that that system of law was the proper law of the contract.[33] But, now, if the only connection of a system of law with a contract is the arbitration clause of the contract, it is not enough for the implication that the law of that country in which arbitration takes place to be the proper law of that contract. In Compagnie Tunisienne de Navigation S.A. V. Compagnie d'Armement Maritime S.A.[34] the arbitration clause of the contract provided for arbitration in London. Apart from this there was no connection between the contract and English law. The contract was entirely connected with French law. The House of Lords held that French law was the proper law and that the arbitration clause was merely one of the factors to be taken into account. There are also some other factors which may be taken into account in determining the implied intention of the parties as to the proper law of their contract, such as: the place of residence of the parties,[35] the place of business of them, the commercial purpose of the transaction[36] or the location of the subject matter of the contract.[37]

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[33] Hamlyn v. Talisker Distillery [1894] A.C. 202; The Njegos [1936] p. 90, 100; Norske Atlas Insurance Co. Ltd. v. London General Insurance Co. Ltd. (1927) 28 LI.L.R. 104; Tzortzis v. Monark Line A/B [1968] 1 W.L.R. 406 (C.A.) in which the contract had no connection with English law but the arbitration clause providing for arbitration in London. The Court of Appeal held that English law was the proper law of the contract.

[34] [1971] A.C. 572.

[35] Keiner v. Keiner [1952] 1 All E.R. 643. See the case of The Comninos S, in which there was no express choice of law in the bill of lading. The court held that since the contract was made in Greece between Greek shippers and Greek managers to carry Greek steel from Greece to Italy for freight payable in Greek currency, Greek law was the proper law of the contract.

[36] Re United Railways of Havana, etc. Warehouses Ltd., supra note 11.

[37] Dicey and Morris, supra note 4, p. 1186. Under Art. 4(2) of the 1980 Rome Convention, however, the contract is presumed to be most closely connected with the law of a country in which the party who is to effect the performance which is charactristic of the contract has, at the time of conclusion of the contract, his habitual residence. As seen, the

In brief, in English law the principle is "principle of party autonomy" or doctrine of autonomy, i.e. the parties to an international contract are free to choose any governing law they wish.[38] The question is: is there any limitation to that freedom of the parties as to the choice of proper law of their contract? Should there be any connection between the chosen law and the contract?

5.1:2:1.1 Limitation of the freedom of the parties as to the choice of proper law

Although some judicial dicta[39] and the decision of the Privy Council in Vita Food support the view that the parties are free to choose any law to govern their contract, there are some limitation to this principle of freedom. In Vita Food,[40] Lord Wright in the Privy Council indicated some restrictions to this principle. He stated that the choice of parties must be 'bona fide and legal' and must not be contrary to public policy of the forum. Therefore, to be more precise, according to English law the parties are free to choose any law they like as the proper law of their contract provided that: (1) - the parties' choice of law to be bona fide and legal; (2) - the parties' choice of law not to be

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Convention has establish a presumption for the determination of the proper law. This is contrary to modern English law which has abandoned the use of presumption for such determination.See Schmitthoff, supra note 21.

[38] This is the same principle adopted in the 1980 Rome Convention scheduled in the Contracts (Applicable Law) Act 1990.

[39] For example Lord Atkin in R. V. International Trustee, [1937] 2 all E.R. 167, at p. 166 said: "intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive".

[40] Supra note 28, at p. 290.

contrary to the public policy of the forum.

(1) - The parties' choice of law must be bona fide and legal

The questions arising are: what is a bona fide choice of law? What is a legal choice of law?

- Bona fide choice of law

To understand the meaning and scope of 'bona fide' choice in English law is difficult. "It is not clear that what a non-bona fide choice would be"[41] because "the formula has never been applied by an English court to strike down a choice."[42]

Cheshire and North say[43]: "The statement [the choice of law must be bona fide and legal] is not free from ambiguity. What it presumably means is that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If, after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as bona fide expression of their intention."[44]

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[41] Parrot, supra note 23, p. 6

[42] Dicey and Morris, supra note 4, pp. 1172; but see Golden Acres, infra, note 44.

[43] Supra note 6, p. 201.

[44] Boissevain v. Weil, [1949]1 K.B. 482 at pp. 490-491; see also Golden Acres, Ltd., v. Queensland Estates Pty, Ltd., [1969] Qd.L.R. 378 in which a choice of law clause was struck down on grounds of lack of bona fides.

It seems that if the parties to a contract choose a law of a country as the proper law of their contract in order to validate their agreement and evade the legal consequences of the law with which the contract has its closest and most real connection and would, in the absence of such choice, be the proper law of the contract, their choice is not genuine and cannot be given effect,[45] but is a mere pretence[46] for giving validity to their contract. Dicey says: "if it is clear that [the parties] meant to contract under one law ... no declaration of intention to contract under another law so as to give validity to the contract will avail them anything."[47] Also Dicey and Morris[48] say: "Where the chosen law has no connection with the transaction the fact that the choice is designed to avoid the application of some other law may be evidence that the choice is not bona fide."

It may be concluded, from the combination of the two preceding paragraphs, that if the parties' choice of law *is not genuine but just a mere pretence in order to validate* their contract and evade the application of the law which would have otherwise been applicable, such a choice is not a bona fide choice. Schmitthoff[49] says: "They [the parties] cannot adopt a particular legal system, e.g. American law, for the majority of their

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[45] "No doubt to be given effect a choice of law must be genuine, and not capricious." Dicey and Morris, supra note 4, p. 1172, with reference to F.A. Mann, (1950)3 Int. L.Q. 60, at pp. 64, 66.

[46] "it [choice of law] must not be a mere pretence,", Dicey and Morris, supra note 4, p. 1172 with reference to Bank of Montreal v. Snoxell (1982) 143 D.L.R. (3d) 349.

[47] lst ed. 1896, p. 820 cited in Dicey and Morris, supra note 4, p. 1172.

[48] Supra note 4, p. 1176.

[49] Supra note 1, p. 176. See The Hollndia, [1983] 1 A.C. 565.

stipulations and submit one provision, e.g. a restraint of trade, to another law, e.g. English law; in this case the choice of English law would not be exercised bona fide and for a legal purpose and the arrangement would fail if it would be evident that it was adopted with the aim of evading the American Anti-Trust Acts."

- Legal Choice of Law

If the choice of a particular law has been prohibited by an applicable law, choosing such a law by the parties as 'proper law' may not be legal. Dicey and Morris say[50]: "The expression 'legal' ... probably refers to the case where the choice is prohibited by some applicable statute."

The difficulty, here, is that by what law the legality of such a choice is to be determined or what law prohibits such a choice of law? In answer to this question Cheshire says[51]: "Presumably, as with the general problems of creation of an obligation, this is to be decided by the proper law objectively[52] ascertained."

So according to this qualification of Lord Wright a choice of law by the parties must be both bona fide and legal. In other words if their choice is legal but not bona fide or it is bona fide but not legal, or it is neither bona fide nor legal, it will not be regarded.

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[50] Supra note 4, p. 1172.

[51] Supra note 6, p. 201.

[52] Objective proper law is the law which would, in the absence of choice of law by the parties, be regarded as the proper law of the contract.

(2 - The parties' choice of law must not be contrary to the public policy of the forum

If a choice of law clause is contrary to the public policy of the forum, the courts will not regard it Cheshire says[53]: "... in all provinces of private international law the courts will refuse to give effect to a foreign legal rule which is incompatible with the public policy of the forum." For example it is contrary to the public policy of the courts to regard a choice of clause which is inconsistent with mandatory provisions. Thus in The Morviken[54] the House of Lords held that a choice of law subjecting the contract of carriage to a foreign law admitting lower limits of liability of the carrier was invalid because the provisions of a Hague-Visby rules were mandatory.[55]

- Choice of law clause and mandatory provisions (such as the H-V-Rs)

What is a mandatory provision? Parrot in his article[56] says: "A mandatory rule is a governing law which ... is designed to protect one of the parties to the contract, and provides by its terms that it is not to be excluded by agreement of the parties." It is

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[53] Supra note 6, p. 201; Cheshire and North's Private International Law, 11th ed. 1987, Butterworths, p. 453 with reference to Tzortzis v. Monark Line A/B [1968] 1 W.L.R. 406 at p. 411.

[54] [1983] 1 Lloyds L.R. p. 1.

[55] Under Art. 16 of the 1980 Rome Convention, however, the parties are even free to choose such foreign law which is contrary to public policy of the forum, but the Convention further provides that the application of such foreign law may be refused if it is manifestly incompatible with the public policy (ordre public) of the forum.

[56] Parrot, supra note 23, p. 7.

submitted that "the mandatory character can be imposed by the rules themselves, other relevant convention, national legal legislation or the court."[57]

The question is that if there are some mandatory rules, such as the Hague or Hague-Visby Rules, about certain kind of contracts, such as carriage of goods by sea contracts, but the choice of law clause subjects the contract to a foreign law which does not contain the rules or even is inconsistent with them, which one, the mandatory rules or the proper law chosen by the parties, will be preferred and regarded by the courts?

It seems that English courts will probably regard the mandatory rules because they are governing law and cannot be, because of their characteristics, contracted out by the parties. In this respect Professor Jackson says[58]: "It is more likely that English courts will now prefer the framework (of the rules as set out in the Act 1924), at least where the choice of a law not containing the rules, and disallow that choice." In the Morviken, for example, the House of Lords regarded the mandatory provisions of the Hague-Visby Rules and disregarded the choice of law clause chosen by the parties. So if it is said that some conflict of law systems, like English conflict of law system, favour the principle of party autonomy, it does not mean that the courts of that system will disregard mandatory rules when there is parties' choice of law, but it means that such courts will not allow that the principle of party autonomy to be misused to evade mandatory rules by uphelding a choice of a foreign law which has been planned to evade the rules. In other words the

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[57] Professor D. C. Jackson Hague-Visby Rules and forum ... law clauses, L.M.C.L.Q. 1980-81, pp. 160-165

[58] Id.

courts will regard the principle of party autonomy so long as it does not harm mandatory rules, otherwise the courts will disregard the proper law chosen by the parties to the extend that it is inconsistent with the mandatory rules,[59] and according to their public policy prefer to apply the mandatory rules regardless the normal rules of the conflict of laws.[60] It should, however, be noticed that the proper law chosen by the parties will be applied by the courts for the purposes unconnected with the mandatory rules.[61]

It can be, therefore, said that if a contract is governed by mandatory provisions, the parties to the contract are still free to choose any law they wish as the proper law of their contract provided that such a law is not inconsistent with the mandatory provisions. In other words, the parties are not free to contract out of the mandatory provisions by choosing a law, as a proper law, which does not contain those mandatory provisions or even is contrary to them.[62] This is because if the parties contract out of mandatory provisions by their choice of law, this choice would, in fact, be contrary to the public policy of the court, and the court will, therefore, disregard their choice of law at least to the extent that the choice is inconsistent with the mandatory provisions. In brief, mandatory provisions may nullify or limit the effect of the choice of law clause intended by the parties.

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[59] See Cheshire and North, supra note 53, p. 456.

[60] Dicey and Morris, supra note 4, p. 1171.

[61] Cheshire and North, 11th ed., supra note 53, p. 456; Dicey and Morris, supra note 4, p. 1171.

[62] The Hollandia [1983] 1 A.C. 565. In this regard a similar principle has been adopted by the 1980 Rome Convention. Under Art. 3(3) of the Convention the parties to a contract are not free to contract out of the mandatory provisions of a particular country with which all the other elements at the time of the choice are connected.

Some mandatory provisions apply to international contracts. For example, Carriage of Goods by Sea Act 1971 to which the Hague-Visby Rules have been scheduled, which apply to international carriage of goods by sea contracts. Where there is an inconsistency between the mandatory provisions of this Act and the chosen proper law of the contract, the courts have to regard these mandatory provisions[63] rather than the proper law because not doing so is contrary to their public policy. This would, therefore, be an important limitation of the freedom of the parties to an international contract as to the choice of law.

Article III rule 8 of the Carriage of Goods by Sea Act 1971 provides: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to ... or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect ...". Now if the parties to an international contract of carriage choose a foreign law as the proper law of their contract which admits lower limits of the carrier's liability than Hague-Visby Rules, their choice of such a foreign law will be regarded as invalid by the courts. Thus in The Hollandia[64] the cargo was carried from Scotland to the Dutch West Indies. The bill of lading contained a choice of Dutch law and exclusive Dutch jurisdiction, and limited the owner's liability to about £250 in accordance with the Hague Rules. The Carriage of Goods by Sea Act 1971 gave the force of law to the Hague-Visby Rules which accordingly there was a limit of liability of about £11,000. The 1971 Act applied so as to make the choice of

[63] "It is now established that the Hague-Visby Rules cannot be avoided by the parties' choice of the governing law": see Cheshire and North, 11th ed., supra note 53, p. 455; The Hollandia [1983]1 A.C. 565.

[64] [1983] 1 A.C. 565.

law and jurisdiction null and void to the extent they wanted to contract out the Hague-Visby Rules.

It should, however, be noted that in the eyes of the English Courts the Rules (Hague or Hague-Visby Rules) are mandatory and applied and cannot be contracted out by the parties' choice of law if the shipment is an outward shipment from the United Kingdom. But when the shipment is not an outward one, the Rules are directory and can be excluded, i.e. the choice of law would be regarded. In Nova Scotian Shipping Co.,[65] the cargo was carried from Newfoundland to New York and English law was the proper law of the contract. The Privy Council held that English law to govern the contract not the Rules and by English law the Rules would apply only to an outward shipment from England, not to a shipment from any other country.

So it can be said that in an outward shipment from the U.K. the liability of the carrier under the choice of law clause should not be less than his liability under the H-V-Rules because otherwise it would be null and void.

In general the effect of the choice of law, here, depends on the law of the country where the suit is brought. If that law takes the Rules (Hague or Hague-Visby Rules) as mandatory rules applying to any relevant case before its courts, it may refuse to upheld the choice of law clause.

[65] [1939] A.C. 277.

- proper law in international multimodal transport of goods contracts

In an international multimodal transport of goods contract the liability of the carrier is - because of lack of any operative convention on international multimodal transport of goods contracts - determined on a contractual basis.[66] Since such a contract contains more than one mode of transport and "most international Conventions regulating the various modes of transportation are of mandatory character",[67] the parties to an international multimodal transport of goods contract are not, therefore, free to contract out the mandatorily applicable provisions relating to the different modes of transportation by choosing a law, for each leg of the carriage, which is inconsistent with the relevant mandatory provisions of that particular leg of the carriage. For example, if an international multimodal transport of goods contract contains a sea leg and an air leg of carriage, the parties are not free to choose a law governing sea leg of the carriage if that law is contrary to the mandatory provisions of the Hague-Visby Rules; also they are not free to choose a law governing the air leg of the carrier if that law is inconsistent with the Warsaw Convention.[68]

So the law which is chosen, as a proper law, by the parties to an international multimodal transport of goods contract should be consistent with the mandatorily

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[66] Schmitthoff, supra note 1, p. 527.

[67] Id. p.527.

[68] Article 31 of The Warsaw Convention deals with combined carriage including an air leg. It provides that in the case of combined carriage the parties may insert in the document of air carriage conditions relating to other modes of transport, provided that the provisions of the Convention are observed as regards the air carriage.

applicable provisions relating to different modes of transportation of that contract.

The liability of an international multimodal transport of goods carrier for each leg of transportation (sea, air, land), is therefore, determined according to the contractual regulations or the law chosen by the parties if it (the carrier's liability according to them) is not contrary to the mandatory provisions of the applicable international convention relating to the same mode of transport. Otherwise, in the case of any inconsistency, the liability of such a carrier will be determined according to the relevant international convention because of the mandatory character of its provisions.

So the parties to an international multimodal transport of goods contract, when determining the carrier's liability for each stage of transport, should consider the mandatory provisions of the applicable international conventions relating to the modes of transportation which are included in their contract, and then determine the carrier's liability for each stage of transport so as to be, at least, not less than carriers' liability as mentioned in the international convention relating to that stage of transport. In other words the international multimodal carrier's liability for each leg of transport should be either, at least, equivalent to the carrier's liability mentioned in the applicable international convention relating to that stage of transport or higher than that.

(3) - Is lack of connection between the chosen law and the contract a limitation on the freedom of the parties as to the choice of the proper law, i.e. should there be any connection between the chosen law and the contract?

When one of the parties to a contract seeks to evade the express choice of law on

the grounds that there is not any connection between the chosen law and the contract, and to rely on the law which would, in the absence of the chosen law, be the proper law of the contract, the question arises is: should there be any connection between the chosen law and the contract?

It seems that the answer is to be given in negative and the chosen law cannot, therefore, be evaded because of lack of connection between it and the contract. The authority for this presentation is the case of Vita Foods Products Inc. v. Unus Shipping Co. Ltd.[69], in which there was an argument that the choice of English law to govern the bill of lading was not valid because it was a law with which the transaction had no connection. In answer to this argument Lord Wright of the Privy Council said: "connection with English law is not as a matter of principle essential".

"This decision of the Privy Council has been the subject of considerable criticism."[70] In Boissevain v. Well,[71] Denning, L. J. said, "I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account". Upjohn J. in Re Helbert Wagg & Co. Ltd.[72] said that the court will not necessarily regard the express choice of law "as being the governing consideration where a system of law is chosen which had no real or substantial connection with the contract looked upon as a whole". However "there

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[69] Supra note 25.

[70] Cheshire and North, supra note 6, p. 200.

[71] [1949]1 K.B. 482, at p. 491.

[72][1956] ch. 323. at p. 341; [1956]1 All E.R. 129, at p. 136.

appears to be no reported case in which an English court has refused to give effect to an express selection by the parties, merely because the other facts of the case showed no connection between the contract and the chosen law".[73] And in fact "it is not easy to envisage circumstances in which an English court would not give effect to a choice of English law just because the transaction had no connection with England".[74]

Dicey and Morris say[75]: "... it is submitted that the dictum of Lord Wright in Vita Food Products Inc. v. Unus Shipping Co. Ltd.[76] is a correct statement of the English rule, and applies whether the law chosen is English law or some foreign law."

So according to English law there is no necessity for there to be any connection between the chosen law and the contract. The parties are free to choose any law, as a proper law, even if with which their contract has no connection. However, "it is suggested that the latter view [limited freedom of choice] is to be preferred. The courts should, and do, have a residual power to strike down, for good reason, choice of law clauses totally unconnected with the contract."[77]

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[73] Dicey and Morris, supra note 4, p. 1174.

[74] Id, p. 1175.

[75] Supra note 4, p. 1176.

[76] Supra note 25.

[77] Cheshire and North, supra note 6, p. 202.

5.1:2:2 United States conflict of laws roles for determination of the proper law of a contract

Formerly the parties to a contract were not free to choose any law to govern their contract, e.g. a law unconnected with the contract. There should have been a connection between the chosen law and their contract. The parties' intention was not a decisive factor to determine the proper law of their contract. The proper law of a contract was, therefore, determined by reference to the place in which the contract had been concluded or the place of performance of the contract. As Cheshire says[78]: "In the United States of America a preference was formerly shown for a rigid and inflexible test, represented by the place of contracting in some of the States but by the place of performance in others."

Under present U.S. conflict of law rules the parties' freedom as to the choice of law is limited. It is not necessarily the parties' intention which determines by what law their contract to be governed. The parties may agree a law to govern their contract only if their contract bears a reasonable relation to that law. Section 1-105(1) of the Uniform Commercial Code (U.C.C.) requires that there should be a reasonable relationship between the chosen law and the contract.[79] Article 2 of the U.C.C. provides: "... when a transaction bears reasonable relations to this state and also to another state or nation, the parties may agree that the law either of this State or of such other State or nation shall govern their rights and duties. Failing such agreement this Act [i.e. the whole U.C.C.] applies to transactions bearing an appropriate relation to this State."

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[78] Id. p. 196.

[79] - The New York courts have decided accordingly in many cases: see Schmitthoff, supra note 1, p. 176.

It appears that, unlike the English law which adopts a wide form of party autonomy, the American conflict of the law rules adopt a restricted form of party autonomy, i.e. the parties' chosen law will be regarded only if it has a reasonable connection with the contract. However, according to the New York Law of General Obligation which was enacted on 19th July 1984, the parties to a non-consumer contract are free to choose the law of New York even if their contract has no reasonable connection with New York.[80]

So, in general, under the United States law the existence of a reasonable relation between a contract and the chosen law by the parties to the contract is a vital condition which validates the parties' choice of law. Lack of such a reasonable relationship causes the invalidity of their choice of law. However, it is now said that there is a tendency to seek an alternative to the condition of 'reasonable connection *between the contract and* the chosen law'. The condition of the existence of a reasonable commercial basis for the choice of law is an alternative to it. Upon this alternative the parties may choose a law unconnected with their contract provided that there are some reasonable commercial basis for the choice of that law.[81] If this alternative is exercised under the U.S. law, the result *will become similar* to the position under *English law*, i.e. "no express choice of foreign law in a contract which has some reasonable basis, whether or not it has any direct or indirect relationship with the transaction, will be disregarded".[82]

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[80] See Graham A. Penn and Thomas W. Cashel, Choice of Law under English and New York Law, [1986] J.B.L.

[81] Dicey and Morris, supra note 4, p. 1176.

[82] Id. p. 1176.

5.2 International multimodal transport contracts and the doctrine of privity of contract

5.2:1 Definition of the doctrine of privity of contract

Privity of contract is a fundamental principle of the common law[1] and of most civil law systems.[2] Under this doctrine the liabilities and rights arising under a contract are imposed and conferred only upon the parties to the contract. In other words, a contract cannot impose liabilities or confer rights upon a person who is not a party to the contract[3]. Consequently according to this principle "no one who is not a party to a contract can sue or be sued upon it or take advantage of the stipulations or conditions that

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[1] Here, in this work, I am going to explain mainly the position of privity doctrine in England. But, briefly, its position in some other common law countries is as follows: 1- In Canada, like England, the general rule is: "a person who is not a party to a contract cannot...enforce the contract even though it was intended that he benefits thereby. 2- In Nigeria, the basic rule is: a person who is not originally a party to a contract, cannot receive any benefit from it. 3- In Australia the rule is: only a person who is a party to a contract can sue on it. 4- In New Zealand, if there is a contract between two parties, it cannot be sued on by a third party even if the contract was made for his benefit. 5- In the United States, however, as we will see, there has been a radical change to the privity principle upon which a third party beneficiary may bring an action to enforce a contract to which he is not a party,(see p. 341 of this thesis): see A. Waters, infra note 14, pp.1111-2.

[2] See, for example, B. Nicholas, French Law of Contract,Butterworths, London, 1982.

[3] A.G. Guest & others, Chitty on Contract, General Principles, Vol. 1, 25th ed., Sweet & Maxwell, 1983, London, p. 662;M.F. Furmston, Cheshire and Fifoot's Law of Contract, 10th ed. Butterworths, London, 1981, p. 404; also in Roman Law a third party could not be either liable or entitled under a contract, and, the doctrine of relativity of the French Civil Code states that 'contracts have effect only between the contracting parties': J. N. Adams & R. Brownsword, Privity and the Concept of a Network Contract, Legal Studies, Vol. 10, No. 1, p. 12 at 13.

it contains".[4]

Thus, if A wants to sue B in contract, there must be privity of contract between them, otherwise he cannot do so. In Tweddle v. Atkinson[5] which is generally considered to have established the doctrine of privity of contract[6], A and B agreed each to pay a sum of money to C. C brought an action against, say, B to enforce that contract. Although C had, according to the contract, full power to sue A and B, the court held that C could not do so because he had no privity of contract with B. So according to this doctrine, a contract concluded between A and B for the benefit of a third party does not give that third party a right of action against A or B although the contract provides so.[7] This principle was extended to exclusionary provisions in favour of a third party. In Scruttons Ltd. v. Midland Sillicone Ltd.[8] there was a carriage contract between the shipper and the carrier. This contract incorporated the 1936 U.S. COGSA which limited the carrier's liability to $500 per package in the event of loss of or damage to or delay of the goods. There was also a stevedoring contract between the carrier and the stevedores, entitling the

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[4] Lord Denning in Midland Silicones Ltd. v. Scruttons Ltd., [1962] A.C. 446 at 483; A. W. B. Simpson A History of the Common Law of Contract, Clarendon Press, Oxford, 1987, p. 475. But see J. Adams & R. Brownsword's analysis of the privity problem in their article, supra note 3.

[5] (1861)1, B & S 393.

[6] Chitty on Contract, General Principles, supra, note 1, p. 669.

[7] See J. Adams & R. Brownsword's answer to the court's argument, supra note 3, p. 23.

[8] [1962] A.C. 446; also see Beswick v. Beswick [1968] A.C. 58, in which the House of Lords held that because the plaintiff (widow of Peter Beswick) was not a party to the contract (contract between Peter and John), she could not enforce the defendant's obligation in her personal capacity but she could as the administratix of Peter's estate.

stevedores to use the carrier's liability limitation mentioned in the carriage contract. The goods damaged by the stevedores and the consignee sued them in tort for the whole price of the goods. The stevedores claimed to benefit from the liability limitation mentioned in the stevedoring contract. The House of Lords held that it was a fundamental principle that only a person who is a party to a contract can sue upon it, and a stranger to a contract could not take advantage of provisions of the contract. Since there was no implied contract to which the present parties were parties, the stevedores were not entitled to rely on the liability limitation mentioned in the bill of lading. In this case Lord Reid said:

> "I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him ..."

It should be noted that if, according to English law, A wants to sue B in contract, A should be either a party to the contract or consideration should move from A to B. In other words, A should not be a stranger to the consideration. In the case of Tweddle v. Atkinson[9] Crompton J said: "The modern cases have, in effect, *overruled the old* decisions; they show that the consideration must move from the party entitled to sue upon the contract." Also in the same case, Wightman J. confirming the decision in Price v. Easton[10] said: "it is now established that no stranger to the consideration can take advantage of contract, although made for his benefit." In Price v. Easton, Lord Denman said that an action must be brought by a person from whom a consideration moves to the defendant and because the plaintiff could not "show any consideration for the promise

[9] (1861)1 B & S 393.

[10] (1833)4 B & Ad. 433.

moving from him to the defendant" he was not entitled to bring the action. A further consequence of the doctrine was held to be that a third party could not be sued. In Dunlop v. Selfridge[11] Dew, who had bought some tyres from Dunlop on a price maintenance stipulation and taking similar undertaking from trade consumers in the case of resale to such people, sold some tyres to Selfridge and obtained a price maintenance stipulation from him. Selfridge broke the condition. Dunlop brought an action against Selfridge for doing so. Viscount Haldane LC said:

> "[In] The law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a just quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."[12]

The Court held that Dunlop could not enforce the contract because no consideration moved from them. In this case Viscount Haldane stated two fundamental principles of English Law, namely: 1-'only a person who is a party to a contract can sue on it'(the issue in this case, however, as noted above, was whether a third party could be sued); 2-'only a person who has given consideration may enforce a contract not under seal'. As seen Viscount Haldane made a distinction between these two principles.[13] So, according to English law, in considering whether or not a person can bring an action in contract (i.e. whether a person is 'in privity'), we should consider either whether he is a party to the contract or not, or whether a consideration has moved under the contract from him or not.

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[11] [1915] A.C. p. 847.

[12] Id., at p. 853. This view was approved by the House of Lords in Scruttons Ltd. v. Midland Silicones Ltd. [1962] A.C. 442.

[13] This distinction was confirmed by the Law Revision Committee in 1937: see M. F. Furmston, Cheshire and Fifoot's Law of Contract 10th ed., Buterworths London, 1981, p. 67.

If the answer to at least one of them is positive, he can bring an action in contract, otherwise he cannot. For example if A is not a party to a contract but a consideration has moved from him under the contract, he may enforce the contract. There are, however, some arguments that these two principles (the doctrine of privity and the doctrine of consideration) are, in fact, the same thing put in different words because a contract, according to English law, is a bargain; if a person does not give a consideration, he is not a party to the bargain, i.e. he is not a party to the contract.[14] When we accept that A, for example, is a party to a contract, it means that a consideration has moved from him to the other party of the contract. In other words it is impossible a person to be a party to a contract if no consideration has moved from him to the other party of the contract.

An answer to this is that the argument is correct only in part rather than in whole. The principle of privity (only a person who is a party to a contract can sue on it) and the principle of consideration (only a person who has given consideration for a contract may enforce the contract) are not always but only sometimes the same. They are like two circles of which the circle of the principle of privity is included inside the circle of the principle of consideration. The principle of consideration, the larger circle, and the smaller circle of the principle of privity coincide with each other. In other words, the principle of privity is not alone, it is always entailed by the principle of consideration, i.e. the privity principle is subject to consideration, and therefore, there is no privity unless consideration has been given, but the principle of consideration is not subject to the principle of privity.

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[14] Cheshire and Fifoot's Law of Contract, supra note 13. Of course, it is possible for a plaintiff to be 'in privity' with a defendant even though the consideration for the defendant's promise moved from a third party: see A.J. Waters, The property in the promise : A study of the third party beneficiary rule, Harward Law Rev., 1985. p. 1113, F.N. 7.

In fact the principle of consideration may include two parts: 1 - a person who has given consideration and is a party to a contract (because every party to a contract must give consideration); 2 - a person who has just given consideration relating to a contract but is not a party to the contract.

The principle of privity can only coincide the first part of the principle of consideration and be entirely accommodated on it. So if we just accept the principle of privity, this will not be conclusive because it will not include the second part of the principle of consideration.

If a person is a party to a contract, it shows that he has certainly given consideration to the other party to the contract, but if a person gives consideration relating to a contract, he may be a party to that contract or not. In other words every party to a contract gives consideration but every person giving consideration may not be a party to the contract. In short, both of these persons (a party to a contract and a person giving consideration) are 'in privity' and can sue on the contract,i.e. 1- a promisee will be able to sue on a promisor's promise only if he has given consideration for such promise; 2- a third party beneficiary is allowed to sue on the promisor's promise only if he has given consideration for that promise.

So if we just accept the principle of consideration and say only a person who has given consideration may enforce the contract, this can be conclusive because it includes either the party to a contract who has certainly given consideration or the person from whom consideration for a contract has moved even if he is not a party to the contract. In

brief, it can be said that so long as the doctrine of consideration is alive in English law, it can work instead of the principle of privity as well as with it. But if the doctrine of consideration were abolished the doctrine of privity would stand on itself.

5.2:2 Exceptions to the doctrine of privity

There are, however, some exceptions[15] to the principle of privity of contract of which some are important. They can be stated as follows:

1 - The doctrine of undisclosed principal[16] upon which a principal whose agent enters into a contract, has the right of intervention and is allowed to bring an action against the other party to the contract. So if A, as an agent of C, enters into a contract with B, C (the principal of A) may bring an action against B, no matter that B has not been aware of that fact.[17] This is because C is in fact the contracting party who acts through his agent 'A'. Thus in the case of New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd. (The Eurymedon),[18] the carrier, as an agent of the stevedores, under a Himalaya clause of the bill of lading, entered into a contract with the consignor.

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[15] J. N. Adams and R. Brownsword, supra note 3, p. 17.

[16] For the brief history of this principle see Id. at p. 32, F.N. 59.

[17] This principle was admitted in the eighteenth century and is now a well-established principle in the law of agency; see Cheshire and Fifoot's Law of Contract 10th ed., Butterworth, London, 1981, p. 404. See also C. M. Schmitthoff Charlesworth's Mercantile Law 14th ed., Stevens & Sons, London, 1984, p. 57, 242-4.

[18] [1975] A.C. 154; [1974]1 All E.R. 1015.

When the consignee received the bill of lading, the goods were damaged because of the negligence of the stevedores. The plaintiff consignee, the holder of the bill of lading, brought an action against the stevedores. They (the stevedores) relied on the Himalaya clause and sought for the limitation of liability. The Himalaya clause of the bill of lading reads as follows:

> "it is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of the bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained, and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as Agent or Trustee on behalf of and for the benefit of all persons who are or might be his servants or Agent from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading."

The Court held for the defendants stevedores and said that the plaintiff, the holder of the bill of lading, had a contract on the terms of bill of lading.[19]

2 - If one of the party to a contract is regarded as a trustee for a third party, the third party will have an equitable right through the contract and can sue the other party to the contract. Thus, in one case[20] P, who owed a sum of money to both G and W, agreed with W to assign to him his property if W would pay the debt due to G. W

[19] Bills of Lading Act 1855.

[20] Gregory and Parker v. Williams (1817) 3 Mer. 582.

promised to do so. P, therefore, assigned the property but W did not execute his promise. G brought an action against W. The court held that P must be regarded as Trustee for G and G had, therefore, an equitable right to bring an action against W. It should, however, be noted that the courts usually have reluctance to recognise a trust relationship from a contract. Du Parcq L.J. said:[21]

> "... unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention".

Also Romer LJ said:[22]

> "An intention to provide benefits for someone else and to pay for them does not in itself give rise to a trusteeship."

3 - If there is a contract (such as a charterparty) between A and B upon which A charters a ship from B. Then another contract (such as sale or mortgage) is concluded between B, the owner of the ship, and C so that C has, at the time of conclusion of the contract with B, knowledge of the contract made between A and B. A will be able and has a right to sue C, who is a third party in relation to the contract between A and B, if C has interfered with the performance of the contract made between A and B.[23] If in such a contract concluded between B and C, C has restrictions upon the use of the subject of the contract which is common to those in the contract made between A and B, C is allowed to use the subject of the contract in accordance with his agreement with B so that his use is not treated as interference with the performance of the contract made between

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[21] In Re Schebsman, Official Receiver v. Cargo Superintendents [1944] ch. 83, [1943] 2 All E.R. 768.

[22] In Green v. Russell [1959] 2 All E.R. 525; [1959] 2 Q.B. 226.

[23] Cheshire & Fifoot's Law of Contract, supra note 13, p. 415.

A and B. Otherwise A can bring an action against him.

Thus in De Mattos v. Gibson,[24] A chartered a ship from B. While the charterparty continued, B mortgaged the ship to C, who had knowledge of the charterparty. A brought an action against C who C threatened to sell the ship regardless of A's contract rights. A sought for an interlocutory injunction to restrain C from doing so. The court did not grant such an injunction because the defendant had not in fact interfered with the performance of the charterparty. The court said that if the defendant had done so, an injunction might well have been granted.[25]

It should be noticed, however, that regarding this exception of the privity of contract, some courts held that some proprietary interest must exist, i.e. if, in the above hypothetical case, A has a proprietary interest, he is entitled to bring an action against a third party, such as when he has the equivalent of a lease.[26] Otherwise he is not entitled. The legal rights of a possesser are always valid againt third parties. In this regard some writers, like Holdworth, observed[27]:

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[24] (1858) 4 de G & J 276. Also see Tulk v. Moxhay (1848) 2 Ph. 774 in which a proprietary interest was found; Lord Strathcona Steamship Co. v. Dominion Coal Co. [1926] A.C. 108; Swiss Bank Corpn. v. Lloyds Bank Ltd. [1979] ch. 548; [1979] 2 All E.R. 853.

[25] Cf. case of Port Line Lt d. v. Ben Line Steamers Ltd. [1958] 2 Q.B. 146 which is generally regarded as the leading modern authority on this kind of point, in which Diplock J. adopted the doctrine of privity of contract and said: "there was no privity of contract between the plaintiffs (the charterers of the vessel) and the defendants (the purchasers of the vessel)."

[26] See, for example, Port Line Ltd. v. Ben Line Steamers Ltd.[1958] 2 QB 146, in which Lord Diplock emphasised that there should be some proprietary interest if we want to support our claim by the authority of Tulk v. Moxhay (supra note 22).

[27] 49 LQR 576 at 579.

"It is obvious that if A has let or pledged his chattel to B and has transferred its possession to B and if he then sells it to C, C can only take it subject's B's legal rights, and since they are legal rights whether C has notice of those rights or not."

4 - If a third party is not stranger to the consideration of a contract and the consideration moves from him to, say, a party to the contract, he can bring an action on contract. In Tweddle v. Atkinson[28] Wightman UJ said:"it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

5 - When a contract is intended to benefit anyone to whom the contract subject may be transferred, the third party to whom the contract subject is transferred will have the right to bring an action upon the original contract and the doctrine of privity of contract has no place here. In Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board[29] the plaintiffs were not parties to a contract with the defendants. Smith was a third party to the contract entered into between the defendants and the landowners of a land adjoining to a stream upon which the defendants had undertaken to improve its banks, to whom a part of the land was transferred by one of the landowners. He then leased it to Snipes Hall Farm Ltd. The land was flooded by the defendants' negligence. The plaintiffs, therefore, brought an action against the defendants upon the contract which had been entered into between the defendants and the previous

[28] (1861) 1 B & S 393; see Cheshire and Fifoot's Law of Contract, supra note 13, p. 406.

[29] [1949] 2 K.B. 500; [1949] 2 All E.R. 179.

landowner regarding improving the banks. The Appeal Court held that the contract between the landowners and the defendants affected the use and value of the land and was intended to benefit anyone to whom the land might be transferred, and that the defendants were, therefore, liable.

6 - If the defendant contract-breaker is negligent and causes physical injury to a third party, he may be liable to the third party. Thus in Donoghue v. Stevenson,[30] the plaintiff bought a bottle of drink which had been manufactured by the defendant. She (the plaintiff) drank part of the contents of the bottle and found a decomposed remains of a snail. As a result of consuming of that part, she was injured. She brought an action against the defendant for the injuries she had suffered on the ground that the manufactuerer had had a duty of care towards the consumers' health, and he had been negligent which caused the accident. The House of Lord held that the defendant owed a duty to the plaintiff as consumer to take care that there was no noxious element in the goods, that he neglected such duty and consequently liable for any damage caused by such neglect. As seen, the plaintiff, despite of lack of privity, was entitled to sue the negligent defendant.

It should be noted that the material fact in Donoghue principle is that the plaintiff's claim is not for purely economic loss. Otherwise, if the plaintiff's claim is for purely economic loss, the Donoghue principle may not be applicable. Thus in Murphy v.

[30] [1932] A.C. 562. Cf. the Dunlop principle upon which a third party plaintiff has no right to enforce a contract even if the defendant contract-breaker be negligent: see J. Adams, supra note 3, p. 17.

Brentwood Council,[31] the third party plaintiff sued the defendant in tort in order to claim damages for the loss he had suffered through the structural defect found in his house. The House of Lord recognised that the plaintiff's claim is for purely financial loss which had been resulted from a latent defect in the buiding. Lord Keith said:[32]

> "I see no reason to doubt that the principle of Dodoghue v. Stevenson does indeed apply so as to place the builder of premises under a duty to take reasonable care to avoid injury through defects in the premises to the person or to property of those whom he should have in contemplation as likely to suffer such injury if care is not taken. But it is against injury through latent defects that the duty exist to guard."

Lord Bridge said:[33]

> "...damage to a house itself which is attributable to a defect in the structure of the house is not recoverable in tort on Donoghue v. Stevenson principle, but represents purely economic loss which is only recoverable in contract or in tort by reason of some special relationship of proximity which imposes on the tortfeasor a duty of care to protect against economic loss."

Then the House of Lord,in its holding, approved the above views of Lord Keith and Lord Bridge and in part 3 of its holding said:

> " ...and a builder in the absence of any contractual duty or of a special relationship of proximity owed no duty of care in tort in respect of the quality of his work."

As seen, the House, in its decision, made a distinction between the situations when

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[31] [1990] 2 Lloyd's L. R. p. 467. This case has effectively overruled the case of Junior Books Ltd. v. Veitchi Co. Ltd.,[1983] 1 A.C. 520, in which the defendants caused negligently a financial loss to the injured plaintiff (a third party to the contract to which the defendants were a party). The Junior court had held for the third party although his claim was for purely economic loss.

[32] Id., at p. 473.

[33] Id., at p. 483.

the loss results from a defect in the structure of a building (latent defect) and when it is the result from a defect which is not latent. The House placed only the second situation under the principle of Donoghue (i.e. the builder owed a duty of care to the plaintiff even if there is no contractual duty or special relationship of proximity between them). But when the claim is based upon a latent defect in the building (as in this case) which is for purely economic loss (the first situation) the Donoghue principle, according to the House, does not apply.

So when the plaintiff's claim is for purely economic loss, a contractual relation or special relationship of proximity between him and the defendant is required to take the defendant under a duty of care upon which the plaintiff becomes able to sue the defendant in contract or in tort. If the plaintiff (a cif buyer, for example) wants to sue the defendant carrier in tort for the loss negligently caused by him to his goods, one point deserves to be noted, that is, the plaintiff must be owner of the goods or entitled to their possession at the time of loss.[34] So mere bearing the risk on the shipment of the cargo is not enough for the plaintiff to sue the negligent carrier.[35]

7 - The principle of vicarious immunity as reflected in the case of Elder Dempster

[34] This was the view of Roskill J. in The Wear Breese, [1969]1 Q.B. 219, which was adopted by the House of Lord in the case of Aliakman [1986] 2, Ll.R., p.1. See p. 360 of this thesis.

[35] Lloyd J. in the Irene's Success, [1982] Q.B. 481, had accepted that passing of the risk to the buyer made him entitled to bring such action. This view was rejected by the House of Lords in Aliakman.

Ltd. v. Paterson, Zochonis and Co. Ltd.[36], In that case the cargo-owners, who had a carriage contract evidenced by a bill of lading with the vessel charterers, brought an action against the owners of the vessel (third parties to the contract concluded between the cargo-owners and the vessel charterers) for damage to the goods caused by bad stowage. The House of Lords held that the owners of the vessel were able to rely on the terms of the bill of lading to which the cargo owners and the vessel charterers were parties, in order to answer the claim brought by the cargo-owners. In other words, in a situation like this the third party has vicarious immunity and the privity doctrine has no place. Also in the more recent case of Port Jackson Stevedoring Pty Ltd. v. Salmond and Spraggon (Australia) Pty Ltd. (The New York Star),[37] Lord Wilberforce noted the significance of the vicarious immunity and emphasised that the utility of this principle was not to be diminished. Referring to The Eurymedon, he said:

> "The decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle [i.e. the principle of vicarious immunity].

8 - The consent principle upon which if the injured plaintiff has voluntarily consented to a risk, for example, to a risk of loss or damage to the goods during carriage, his consent to take the risk also avails the second carrier even if there is no contract between them, i.e. the privity principle does not work here. Thus Lord Denning in Scruttons said: "So in the case of through transit, when the shipper of goods consigns them 'at owner's risk' for the whole journey, his consent to take the risk avails the second

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[36] [1924] A.C. 522; see also Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 Q.B. 402.

[37] [1980] 3 All E.R. 257.

carrier as well as the first, even though there is no contract between the goods owner and the second carrier."[38] It should be noted that this principle is sometimes called 'The principle of special acceptance' which is used in bailments.[39] In Morris v. C.W. Martin and Sons Ltd.,[40] Lord Denning said:

> "Now comes the question: can the defendants [the sub-bailee] rely, as against the plaintiffs [the owner of a mink stole who had contracted with the bailee, a furrier, for the cleaning of the fur] on the exempting conditions although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knows nothing and to which she is not a party. On the other hand, it is hard on the defendants if they are held liable to a greater responsibility than they agreed to undertake ... The answer to the problem lies, I think, in this: The owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise."

9 - The legal institution of the 'implied contract' can be regarded as another exception to the privity doctrine. In the case of The New York Star,[41] Lord Wilberforce, with supporting The Eurymedon[42] principle and emphasising on the continuity of the utility of the principle of vicarious immunity, openly invited the courts to outflank Scruttons[43] principle by employing the implied contract device. Upon this institution

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[38] [1962] A.C. 446 at 488. Of course, if it is expressed that the exemption is only for the first carrier, the second carrier cannot avail of it : see Lord Denning, id.

[39] See J. N. Adams, supra note 2, p. 18.

[40] [1966] 1 Q.B. 716, at p. 729; see also Norwich City Council v. Harvey [1989] 1 All E.R. 1180, in which the Court of Appeal held that because the main contract provided that the building owner was to bear the risk of damage by fire, and the sub-contractor had contracted on this basis, it would not be just and reasonable to hold the sub-contractor liable to the plaintiffs.

[41] [1980] 3 All E.R. p. 257.

[42] [1975] A.C. 154.

[43] [1962] A.C. 446.

which can be applied in relation to linked commercial contracts (such as multimodal transport contracts), a third party to a contract, for example a third party stevedore can rely on the contract concluded between the cargo-owner and the carrier to get advantage of the exempting or limiting clauses of that contract in order to answer the cargo-owner's claim. Because although there is not any express contract between the stevedore and the cargo-owner, the existence of a contract can be implied between them. In The New York Star there was a carriage contract between the cargo-owner and the carrier evidenced by a bill of lading which limited or exempted the carrier's liability. Clause 2 of the bill of lading extended the benefit of defences and immunities conferred by the bill of lading on the carrier to independent contractors employed by the carrier. The goods were stolen while they were in the stevedore's store. The question was whether the stevedore was entitled to take benefit of the protective provisions of the bill of lading to which he was not a party, in order to answer the cargo-owner's claim. The court held for the stevedore. The court said:

> "...it was established law that in the normal situation involving the employment of a stevedore by a carrier, commercial practice require the stevedore to enjoy the benefit of contractual provisions in the bill of lading. Shippers, carriers and stevedores knew that such immunity was intended; in principle a search for the factual ingredients required to confer the benefit was unnecessary.

A way of answering the question raised in The New York Star, leaving aside the view of *Lord Wilberforce* 'employing an implied contract', is, I think, to explore the possibility of a contract between the cargo-owner and the stevedore[44]. It seems to me that it is possible to do so for the following reasons:

first, such bill of lading not only evidences the existence of a carriage contract between the cargo-owner and the carrier but it also evidences, by clause 2, a potential obligatory

[44] See New Zealand Shipping Co. v. Satterthwaite, [1975] A.C. 154.

offer from the cargo-owner to a person who is latter employed by the carrier (such as the stevedore) in order to perform a service in direction to the performance of the main contract (carriage contract). This person, although is in stevedoring contract with the carrier (an offer from the carrier and an acceptance from the stevedore), is also placed in a contract with the cargo-owner as soon as the stevedoring contract is concluded. The contract between the stevedore and the cargo-owner is concluded by that offer of the cargo-owner which had been mentioned in the bill of lading (which is now an obligatory offer) and the acceptance of the stevedore towards the stevedoring contract. In fact the stevedore's acceptance has two roles, 1) against the offer of the carrier and 2) against that offer of the cargo-owner. As we have seen the contract between the cargo-owner and the stevedore is not so apparent to be understood but it is a contract which constructively exist. If we think carefully, we can understand that the offer of this construtive contract has been made (but in form of a potential obligatory offer) in the carriage contract between the cargo-owner and the carrier, and the acceptance of that has been made in the stevedoring contract between the carrier and the stevedore. In fact the bodies of three contracts (1- a contract between the cargo-owner and the carrier; 2- a contract between the carrier and the stevedore; 3- a contract between the cargo-owner and the stevedore) are contained in two documents. This is why one of which (the constructive one) is not at first sight obvious. Secondly, if we do not accept the reasoning for the existence of such constructive contract and say that the stevedore as such can not rely on such protective provisions, the question is: what would be the use of a clause like clause 2 of The New York Star bill of lading? It seems to me that it is intended to fulfill such function as I said in the 'First',i.e. to create a possibility for the creation of a contract as between cargo-owner and a person other than carrier and, therefore, to enable the

stevedore to take advantage of the bill of lading's protective provisions. That the "...commercial practice requires the stevedore to enjoy the benefit of contractual provisions in the bill of lading"[45] is, I think, for its being in harmony with clause 2 of the bill of lading.

So it seems clear to me that the stevedore, for example, in answering the cargo-owner's claim, can rely on such defences, in so far as they relate to him, of such contract to which he is not a party because although he is not a party to such contract there is in that contract the basis (i.e. the offer) of a constructive contract to which he is a party. Of course, this constructive contract can even be sued on by the stevedore if, according to the consideration principle, consideration has moved from the stevedore (e.g. the stevedore has started his services for the benefit of the cargo-owner). Similarly, the cargo-owner can sue the stevedore on the contract concluded between the carrier and the stevedore because although he is not a party to the stevedoring contract he is a party to the constructive contract whose acceptance has been made in the stevedoring contract.

10 - There are also statutory exceptions to the privity doctrine. one of which is Section 1 of the Bills of Lading Act 1855. It provides:

> "Every consignee of goods named in a bill of lading , and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

[45] [1980] All. E.R., p.257.

So according to Section 1 of the bills of lading Act 1855 a third party to a contract of carriage contained in a bill of lading and concluded between the carrier and the consignor can sue the carrier or be sued by the carrier if he is either a consignee of goods named in the bill of lading or an endorsee of the bill of lading and the property in the goods mentioned in the bill of lading passes to him.[46]

5.2:3 History of the doctrine of privity of contract

(1) - In England

The history of the doctrine of privity of contract in the common law seems to date back to the eighteenth century although it was not firmly established until the nineteenth century.[47] In the case of Crow v. Rogers[48] (1724), H who owed C (Crow) a sum of money had an agreement with Rogers upon which Rogers promised to discharge this debt and H promised to convey a house to Rogers. C sued Rogers on this promise and failed. But prior to the eighteenth century if a contract was concluded and intended for the

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[46] See also Section 26 of the Resale Price Act 1976 under which a supplier can sell his goods subject to a price maintenance stipulation and can enforce the condition against any person who subsequently acquires the goods with notice of the condition, although that person is a party to the sale contract and not a party to it; and Section 148(4) of the Road Traffic Act 1972 amended by Transport Act 1980, Section 61, under which a person named in a third party motor insurance policy may sue the insurer although he is not a party to the contract concluded between the insurer and the car user.

[47] Chitty on Contract - General Principles, supra note 2, p. 668; M. F. Furmston Cheshire & Fifoot's Law of Contract, supra note 13, p. 407; Lord Denning in Midland Silicones Ltd. v. Scruttons Ltd. [1962] A.C. 446 at 483.

[48] (1724) 1 Stra 592; see also Tweddle v. Atkinson (1861) 1, B & S 393; Price v. Easton (1833) 4, B & Ad. 433.

benefit of a third party, that third party might have a right to bring an action on that contract. In fact, in the sixteenth and seventeenth centuries some courts were of the opinion that the person with an interest in performance should be allowed to sue.[49] Therefore, because sometimes it was a third party with an interest of performance, he was allowed to sue on the contract. Thus in Lever v. Heys,[50] the father of a girl promised the father of a boy that if he would be willing to give his consent to the marriage and assure forty pounds worth of land to the son, he, the father of the girl, would pay £200 to the son in marriage. The father of the girl failed to do so. The question was that who is entitled to sue him? The father of the son or the son? The court held that the son must sue and not the father.

At the same time, in the 16th and 17th centuries, some other courts were of the opinion that an action was a consequence of a breach of promise, and, therefore, the proper person to sue was the person to whom the promise had been made. According to this opinion a third party, if he was *not a person to whom the promise had been made*, could not bring an action on the contract. Thus in Taylor v. Foster,[51] the defendant promised the plaintiff that if he, the plaintiff, would marry his daughter, he, the defendant, would discharge the plaintiff's debt of £100 which the plaintiff was indebted to J.S. The court held that the plaintiff was the proper person to sue and not J.S. because the promise

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[49] A. W. B. Simpson A History of the Common Law of Contract, Clarendon Press, Oxford, 1987, pp. 477-8.

[50] (1598) Moo K. B. 550; Cro. Eliz. 619-52. See also Rippon v. Norton (1601) Cro. Eliz. 849; Hadres v. Levitt (1630) Hetley 176; Rookwood's Case (1589) 1 Leon. 193; Cro. Eliz. 164; Manwood v. Burston (1587) 2 Leon, 203; Oldman v. Bateman (1637) 1 Rolle Ab. 31.

[51] (1600) Cro. Eliz. 776, 807. See also Jordan v. Jordan (1594) Cro. Eliz. 369.

is unto the plaintiff, although the £100 had been to be paid to a stranger and not to the plaintiff. In brief, under this opinion the third party who was regarded as a promisee could sue on the promise but the third party who was not regarded as a promisee could not, i.e. being a promisee was a determinating factor.

Then, in the second half of the 17th century the courts took the view that a person who had given a consideration should be allowed to sue even if he was not the promisee, i.e. being a promisee was not a determinating factor but moving consideration for the promisor's promise[52] was a determinating factor. In Bourne v. Mason,[53] Parry was indebted to both Bourne and Mason. C was indebted to Parry. Parry promised Mason that if Mason would pay to Bourne the money which Parry was indebted to Bourne, Parry would let Mason sue C. Mason promised to do so and Parry let him sue C. Mason failed to do his promise. Bourne brought an action against Mason. The court held that the plaintiff was not entitled to sue because he "did nothing of trouble to himself or benefit to the defendant. In this case the court recognised that a consideration might be natural love and affection. Also Scroggs C.L. in Dutton v. Poole[54], followed the decision made in Bourne v. Mason and said: "There was such an apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children."

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[52] W. Holdsworth A History of English Law, vol. VIII, Methuen and Co. Ltd., London, 1966, p. 11.

[53] (1670) 1 Vent. 6, 2 Keb. 457, 527.

[54] (1678) 2 Lev. 210.

So in the second half of the 17th century, it was possible that a third party who had been given a promise for his benefit to bring an action even if the consideration was a natural love and affection.[55]

Finally in the nineteenth century the view that natural love and affection might be a consideration was removed and the doctrine of privity was established.[56] For example in Price v. Easton,[57] as stated before, the court held that the plaintiff was not entitled to sue because he was not a party to the contract and no consideration moved from him. Also Wightman J. in Tweddle v. Atkinson[58], said: "... it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

However, inspite of the establishment of the privity doctrine in the nineteenth century in English law and its re-affirmation[59] in the 20th century by English law, we can see that the English courts have confused different privity questions (the questions which have arisen in concern with the privity doctrine). As a result, there can be found, in English law, some conflicting principles[60] which weaken the existence of the privity

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[55] See Dutton v. Poole, (1678) 2 Lev. 210. Simpson A History of the Common Law Contract, supra note 49, pp. 475-485.

[56] Cheshire & Fifoot's Law of Contract, supra note 13, p. 66; Chitty on Contract, supra note 3, p. 668, para. 1231.

[57] (1833) 4, B & Ad. 433.

[58] (1861) 1 B & S 393.

[59] See Dunlop v. Selfridge, [1915] A.C. p. 847; Beswick v. Beswick, [1968] A.C. 58.

[60] See J. Adams & R. Brownsword, supra note 3, pp. 17-19.

doctrine. There is an argument that although English law, with regard to the three leading cases of Dunlop[61], Scruttons[62], and Port Line[63] supports the privity doctrine in order to answer the privity questions, it is not accurate to say that English law is fully committed to the privity doctrine because a variety of departures (in both doctrine and judicial practice) from the privity doctrine, in order to avoid the inconvenience caused by it, can be found in English law, and the complexity of English law's responses to privity questions is basically caused by the application of both legal doctrines and judicial practices. In other words, "in consequence of [the demand for the avoidance of inconvenience of the privity doctrine], the law [English law] pulled in different directions as the strict privity approach is modified both by doctrinal statement and by subversive judicial practice."[64] Some examples of departures from the privity doctrine which appear in the form of conflicting principles are as follows: 1)- according to the Dunlop[65] principle, a third party plaintiff has no right to enforce a contract even if the defendant contract-breaker may have been negligent; whereas under the Donoghue[66] principle a negligent contract-breaker may be liable to an injured plaintiff, irrespective of whether the plaintiff is a party to the defendant's contract,[67] or, under the Hedley[68] and Junior

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[61] [1915] A.C. p. 847.

[62] [1962] A.C. 446.

[63] [1958] 2 Q.B. 146.

[64] Adams & Brownsword, supra note 3, p. 21.

[65] See p. 320 of this thesis.

[66] See p. 328 of this thesis.

[67] J. Adams & R. Brownsword, supra note 3, p. 17.

[68] Hedley and Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465.

Books[69] principle where B (a party to a contract) negligently causes A (a non-party to that contract) to suffer financial loss, the fact that A has no privity of contract is no barrier to A having a remedy aginst B. Of course, Junior Books was overruled by Murphy v. Brentwood City Council[70] under which when the claim is for purely financial loss, a party to a contract has no duty of care in tort unless there is a special relationship of proximity. 2)- Whereas according to the Scruttons[71] principle, a person who is not a party to a contract cannot take advantage of the limiting or exempting clauses of that contract in order to answer a claim of a party to that contract; according to the Elder Dempster[72] principle (vicarious immunity principle), or to the Morris[73] principle (special acceptance principle) he can. 3)- Whereas according to the Scruttons principle, a contracting party cannot take advantage of that contract in order to answer a claim brought against him by a person who is not a party to that contract; according to the Morris principle he can.

(2) - In the United States of America

Before the nineteenth century and even in the first half of it the American contract law protected the 'privity of contract' principle. Only a person who had a privity of contract was allowed to sue on it. The plaintiff was held to be 'in privity' with the

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[69] [1983] 1 A.C. 520.

[70] [1990] 2 Lloyd's L. Rep. p. 467.

[71] [1962] A.C. 446.

[72] [1924] A.C. 522.

[73] Morris v. CW Martin & Sons Ltd., [1966] 1 Q.B. 716.

defendant if he was a promisee and consideration for the defendant's promise moved from him. So a third party to a contract who had no obligation under the contract and no consideration had moved from him to the defendant promisor, had no right to sue on that contract even if it was intended to benefit him.[74]

This limitation of actions carried over into nineteenth century contract law.[75] In the middle of the 19th century there was a radical change in this regard so that the American courts went a way different from that of the English courts and other common law countries.[76]

In 1859 when the case of Lawrence v. Fox,[77] a third party beneficiary case, came up in the New York Court of Appeal, a third party beneficiary rule came into being. There, Hawley lent $300 to Fox and told him that he owed this amount to Lawrence. Fox promised Hawley that he would repay it to Lawrence (this promise was made to Hawley and not to Lawrence or his agent. It was not even at the present of Lawrence. But it was just made for Lawrence's benefit). Fox failed to do his promise. Lawrence sued him to enforce the contract.

The Court of Appeal stated the following sentence as the principle of this case:

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[74] A. Waters, supra note 14, p. 1112, F.N. 5.

[75] Id., p. 1113. See also A. Simpson, A HISTORY OF THE COMMON LAW OF CONTRACT, supra note 49, 475-485 (1975).

[76] Id., p. 1111-2. See also note 1 of this part.

[77] 20, N.Y. 268 (1859).

"[When] a promise [is] made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach."[78]

Then with the combination of this principle and the privity principle, the Court of Appeal made a fundamental change in the traditional privity doctrine. The court held that a third party to a contract (someone not a party to the contract) had no obligation under it, and had given nothing in exchange for the right being claimed. Nevertheless, if a contractual obligation was made for the third party's benefit, that third party might enforce it.

After Lawrence v. Fox, there were some different opinions about the Lawrence v. Fox principle. In 1877 the Court of Appeal in the case of Vrooman v. Turner,[79] held that the rule of Lawrence v. Fox was to be strictly limited. The court held that a mortgagee could not maintain suit against an assuming grantee, when the promisee had no obligation to the plaintiff-mortgagee. The court said: "the courts are not inclined to extend the doctrine of Lawrence v. Fox to cases not clearly within the principle of that decision."[80] But in 1918 the court in the case of Seaver v. Ransom,[81] accepted the Lawrence v. Fox principle as 'progressive not retrograde'.[82] "Other jurisdictions accepted third party enforcement of beneficial promise but often within narrow confines and with wide variations from state to state."[83]

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[78] Id., p. 275.

[79] 69, N.Y., 280 (1877).

[80] Id., at p. 284-5.

[81] 244 N.Y. 233 (1918).

[82] See A. Waters, supra note 14, p. 1148.

[83] Id., p. 1149.

In short, since Lawrence v. Fox in 1859 it has become generally accepted in American jurisdictions, state and federal, that a third party may enforce a contractual obligation made for his or her benefit (the third party beneficiary doctrine).[84]

5.2:4 The privity of contract problem

The doctrine of privity, as defined, is one of the general principles governing on contracts. International multimodal transport contracts, like other contracts, are governed by the doctrine of privity.

Although the House of Lords reaffirmed the principle established in the nineteenth century of privity, in Dunlop v. Selfridge[85] and Beswick v. Beswick,[86] and "drew the logical inference from the common law premises"[87] (as they saw them), it is a fact that the doctrine of privity causes a problem that a third party to a contract cannot sue or be sued on it and it results in inconvenience and double litigation. For example, in carriage

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[84] Id., p. 1112-6.

[85] [1915] A.C. p. 847.

[86] [1968] A.C. 58, in which Peter - a coal merchant - sold his business to his nephew, John in 1962. In consideration John agreed to pay Peter £6 10s a week for the rest of Peter's life; and if Peter's wife survived him, John should pay her £5 a week. When in 1963 Peter died, John paid Peter's widow £5 for one week and then refused to pay any more. The widow sued him for administratix of Peter's estate and as a third party to the contract (in her personal capacity). The House of Lords affirmed the decision of the Court of Appeal and held that she was entitled, as administratix, to an order for specific performance but she was not in her personal capacity.

[87] M. P. Furmston Cheshire and Fifoot's Law of Contract 10th ed. 1981, p. 407.

of goods by sea if the Bill of Lading Act 1855 does not apply (e.g. where a bill of lading is not issued) and the consignor sells the goods to a buyer, the consignor may, in case of loss of or damage to the goods, recover a substantial damages from the carrier on the ground that there is privity contract between him and the carrier, irrespective of whether or not he has himself sustained them.[88] But the buyer is not allowed to sue the carrier in contract even if the property in the goods has passed to him because there is no privity contract between them. In other words, the consignor may sue the carrier and the buyer may sue the consignor[89] which causes double litigation. When the doctrine of privity is considered in relation to international multimodal transport contracts, the problem may even become greater because in order to perform a multimodal transport contract, the MTO usually concludes some other contracts with, e.g. actual carriers or stevedores. These contracts including the multimodal transport contract constitute a network of contracts[90] and the number of third parties involved in it may be, therefore, considerable.

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[88] Dunlop v. Lambert, (1837)6 BL. & F. 600 as explained in The Albazero. The Dunlop v. Lambert priciple extends, according to Lord Diplock in Albazero, to all forms of carriage including carriage by sea itself where no bill of lading has been issued: The Albazero, [1976] Ll.L.Rep., 467, at p. 474. See also the recent case of Obestaininc v. National Mineral...(The Sanix Ace) [1987]1 Ll.L.Rep. 465.See also Schmitthoff, supra chap. 1 note 2, p.480; Scrutton, supra chap. 3, note 23, p. 250.

[89] "...he [the consignor] will be accountable to the true owner for the proceeds of his judgment": Lord Diplock in The Albazero, [1976] 2 Ll. L. Rep. 476, at p. 473. Cf. the case of The Albazero, in which a bill of lading to which the Bill of Lading Act 1855 applied was issued. The charterers of the vessel named as 'consignees' in the bill of lading, indorsed the bill to a buyer. The goods were lost and the charterers (consignees) brought an action against the shipowners. With regard to Section 1 of the 1855 act Lord Diplock said:"...The right of suit against the shipowners in respect of obligations arising under the contract of carriage passes to [the consignee or indorsee] from the consingnor. The court held that the plaintiffs were not entitled to receive substantial damages from the shipowners becasue they had not proprietary interest in the goods and had not suffered them.

[90] Regarding the expression 'network contracts' see p. 365 of this thesis.

Since the multimodal transport contract (MTC) is concluded between the multimodal transport operator (MTO) and the consignor, there is privity of contract between them. Therefore, the limitations or exceptions in their contract may not benefit a third party to their contract such as the actual carrier if different from the MTO. However, with regard to the exceptions to the privity doctrine and the doctrines departing from it, we need to consider a more precise application of the various aspects of the privity problem in relation to a network of contracts including the multimodal transport contract.

5.2:4:1 Various aspects of the privity problem

Two important questions of the privity problem are as follows:

(1) - Whom does the privity problem prevent from being sued?

(2) - Whom does the privity problem prevent from taking advantage of the MTC's exempting or limiting clauses?

The first question can also be expressed as 'whom does the privity problem prevent from suing?' because when the privity problem does not allow C to be sued by A, it means that it does not allow A to sue C. The three following questions may be, therefore, derived from the first question.

1 - Can a person who is not a party to the MTC but a party to a contract concluded in order to perform the MTC (such as the actual carrier if different from the MTO,

or the stevedore) bring an action upon the MTC against a party to the MTC (such as the consignor)?

2 - Can a party to the MTC (such as the consignor) bring an action upon the MTC agaist a person who is not a party to the MTC but a party to a contract concluded in order to perform the MTC (such as the actual carrier or the stevedore)?

3 - Can a party to the MTO (such as the consignor) bring an action against, e.g. the stevedore upon the stevedoring contract to which he is not a party in order to enforce his contractual right?

In addition, the two following questions are derived from the second question.

1 - Can a person who is not a party to the MTC (like the stevedore) take advantage of the MTC's limiting or exempting clauses when he is sued by a party to the MTC (such as the consignor)?

2 - Can a party to the MTC (such as the MTO) take advantage of the MTC's limiting or exempting clauses when he is sued by a non-party to the MTC (such as the consignee)?

As stated above, according to the doctrine of privity it is only the MTO and the consignor - the parties to the MTC - who can sue or be sued by one another upon the MTC. Therefore, the answer to each of the above questions, with regard to the privity doctrine, is negative. The authority for this in relation to questions 1 and 3 arising out of the first question is the case of Dunlop v. Selfridge,[91] for question 2 arising out of the

[91] [1915] A.C. 847.

first question is the case of Port Line Ltd. v. Ben Line Steamers Ltd.,[92] and for questions 1 and 2 arising out of the second question is the case of Scruttons Ltd v. Midland Silicones Ltd..[93]

However, there is an argument[94] that since the MTC and the contracts concluded in order to perform the MTC are an example of a network contract, the privity doctrine should have no effect and application as between the network contractors.[95] They argue that in relation to cases involving linked commercial contracts, i.e. network contracts (such as a MTC and the contracts concluded to perform it), English law has shown itself to be ready to take a practical approach to find ways of circumventing the privity doctrine. To support their contention they mention Lord Wilberforce's observation in The Eurymedon[96] that the courts should adopt a practical approach in cases where the relations of all parties to one another are purely commercial. They also mention some relevant cases in which the courts did not follow the privity doctrine.[97] Instead, they propose that special rules meeting the requirements of both certainty and justice should apply as between network contractors. Giving a detailed definition and some examples of 'network contracts',[98] they believed that although their definition may give rise to some

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[92] [1958] 2 Q.B. 146.

[93] [1962] A.C. 446.

[94] See, the analysis of the problem written by Adams & Brownsword, supra note 3.

[95] Id., p. 13. Regarding the expression 'network contractors', see p. 366 of this thesis.

[96] New Zealand Shipping Co. v. A M Satterthwaite Co Ltd. [1975] A.C. 154.

[97] See pp. 367-8 of this thesis.

[98] J. Adams & R. Brownsword, supra note 3, pp. 27-28. also see p. 365 of this thesis.

difficult cases, it meets the requirement of certainty because it is limited to network contracts. Regarding the justice of their proposal, however, they say that with the relaxing of the privity doctrine and applying their proposal as between network contractors there may be some conflicting considerations of fairness. For example, regarding the second question arising out of the second question (above), it can be seen that, on the one hand, it is unfair to, e.g. the consignee, if the MTO is allowed to rely on the limiting or exempting clauses of the MTC of which the consignee has no knowledge, and on the other hand, it is unfair to the MTO if he is deprived of the benefit of such provisions of the contract to which he is a party and which he specially contracted. They, therefore, state that since relaxing the privity requirement and putting into effect their proposal as between network contractors may not suffice for the fair resolution of the privity questions (such as the above question in relation to MTC), "supplementary rules of transactional fairness within network contracts will be required." So in order to operate their rules to resolve the disputes raising as between network contractors, those rules should accommodate the transactional fairness rules of the common law.[99] Thus, if the consignee sues the MTO for his negligence (as in question 2 of the second aspect), the key issue for permiting the MTO to take advantage of the MTC's limiting or exempting clauses is the consignee's knowledge of and assent to such clauses,[100] i.e. the MTO should be permitted the defences provided that the consignee has had knowledge of and assented to those defences.

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[99] Id., p. 32.

[100] See the judgment of Lord Dening in Morris,p. 332 of this thesis. Also Atiyah sayes "it is impossible for the parties to a contract to impose liabilities on third parties without their consent.": P.S. Atiyah An Introduction to the Law of Contract, 3rd. ed., 1981, Clarendon Press, Oxford, p. 282.

- **The effect of the proposal of Adams-Brownsword on different parties performing under multimodal transport contracts**

Now, the question is: if the Adams and Brownswords' proposal, which has been presented as a solution to the privity problem in this thesis, is accepted and the privity doctrine relaxed in relation to network contracts, what would be the effect of that on the parties ingaged in performing a MTC such as the MTO, the actual carrier and the stevedore?

Obviousely it would have a great effect and change the situation fundamentally. Regarding the question, e.g. 'can the actual carrier, if different from the MTO, who is not a party to the MTC, bring an action against the consignor? (question 1 arising out of the first question)' the answer is, contrary to privity doctrine (the Dunlop principle), 'yes'. The lack of privity between the actual carrier and the consignor is not a barrier to the actual carrier suing the consignor on the contract concluded between the MTO and the consignor. This is consistent with the case of Trident General Assurance Co. Ltd. v. McNiece Bros[101] upon which a sub-contractor was allowed to sue on an insurance policy concluded between the head contractor and the insurer. Regarding the queston, e.g. 'can the consignor who is a party to the MTC bring an action on it against, say, the stevedore? (question 2 arising out of the first question)', too, the answer again is, contrary to privity doctrine as expounded in Port Line, 'yes' and the fact that there is no contractual relationship between the consignor and the stevedore is not a barrier to the

[101] (1987) L.M.C.L.Q. 288.

consignor suing the stevedore on the MTC.[102] With respect to the question, e.g. 'can the stevedore who is not a party to the MTC take advantage of the MTC's limiting or exempting clauses when he is sued by the consignor? (question 1 arising out of the second question)', the fact that the stevedore is not in privity with the consignor does not prevent him from taking advantage of such clauses in the MTC when answering the consignor's claim. So the answer to this question is, conrary to the privity doctrine applied in Scruttons, 'yes'. This will be consistent with the Morris principle (the special acceptance principle),[103] and with the Elder Dempster principle (the vicarious immunity principle).[104] Finally, in relation to the question, e.g. 'can the MTO take advantage of the MTC's limiting or exempting clauses when he is sued by a non-party to the MTC such as the consignee? (question 2 arising out of the second question)', the fact that the consignee is not a party to the MTC will not prevent the MTO from relying on the MTC's limiting or exempting clauses in order to answer the consignee's claim. This will be in the line of the decision of Lord Denning in Morris, i.e. the answer is 'yes'.

As we have seen, the effect of the Adams and Brownswords' proposal, in relation to MTCs, is, like other network contracts, to lift the restrictions imposed by the privity doctrine as between the netwok contractors such as the MTO, the actual carrier and the stevedore. It should be however noted, as the proposers say, that: 1)- the proposal should be operated so as to accommodate the principles of transactional fairness within the

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[102] See the case of Lord Strathcona Steamship Co. v. Dominion Coal Co., [1926] A.C. 108, for example.

[103] This seems to be the same consent princile which has been explaind at p. 331 of this thesis.

[104] See p. 330 of this thesis.

common law; 2)- the proposal is not intended to reverse particular provisions in a contract.[105] For example, if a term of a MTC does not avail the stevedore but it is expressed only to protect the MTO, the proposal would not alter the situation, i.e. such stevedore cannot take advantage of limiting or exempting clauses of such MTC when he is sued by the consignor. This is not because of the privity doctrine since it has already been relaxed by the proposal but because of the MTC's provision which is not altered by the proposal.

5.2:5 Multimodal transport contracts and possible reform of the privity doctrine

As stated above, the privity doctrine creates problems causing inconvenience. Therefore, it has sometimes been severely criticised. For example the argument of Crompton J. in case of Tweddle v. Atkinson[106] on which the privity doctrine was established has been admirably criticised in an article written by J. Adams and R. Brownsword. In that case Crompton J. said:

> "The modern cases have, in fact, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."[107]

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[105] J. Adams & R. Brownsword, supra note 3, p. 29.

[106] (1861) 1 B & S 393.

[107] Id., at p. 398.

The critics say that there are two interpretations of Crompton J's argument[108] each objects to the claim of third party. One objection is that where there is a contract between A and B, how can third party (C) sue the defendant (B) on A/B contract whereas B cannot be able to sue C. Another objection is that it is unfair for the third party to get something for nothing. The critics answer the first objection as follows:

"B [the defendant] is fully protected by having a claim against A. After all, when B promised to confer the benefit on C, he did not contract for any performance from C, so it is absurd to hold it against C that he enjoys immunity from suit in relation to B. Indeed, on Crompton J's logic, we could just as well say that it was monstrous that A shoud be a party to the contract for the purpose of being sued (by B), but not for the purpose of taking any direct advantage from it."

They answer the second objection as follows:

"Certainly, gratuitous third party beneficiaries stand to get something for nothing, at least in the sense that they stand to benefit from an exchange to which they have made no contribution; so much is undeniable. However, this hardly constitutes an argument for saying that they should derive no assistance from the courts in holding a defaulting promisor-contractor to his word. After all, if the third party beneficiary is given no remedy, this may result in the sort of nonsence that Megarry V-C pointed to in Ross v. Caunters,[109] and in the defaulting promisor getting away with breaking his promise; which is to say, that this may result in the promisor getting something for nothing. At the very leat, therefore, the 'something for nothing' argument cuts both ways, and effectively cancels itsef out."

They add that the argument of 'something for nothing' is even more to the detriment of the defaulting promisor than the third party because the defaulting promisor is in the wrong, whereas the third party beneficiary has done nothing wrong as such. And if we

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[108] One interpretation is that there is no reciprocity between the third party and the contracting party who is sued. Another one is that the third party should not be assisted in getting something for nothing. See J. Adams & R. Brownsword, supra note 3, p. 23.

[109] [1979] 3 All E.R. 580. See p. 367 of this thesis.

hold for the defaulting promisor and deny the third party right, we have, in fact, allowed to the defaulting defendant to profit his own wrong which clearly is unfair to the third party beneficiary.[110] Rejecting the argument of 'something for nothing' in favour of privity doctrine, they conclude that the Crompton J's argument is unfair for the third party beneficiary (C). Moreover, the objection 'getting something for nothing' has no place in network contracts as between network contractors since they are already in a contractual relationship with one another and give consideration under the contract to which they are a party.[111]

Now the question is: is there any possibility of reforming the privity doctrine in relation to network contracts (such as MTCs)?

It is arguable that the privity doctrine, although it causes inconvenience, brings about predictability and consistency,[112] i.e. a party to a contract can at the time of conclusion of the contract predict: 1- who he can sue; 2- who he can be sued by; 3- the contract conditions and terms which he can sue on or can be sued on. These are naturally demanded by the parties to a contract. So if there is to be any reform of the privity doctrine in order to remove the inconvenience caused by it, it should be in a manner which satisfies the two following conditions:

1 - it should preserve the predictability and consistency as the traditional privity doctrine does.

2 - it should remove the inconvenience caused by the privity doctrine.

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[110] J. Adams & R. Brownsword, supra note 3, p. 24.

[111] Id.

[112] Id., p. 21.

It seems to me that no reform of the privity doctrine is possible because it seems to be impossible for a reform to the privity doctrine to satisfy the two above conditions together. If the reform satisfies condition 1, it should be in form of the traditional privity doctrine in which case it cannot satisfy condition 2; and if the reform satisfies condition 2, it should take into account every possible third party involved in the network contracts, and also the terms and conditions of the contracts in connection with the main contract which this makes impossible for the reform to satisfy condition 1. This is probably why some writers[113] suggest, without suggesting any reform of the privity doctrine, that it should be relaxed in relation to network contracts as between network contractors. Before giving an alternative to the privity doctrine, they suggest that "the law should satisfy three criteria. First, the law should be clear, coherent, and predictable in its application. Secondly, giving that we are dealing essentially with commercial contracting, the law should avoid commercial inconvenience. And, thirdly, the law should avoid obvious injustice or anomaly." Then, they resort to the doctrine of consideration as an alternaive to the privity doctrine. However, in order to find an alternative not having the privity doctrine's inconvenience they do not deal with the doctrine of consideration as being the logical corollary of the privity doctrine. They take it that the function of the doctrine of consideration is: "to limit the kinds of promises which the law will enforce",[114] i.e. only a promise for which consideration has been given is enforceable.

According to the logical corollary argument, the logical result of the proposition 'only a promise for which consideration has been given is enforceable' is presupposed to

[113] J. Adams & R. Brownsword, supra note 3.

[114] Id., p. 22.

be the proposition 'only those who have given consideration for a promise can enforce that promise'. In other words, the former proposition entails the latter one. This argument in fact favours the privity doctrine upon which a third party beneficiary who has not given consideration for a promise cannot enforce it.

The persons attempting to invoke to the consideration doctrine, as an alternative to the privity doctrine, however, rejected the 'logical corollary argument'. They contend, and I think this is right, that although the approach which has been reached by the 'logical corollary argument' is certainly a possible one, "the first proposition does not in fact entail the second.....Once the law has adopted the former proposition....,it does not follow that it must make the personal provision of consideration by the plaintiff a precondition to the right to sue". To be more precise, we can say that once the law accepts the proposition that 'a promise is not enforceable unless consideration has been given for it' as the 'doctrine of consideration', being given of consideration for the promisor's promise is material in order to sue on the promisor's promise rather than the person who has given the consideration. "In other words, in determining whether C [the third party beneficiary] can sue on B's promise, it is essential that consideration has been given for B's promise, but it is not necessary that C has given consideration".[115] So, once consideration for the promisor's promise has been given, both the person who has given the consideration and the third party beneficiary (even if he has not given the consideration) may sue upon the promisor's promise. In short, if we accept the doctrine of consideration with a concept like that stated above, we will be able to remove the inconvenience caused by the privity doctrine particulary in relation to network contracts such as multimodal transport contracts

[115] Id., at p. 22.

which consideration is usually moved from a third party beneficiary.

5.2:6 Solutions to the privity of contract problem in connection with multimodal transport contracts

As stated above, in international multimodal transport contracts there may be some disputes between some persons between whom there is no privity of contract, i.e. there may be a privity of contract problem in that because of the absence of privity of contract, 'X' cannot sue or be sued by 'Y'. Now the question is: with regard to the importance of international multimodal transport operations in international trade, what would be the solution to the privity problem in relation to them. There seem to be the following solutions:

(1) - Use of the exceptions to the doctrine of privity

With the use of the exceptions to the doctrine of privity some of which we have already[116] mentioned, a third party to the contract may sue or be sued on the contract and the privity of contract problem is, therefore, solved. "Judges who wish to avoid some commercial inconvenience occasioned by privity can often do so by reading the facts as fitting one of the categories of exceptions".[117] For example, if a party to a contract is an agent of a third party and enters into the contract on behalf of him, the court may avoid the privity doctrine by using the undisclosed principal principle upon which the

[116] p. 320 of this thesis.

[117] Adams & Brownsword, supra note 3 p. 20.

third party may sue or be sued by the other party to the contract.

Thus in New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd.[118] there was a contract between the consignor and the carrier, as an agent of the stevedores. The goods were damaged because of the stevedores' negligence. The stevedores relied on the limitation clause of the contract concluded between the consignor and the carrier on the grounds that they have had a contract with the plaintiff because the carrier was their agent in that contract. The court held for the stevedores.

(2) - Suing in Tort

If a party to a carriage contract (such as the consignor) cannot bring an action in contract against a third party to the contract (such as the stevedore), he may bring it against him in tort. For example in Scruttons Ltd. v. Midland Silicones Ltd.,[119] the plaintiffs had a cargo carriage contract with the carrier, the United States Lines, limiting the carrier's liability. The defendants were stevedores who had contracted with the carrier on the terms that they were to have the benefit of the limiting clause in the bill of lading. Because of the stevedores' negligence the cargo was damaged. Since there was no contract between the plaintiffs and the stevedores, they brought an action against the

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[118] (The Eurymedon) [1975] A.C. 154; [1974] 1 All E.R. 1015.

[119] [1962] A.C. 446; See also New Zealand Shipping Co. v. A.M. Satterthwaite & Co., supra note 118; Elder Dempster Ltd. v. Paterson, Zochonis & Co. [1924] A.C. 522, in which the cargo-owner who had a carriage contract with the carrier and no contract with the shipowner sued the shipowner in tort because of bad stowage; Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 Q.B. 402; The New York Star,[1980] All. E. R. 1180.

stevedores in tort of negligence. The court held for the plaintiffs.[120] Similarly a third party to a carriage contract who cannot sue a party to the contract in contract, may sue him in tort.[121] Thus in N.Y.K. v. International Import and Export Co. Ltd.[122], the indorsee of a combined transport bill of lading was a third party for the carriage contract concluded between the MTO and the road carrier (the sub-contractor). The goods were stolen while they were in custody of the road carrier. The indorsee, therefore, brough an action in tort against the road carrier who had a sub-contract with the MTO.

- **Who can sue in tort?**

Now the question is: when there is a cargo carriage contract and then a cargo damage or loss, who can sue in tort? If a non-party to a cargo carriage contract, e.g. a c.i.f. or c.f. buyer who is consignee, sustains a loss because of the cargo damage or loss, he may bring an action aginst a party to the contract, e.g. the sea carrier, MTO, or a person with whom the MTO has contracted to perform the carriage contract, in tort if:

(i) the property in the goods had passed to him at the time the loss occurred; or

(ii) he has possessory title to the goods at the time the loss occurred.

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[120] See also Alder v. Dickson, [1955] 1 Q.B. 158.

[121] M. P. Furmston Cheshire and Fifoot's Law of Contract, supra note 13, p. 405.

[122] [1978] 1 Ll. L. Rep. 206. For an example of non-carriage contract see Donoghue v. Stevenson, [1932] A.C. 562; see also Rookes v. Barnard [1964] A.C. 1129 in which a non-party to a contract sued a party to the contract in tort of intimidation.

So a non-party to a cargo carriage contract to whom neither the property in goods had passed nor has he a possessory title to the goods at the time when the loss occurred cannot bring an action against the carrier in tort.

Thus in Leigh and Sillivan Ltd. v. Aliakman Shipping Co. (The Aliakman),[123] the Court of Appeal adopted the view of Roskill J. in The Wear Breeze[124] in which Roskill J. held that no action would lie if there was neither a contractual relationship with the carrier nor the ownership or possession of the goods. In a further appeal[125] the House of Lords upheld the Roskill's decision that the C.I.F. or C.F. buyer to whom the property in goods had not been passed at the time of loss could not bring an action in negligence against the carrier even if the risk[126] of the cargo had passed to him at that time. As a solution to this problem, Lord Brandon in the above case believed that in such a position the buyer could make an arrangement with the seller whereby the seller assigned his contractual claim against the carrier to him.

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[123] [1985] 2 W.L.R. 259. See also The Albazero [1977] A.C. 774, in which the court held that the plaintiff could not sue the defendant in tort since the property in the goods had passed from him to the indorsee before the loss of the cargo; The Sanix Ace [1987]1 Ll.L.Rep. 465, in which the court held that although the plaintiffs sold the goods and were fully paid for they could sue the defendant for substantial damages because they had property in the goods; Mitsui & others v. Flota Mercante S.A. [1988]2 Ll.L.Rep. 208, in which the court held that the plaintiffs were not entitled to sue the defendant in tort since it was not proved that the property in the goods had passed to them; and The Filiatra Legacy, [1990] 1, Ll.Rep., 354.

[124] [1969] 1 Q.B. 219.

[125] [1986] 2 L.R. 1.

[126] But in The Irene's Success [1982] Q.B. 481, Lloyd J. held that when the buyer bears risk on the shipment of the goods it was sufficient to give him a right of action even if he has not been passed the property in the goods. This was followed by Sheen J. in The Nea Tyhi [1982] 1 L.R. 606.

It should be noticed that a mere contractual right[127] relating to the goods of a person will not entitle him to bring an action in tort of negligence against the carrier.[128]

Thus the House of Lords in Leigh and Sillivan v. Aliakman Shipping Co. Ltd. (The Aliakman),[129] held "in order to enable a person to claim in negligence for property he must have had either the legal ownership of, or a possessory title to, the property concerned at the time when the loss or damage occurred, and it was not enough for him to have had only contractual rights in relation to such property which had been adversely affected by the loss of or damage to it."

In Ishag v. Allied Bank International, Fuhs and Kotalimbora,[130] the plaintiff, Ishag, paid a sum of money to Fuhs and Fuhs agreed to deposit his goods mentioned in the January bill of lading with Ishag as a security. The plaintiff was held to be entitled to the possession of the goods mentioned in the bill of lading.

In such a situation, since Ishag, the plaintiff, had a possessory title to the goods mentioned in the bill of lading, he could bring an action against the carrier in tort for the loss of or damage to the goods, if available. In other words Ishag, the plaintiff, did not have a privity of contract problem because he did not need to have privity of contract with the carrier. Similarly the carrier could bring an action against Ishag (who had a

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[127] Such as contractual rights arising from a sale of goods contract.

[128] See The Mineral Transporter [1986] A.C. 1.

[129] [1986] 2 L.R. 1.

[130] [1981] 1 Lloyd's L.R. 92.

possessory title to the goods) to receive some money which he had spent in relation to the goods, as the carrier did so,[131] although there was no contract between them.

With regard to suing in tort attention should be drawn to some points: firstly, the tort of negligence, which is an independent tort nowadays,[132] was not an independent tort in the nineteenth century. It was a dependent tort subject to special circumstances existig such as contracts, bailment, etc., and in the absence of any such special circumstances there was no general duty to use care and one could not sue on tort of negligence itself. In the 19th century, therefore, contrary to today, if one wished to sue a person for negligence, he had to show, e.g. a contractual relation which put him under a duty of care towards him, otherwise he failed.[133] So suing in tort of negligence which can, today, be a solution to the privity of contract problem, could not be a solution to that problem in the 19th century. Secondly, "even though negligence is an independent tort, nevertheless it is an accepted principle of the law of tort that no man can complain of an injury if he has voluntarily consented to take the risk of it on himself. This consent need not be embodied in a contract. Nor does it need consideration to support it. Suffice it that he consented to take the risk of injury on himself."[134] Accordingly, it can be said that

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[131] Elder Dempster Lines v. Zaki Ishag (The Lycaon) [1983] 2 L.R. 548.

[132] Since the decision of Donghue v. Stevenson [1932] A.C. 562, in which negligence has been established as an independent tort in itself. However, if the plaintiff's claim is for purely economic loss, there should be special relationship of proximity to take the defendant under a duty of care towards the plaintiff: see Murphy v. Brentwood City Council [1990] Ll. L. Rep. 467.

[133] Lord Denning in Midland Silicones Ltd. v. Scruttons Ltd. [1962] A.C. 446 at 483-4. Murphy v. Brentwood way, however, has 'put the clock back'.

[134] Id. at 488.

in a carriage contract which there is a loss of or damage to the cargo, a person to whom the property in the goods had passed or has possessory title to the goods at the time when the loss or damage occurred can sue in tort if he has not voluntarily consented to take the risk of the loss on himself. Otherwise he cannot sue in tort. "...in the case of through transit, when the shipper of goods consigns them "at owner's risk" for the whole journey, his consent to take the risk avails the second carrier as well as the first, even though there is no contract between the goods owner and the second carrier."[135] In other words if such a shipper wants to sue the second carrier in tort for his negligence, he fails because he has voluntarily consented to take the risk of the loss on himself.

In conclusion a non-party to a carriage contract who sustains a loss because of loss of or damage to the cargo may bring an action in tort if: (i) he has the ownership of the cargo lost or damaged; or the property in the goods has passed to him at the time the loss occurred; or he has possessory title to the goods at the time the loss occurred; and (ii) he has not consented to take the risk of the loss on himself.

(3) - Intervention of Parliament

While the doctrine of privity is not an irrational inference from the nature of a contract,[136] it causes, as stated above, problems which become greater in relation to multimodal transport contracts which are necessary to the modern conditions. In other

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[135] Lord Denning in Midland Silicones v. Scruttons Ltd. [1962] A.C. 446 at 488; see also Norwich City Council v. Harvey [1989] a All E.R. 1180.

[136] M. F. Furmston Cheshire & Fifoot's Law of Contract 10th ed. 1981, p. 408.

words the doctrine of privity has proved inconvenient to modern needs. One solution to the problem is the intervention of Parliament so that in multimodal transport contracts the cargo-owner can bring an action on the contract against any third party such as stevedores, second carriers, etc. acting for the performance of the multimodal transport contract; and also so that third parties can sue the cargo-owner on the contract. There are, at present, some examples where Parliament has, in order to meet modern needs, intervented and passed Acts under which third parties can bring an action against a party to a contract. For example, "husband and wife have been enabled to take out life insurance policies in favour of each other or of their children; Third parties have been allowed, in certain circumstances, to sue on marine or fire insurance policies, or on the policies covering road accidents required by the provisions of the Road Traffic Act 1972."[137] However, because the privity doctrine exists in many jurisdictions, there would be obvious problems with such unilateral relaxation. It would seem that ideally what is needed is an 'International Convention on privity', possibly along the lines of the Adams and Brownsword's proposal.

(4)- The Relaxation of the Privity Doctrine in Connection with Network Contracts by the Courts

As it was stated above, there has recently been an argument that the privity principle should not have any application in relation to the 'network contracts'[138] (such

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[137] M. P. Furmston Cheshire & Fifoot's Law of Contract 10th ed. 1981, pp. 407, 408.

[138] See J. N. Adams and R. Brownsword, supra note 2, pp. 13 and 24. The 'network contracts' are defined as a group of contracts of which one or more are principal giving the group an overall objective, and the rest are secondary or tertiary contracts helping directly or indirectly the overall objective to be achieved, i.e. the set of contracts which have collectively,

as MTCs), as between the network contractors.[139] The persons[140] favouring this argument believe that "it is possible to work out with some precision the area where the privity rule could, and should, be abrogated, without either 'opening the floodgate' or doing violence to the general principles of contract".[141] They contend that as a result of the inconvenience caused by the privity principle, the law has been pulled in different directions as the strict privity approach is modified both by doctrinal statement and by subversive judicial practice.[142]

In order to illustrate their contention they mention some principle such as the undisclosed principal principle,[143] the vicarious immunity principle[144] and the consent principle[145] which depart from the privity principle. They also present some authorities and contend that the court have shown a certain antipathy to the privity doctrine. For

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as their object, the attainment of a common underlying purpose in which each contract in the set (network contract which forms a part of the set) contributes in some way towards the achievement of that purpose. No matter that the secondary or tertiary contract are concluded before or after the conclusion of the principle contract; see Id., pp. 14 and 27. A multimodal transport contract and the contracts concluded in order to perform it such as the carriage contracts concluded between the M.T.O. and modal carriers, and stevedoring contract can be regarded as 'network contracts', for example.

[139] Network contractors are parties who are already in a contractual relationship with another network contractor and who give consideration in the ordinary way under the contract to which they are a party: see Id. p. 24.

[140] Adams and Brownsword, supra note 2.

[141] Id. p. 14.

[142] Id., p. 21.

[143] See p. 320 of this thesis.

[144] See p. 323 of this thesis.

[145] See p. 324 of this thesis.

example, in Scruttons, Lord Reid regretted that it was impossible for him to deny the privity principle. He said: "Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him ..." Also Sir Robert Megarry V-C in Ross v. Caunters[146] said:

> "If this is right [i.e., if the third-party beneficiary has no claim against the negligent solicitors], the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim."

In Junior Books[147] and Hedley Byrne,[148] as stated, the lack of privity of contract between the negligent defendants and the third party plaintiffs was not a barrier to the third party plaintiffs to prevent them from suing the negligent defendants (though, as noted above, the authority of the former decision is now virtually gone).

For the further illustration of their argument they also present some cases of linked commercial contracts, i.e. network contracts. For example, in Norwich City Council v. Harvey,[149] the plaintiff employed the contractors to extend a swimming pool complex. The existing structures and the extension burnt down as a result of the negligence of the

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[146] [1979] 3 All E.R. 580 at 583.

[147] [1983] 1 A.C. 520. This case was overruled by Murphy v. Brentwood City Council [1990] 2 Ll. L. Rep. P. 467.

[148] [1964] A.C. 465.

[149] [1989] 1 All E.R. 1180.

sub-contractor employed by the contractors. The plaintiff brought an action against the sub-contractor. The sub-contractor with whom the plaintiff had no contact tried to rely on the clauses of the contract concluded between the plaintiffs (employers) and the contractors. May L. J. said:

> "I do not think that the mere fact that there is no strict privity between the employer and the sub-carrier should prevent the latter from relying on the clear basis on which all parties contracted in relation to damage to [the plaintiff's] building caused by fire even when due to negligence of the contractor or sub-contractors."[150]

The plaintiff appealed and the Court of Appeal held that because the main contract provided that the building owner was to bear the risk of damage by fire, and the sub-contractor had contracted on this basis, it would not be just and reasonable to hold the sub-contractor liable to the plaintiffs. Of course, if we consider this case in light of Murphy v. Brentwood[151] principle, we would probably be faced with the result that the plaintiff (N.C.C.) could not sue the sub-contractor because the claim of the plaintiff was for purely economic loss. If he wanted to sue the sub-contractor in tort (as he did) , there should have been a special relationship of proximity between them. Since there was not such relationship, the sub-contractor had no duty of care in tort in respect of his work. The plaintiff, therefore, could not sue him.

Also in Trident General Assurance Co. Ltd. v. McNiece Bros.,[152] a sub-

[150] Ibid., at p. 1187.

[151] [1990] 2 Ll.L.Rep. 467.

[152] (1987) L.M.C.L.Q., 288.

contractor was permitted to sue on an insurance policy taken out by the head contractor, which by its terms purported to cover the sub-contractors. The Insurance Company appealed on the grounds that there is no privity between it and the sub-contractors and they are strangers to their contract with the head contractors. The Court of Appeal attacked on the application of the privity rule in that particular context.

We therefore propose that the privity doctrine should be relaxed as between network contractors, i.e. as between parties who are already in a contractual relationship with another network contractors and who give consideration in the ordinary way under the contract to which they are a party,[153] and that special rules should apply as between network contractors, in place of the privity rule.[154]

If this suggestion is accepted by the English courts, the privity doctrine would, it seems, be no problem in relation to multimodal transport contracts which are examples of network contracts. Ideally, however, what is needed is an International Convention on network contracts - which could be limited to multimodal transport contracts as an important area where the privity doctrine causes problems.

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[153] J. N. Adams & R. Brownsword, supra note 2, p. 24.

[154] Ibid., p. 27.

5.3 Transhipment Problems

If in international carriage of goods by sea, which is usually governed by The Hague (H) or Hague-Visby Rules (H-V-Rs), there is a transhipment of goods, there might arise some problems usually called 'transhipment problems'. Firstly, it is not clear whether The Hague or Hague Visby Rules will apply after the goods are discharged from the ship or not[1], e.g. when the goods are waiting to be loaded for on-carriage at an intermediate port, or when they are being on-carried. In other words, in the event of transhipment the question is that exactly up to what time the H or H-V-Rs continue to apply to the crriage of goods to determine the carrier's liability for loss of or damage to the goods?

Article I(e) of both the H and the H-V-Rs provides:

> " 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."[2]

According to this article once the goods are discharged from the ship, the carriage of goods period ends and the H or H-V-Rs do not, therefore, continue to apply after the discharge of the goods. However the place of discharge has not been determined in this article. This causes the uncertainty because it is not certain whether the 'discharge' should be done at the place of destination or at any place even before destination, e.g. at any

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[1] S. Mankabady, Some legal aspects of the carriage of goods by container, I.C.L.Q., [1974] p.317 at pp 318-319.

[2] The H or H-V-Rs apply from tackle to tackle: The Pioneer Land,[1957] A.M.C. 50; Stafford Allen and Sons Ltd. v. Pacific S. N. Co. [1956] 1 Lloyd's Rep., 104 & 496.

intermediate port. If we say that it refers to the place of destination, then the H or H-V-Rs will continue to apply to the carriage even after the transhipment until the goods are discharged at their destination. But if it refers to any place even before destination, the H or H-V-Rs Rules will apply just until the goods are discharged from the ship, no matter where they are discharged, e.g. the goods can be discharged from the ship on an on-carrying vessel or at an intermediate port and wait to be loaded on board the on-carrying vessel. In any way this is a matter of uncertainty in article I(e) of the H and H-V-Rs which creates this transhipment problem. The court in Mayhew Foods Ltd. v. Overseas Containers Ltd.[3], held that where the bill of lading permits transhipment the Rules continue to apply whilst the goods are ashore waiting to be loaded on board the on-carrying vessel.

It seems that this problem of transhipment may also appear in multimodal transport of goods involving a sea leg of carriage in which there is a transhipment operation. The reason for this is that the I.C.C. multimodal transport document or container bills of lading, which are presently used for multimodal transport of goods, have adopted the network liability system upon which the liability of the multimodal transport operator for loss or damage occurring during the sea leg of the multimodal transport is determined by the respective international convention i.e. by the H or H-V-Rs. Further, the Hague or Hague-Visby Rules are, as stated, mandatorily applicable to the sea leg of a multimodal transport contract.

Thus if there exists a transhipment operation in the sea leg of the multimodal transport so that the goods are discharged at an intermediate port and there the goods, while waiting to be loaded on board the on-carrying vessel, are lost or damaged, it is not

[3] [1984] 1 Lloyd's Rep. 317.

clear whether the H or H-V-Rs apply to determine the MTO's liability for such loss or damage occurred after the discharge of the goods. It may be said that if the transport document permits such transhipment, the H or H-V-Rs will continue to apply to this situation[4]. But what if in the sea leg of the multimodal transport there is a transhipment from one ship to another and the loss or damage occurs during on-carriage by sea, would the H or H-V-Rs continue to apply? As stated, if such transhipment is done in international sea carriage evidenced by a bill of lading, the transhipment problem will, because of different interpretation of article I(e) of the H or H-V-Rs, arise and therefore it is not clear whether the on-carriage is subject to the H or H-V-Rs or not. Further, the bill of lading issued by the carrier is a document for carriage of goods subject to the H or H-V-Rs, if the carriage of goods period ends by the discharge of the goods from the ship at the time of transhipment, the bill of lading will no longer be a document for on-carriage and therefore there will be no cause to be applied by the H or H-V-Rs. But in the case of multimodal transport it seems that the H or H-V-Rs will continue to apply to on-carriage done whether after transhipment of the goods from the ship to on-vessel or after the goods are loaded on board the on-vessel at an intermediate port because multimodal transport document, unlike bill of lading which may not cover the carriage done after transhipment, covers throughout the sea carriage of goods including the carriage done after transhipment.

In brief, in the case of transhipment of goods from one ship to another in multimodal transport, there will be no problem of the H or H-V-R's application to the on-carriage. But if the goods, through transhipment are discharged at an intermediate port

[4] Mayhew Foods Ltd. v. Overseas Container Ltd., [1984] 1 Lloyd's Rep. 317.

and there lost or damaged, the problem of the H or H-V-Rs' application will arise which may be removed by transhipment permission at the time of shipment.[5]

Another problem of transhipment is that the first carrier may disclaim any liability for on-carriage. In international carriage of goods by sea two situations should be distinguished for this problem. First, if there is an agreement at the time of shipment that there will be such transhipment and that the carrier will act as the shipper's agent after the transhipment and will, therefore, have no responsibility for the goods. This transhipment clause, it is submitted, to be valid according to article 7 of the H and H-V-Rs and to the application of the H and H-V-Rs which is tackle to tackle.[6] Second, if there is no agreement to such effect and the contract is for the carriage of goods until final destination and the carrier disclaims his liability after transhipment, it seems that this disclaim of liability is, according to article 3(8) of the H and H-V-rs, null and void.[7]

But in any way, it does not seem that this problem of transhipment can appear in multimodal transport of goods, at least between the MTO and the consignor, since the MTO agrees to carry the goods from the origin to the final destination (door-to-door carriage), and assumes liability for the goods throughout the multimodal transport

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[5] Article 7 provides: "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea."

[6] See The Pioneer Land [1957] A.M.C. 50; Stafford Allen & Sons Ltd. v. Pacific S. N. Co.. [1956] 1 Lloyd's Rep. 104 & 496.

[7] A. Muscut, chap. 3 note 27, p. 47; see also Scrutton, supra chap. note 23, p. 378.

including the carriage done after transhipment, if there is any. However, this problem may arise between the MTO and the shipping lines with which he sub-contracts for the performance of the sea carriage of the MTC. In this situation it seems that we should have regard to the two distinguished situations mentioned above.

CHAPTER SIX

THE LIABILITY OF THE MTO FOR LOSS OF OR DAMAGE TO THE GOODS UNDER THE 1980 UNITED NATIONS MULTIMODAL TRANSPORT OF GOODS CONVENTION

6.1 Introduction

As long ago as the 1920's there had been some efforts to establish a legal regime for multimodal transport of goods although they were theoretical rather than practical.[1] Later there have been projects[2] on multimodal transport instrument being based upon a need for such an instrument so as to determine the liability of the operator for loss of or damage to goods occurring during multimodal transport and to standardise all other aspects of multimodal transport.[3]

With the advent of containerization and other forms of unitisation in the 1960's, the world of transportation witnessed an increasing development of international

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[1] UNCTAD Secretariat,The economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodel Transport Convention, part 2, Rep. No. TD/B/C. 4/315, 1989, p.6; see also F.J.J. Cadwallader, Uniformity in the Regulation of Combined Transport, J.B.L.[1974] p.193.

[2] For example, the work done in the late 1950's by the International Institute for the Unification of Private Law (UNIDROIT).

[3] W.J. Driscoll,The Convention of International Multimodal Transport : A Status Report, J. of Mar. L & Com., Vol. 9, 1970, p.441.

multimodal transport, firstly, because it is the unitisation system, particularly container system, which facilitates and eases multimodal transport operations, and secondly, sellers and buyers are often interested in concluding a contract for door-to-door carriage, i.e. multimodal transport contract because the centres of industry are not always to be founded in seaports.[4]

This development, the lack of any international convention on multimodal transport[5] despite the efforts which had been made, and inadequacies in the existing law on container and multimodal transport[6] resulted in the creation of differing documents for multimodal transport operations[7] in the context of a conflict of national laws. As a result there arose a serious need[8] for the creation of a convention on multimodal transport

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[4] S. Mankabady,The Multimodal Transport of Goods Convention,I.C.L.Q., 32[1983], p. 139.

[5] O.C. Giles, Combined Transport,I.C.L.Q., 24[1975] p.380.

[6] UNCTAD, supra note 1, p.6, para 5; S. Zamora, Carrier's Liability for Damage or Loss to Cargo in International Transport,The American J. of Comparative Law, Vol. 23, 1975 p.392; K. Nasseri,The Multimodal Convention, J. of Mar L. & Com., Vol 19, 1988, p.234.

[7] For example, the Combicon bill of the Baltic and International Maritime Conference(BIMCO); the Combined Transport Document of the International Shipowner Association(INSA); the Rules for a Combined Transport Document of the International Chamber of Commerce(ICC); the Combidoc, co-sponsored by the three aforementioned organizations. These standard multimodal transport documents are optional and not mandatory. See, Chrispeels,The United Nations Convention on International Multimodal Transport of Goods : A Background Note, ETL(European Transport Law), Vol. XV, No. 4, 1980 p.358; A. Diamond, supra chapter 2 note 14, p. C17-18; B.S. Wheble,The I.C.C. Uniform Rules for a Combined Transport Document, L.M.C.L.Q.[1976] p.145.

[8] K. Nasseri, supra note 6, p.234; also see Maritime Transportation Research Board Report on Legal Impediments to International Intermodal Transportation, 1971, p.47-50.

contracts to bring certainty in this area of transportation, and therefore, to ease trade by removing any impediments slowing down the growth of multimodal transport.

Thus, it is no surprise that before the adoption of any such convention, there existed some documents[9] covering international multimodal transport contracts, and even, as stated, a set of 'Uniform Rules for a Combined Transport Document' was published by the International Chamber of Commerce(I.C.C) comprising of interests in the commercial problems of multimodal transport.

This felt-need for such a convention caused[10] the UNCTAD sponsored conference to adopt the United Nations Convention on International Multimodal Transport of Goods, 1980, at the United National Conference on International Multimodal Transport of Goods in Geneva in May 1980.[11] Obviously the objective of this Convention was to create a uniform multimodal transport document and to dispel the wide disparity which was in the contractual terms adopted by different operators. This Convention will become applicable to international multimodal transport of goods contracts when there will be 30 *states as its contracting parties.*[12] Under the UN Convention, the multimodal transport

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[9] For example, FIATA Combined Transport Bill of Lading ; The document introduced by BIMCO : see supra note 7.

[10] UNCTAD Secretariat, supra note 1, p.6, para 8.

[11] Hereafter cited as the Multimodal Transport Convention, or the Convention.

[12] Article 36 of the Convention. As of 01 December 1988, five states, namely, Chile, Malawi, Mexico, Rwanda and Senegal, have ratified or acceded to the Convention. See, the UNCTAD Secretariat Report, supra note 1, pp. 56 & 61.

operator's liability including his liability limitation for loss of or damage to goods is in great detail considered.[13]

This chapter will deal with the background to the Convention followed by the application of the Convention. It will then go on the main point, i.e. the liability of the multimodal transport operator for loss of or damage to goods under the Convention.

6.2 The background to the multimodal transport Convention

The background of the multimodal transport Convention on which the Convention is based is three fold : a- the international unimodal transport of goods conventions; b- the previous efforts done in order to prepare a convention on multimodal transport of goods; and c- political background to the Convention.

6.2:1 The international unimodal transport of goods conventions

International transport of goods by a particular mode of transport is usually governed by an international unimodal transport convention(s) relevant to that mode of transport, e.g. international air cargo carriage is governed by the Warsaw Convention; international sea cargo carriage by the Hague or Hague-Visby Rules or by Hamburg Rules

[13] Prof. E. Selving,The Background to the Convention [the Multimodal Convention], papers of a one day seminar, Southampton university, Faculty of Law, 12 September 1980, p. A1.

if come into force; international rail cargo carriage by the CIM or COTIF, and international road cargo carriage by the CMR convention.

The roots of the multimodal transport Convention are directly or indirectly based on the international unimodal transport of goods conventions such as the CMR, the Hague/Visby Rules and the Hamburg Rules.[14] In other words, the multimodal transport Convention is not separate from the unimodal conventions but has a close relationship with them[15] so that they can be regarded as a background to the multimodal transport Convention.

For example, the CMR which had made carriers liable for unlocated damage occurring within the scope of that Convention, was the starting point for the private body of the International Institute for the Unification of Private Law (Unidroit) when it first, in 1957, started to create a multimodal transport draft convention dealing with both the liability and documentation aspects of multimodal transport.[16] It finally prepared a draft convention, known as Unidroit multimodal transport draft convention, drawn upon the CMR model. On the other hand, the 1924 Hague Rules were the basis and model for the Comite' Maritime International (CMI) when it decided to prepare rules on multimodal

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[14] UNCTAD Secretariat, supra note 1, p. 4.

[15] W. Driscoll, P.B. Larsen,The Convention on International Multimodal Transport of Goods, TUL. Law Rev., Vol. 57, 1982, p. 209.

[16] Unidroit Doc. U.D.P. 1970; See also Driscoll, supra note 3, p.442; E. Massey, The Convention on International Multimodal Transport,J. of Mar. L & Com, Vol.3, 1972, p. 727.

transport emphasising on documentation aspects and damage or loss problem when the place of loss or damage can not be known. In 1969 the CMI prepared some rules on multimodal transport, known as 'Tokyo Rules', based on the model of the Hague Rules.[17] So, there were by then two sets of rules on multimodal transport, i.e. the Unidroit multimodal transport draft convention and the 'Tokyo Rules'. In order to remove any confusion caused by the existence of the two drafts, the two private bodies, Unidroit and CMI, agreed, at the request of the Economic Commission for Europe(ECE) to unify them. To this end they had a meeting in Rome in 1970 the result of which was a draft Convention, known as the '1970 Rome Draft'. The Rome Draft which was based on the CMR and the Hague Rules[18] can, as will be seen, be regarded as a background to the multimodal transport Convention. In other words, the CMR and the Hague Rules can indirectly be considered as background to that Convention.

The TCM Convention - a background to the multimodal transport Convention as we will see - is directly linked to the existing unimodal conventions because it attempted to place an umbrella of uniformity over the existing conventions governing liability.[19] Thus, it can be said that the unimodal conventions are indirectly a background to the multimodal transport Convention.

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[17] Driscoll, supra note 3, p. 442; E. Massey, supra note 16, p. 727.

[18] The Rome Draft adopted the liability regimes of the Hague Rules where the place at which the loss or damage occurred can be known (network liability system):see Driscoll, supra note 3, p. 446.

[19] E. Massey, supra note 16, p.727; See also S. Mankabady, infra note 34, p. 329.

The 'Hamburg Rules', which are not yet in force, are another example of the international unimodal convention which can be regarded as a background to the multimodal transport Convention. They were prepared by UNCTAD at the request of the developing countries in order to review the Hague and Hague-Visby Rules and to provide adequate protection of shippers because the developing countries, which are mainly shippers, considered the Hague/Visby Rules as Rules which provide inadequate protection of the shipper's interest.[20]

The multimodal transport Convention which is also a product of UNCTAD, is, to a large extent, based on and strongly influenced by the Hamburg Rules.[21] Firstly, because many of the participants involved in the work on the multimodal transport Convention were the same participants in the work on the Hamburg Rules who had their main background in shipping law and policy so that they considered the problems of multimodal transport mainly from the point of view of shipping, although the multimodal transport Convention covers all types of multimodal carriage.[22] Secondly, the Hamburg Rules were used by all groups involved in the work on the Convention as a model for the multimodal transport Convention whether from the view of subject matters or of substance and drafting of the various provisions of the Hamburg Rules.[23] Thirdly, the Hamburg

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[20] E. Selving, supra note 13, p. A8.

[21] Ibid, p.A13; See also UNCTAD Secretariat, supra note 1, pp. 4 & 7.

[22] E. Selving,The background to the Convention, supra note 13, p. A12.

[23] Ibid, pp. 12 & 13.

Rules brought the international law on carriage by sea closer to the international conventions governing carriage by the other modes of transport[24] and, therefore, became a relevant law to be considered as a base for the multimodal transport Convention by the Intergovernmental Preparatory Group(IPG). Of course, when the Hamburg Rules were adopted there had been left just two sessions from the total six preparatory work sessions on the multimodal transport Convention.[25] However, it was during the two sessions held after the adoption of the Hamburg Rules which the major part of the Convention were prepared.[26]

Since the Hamburg Rules themselves were modelled on land and air conventions such as the CMR convention and the Warsaw Convention[27] and "the net effect of the Hamburg Rules was to bring shipping law close to the law of carriage by other modes of transport,[28] it can be, therefore, said that the background of the multimodal transport Convention is indirectly based on the other unimodal conventions.

It should also be noted that although each international unimodal transport

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[24] Ibid, p. A9.

[25] "The first four of the six sessions were devoted to the review of the economic and social implications of the multimodalism, particularly for developing countries." See ibid, p. A12.

[26] Ibid, p. A13.

[27] UNCTAD Secretariat, supra note 1, part 1, p. 4, para 3.

[28] E. Selving, supra note 13, p. A13.

convention on a particular mode of transport was intended to create uniformity in international transportation law relating to that particular mode of transport, it also tried to take into account the use of other transportation mode as an incidental one and the problem of the carrier's liability for the entire multimodal transport so that it contains a specific regulation regarding multimodal transport.[29] This shows that the international unimodal conventions can be also directly a background to the multimodal transport Convention.

6.2:2 The previous efforts at preparing a multimodal transport of goods convention

Basically all efforts to create a multimodal transport convention had their roots in the fact that each specific mode of transport was and still is subjected to a specific legal unimodal regime which differ from each other to a considerable degree. Otherwise, if there had been general and uniform regulations regarding transportation, irrespective of the mode of transport, there would have been no need for regulation on multimodal transport.[30] So the existence of different unimodal conventions on different modes of transport differing highly from each other caused some efforts to establish a multimodal transport convention to eliminate these differences which may affect multimodal transport between any two countries.[31]

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[29] For example, the CMR Art. 2, the CIM Art. 63, the Warsaw Convention, Art. 31.

[30] UNCTAD Secretariat, supra note 1, p. 6.

[31] Lord Diplock,The Genoa Seminar on Combined Transport,J. Bus. L. [1972] p. 269; see also S. Mankabady, supra note 4, p. 120.

These efforts, which later became a background to the multimodal transport Convention, go back to 1930[32] when the International Institute for the Unification of Private Law (UNIDROIT) first started to create a multimodal transport convention. At that time, because containerization had not yet been introduced, transport in the form of multimode was rarely performed and, therefore, these efforts were mainly of theoretical nature rather than practical.[33] However, there were some desires by the International Chamber of Commerce(ICC) in 1948 or by the CMR signatory States in 1956 for uniform rules on combined transport.[34]

In 1950's when containerization system was introduced and multimodal transports were, therefore, increasingly developed[35] and the parties to an international multimodal transport contract recognised the importance of uniform rules on multimodal transport, these efforts became important so that they can be regarded as the very background of the multimodal transport Convention.

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[32] UNCTAD Secretariat, supra note 1, p. 6; E. Selving, supra note 13, p. A9.; see also S. Zamora, supra note 6, p. 392.

[33] W. Driscoll, supra note 15, p. 195.

[34] S. Mankabady, Some legal aspects of the carriage of goods by container, I.C.L.Q. [1974] p. 328.

[35] W. Driscoll, supra note 15, p. 195.

6.2:2.1 TCM draft convention

The TCM draft convention[36] is a result of the efforts done to provide a multimodal transport of goods convention. As seen, the 1970 Rome Draft was a combination of the Unidroit multimodal transport draft convention prepared by the Unidroit and the 1969 Tokyo Rules prepared by the CMI. Then under the auspices of UNIDROIT, the Intergovernmental Maritime Consultative Organization (IMCO)[37] and the Economic Commission for Europe (ECE) decided to review the 1970 Rome Draft. As a result, there was no agreement between them to endorse the Rome Draft but a draft convention, called TCM draft convention which had many similarities to the Rome Draft, was presented and adopted at the fourth meeting of them in London in November 1971.

TCM draft convention attempted to set out some voluntarily applicable common rules dealing with liability and documentation aspects of contracts for multimodal transportation in order to fill the gaps in existing conventions on carriage of goods and to establish single responsibility and a through transportation document upon which the created Combined Transport Operator (CTO) is responsible for the whole multimodal journey. However, it failed because of : 1- the lack of support by the United States and

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[36] Draft Convention of the Combined Transport of Goods, U.N. Doc. Tans/370, CTC/III/1, Annex 1, reprinted in ibid at 617; The initials 'TCM' represents the French title of the Convention, "Transport Combine' des Marchandises".

[37] See IMCO Doc. : CTC/IV/18/Rev. I; IMCO changed its name to International Maritime Organisation(IMO) as from 22 May 1982.

some other countries[38] demanding that several aspects of international combined transportation including the economic and social implications must, with special respect to the needs and requirements of developing countries, be fully studied before a convention be concluded;[39] 2 - the work on the multimodal transport Convention already started by UNCTAD[40] and the prevailing view within UNCTAD was that it was premature to adopt a multimodal transport convention on the basis of the TCM draft.[41]

Since the TCM draft was the starting point for the Intergovernmental Preparatory Group (IPG) of the UNCTAD in its efforts to develop an international multimodal transport convention[42] and the multimodal transport Convention "draws heavily on the TCM draft",[43] it can be, at least to some extent, considered as a background to the multimodal transport Convention. TCM is also a reflection in the I.C.C. Uniform Rules on combined transport which are another background to the multimodal transport

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[38] UNCTAD Secretariat, supra note 1, p. 4; see also E. Selving, The Influence of the Hamburg Rules on the Work for a Convention on International Multimodal Transport, The bill of lading conference, New York, November 29/30, 1978, organised by the Llyod's of London Press Ltd., New York 1978, p. Selving 4.

[39] E. Massey, supra note 16, p.729; E. Selving, supra note 13, p. A9.

[40] UNCTAD Secretariat, supra note 1, p. 6.

[41] E.Selving, supra note 13, p. A9.

[42] W. Driscoll, supra note 3, p. 443.

[43] UNCTAD Secretariat, supra note 1, p. 7.

Convention.[44]

6.2:2.2 ICC Uniform Rules on a Combined Transport Document (The ICC Rules)

When the ICC was faced with the failure of the TCM draft published its Uniform Rules for a combined transport document in 1973 because it was very concerned with the commercial problems of combined transports and felt that such publication is essential. The ICC Rules which are a voluntary code for a combined transport contract and have no statutory force are operated by incorporating into a contract made by the consignor and the combined transport operator (CTO) and evidenced by the combined transport document.

The ICC Rules which are based on the texts which were then available can be regarded as a background to the multimodal transport Convention because the Convention is closely modelled on the ICC Rules and its language is similar to that used by the ICC Rules.[45] In fact the multimodal transport Convention draws heavily on the ICC Rules so that without the earlier negotiations on the Hamburg Rules and the ICC Rules, the agreement on the multimodal transport Convention was much more difficult to achieve.[46]

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[44] E. Selving, supra note 13, p. A9.

[45] UNCTAD Secretariat, supra note 1, p. 4.

[46] Ibid, p. 7.

6.2:2.3 Efforts on Convention for liner conferences

The efforts made on shipping problems and on the Convention for liner conferences by the UNCTAD Working Group on International Shipping Legislation can also be regarded as background to the multimodal transport Convention because there were close connections between liner shipping and multimodal transport so that in most trades multimodal transport meant a substantial expansion of shipping lines' activity, substituting or supplementing traditional port-to-port service by multimodal service.[47]

6.2:3 Political background to the Convention

The multimodal transport Convention also has a political background. As stated above, the Convention was prepared and adopted by the UNCTAD. UNCTAD consists mainly of developing countries and, therefore, has a new balance of power and more political body in relation to other organizations being involved in preparing international conventions. Thus, it can be said that the Convention has a political background. This can be seen in the preamble and some provisions of the multimodal transport Convention.[48]

In a worldwide container conference sponsored by the UN and IMCO held in Geneva in November 1972, it was recommended that UNCTAD should carry out further studies on several aspects of multimodal transport and provide a draft convention on it

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[47] E. Selving, supra note 13, p. A7.

[48] Ibid, p. A3.

because the existing draft conventions seemed not to be sufficient for multimodal transport. When the UN/IMCO recommendation was endorsed by the Economic and Social Council of the UN (ECOSOC) the whole matter of multimodal transport was entrusted to UNCTAD. In order to prepare the draft convention the Board of UNCTAD which already had done some work on sea transport regulations decided to extend the activities into other modes of transport, too. To this end the Board of UNCTAD established the Intergovernmental Preparatory Group (IPG) of 68 countries in 1973. After six years, in March 1979, the IPG completed a draft convention on international multimodal transport of goods. "Within the IPG the subject has since been dealt with basically as a liner shipping matter although, in principle, the new convention applies to any multimodal contract."[49] On May 24, 1980, a diplomatic conference held in Geneva adopted the Convention on Multimodal Transport of Goods by consensus. [50]

6.3 Application of the multimodal transport Convention

Article 2 of the multimodal transport Convention makes the scope of application of the Convention clear. In accordance with Article 2,the subject of the Convention is contracts of carriage but it applies only to a special kind of carriage contract, i.e. to all contracts of international multimodal transport provided that either the place for taking in

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[49] Ibid, p. A7; see also p. A12: "The IPG considered the problems of multimodal transport mainly from the point of view of shipping. Although this has never been expressly recognised, the Convention must be read with this in mind, taking into account also that most participants had their main background in shipping law and policy."

[50] R. Vogel, Multimodal Transport : Impact on Developing Countries, 6, Ocean Yearbook, 1986, p.145; see also UNCTAD, The History of UNCTAD, pt. 2, chap. IV.C., UN Publication sales no. E.85.II.D.6.(New York 1985).

charge of the goods by the multimodal transport operator or the place for delivery is located in a Contracting State to the Convention. Article 2 provides :

> "The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if :
>
> a) the place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State; or
>
> b) the place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State."[51]

As seen, multimodal transport is required to be international since it must proceed between two different countries. The question now is : what does international multimodal transport mean from the view of the Convention? This along with other expressions have been defined in Article 1 of the Convention. So, to be more exact, it can be said that the Convention applies to every contract for international multimodal transport which can be included in the definitions mentioned in Article 1. By Article 1(3) of the Convention 'multimodal transport contract' means a contract whereby a multimodal transport operator (MTO) undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport. The MTO is, by Article 1(2), defined as a person who on his own behalf or through another person acting on his behalf enters into a multimodal transport contract as principal and assumes responsibility for the performance of the contract. International multimodal transport is defined by the Article 1(1) as follows :

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[51] The purpose of requiring one place and not both to be in Contracting State is to widen the scope of application of the Convention. See, Mankabady, supra note 4, p. 127.

" 'international multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country."

So, from the view of the Convention international multimodal transport should contain the following elements. Otherwise it is not regarded as international multimodal transport to which the Convention applies.

1) The transport must proceed at least by two different modes of carriage.

2) The transport must proceed between two different countries.

3) The transport must be performed on the basis of a multimodal transport contract, i.e. there must be a multimodal transport contract covering at least two of the modes to be used.

Thus, if our international transport is on the basis of a unimodal transport contract so that the operations of pick-up and delivery of the goods are carried out by a mode different from that of our transport in the performance of that unimodal transport contract, that kind of transport, although apparently in form of international multimodal transport, is not international multimodal transport as defined by Article 1(1) and, therefore, the Convention does not apply to such contract.[52] Moreover, the last sentence of Article 1(1) of the Convention states :

"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."

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[52] There is a general rule that where services provided can naturally be considered to be part of a unimodal service, the Convention shall not be applicable : see Selving, supra note 13, p. A4.

Also the Convention does not apply to the following situation which fall outside the Convention's scope of application :

1 - To a contract for multimodal transport carried out within one country.[53]

2 - To a contract for international multimodal transport carried out between two different countries of which none is a contracting party to the Convention.[54]

3 - To a gratuitous contract for international multimodal transport. [55]

4 - To a contract for international multimodal transport if the carrier does not assume responsibility for the performance of the contract since such a carrier is not a multimodal transport operator as defined in Article 1(2) and therefore such international multimdal transport is not international multimodal transport as defined in Article 1(1). For example, a shipping line issuing a through bill of lading or combined transport document disclaiming liability for the on-carriage is not a multimodal transport operator as defined in Article 1(2).[56]

6.3:1 Application of the Convention only to relationship of the multimodal transport operator (MTO) and the consignor

The multimodal transport Convention applies only to the relationship between the MTO and the consignor, i.e. the parties to a multimodal transport contract.[57] It does not, therefore, apply to the relationship between the MTO and the sub-carrier employed by him

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[53] Article 1(1) and 2 of the Convention.

[54] Article 2 of the Convention.

[55] Article 1(3) of the Convention.

[56] Article 1(2) and 1(1) of the Convention.

[57] E. Selving, supra note 13, p. A4; W. Driscoll, supra note 15, p. 210; A. Diamond, supra chapter 2 note 14, p. C8.

under a separate contract in order to perform a particular step of the multimodal transport. Nor does it apply to the relationship between the consignor and the sub-carriers employed by the MTO.[58] These relationships are governed either by international convention or by national law, whichever applicable to the contract entered into between the MTO and the sub-carrier.[59]

6.3:2 Mandatory application of the Convention

The application of the Convention to multimodal transport contracts is mandatory. This means no term or stipulation of the multimodal transport contract can contract out or derogate from the Convention's provisions particularly if it is to the detriment of the shipper. This is a principle stated in Article 3(1) of the Convention. Article 3(1) provides:

> "When a multimodal transport contract has been concluded which according to Article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract."

A term or condition which contracts out or derogates from the Convention's provisions is null and void. This invalidity is just for such term or condition and not for the contract as a whole. Article 28(1) of the Convention provides :

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[58] E. Selving, supra note 13, pp. A16-17.

[59] E. Selving, supra note 13, p. A16; W. Driscoll, supra note 15, p. 210. See Article 16 of the Convention.

"Any stipulations in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part....."

However, there are some exceptions to the principle of mandatory application of the Convention. For example, if a term of contract increases the liability of the MTO under the Convention, such a term, although derogates from Article 28(1), is valid provided that it is with the agreement of the consignor. Article 28(2) provides :

"Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention".

But if a term of a contract decreases the liability of the MTO under the Convention, i.e. if the term is to the detriment of the consignor, it is null and void even if is with the agreement of the consignor because it derogates downwardly from the MTO's liability provisions of the Convention. This is because the Convention, in order to prohibit such terms, went further from Article 28(1) and (2) and provided other mandatory provisions in Article 28(3) and (4) that the multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of the Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee; and if the claimant has incurred a loss as a result of the lack of such statement in the multimodal transport document, the MTO must pay compensation to him. Article 28(3) and (4) provide :

(3) "The multimodal transport document shall contain a statement that the international

multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee."

(4) "Where the Claimant in respect of the goods has incurred a loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted."

It should be noted that at the time of negotiations on the multimodal transport Convention some countries[60] were of the view that the multimodal transport Convention should have had optional and not mandatory application as it was optional regarding choosing the type of transport so that the application of ICC Rules and other standard conditions for multimodal transport which were being used could be continued and in the meantime there would be an opportunity for the Convention, which was a new and untried regime, to be experimented with. The view was not accepted and the Convention is now of mandatory application firstly because the major negotiating Groups[61] on the multimodal transport Convention in UNCTAD favoured mandatory application of the

[60] Western countries such as U.S.A. : see E. Selving, supra note 13, p. A18; W. Driscoll, supra note 15, p. 240.

[61] The Groups were : 1) the Group of 77 (Developing Countries), 2) Group D (Socialist Bloc and the People's Republic of China(PRC)), and Group B (Developed Countries). All Group of 77 and D and even some State in Group B favoured the mandatory character of the Convention.

Convention.[62] Secondly, Article 3 of the Convention made it expressly clear that the application of the Convention to multimodal transport contracts is mandatory. Thirdly, Article 3(2) which provides : "Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport" does not imply the optional application of the Convention but it states that the consignor has the option[63] to determine the kind of transport, i.e. multimodal transport or unimodal transports. In fact Article 3(2) reminds the parties of their right and the option of choosing between multimodal and unimodal transport. In other words, Article 3(2) is intended to remined parties that if they do not want to be involved in the mandatory character of the multimodal transport Convention, then they can, instead of multimodal transport, choose segmented transport and enter into several unimodal transport contracts (one contract for each mode of transport) to which the Convention does not apply but the relevant unimodal convention applies to each mode of transport. Thus, once the parties choose the type of transport and enter into a contract for the transportation of goods, whether multimodal or unimodal, their option has, in fact, been exercised. If they enter into a multimodal transport contract, then the Convention will apply to it mandatorily.

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[62] See, UNCTAD Report of the United Nations Conference on International Multimodal Transport on its Resumed Session, U.N. Doc. TD/MT/CONF/16/Add.1(1980).

[63] Although Article 3(2) does not expressly say about the carrier's right of choosing between the multimodal transport and segmented transport, it is also the right of the carrier to decide between multimodal transport and segmented transport unless the national law regulation provides otherwise, (see E. Selving, supra note 13, p. A19). So if the carrier acts as a common carrier who does only with unimodal transport services, he has the right not to accept the consignor's demand for a multimodal transport contract. But if he does with multimodal transport services as well as unimodal transport services he does not have the right of choosing between multimodal and unimodal transport but has the duty to accept whatever the consignor might prefer. See, UNCTAD supra note 1, p. 31.

Finally, if it is said that the Convention is not mandatory but optional, it means that Articles 3(1) and 28 of the Convention are meaningless and should be deleted.

In brief, it can be said that the multimodal transport Convention is mandatory regarding its application to an international multimodal transport contract but it is optional regarding choice of the mode of transport.[64]

6.3:3 The Problem of conflict between the multimodal transport Convention and the existing unimodal transport conventions

With the coming into force of the multimodal transport Convention one important problem which may arise is that of conflict between the Convention and the existing unimodal conventions - a problem which would not have been arisen if the Convention had accepted the network liability system.[65] This problem arises if the MTO's liability for localized loss or damage is also governed by the relevant unimodal convention.[66] In fact the conflict problem results from liability regime of the Convention and that of the unimodal convention which differ from each other.

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[64] R. Vogel, supra note 50, p. 146.

[65] A. Diamond, supra chapter 2 note 14, pp. C8, C18 & C21; the view of delegations favouring the network liability system : see Prof. D.C. Jackson, Conflict of conventions, papers of a one-day Seminar organized by the Southampton University's Faculty of Law on Sept 12th, 1980, pp. G1 & G6.

[66] It was argued, in particular by the United Kingdom delegation, that the conventions governing sea, air, road and rail all applied to multimodal transactions and that there was, therefore, conflict : see A. Diamond, supra chapter 2 note 14, p. C8; D.C. Jackson, supra, note 65, p. G3.

The conflict problem is particularly evident if we accept that the multimodal transport contract can be split up into several unimodal transport contracts since each unimodal transport contract will be for one segment of the multimodal transport to which both the multimodal transport Convention and a unimodal convention relevant to that segment apply. But, as already reasoned, the multimodal transport contract is a single contract concluded between the consignor and the MTO as a principal taking responsibility for the performance of the multimodal transport contract. It has a nature completely different from that of unimodal transport contracts since the parties have reached an agreement on that contract (multimodal transport contract) as a whole and not on any particular unimodal contract. If it is, by construction, split up into several unimodal transport contracts, it is very difficult or impossible and unjustifiable to say that the agreement of the original parties is still available on the split contracts because, as stated, the parties had reached their agreement on a single contract of multimodal transport and nothing else. Thus, it is illogical that a multimodal transport contract, which should be regarded as a whole and is, in fact, a new type of carriage contract, can be split up into several unimodal contracts.

It seems that even if it is accepted that the multimodal transport contract is a new and distinct type of carriage contract which can not be split up into several unimodal contracts (as has been accepted so far as the prevailing view[67] and one I believe to be

[67] E. Selving, supra note 13, p. A17. This view has been mentioned in a number of background papers to the Convention such as 1) the ICAO document 9096-LC/171 Documents pp. 96-106 which is a Memorandum dealing with the Warsaw Convention submitted in 1974 to the Legal Committee of ICAO by the Norwegian Delegation; 2) Professor Jackson's paper submitted to the IPG in UNCTAD document TD/B/AC/15/53 : see Ighile, infra note 68, p. 65. Also this view was expressed in a report prepared at the request of the UNCTAD Secretariat for submission to the IPG and subsequently endorsed by a board

right) still the conflict problem will be with us.[68] But the problem arises in connection with the sea and air unimodal conventions rather than with the rail and road conventions (CIM and CMR) because firstly, the CIM and CMR conventions apply, as argued, neither to the multimodal transport contract nor to, respectively, rail or road leg of the multimodal transport performed under a multimodal transport contract; secondly, the Convention in Article 30(4) expressly provides that the carriage of the goods under Article 2 of the CMR or CIM is not such multimodal transport which is governed by the Convention, i.e. if there is a combined carriage involving a road or rail leg, it is governed either by the CMR or CIM, or by the Convention and there would be no conflict. However, some may conclude from Article 30(4) of the Convention that there would have been conflict between the Convention and the CIM and CMR if there had not been Article 30(4). Article 30(4) is intended to prevent the conflict. The answer to this seems to be that Article 30(4) is not intended to prevent the conflict, since basically there is not, as argued, any such conflict; but it is intended to prevent any interpretation which poses such a conflict. Anyway, even if it is accepted that CMR or CIM is, at the present time, applicable to, respectively, the road or rail leg of the multimodal transport carried under a multimodal transport contract,[69] there would still be almost no conflict problem with the coming into force of the Multimodal Convention since whether the relevant unimodal

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majority of the IPG and the diplomatic conference : see Selving, ibid.

[68] The Diplomatic Conference on multimodal transport Convention recognised the possibility of conflict between the Multimodal Convention and the unimodal conventions and tried to solve the problem by some provisions in the Convention: see M.O. Ighile, The Concept of liability under the Multimodal Transport of Goods Convention, 1984, Liverpool Polytechnic, Department of Maritime Studies, p. 78.

[69] See supra note 66.

convention (CIM or CMR) applies or the Multimodal Convention to determine the MTO's liability for the localized loss or damage, the result would be to a large extent the same[70] because the Multimodal Convention has incorporated the unimodal conventions including the CIM and CMR in Article 19 to determine such liability of the MTO.

In connection with the air convention (Warsaw Convention), the conflict problem arises because both the Multimodal Convention and the Warsaw Convention apply to air leg of the multimodal transport involving an air leg. However, the problem seems to be manifested only regarding the lost or damaged packages or other shipping units weighing less than 54.2 kg., e.g. 40 kg., because the MTO's liability limit for such package under the Warsaw Convention is 680 S.D.Rs while under the Multimodal Convention, Article 18(1), is 920 S.D.Rs. But in case of lost or damaged packages or other shipping units weighing more than 54.2 kg. or of goods carried not in packages or other shipping units, i.e. when the limitation unit is kg., there would be no conflict because the bases of liability under the two conventions is the same - the carrier's fault or negligence - and under Article 19 of the Multimodal Convention, it is the Warsaw Convention's liability limit which, because of its higher limit than the Multimodal Convention, applies to determine the MTO's liability. In other words, the result of the liability limitation amount will be the same under the two conventions.

In connection with the sea conventions - the Hague Rules and the Hague-Visby

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[70] Only if the limitation amount under the CIM and CMR is less than that under the Convention, there may be a conflict, and that is when the goods are carried in packages or other shipping units and each weighs less than 55.2 kg. when there is rail loss or damage, and less than 110.2 kg. when there is road loss or damage.

Rules - the conflict problem becomes more complicated since apart from the limitation amount the bases of liability under the sea conventions and the Multimodal Convention are not the same. A MTO who is liable under the Multimodal Convention for sea loss or damage, may not be liable under the Hague or Hague-Visby Rules. In addition the MTO's liability limit under the Hague-Visby Rules is always lower than that under the Multimodal Convention and Article 19 of the Convention has, therefore, no effect to remove or reduce this conflict between the limitation amount. Regarding the Hague Rules the conflict may even become harder since the container-package problem, which is solved under the Multimodal Convention, exists under the Hague Rules.

The conflict may also arise if the Hamburg Rules come into force because Article 1(6) of the Hamburg Rules, which provides: "a contract which involves carriage by sea and also carriage by some other meams is deemed to be a contract of carriage by sea for the purpose of this convention only in so far as it relates to the carriage by sea", is so broad that it may be interpreted to include multimodal transport contracts. Accordingly if the relevant states are parties to both Conventions, then both Conventions will apply as between the goods owner and the MTO to regulate the sea portion of the carriage.[71] However, since the bases of liability under the Multimodal Convention and the Hamburg Rules are the same, the result of the applying the two conventions will be, except as to the limitation amount, the same.

[71] A. Diamond, supra chap. 2, note 14, p. C8.

6.3:3.1 The Convention's solution to remove the conflict

In order to avoid any conflict with the unimodal transport conventions which may cause a great deal of litigation, and to meet to some extent the views of the delegations pressing the conflict issue, the Convention adopted the following provisions:

1 - The provision of paragraph 1 of Article 1 has the effect that the operations of pick-up and delivery of goods carried out under and in the performance of a unimodal transport contract would not be considered as international multimodal transport as defined in the Convention. This was intended particularly to exclude air carriers operations, usually coupled with pick-up and delivery operations done by a mode other than air, from being multimodal transport.

2 - As stated, regarding the MTO's liability for non-localized loss or damage Article 18(3) has made a distinction between when the multimodal transport does not involve a sea or inland waterways leg and when it does. It has determined a higher limit when no sea or inland waterways leg is included in the multimodal transport. This was intended to remove or reduce the probable conflict between the Multimodal Convention's limit and that of the existing unimodal conventions.

3 - Article 19 of the convention has employed the applicable unimodal conventions and mandatory national laws to determine the MTO's liability for localized loss or damage. Although this would prevent the conflict problem in some cases, i.e. when the limit under the unimodal convention is higher than that under the

Convention, the problem may appear in some other cases, i.e. when the limit under the unimodal convention is lower than that under the Convention.

4 - Article 30(4) attempts to show that carriage of goods under Article 2 of the 1956 CMR and Article 2 of the 1970 CIM are not the same as the multimodal transport within the meaning of Article 1, paragraph 1, of the Convention. They should not be interpreted as the same so as to create a conflict between the CMR or CIM and the Convention. In fact Article 30(4) prevents any interpretation which causes the problem. It provides:

"Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for State Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods."

5 - It is said that Article 38 is intended to avoid any remaining conflict of conventions, and is an escape route for those who believe that there may be such a conflict. Article 38 provides:

"If, according to article 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both of these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof."

Consequently, this Article does not apply if the multimodal transport takes place between two states which are both parties to the Multimodal Transport Convetion.

However, in spite of the Convention' solutions the conflict problem may still, as we have seen, remain in some cases. It has been suggested that one way to avoid conflict is that the Multimodal Convention should have required that the modes of transport should not be stated in the multimodal transport document. The unimodal conventions would be applicable to contracts of carriage by a specific mode of transport while the Multimodal Convention would be applicable to contracts of carriage not specifying the modes of transport.[72] The idea is that emphasis in multimodal transport should be carrying the goods, without involving a number of contracting carriers whether linked together by forwarding agents or not, from the shipper's to the receiver's premises.[73]

6.4 Liability of the multimodal transport operator(MTO) for loss of or damage to goods under the Multimodal Transport Convention

The international multimodal transport Convention consists of seven parts. One of the most important parts of the Convention is part 3, i.e. 'Liability of the multimodal transport operator'. In this part some points are of a high degree of importance. Here we

[72] See Mankabady, supra, note 4, at p. 140. See also Ramberg, The Law of Carriage of Goods: Attempts at Harmonisation, European Transportation Law, 1974, at p. 34.

[73] See Ramberg, ibid at p. 34.

are going to consider them.

6.4:1 The system of liability under the Convention

An important point in multimodal transport is whether the loss of, or damage to,goods which occurs during the multimodal transport is localized[74] or non-localized.[75] If the place of loss or damage is known and can be attributed to a particular mode of the multimodal transport, it is localized otherwise it is non-localized loss or damage. The Convention's system of liability should, therefore, be a system to cover both localized and non-localized loss or damage.

The liability system which was established by the Convention is neither the uniform liability system, nor the network liability system.[76] It is called a "modified network liability system"[77] or sometimes "modified uniform liability system".[78] This was a compromise solution to reconcile those favouring the network system and those favouring the uniform system of liability for the Convention.

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[74] Often called 'known'.

[75] Often called 'unknown' or 'concealed'.

[76] These were two alternative solutions to the Convention's liability system problem in front of those who negotiated it.

[77] E. Selving, supra note 13, p. A14; W. Driscoll, supra note 15.

[78] R. Vogel, supra note 50, p. 146.

Under the uniform liability system the liability regime (the basis of liability and limits of liability) of the MTO whether the loss or damage is localized to a particular mode of transport or not is the same. In other words, the uniform system regulates the liability of the MTO uniformally throughout the entire multimodal transport regardless of the liability regimes governing different modes of transportation, whereas under the network liability system if the place of loss or damage is unknown the basis and limits of liability of the MTO cannot be determined by the network system but by the provisions of the multimodal transport convention. This is a problem with the network system. And if the loss or damage is localized to a particular stage of multimodal transport, the basis and limits of liability of the MTO will be the same as liability regime applicable to unimodal carriers of that particular mode of transport. for example, if damage is localized to the sea leg, then the current sea carriage convention - the Hague or Hague-Visby Rules - will be applicable to determine the basis and limits of liability of the MTO. In fact the network liability system is a safeguard preserving the various liability regimes established by the different unimodal transport conventions. This is why it is called 'network liability system'.[79] The network system has been used in the ICC Uniform Rules for a Combined Transport Document, and is used in current commercial practices.[80]

According to the liability system of the Convention - modified network liability

[79] E. Selving, supra note 13, p. A14.

[80] R. Vogel, supra note 50, p. 146.

system[81] - the basis of liability of the MTO is determined uniformally for the entire multimodal transport by the Convention whether there is localized or non-localized loss or damage.[82] So, in the case of localized loss or damage, the MTO's basis of liability, unlike the network liability system, has nothing to do with liability regimes concerning with the different unimodal transport conventions. But regarding the limits of liability of the MTO the network principle is applicable[83], that is, the Convention is confined to determining the MTO's liability limits in cases of non-localized loss or damage, and in cases of localized loss or damage the MTO's liability limits will be the same as liability limits mentioned in the relevant unimodal transport convention or mandatory national law. However, if in case of localized loss or damage the MTO's liability limit under the relevant unimodal transport convention or mandatory national law is lower than his liability limit under Article 18 of the Convention, then it will be the Convention which applies to determine the MTO's liability limit.[84] In brief it can be said that the network liability system is, only in case of localized loss or damage, applied if the MTO's liability limit under the relevant law is highrt than that under the Convention. Otherwise, the

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[81] It seems that the wordings of 'modified uniform liability system' is much more suitable than 'modified network liability system' to describe the Convention's system because the content of the system is nearer to the uniform liability system than the network liability system. Upon the Convention system the basis of liability whether in localized or non-localized loss is uniform, and even the limit of liability in localized and non- localized loss is uniform unless in case of localized loss or damage which the limit of liability of the relevant liability regime is higher than that of the Convention.

[82] Article 16 of the Convention.

[83] Ibid, Article 19.

[84] Ibid.

Convention's limit applies even to localized loss or damage.

It can, therefore, be concluded that when the loss or damage is non-localized and when it is localized but the Convention's liability limit is higher than that of applicable law relevant to the mode of carriage at which the loss or damage occurred, the MTO's liability limit is the same, i.e. according to Article 18 of the Convention. In other words, under the Convention's liability system there is the possibility of uniform liability limit for the entire multimodal transport whether there is localized or non-localized loss or damage. Therefore, under the Convention liability system the basis and limit of liability whether in localized or non-localized loss or damage is the same and uniform unless in case of localized loss or damage which liability limit of the relevant unimodal transport convention or mandatory national law is higher than that of the Convention. So, it seems better to call the Convention's liability system as a 'modified uniform liability system'- not a 'modified network liability system'- because it gives a narrow way to network liability system in the case of localized loss or damage, i.e. it gives a way to the liability limit of the relevant law with a higher limit than that of the Convention.[85]

It is worth being noted that the developing countries rejected the network liability system because it would preserve the Hague-Visby system.[86] They favoured the modified network liability system. The pro-network liability system countries accepted the modified network liability system because the Convention guaranteed that the unimodal conventions

[85] W. Driscoll, supra note 15, p. 236 F.N. 228.

[86] E. Selving, supra note 13, p. A16.

would apply whenever by their own terms they would apply.[87] An example of this is Article 30(4) of the Convention under which the Convention has accepted that carriage of goods under the CMR and CIM conventions shall not be considered multimodal carriage under the Convention to the extent that State Parties are bound by those conventions.

6.4:2 The basis of liability under the Convention

As stated, the Convention provides a uniform basis of liability. In case of loss of, damage to, or delay in delivery of the goods, whether localized or non-localized, the basis of liability is that the MTO is presumed to be at fault or negligence. in other words, the Convention system is based on the principle of presumed fault or negligence of the MTO. However, this presumption may be rebutted by the MTO, i.e. the burden of proof that he has not been at fault rests on him. To be more precise, the Convention's basis of liability is a 'rebuttable presumption of the MTO's fault or negligence'.

Therefore, if the occurrence causing the loss or damage to the goods happens while the MTO is in charge of the goods, he is liable for - no matter that it is localized or non-localized loss or damage - unless he proves that:

1 - He, his servant or agent or any other person referred to in article 15 have not been at fault in causing the loss or damage, i.e. he proves that they all took all measures

[87] W. Driscoll, supra note 15, p. 233.

that could reasonably be required to avoid the occurrence and its consequences;[88]

or

2 - The consignor or consignee caused the loss or damage.[89]

This principle of presumed fault or negligence is the same principle which had been also employed by the Hamburg Rules, Article 5, and by the 1929 Warsaw Convention. As already stated, the Hamburg Rules, including its principle of the presumed fault or negligence of the carrier, was used as a model for the multimodal transport Convention[90]. Article 16 of the Convention, which contains the main rule on liability, creates the uniform basis of liability.

In fact the uniform basis of liability in the Convention's system is of importance (as against the network basis of liability) when the loss or damage occurs during the sea leg to which the Hague-Visby Rules apply because the basis of liability in the Hague-Visby Rules[91] is, unlike the Hamburg Rules, Warsaw Convention, Rail and Road Conventions,[92] different from that under the Convention. Otherwise, if the basis of

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[88] A. Diamond, supra chap. 2, note 14, p. C19.

[89] Articles 16 & 17 of the Convention.

[90] E. Selving, supra note 13, p. A13.

[91] Under the H-V-Rs. there are many exceptions of liability including no liability for damage caused by nautical fault or fire. Also the liability limit is very low.

[92] E. Selving, supra note 13, p. A16.

liability under the Hague-Visby Rules, which govern to most sea carriage today, was the same as that of the Convention, as it is in the Hamburg Rules, Warsaw Convention, Rail and Road Conventions, the result of the uniform basis of liability and the network basis of liability would become the same and, therefore, the uniform basis of liability would not be of such importance. So, if a carrier is not held, under the Hague-Visby Rules' basis of liability, liable for loss or damage occurred at sea, he may be held liable for when he acts as a MTO and such loss or damage occurs at the sea leg of the multimodal transport to which the Convention's basis of liability indicated in Article 16 governs. Article 16(1) of the Convention provides:

> "The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences."[93]

Articles 14 and 15 will be considered later on. Here the word 'reasonably' needs paying attention to.[94] The question is: what measures could reasonably be required to avoid the occurrence and its consequences? The answer is, the standard of care which could be expected a diligent MTO in order to avoid the loss.[95] In other words, regard

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[93] This Article is similar to Article 5 of the Hamburg Rules and Article 18(1) of the Warsaw Convention.

[94] More explanations regarding the word 'reasonably' have come in previous chapters.See, for example, chapter 3, p. of this thesis.

[95] UNCTAD Secretariat, supra note 1, p. 39.

must be given to the course which would be pursued by a prudent operator in the circumstances of the case.[96]

It is said that Article 16 introduces a two-fold test to the liability regime. First, one has to ask "Did the occurrence causing the loss or damage occur while the goods were in the operator's charge" ? If it did, then the second wing of the test is that the operator is liable unless he can prove that he and those for whom he is responsible took all measures that could reasonably be required to avoid the occurrence and its consequences.[97]

Further, the Convention's preamble also makes it clear that the MTO's liability should be based on the principle of presumed fault or neglect.[98]

6.4:3 The period of responsibility of the MTO

Regarding the MTO's period of responsibility, the principle accepted by the Convention is that the MTO is responsible during the whole period the goods are in his charge[99].

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[96] S. Mankabady, The Hamburg Rules on carriage of goods by sea, Layden/Boston, 1978, p. 55.

[97] A. Diamond, supra chap. 2 note 14, p. C19.

[98] Paragraph (d) of the second part of the preamble of the Convention.

[99] Article 14 of the Convention which is similar to Article 4 of the Hamburg Rules but the words 'multimodal transport operator' have come instead of the word 'carrier', and the

This period of responsibility begins from the time the MTO takes the goods into his charge until the time of their delivery, i.e. throughout the multimodal transport of the goods whether the MTO himself performs the whole various modes of the transport or just performs part of the transport and sub-contracts with unimodal carriers the rest, or sub-contracts with unimodal carriers to do the whole transort. This period was accepted by all the negotiating groups on the Convention[100] and was reflected in Article 14 of the Convention. Article 14(1) provides :

> "The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of delivery."

Paragraph 1 of Article 14 seems to be clear enough. However, there might be some practical difficulties in determining the period of responsibility since the goods are not often delivered by the consignor himself to the MTO but by, e.g. his agent or servant, and also the goods are often delivered by the MTO to a person other than the consignee. Therefore, the important questions are : from whom should the MTO take the goods into his charge ? To whom should he deliver the goods ?

In order to determine the period during which the MTO is in charge of, and responsible for, the goods, the above questions need to be answered. The determination of this period is of a high degree of importance because the liability of the MTO for loss of, damage to or delay in delivery of the goods depends, as will be seen, on the period

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words 'at the port of loading, during the carriage and at the port of discharge' have been omitted in the Convention which make the period of liability wider.

[100] W. Driscoll, supra note 15, p. 230.

of responsibility of the MTO, i.e. if the occurrence causing the loss, damage or delay happens between the time the goods are taken in the MTO's charge and the time they are delivered (during the period of responsibility) the MTO is liable for - no matter in which mode of the transport the loss occurs; otherwise if the loss, damage or delay occurs while the goods are in the custody of a person acting on behalf of the consignor or consignee, or in the custody of an authority to whom the goods must legally be handed over by the consignor for transport at the place of taking the goods in charge or by the MTO for delivery at the place of delivery, the MTO is not liable for because it has happened outside the period of his responsibility. The above points are covered by Article 14(2) of the Convention which provides :

> "For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods :
>
> (a) from the time he has taken over the goods from :
>
> (i) the consignor or a person acting on his behalf ; or
>
> (ii) an authority or other third party to whom, pursuant to law or 8regulations applicable at the place of taking in charge, the goods must be handed over for transport.
>
> (b) until the time he has delivered the goods :
>
> (i) by handing over the goods to the consignee; or
>
> (ii) in cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery ; or
>
> (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over."

An important point is that there is no need that the MTO himself takes over or

delivers the goods personally. It suffices that the MTO takes over or delivers the goods through his servants or agents or any other person whose services he makes use of for the performance of the multimodal transport contract because the MTO's acts in Article 14(1)&(2) include acts of those persons.[101] Similarly it is possible that the MTO takes over the goods from the consignor's servant or agent, and deliver them to the consignee's servant or agent.[102] Article 14(3) of the Convention provides :

> "In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor and consignee shall include their servants or agents."

So if, for example, the MTO takes over the goods from the consignor's servant or agent, he will be in charge of the goods and his period of responsibility starts. Similarly if the MTO delivers the goods to a person appointed by the consignee in the multimodal transport contract by placing them in a certain location, he will not be in charge of the goods any more and his period of responsibility ends.[103]

It is worth noting that during that period only the MTO is responsible for the goods against the consignor because it is only the consignor and the MTO who are the parties to the multimodal transport contract, and, as stated, the Convention determines

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[101] Article 14(3) of the Convention; see W. Driscoll, supra note 15, p. 230.

[102] UNCTAD Secretariat, supra note 1, p. 38.

[103] Ibid, p. 37.

only the relationship between the MTO and the consignor. In fact the Convention simplifies the situation, particularly for the shipper, because he, instead of dealing with many sub-carriers, with their different period of responsibility, deals only with the MTO with one period of responsibility.

6.4:4 For whose acts or omissions the MTO is liable

Whether the MTO is liable just for his own acts or omissions, or for somebody else's acts or omissions as well, is a question which must now be addressed.

As stated, reference to the multimodal transport operator in paragraphs 1 and 2 of Article 14 of the Convention includes his servants or agents or any other person whose services he makes use of for the performance of the multimodal transport contract.[104] This means that the acts or omissions of the MTO's servents or agents or of any such person referred to in Article 14(3) are included in, and imputed to, the MTO. Therefore, it seems to be logical for the MTO to be liable for the acts or omission of his own servants or agents or of any person performing under the multimodal transport contract.[105] This is why Article 15 of the Convention makes the multimodal transport

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[104] Article 14(3) of the Convention.

[105] Cf. Article IV r. 5(e) of the H-V-Rs. which refers to acts or omission of the carrier. The carrier is not, therefore, deprived of the liability-limiting provision of Article IV r. (5) because of the reckless acts or omission of his agent or servant. The court in The European Enterprise, [1989] 2 Ll. Rep. p. 185 held that:"the general view was that art. IV r. 5(e) referred to the carrier himself and did not include his servants or agents except in so far as employees were to be regarded as constituting part of the alter ago of the carrier and there was nothing to induce a change in that general view. ...and there were commercial arguments in favour of a restrictive meaning of 'carrier'[referred to in art. IV r. 5(e)].

operator liable for his servant's or agent's acts or omissions or for the acts or omissions of any such person referred to in Article 14(3), but his liability is subject to the condition that the servents or agents have acted within the scope of their employment,[106] or any such person referred to in Article 14(3) has acted in the performance of the multimodal transport contract. Article 15 of the Convention provides :

> " ...., the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own."

It is suggested that this Article is an improvement on the Hamburg Rules text,[107] because it attempts to give an answer to the question" for whose fault or negligence is the operator liable ?" which was left unanswered in the Hamburg Rules.

Thus, under the Convention the MTO is not only liable for his own acts and omissions in the performance of a multimodal transport contract, but also he may be liable for the acts or omissions of a person other than himself, i.e. his servants, agents or

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[106] See, for example, Rose v. Plenty, (1976)1 W.L.R. p. 141, in which Lord Denning MR said, at p. 144 :"If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act." It is argued that the words 'acting within the scope of their employment or of the contract' have considerably cut down the impact of Articles 14 and 16 as it reduces the circumstances in which shippers may look to the MTO in case of loss or damage: see Booker, The effect of the Multimodal Convention on international shippers, papers on one day Seminar on the Multimodal Transport Convention held by Southampton University, Faculty of Law on 12, Sep., 1980, p. E3.

[107] A. Diamond, supra chap. 2, note 14, p. C20.

any such person referred to in Article 15. His liability for these persons' acts or omissions is, however, subjected to Article 21 relating to loss of the right to limit liability which will be discussed later on.

6.4:5 The limitation of liability of the MTO under the Convention

All modern international carriage conventions provide, except in certain situations, a limitation on the carrier's liability. This is, firstly, because the carrier becomes enable to know his liability for cargo loss or damage and upon which obtains an insurance policy; and, secondly, the underlying theory is that the carrier, who has no exact knowledge of the value of the cargo he receives, should not be held liable in excess of normal value. If the cargo owner wants a higher limit he must make a declaration of value and, in most cases, pay an extra amount in addition to the freight.[108]

With the acceptance of the modified network liability system, under which the MTO's liability limitation was not generally uniform for localized and non-localized loss or damage, the Convention referred the MTO's liability limit for localized loss or damage to the international convention applicable to the particular mode of transport at which the loss or damage occurred ,and determined a liability limit for the MTO whenever the loss or damage is non-localized and cannot be attributed to a particular mode of the multimodal transport. However, the Convention further provided that if in the case of localized loss or damage the MTO's liability limit under the network system of liability

[108] See Ramburg, The Law of Carriage of Goods : Attempts at Harmonisation, European Transport Law (ETL), 1974, p. 13.

is lower than that under the Convention, then the Convention's liability limit, which is used for non-localized loss or damage, prevails. In a case like this we will have, as stated, a system of uniform liability under the Convention, because the MTO's liability limit whether for localized or non-localized loss or damage becomes the same.

6.4:5:1 The MTO's liability limit in case of non-localized loss or damage, or of localized loss or damage for which his liability limit under the network liability system is lower than that under the Convention

When the point in time at which the loss of or damage to the goods occurred is not known, and the MTO is liable for according to Article 16 of the Convention, i.e. it is proved that the loss or damage occurred during his period of responsibility, and he fails to prove that the loss or damage was not as the result of his failour to take all measures that could reasonably be required to avoid the occurrence causing the loss or damage, and he is not deprived from the right to limit liability, his liability is limited to a certain amount. It is determined in accodance with Article 18 of the Convention irrespective of the stage at which the loss occurred. Accordingly, the calculation of the MTO's liability limitation amount depends on whether or not the multimodal transport includes a sea, or inland waterways, leg. In fact, Article 18 contains a two-tier method of calculation for determining the amount of the MTO's liability limitation which works either when the multimodal transport includes a sea or inland waterways leg of transport, or when it does not include such leg of transport.

(1) - The MTO's liability limit in case of non-localized loss or damage if a sea leg of transport is included in the multimodal transport

In this situation the Convention did not choose an average between the limitation amounts used in the various international unimodal transport conventions, but chose to limit it to the amount applicable under the sea transport convention, namely, the Hamburg Rules. The reason for this choice was that when a sea leg is included in the multimodal transport it is almost always the major leg.[109] Therefore, the MTO's liability limit is, like the Hamburg Rules,[110] based on either "per package or other shipping unit" or "the gross weight" of the goods lost or damaged, whichever is the higher. But the limitation amount under the Convention is about 10 percent higher than that under the Hamburg Rules. This dual formulation is provided in Article 18(1) of the Convention upon which the MTO's liability does not exceed 920 units of account[111] per package or other shipping unit, or 2.75 units of account[112] per kilogramme of gross weight of the goods lost or damaged. Of these the higher one will constitute the liability of the MTO and the claimant may choose whatever is most favourable for him. The reasons for choosing the 'per package or other shipping unit' as a base for the calculation of the MTO's liability limit were that it was much more favourable than 'per kilo' base for the consignor

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[109] W. Driscoll, supra note 15, p. 237.

[110] Article 6(1) of the Hamburg Rules.

[111] Under the Hamburg Rules it is 835 units of account.

[112] Under the Hamburg Rules it is 2.50 units of account.

whenever there is light weight cargo, and that it applied traditionally to carriage of goods by sea.[113] So, for packages weighing less than 54 kilos, it is higher than both the Warsaw Convention's and the CIM Convention's limit, and for packages under 110 kilos it is higher than the CMR Convention's limit. Article 18(1) provides:

> "When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to Article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher."

When the MTO's liability is calculated upon the per kilo limitation, a question which may arise is whether when just part of a package is lost or damaged, the MTO's liability limit should be calculated on the basis of the weight of such lost or damaged part or of the weight of the whole package of which the part is lost or damaged ? It seems that the amount should be computed on the weight of the part lost or damaged because Article 18(1) implies that the base of such calculation is the gross weight of the goods lost or damaged and in a case like this only part of the package is lost or damaged rather than the whole package. However, if the lost or damaged part is regarded as a very important part of the package without which the package would be useless, it might be reasonable to take the weight of the whole package into account in calculating the per kilo limitation.[114]

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[113] UNCTAD Secretariat, supra note 1, p. 41.

[114] Ibid, p. 42; see p. 114 of this thesis along with relevant cases mentioned there.

The dual formulation of 'per package' and 'per kilogramme' would cause the same problems in relation to container-package as it caused it in the Hague-Rules. In order to resolve this problem the Convention followed the Hague-Visby and Hamburg Rules. It provides that if the packages or other shipping units inside the container or similar article of transport are enumerated in the multimodal transport document, then those numbers are deemed to be the number of packages or other shipping units; otherwise, if they are not enumerated, the goods inside the article of transport are deemed to be one shipping unit for the purpose of the calculation of the higher limitation amount.[115]

So, in order to determine the higher amount in the case of goods carried in a container, it is essential to see whether or not the packages or other shipping units inside the container have been enumerated in the multimodal trasport document.

The Convention also provided that the article of transport itself is considered as one shipping unit in case of loss or damage to it if it is not owned or supplied by the MTO.[116]

(2) - The MTO's liability limit in case of non-localised loss or damage if no sea leg of transport is included in the multimodal transport

In this case, unlike the situation when a sea leg is involved, the Convention chose the amount applicable under the road transport convention (CMR). Here, the MTO's limit

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[115] Article 18(2)(a) of the Convention. See the discussion regarding the container-package problem at pp. 85 etc. of this thesis.

[116] Article 18(2)(b) of the Convention.

is based only on the gross weight of the goods lost or damaged.

So, whenever no sea leg is involved in the multimodal transport, as evidenced by the multimodal transport contract, the liability limit provided for in Article 18(1) and (2) will not apply but Article 18(3) based on a single formulation for the calculation of the MTO's liability limit, i.e. per kilogramme limitation with a higher amount , that is, up to 8.33 units of account per kilogramme of gross weight of the goods lost or damaged. This single formulation and amount was proposed by Group B which was a negotiating group on the Convention.[117] In fact paragraph 3 of Article 18 removes or reduces the possibility of a conflict between the Convention and the unimodal transport conventions because if paragraph 3 had been omitted, as suggested and favoured by the negotiating groups of 77, D and the PRC, there would have been a conflict between the Convention's liability limit and the liability limit of the international air, land and road transport conventions. Article 18(3) provides:

> "Notwithstanding the provisions of paragraph 1 and 2 of this Article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogramme of gross weight of goods lost or damaged."

Article 18(3) may produce a higher limit than Article 18(1) for very heavey packages (packages weighing more than 110.5 kg.), but normally (for packages weighing less than 110.5 kg.) produces a lower limit than Article 18(1). Thus when our transport

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[117] W. Driscoll, supra note 15, p. 237, F.N. 231.

involves a sea leg, the limitation amount may be higher than when it does not. So, under the Convention we can no longer say the tradition that lower recoveries are made for transport by sea than for other modes of carriage.[118]

In brief, if there is non-localized loss or damage in multimodal transport involving a sea leg, Article 18(1), and if such loss or damage is in multimodal transport involving no sea leg, Article 18(3) of the Convention applies to calculate the amount of the MTO's liability. It should be noted that this kind of calculation of the amount of the MTO's liability limit also applies whenever the loss or damage can be localized to a particular mode of transport but the MTO's liability limit under the modal convention or mandatory national law relevant to that mode is lower than that under the Convention.[119] So if, for example, in multimodal transport involving a sea leg the loss or damage occurs during the sea transport, the MTO's liability is to determined according to the Hague-Visby Rules' limits, but since his liability under the Hague-Visby Rules is lower than that under the Convention, it is the Convention' liability limit of Article 18 which determines his liability limit for the localized loss or damage. In other words, Article 19 is not likely to be relevant for determining the MTO's liability in case of damage or loss localized to the sea leg.[120]

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[118] A. Diamond, supra chap 2, note 14, p. C23.

[119] Article 19 of the Convention.

[120] E. Selving, supra note 13, p. A15.

6.4:5:2 The MTO's liability limit in case of localized loss or damage

If loss or damage can be localized and attributed to a particular mode of multimodal transport and the MTO is, in accordance with Article 16, liable, the provisions of Article 18 are replaced by the provisions of the relevant unimodal transport convention, or mandatory national law,[121] applicable to that mode of transport, if the limits of liability under it are higher than those provided in Article 18.[122] This is because of the modified network liability system upon which Article 19 has been based. Article 19 provides:

> "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 would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law."

The reason for these provisions is that if the Convention accepted a lower limit than that under the international unimodal transport conventions, the consignor or consignee would have the possibility of recovering up to the higher limit of liability applicable to the sub-contractor by a direct action against him. Article 19 places the claimant in the same position as he would have been if he had concluded the contract

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[121] Mandatory national law was included in Article 19 mainly because of the persistence of the U.S.A. : see Driscoll, supra note 15, p. 236.

[122] E. Selving, supra note 13, p. A15; A. Dimond, supra Chap. 2 note 14, pp. C14 & C24.

directly with a unimodal carrier.

It should be noted that if the loss or damage is localized to sea leg of the multimodal transport, and the Hague or Hague-Visby Rules are applicable to that leg, their limits are not used because they are even lower than the Hamburg limits which are some 10 percent lower than the Convention limits. The Convention limits are therefore applicable. This is why the liability of shipping lines for sea loss or damage of multimodal transport is greater than their liability for sea loss or damage of sea carriage.

It seems that Article 19 is of importance if loss or damage can be attributed to an air carriage leg governed by the Warsaw Convention, or a rail carriage leg to which the CIM convention applies, because these two are the only two unimodal transport conventions which provide a higher liability limit than the Convention. Also when there is a mandatory national law applicable to the localized loss or damage with a higher liability limit than the Convention, Article 19 is of importance.

In brief, in case of localized loss or damage, the MTO's liability limit is determined either by a unimodal transport convention or mandatory national law, or by the multimodal transport Convention, depending on which one is of the higher limit.

Nevertheless, regarding the interpretation of Article 19 there may be some difficulties. One may say that Article 19 should be interpreted in a manner which gives effect to its obvious purpose cleared from its literal wording, i.e. applicable international conventions or mandatory national laws, if are of a higher liability limit than the

Convention, are taken into account in order to remove the possibility of conflict between them and the Convention. Article 19 may also be interpreted that it is illogical to say that international conventions and mandatory national laws for unimodal transport of goods can be applicable to the multimodal transport contract because the multimodal transport contract, upon which the multimodal transport Convention is based, is naturally independent from unimodal transport contracts and cannot be, therefore, applied by unimodal convention or mandatory national law. It seems that the former interpretation should be right because with the acceptance of the latter one Article 19, which has in some circumstances followed the unimodal conventions liability limits (network limits of liability), becomes useless, [123] and as a result the Convention itself, which is based on the modified network liability system, will go under question, i.e. if the second interpretation is accepted, it will be illogical for the Convention to accept the 'network liability system' even its modified in any form.

6.4:6 Loss of the right to limit liability

As stated above, if the MTO is liable for loss of or damage to the goods, he will be entitled to limit his liability.[124] However, his right to limit liability may be lost under certain circumstances, i.e. if it is proved that the loss or damage were caused by the 'intentional or reckless'[125] act or omission of the MTO and with knowledge that such

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[123] UNCTAD Secretariat, supra note 1, p. 43.

[124] Article 18 of the Convention.

[125] These expressions were already explained in the previous chapters.

act or omission would probably result in the loss or damage.[126]

Article 21(1) provides :

> "The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

Similarly if the action is brought against the MTO's agent or servant acting within the scope of his employment, or against a person of whose services the MTO makes use for the performance of the multimodal transport contract, acting in the performance of the contract (like a sub-contractor),[127] each of them has the right to limit his liability.[128] However, they will lose the right under the same rules as apply to the MTO. Article 21(2) provides:

> "Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omissin of such servant, agent or other person done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."

A difficult problem arises when the loss or damage is caused by the intentional or

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[126] R. Vogel, supra note 50, p. 147.

[127] Real difficulty with sub-contractors is that they are third parties to the MTO's contract with the shipper: see chapter 5 of this work; also see J.N. Adams, Privity and the concept of a network contract, Legal Studies, Vol. 10, No 1, p. 12.

[128] Article 20(2) of the Convention.

reckless act or omission of the MTO's agent or servant or of a person of whose services the MTO makes use for the performance of the contract, but the action is brought against the MTO. If the MTO, under Articles 15 & 16 of the Convention, is liable for such loss or damage, does he lose the right to limit his liability or is he entitled to that limitation?

Article 15 of the Convention makes the MTO liable for acts or omissions of his agent or servant or of such person referred to in Article 14(3) but it is subject to Article 21. Article 15 provides :

> "Subject to article 21, the multimodal transport operator shall be liabe for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts or omissions were his own."

It has been pointed out[129] that the relationship between Article 15 and 21 is not clearly expressed in their language, and there is therefore an argument that if deliberate or reckless loss or damage is caused by the MTO's agent, servant or a person whose services the MTO uses in the performance of the contract, *and an action is brought against* him, he will lose the right to limit liability whereas if the action is brought against the MTO, the MTO will probably not, under Articles 15 and 21, lose the right to limit his liability. The reason stated for this is that it probably cannot be proved that the loss or damage results from an act or omission of the MTO done with the intent to cause such loss or damage or recklessly with knowledge that such loss or damage would probably

[129] W. Driscoll, supra note 15, p. 231.

result and, therefore, the deliberate or reckless loss or damage cannot be attributed to the MTO.[130] It seems that this reasoning is not correct, however, and that in a case like that the MTO, too, will lose the right to limit liability. This is firstly because, according to the express provisions of Article 15, the MTO's liability for the acts or omissions of his servants, agents or of other person referred to in Article 14(3) is subject to Article 21. This liability of the MTO (i.e. the liability under Article 15) is not limited if such act or omission is intentional, or reckless with knowledge that such loss or damage would probably result. Secondly, the sentence 'as if such acts or omissions were his own' of Article 15 implies that such intentional or reckless acts or omissions of the MTO's agent or servant or of such other person can be imputed to the MTO. Thirdly, it is not easy to draw a distinction between acts or omissions attributable to the MTO and those attributable to his servant, agent or to such other person because the MTO's liability, according to Article 15, includes the vicarious liability for his servants, agents or for such other persons.[131] Fourthly, during the MTO's period of responsibility the MTO's acts or omissions include the acts or omissions of his agents or servants or of any such other person;[132] there is no reason why deliberate or reckless acts or omissions of such persons which cause the loss or damage are not included in the MTO's acts or omissions. So, if a deliberate or reckless act or omission of such persons causes loss or damage, not only is the MTO liable, under Article 15, for such act or omission, but he also loses the

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[130] Ibid, p. 231.

[131] UNCTAD Secretariat, supra note 1, p. 45.

[132] Article 14(3) of the Convention.

right to limit his liability under Article 15 and 21.[133] Of course it should be noted that the MTO is only liable for his servants' or agents' acts or omissions if they act within the scope of their employment, and is only liable for the acts or omissions of the other person referred to in Article 14(3) if he acts in the performance of the contract.

At any rate, this is a matter of uncertainty which has to be resolved either by the courts or by the clarification in later protocols to the Convention.

6.4:7 Limitation periods for actions against the MTO under the Convention

Under the Convention, the period during which an action[134] may be brought against the MTO depends on whether or not a notice of claim, in writing, has been given to him within a certain time.

6.4:7:1 If notification of claim, in writing, is given within a certain time

If the shipper or consignee gives the MTO a written notice of claim describing the nature and main particulars of his claim, within six months after the day on which the goods have been or should have been delivered, he is allowed to bring his action within two years commencing on the day after the day on which the goods have been or should

[133] See supra note 105.

[134] It should be noted that the action must relate to international multimodal transport as defined by the Convention; Aticle 25(1). Otherwise the action falls outside the two-year time bar provision.

have been delivered.[135] If the claimant fails to bring his action either to a court of law or to an arbitral tribunal within the two year period of time bar, his claim relating to the international multimodal transport will be time barred. In other words, the time limit for bringing actions against the MTO is two years provided that the claimant gives notice within the six months. The reason for giving a notice of claim to the MTO within six months is so that the MTO, who quite frequently has subcontracts with unimodal carriers, has enough time to bring a recourse action against the unimodal carrier during whose carriage the loss or damage occurred. Otherwise, if the time for giving the notice were greater, the MTO's recourse action, which is likely to be governed by a unimodal convention, might be time barred and, therefore, the MTO might lose the opportunity to claim indemnification from his subcontractor since the time bar under some unimodal transport conventions is very short.[136] Article 25(1) of the Convention provides :

> "Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period."

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[135] Article 25(2) of the Convention.

[136] The time limits for bringing actions against modal carriers under the Hague Rules, Hague-Visby Rules, CIM and CMR conventions are just one year: see the recent cases of The Castle Alpha, [1989] 2 Ll. Rep. 383; The Antares, [1987] 1 Ll. Rep. 424. It is two years only under the Warsaw Convention and the Hamburg Rules.

6.4:7:2 If notification of claim, in writing, has not been given within a certain time

If the shipper or consignee fails to give the MTO a written notice of claim within the mentioned six months, he is not allowed to bring his action afterwards,i.e. his action will be time-barred after the six months have expired.[137] So, depending on the situation, the time bar under the Convention is either 6 months or 2 years commencing from the day after the day on which the goods have been or should have been delivered. However, this period under the Convention may be extended by the MTO or his representative if the extension of the period is made in writing during the running of the limitation period. Article 25(3) provides:

> "The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations."

[137] Article 25(1) of the Convention.

CHAPTER SEVEN

A COMPARISON BETWEEN THE MTO'S LIABILITY FOR LOSS OF OR DAMAGE TO THE GOODS AT THE PRESENT TIME AND WHEN THE 1980 INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS CONVENTION COMES INTO FORCE

Today, when a shipper concludes a multimodal transport of goods contract with a MTO, it is the contract which determines different legal aspects of the carriage including the MTO's liability for the loss or damage to the goods. Their contract is, however, subject to a variety of legal terms imposed by national laws or international conventions because of their mandatory character.[1] In case of localized loss or damage, the remedies given to the shipper depend on the stage of the transport at which the loss or damage occurred. And when the shipper cannot show that at which stage the loss or damage occurred, it is the shipper who has to sustain the loss unless he has a contractual agreement with the MTO upon which the MTO assumes responsibility for the non-localized loss or damage. So, at the present time the MTO's liability is based on the contractual basis but the applicable international unimodal transport conventions or madatory national laws must be regarded by the parties to the multimodal trnsport contract.

In future - when the Multimodal Convention comes into force - it will be the

[1] See pp. 306 & 311 of this thesis.

Convention's provisions which determine the MTO's liability, whether for localized or for non-localized loss or damage, rather than the parties.[2]

Now we are going to compare the MTO's liability for non-localized and localized loss or damage at the present time and under the Convention.

7.1 If there is non-localized loss or damage

At present, if the stage of multimodal transport at which the loss or damage occurred cannot be discovered, it is not clear which law is applicable to govern the MTO's liability for such loss or damage. This is a problem under the network liability system presently used. The MTO's liability and liability limits for non-localised loss or damage are, therefore, determined, independently of national and international law terms, by the parties to the multimodal transport contract, and in the absence of an agreement to that effect between the parties it is the shipper who has to, as stated above, sustain the loss. Often it is deemed that such loss or damage has occurred at the sea leg of the multimodal transport and the MTO's liability and liability limits are determined by the Hague or Hague-Visby Rules.[3]

We have already stated the MTO's liability for non-localized loss or damage under the ICC Rules since many multimodal transport documents follow the Rules. Under these

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[2] A. Diamond, supra chapter 2, note 14, p. C16.

[3] Id., p. C16. Also some operators adopt liability not exceeding that of their sub-contractors under an actual or assumed contract made on the sub-contractors' usual terms and condition: see, id., p.C17.

Rules the MTO is liable for such loss or damage to the extent set out in Article 5(e) of the Rules unless he can bring himself within one of a catalogue of exceptions.[4] His liability is determined according to Article 11 and limited to 30 Poincare francs per kilogramme,[5] although the parties are free to insert a higher value in respect of the goods in the transport document. However, the MTO' liability is, in no event, more than the actual loss or damage sustained by the person claiming.[6]

If the Multimodal Convention comes into force, the MTO is presumptively liable for non-localized loss or damage. Once he cannot rebut the rebuttable presumption of the carrier's liability known by Article 16 of the Convention, his liability is limited to an amount depending on whether the multimodal transport includes a sea or inland waterways leg or not. If it does, the amount of limitation is, according to Article 18(1), 920 units of account per package or other shipping unit, or 2.75 units of account per kilogramme of gross weight of the goods lost or damaged - whichever is the higher. This is similar to the Hague-Visby Rules' and the Hamburg Rules' calculation system but some percentage higher than them. If the journey does not include a sea leg, the limitation amount will be, according to Article 18(3), 8.33 units of account per kilogramme of gross weight of the goods lost or damaged. This is similar to the CMR Convention's calculation system.[7]

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[4] Id., pp. C17 & C18. See Art.12 of the ICC Rules.

[5] Article 11(c) of the ICC Rules. This is the same liability limit as in the Hague-Visby Rules which is 2 S.D.Rs. per kilogramme; see pp. 39-41 of this thesis.

[6] Article 11 of the ICC Rules.

[7] See pp. 421-2 of this thesis.

As we have seen, under the ICC Rules the limitation unit is only by reference to 'kilogrammes'[8] whereas under the Convention it is both 'package or other shipping unit and kilogrammes'. Obviously the Convention's limit is much more favourable to the goods owner than the I.C.C. Rules because firstly, the limitation amount has gone up to 2.75 S.D.Rs per kilo, secondly, there is a 'package' alternative in the Multimodal Convention[9] and thirdly, there is a distinction between the two situations where there is a sea leg and when there is no sea leg in the multimodal transport by which the limitation amount may even go up to 8.33 S.D.Rs per kilo for when the journey does not include a sea leg.

7.2 If there is localized loss or damage

We will now compare the MTO's liability for localized loss or damage under the two regimes. It seems to me that three topics are of main importance which need comparing. They are: a- the liability system; b- the basis of liability; c- the limits of liability.

7.2:1 The liability system

At present, as stated, nearly all of the multimodal transport documents (such as the ICC Combined Transport Document) have adopted the network liability system.[10] Under

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[8] See pp. 40-41 of this thesis.

[9] See p. 422 of this thesis.

[10] Zamora, supra chap. 6, note 6, pp. 292-3; Dimond, supra chap. 2, note 14.

this system the basis and limits of liability of the MTO for localized loss or damage is determined by the international unimodal convention or mandatory national law applicable- whether by law force or by contractual force - to that stage of transport at which the loss or damage occurred. The reason of the adoption of the network liability system is that the parties to a multimodal transport contract do not have any other choice. They must adopt it since the international unimodal transport conventions are of mandatory character and, if applicable, cannot be contracted out by the parties. If the parties do not adopt the network liability system, their otherwise adoption is not valid and it is still the relevant mandatorily applicable transport convention which determines their legal relations. In other words, even with non-adoption of the network liability system, it is still the network liability system which appears to govern the MTO's liability although some of the mandatory unimodal conventions such as the CMR and the CIM may not, as argued before, be applicable to the respective part of the multimodal transport performed under a multimodal transport contract.

With the coming into force of the Multimodal Transport Convention, the modified network liability system will govern to determine the MTO's liability for localized loss or damage. Upon this system the basis of liability of the MTO is, unlike the network liability system, determined by the Multimodal Convention itself rather than by the relevant international unimodal convention. But, once the MTO cannot disprove the rebuttable presumption of his liability known by Article 16 of the Convention, his liability limitation will be determined by the relevant unimodal convention if the liability limitation amount under that unimodal convention is higher than that under Article 18 of the Convention.

7.2:2 The basis of liability

Under the present regime - the network liability system - the unimodal transport conventions are preserved in the multimodal context. Therefore, in determining the MTO's liability for localized loss or damage, the MTO's basis of liability is the same basis of carrier's liability as under the relevant unimodal convention applicable to the stage at which the loss or damage occurred. So, if, for example, the loss or damage is localized to the sea leg of the multimodal transport, the MTO's basis of liability will be the same as the sea carrier's basis of liability which is, in most cases today, the basis of liability provided in the Hague-Visby Rules.

The basis of liability of the carrier in all the international unimodal transport of goods conventions - the Warsaw Convention,[11] the CIM Convention, the CMR Convention and the Hamburg Rules[12] (but not in the Hague and Hague-Visby Rules) - is a 'rebuttable presumption of the carrier's liability'. In contrast, in the Hague and Hague-Visby Rules there is a rebuttable presumption of the carrier's non-liability. In fact the sea carrier is exempted from liability in many cases and has no liability for damage caused by nautical fault or fire.

Under the Convention regime, the MTO's basis of liability is, like the Warsaw

[11] See pp. 200-1, 244 & 260 of this thesis.

[12] Except for loss or damage to live animals which is "rebuttable presumption of the carrier's non-liability": see p. 174 of this thesis

Convention, CIM, CMR and Hamburg Rules [13] but unlike the Hague and Hague-Visby Rules, a 'rebuttable presumption of the MTO's fault or negligence'[14] - no matter where the stage of loss or damage is.[15] The importance of the Convention's basis of liability will, therefore, become clear in connection with the Hague and Hague-Visby Rules because as to the other unimodal transport conventions, which have similar basis of liability with the Convention's, the result will be the same whether under those conventions or under the Multimodal Convention, but under the Hague and Hague-Visby Rules will not. In other words, the Convention has determined the MTO's basis of liability uniformly, and therefore, the question of 'uniform' versus 'network' liability has been thought to be of particular importance with regard to damage occurring during a sea leg of a multimodal transport. This is, of course, so if the law of carriage of goods by sea is the Hague or Hague-Visby Rules and not the Hamburg Rules which have the same basis of liability as the Convention.[16]

So, if, today, under the present regime of network liability system, which preserves the Hague/Visby Rules' basis of liability, the MTO is not liable for loss or damage which occurs at sea, he may, under the Convention's modified network liability system, which creates a uniform basis of liability, be liable.

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[13] See Diamond, supra chap. 2, note 14, p. C20 that he believes that three points of 'burden of proof', 'vicarious liability', and 'deviation' make the Convention's basis of liability different from that of the Hamburg Rules.

[14] Article 16 of the Convention.

[15] See pp. 404-8 of this thesis.

[16] E. Selving, supra chap. 6, note 13, p. .

7.2:3 The limits of liability

At present, once the MTO is liable for localized loss or damage under the relevant applicable unimodal convention, his liability will be (provided he has not lost the benefit of the limitations) limited to a certain amount according to the liability-limiting provisions of the same unimodal convention. But there is a great difference in the limitation amounts of different unimodal conventions. This liability limit under the Hague-Visby Rules is 10000 Poincare francs[17] per package or unit, or 30 Poincare francs[18] per kilogramme, whichever is the higher, under the Warsaw Convention is 250 gold francs[19] per kilogramme, under the CIM is 50 gold francs (Germinal francs)[20] per kilogramme and under the CMR is 25 gold francs (Germinal francs)[21] per kilogramme of the gross weight of the goods lost or damaged.

Although under the Multimodal Convention's modified network liability system the basis of liability is not subject to the unimodal conventions, the liability limit for localized loss or damage is subject to the relevant applicable unimodal convention or

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[17] This amount was changed to 666.67 S.D.Rs. by the 1979 Protocol amending the 1968 Hague-Visby Rules.

[18] This amount was changed to 2 S.D.Rs. by the 1979 Protocol amending the 1968 Hague-Visby Rules.

[19] These, which are poincare francs, were changed to 17 S.D.Rs. by Article 22 of the Warsaw Convention as amended by the 1975 Montreal Protocol No. 2.

[20] The corresponding figure in terms of S.D.Rs. is 16.666: see Diamond, supra chap. 2, note 14, p. C22.

[21] The corresponding figure in terms of S.D.Rs. is 8.333: see id.

mandatory national law.[22] Therefore, in case of localized loss or damage, once the MTO is known to be liable under the basis of liability provisions of the Mutimodal Convention, his liability will be (provided he has not lost the benefit of the limitations) limited to a certain amount determined according to the liability-limiting provisions of the relevant unimodal convention. However, if the Convention's limit is higher than that provided in that unimodal convention, then the Convention's limitation amount - 920 S.D.Rs. per package or other shipping unit, or 2.75 S.D.Rs. per kilogramme - whichever is the higher - will be the MTO's liability.[23] The Convention's limitation system follows the Hague-Visby Rules and the Hamburg Rules but the figure is some 38% higher than the Hague-Visby Rules and some 10% higher than the Hamburg Rules.[24]

So, the MTO's liability limit for localized loss or damage under the present regime and when the Multimodal Convention comes into force will be the same as long as the limitation amount of the relevant unimodal convention is higher than that of the Multimodal Convention. This is the case regarding the goods carried in packages or other shipping units lost or damaged : 1) at the air leg of the multimodal transport and weighing more than about 54.2 kg.; 2) at the rail leg of the multimodal transport and weighing more than about 55.2 kg.; and 3) at the road leg of the multimodal transport and weighing more than 110.4 kg.; or regarding the goods not carried in packages or other shipping units, like bulk cargoes, which the limitation unit is kilogramme. But when the weight of the lost or damaged package or other shipping unit is lower than the weights stated above

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[22] Article 19 of the Multimodal Convention.

[23] Articles 18 & 19 of the Convention; see also Dimond, supra chap.2, note14, p.C14.

[24] See p. 420 of this thesis.

for each mode, then it is the Convention's limit of Article 18 which is of the higher limit and determines the MTO's liability limit rather than the unimodal conventions. As to the packages lost or damaged at the sea leg of the multimodal transport, it seems that the MTO's liability limit is only determined by the provisions of Article 18 of the Convention rather than by sea unimodal conventions since Article 19, which only refer to a higher limit, is not likely to be relevant in case of loss or damage localized to sea leg[25] because neither the Hague-Visby Rules nor the Hamburg Rules, if and when they come into force, are of a higher limit than the Convention. As seen, even with the coming into force of the Multimodal Convention, the unimodal conventions' liability-limiting provisions may, depending on the weight of the lost or damaged goods, continue to determine the MTO's liability limit. In other words, the Multimodal Convention does not remove the diversity created by the international unimodal transport conventions but it provides a floor which will, in the absence of any higher limit, uniformally apply.[26]

As stated in the previous chapters, under all the international transport conventions, including the Multimodal Convention, the carrier is deprived of the right to limit liability if the loss or damage results from his intentional or reckless act or omission. Regarding the carrier's deprivation of the right to limit liability as to the loss or damage resulting from his agent's or servant's intentional or reckless act or omission, however, there is difference between different international transport conventions. Under the 1929 Warsaw Convention, the 1955 amended Convention, the CMR and the CIM conventions the carrier is not entitled to limit his liability for loss or damage if it is caused by an act or omission

[25] E. Selving, supra chap. 6, note 13, p. A15.

[26] A. Diamond, supra chap. 2, note 14, p.C23.

of his agent or servant done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result, and if such agent or servant has acted within the scope of his employment. Similarly under the Multimodal Convention the MTO may be deprived[27] of the right to limit his liability if the loss or damage results from an intentional or reckless act or omission of his agent or servant acting within the scope of his employment. In contrast, under the Hague-Visby Rules if such act or omission of the carrier's agent or servant causes the loss or damage, the carrier will not be deprived of the right to limit his liability if the action is brought against him[28].

One point which deserves to be noted is that since the Multimodal Convention applies only to relationship between the MTO and the consignor, the consignor may, in order to evade the Convention's limitations, sue the actual carrier who caused the loss or damage, if different from the MTO. But because there is no privity of contract between them, he can do so either by using the exceptions to the privity doctrine, or, if appropriate, suing in tort if the property in the goods has not passed from him at the time of loss or damage. Similarly the actual carrier may take the benefit of the multimodal transport contract which *is subject to the Multimodal Convention's limitations if* he can invoke one of the exceptions to the privity doctrine, e.g. if he can prove that the MTO has been his agent for the conclusion of the multimodal transport contract, and he has been, if fact, in privity with the consignor. Otherwise the actual carrier cannot benefit from such limitation if he is sued by, e.g. the consignor. It seems that even with Adams-

[27] Although it is a matter of uncertainty: see pp. 428-30 of this thesis.

[28] See the case of, The European Enterprise, [1989] 2 Ll. Rep. p. 185.

Brownsword's proposal and the relaxing of the privity doctrine as between the network contractors, neither the consignor could sue the actual carrier on the multimodal transport contract nor could the actual carrier use the multimodal transport contract (which is subject to the Multimodal Convention's limitations) when the carrier is sued by the consignor because the Convention has by its terms restricted its application only to the situation between the MTO and the consignor and this cannot be altered by the proposal.

CONCLUSION

We have surveyed the MTO's liability for loss of or damage to goods under the present regime and the 1980 Multimodal Convention regime.

The present regime of 'network liability' causes confusion because of the application of the several international unimodal conventions and national laws to a single through movement of goods. It is a well-known fact that the principles governing the unimodal conventions are to a great extent different from each other, e.g. these conventions establish different rules of liability and different limits of liability for each segment of the multimodal transport. Under the network liability system which preserves the Hague-Rules we face the complex problem of 'container-package'. In the absence of an arrangement between the shipper and the MTO, it is the shipper who has to sustain the loss resulting from the non-localized loss or damage to the goods. If there are arrangements in multimodal transport documents they tend to differ very much from each another. This causes considerable divergence between different multimodal transport documents employed by different multimodal transport operators.

In fact, under the present regime it is impossible to predict before carriage begins which limit will be applicable in the event of loss or damage. These uncertainties are certainly impediments to the growth of multimodal transport and, in turn, international trade. The unimodal conventions are, therefore, really inconvenient for the multimodal transport of goods. It is difficult and complex to bring multimodal transport contracts

under the network liability system which preserves the unimodal transportation regimes, and this results in unpredictability. This was why a set of rules suitable for multimodal transport of goods was required.

Under the Multimodal Convention these problems will, at least to some extent, be solved because the Convention's modified network liability system has, to a large extent, taken account of the uniform liability system to solve the problems.

Under the Convention the MTO is liable to the shipper for loss or damage to goods occurring at any time between taking over, and delivery of the goods - no matter where the loss or damage occurs - no matter whether it is localized or non-localized. The MTO's liability provisions for non-localized loss or damage have, like other provisions of the Convention, mandatory character and cannot be contracted out. This will remove the defect of the present regime and effect a uniformity regarding the MTO's liability for non-localized loss or damage in different multimodal transport documents. In this respect the Convention has even made a distinction between cases when the multimodal transport involves a sea leg and when it does not so as to remove or reduce any probable conflict between its limit and the existing unimodal conventions' limits.

The Convention also creates uniformity, although to a limited extent, regarding the MTO's liability limit for the loss or damage occurring at different modes of multimodal transport. This uniformity relates to the goods: 1)- carried in packages or other shipping units, weighing less than 54.2 kg. and lost or damaged during air leg; 2)- carried in packages or other shipping units, weighing less than 55.2 kg. and lost or damaged during

rail leg; 3)- carried in packages or other shipping units, weighing less than 110.4 kg. and lost or damaged during road leg of the multimodal transport. In these situations it is, according to Article 19, Article 18(1) of the Convention which determines the MTO's liability limit uniformally because it is of a higher limit than the relevant unimodal convention, i.e. 920 units of account per package or other shipping units. The Convention regime will also solve the 'container-package' problem.

However, it seems that the coming into force of the Multimodal Convention itself may be an impediment to the development of multimodal transport because the Convention's liability system, i.e. modified network6 liability, is of the basis of liability upon which the MTO is presumptively liable for loss or damage to the goods. Assuming the Multimodal Convention comes into force, the sea carrier who acts as a MTO as well, or has switched his business to a MTO, and formerly (under the network liability system which preserves the Hague-Visby Rules with the presumption of the carrier's non-liability) may not have been liable for loss or damage to the goods, is presumptively liable under the Multimodal Convention. He even has a higher liability limitation than the Hague-Visby Rules since the Convention's Article 19 requires the higher limit and it is unlikely that the Hague-Visby Rules would be relevant. In other words, regarding the loss or damage which occurs during the sea leg of the multimodal transport both the MTO's basis of liability and his liability limit are determined by the Multimodal Convention. In addition the carrier who was not (under the Hague-Visby Rules) deprived of the right to limit liability for loss or damage caused by the intentional or reckless act or omission of his servant or agent, will probably lose this right to limit liability under the Multimodal Convention. So, it is not to the benefit of the sea carrier to continue as a MTO, or to

switch his business to a MTO. He is likely, therefore, to prefer to remain solely as a sea carrier which will obviously hamper the development of multimodal transport and, in turn, the development of international trade. This is may be why acceptance of the Convention has been slow.

But if sea leg of the multimodal transport were governed by the Hamburg Rules, with the coming into force of the Multimodal Convention there would be no significant difference except the difference regarding the amount of limitation because in nearly all cases the liability regimes of the Multimodal Convention and the Hamburg Rules produce the same substantive result. In fact if the limits of the Convention were exactly the same as those of the Hamburg Rules there would be no difference in substance since presumed fault under Article 16 of the Convention and that of Article 5(1) of the Hamburg Rules are identical.

Therefore, it seems that the 'Hague-Visby Rules being in force' is a barrier to the acceptance and coming into force of the Multimodal Convention. This barrier will be removed if the Hamburg Rules come into force because the Hamburg Rules are very close to the Multimodal Convention as to the basis and limit of liability. As a result when the sea carrier acting as a MTO sees that the basis of liability for sea loss or damage under the sea convention (the Hamburg Rules) and the Multimodal Convention is the same, he will see no reason to leave the multimodal transport operations and act solely as a sea carrier. In other words, the coming into force of the Multimodal Convention when the Hamburg Rules are already in force will not an impediment to the development of multimodal transport. So it seems that the coming into force of the Hamburg Rules will accelerate the acceptance and coming into force of the Multimodal Convention.

A problem with which we will still be faced with the coming into force of the Multimodal Convention is the privity problem as between the network contrators involved in multimodal transport contracts, since there is nothing in the Convention to remove the problem as between such network contractors. In addition, there is a restriction on the application of the Convention to the effect that the Convention will only apply to the relationship between the MTO and the consignor. A third party to a multimodal transport contract will not, therefore, operate under the Convention. So a consignor cannot sue, e.g. the actual carrier (if different from the MTO) on the multimodal transport contract, and similarly the actual carrier, when sued by the consignor, cannot take benefit of the multimodal transport contract which is subject to the Mutimodal Convention's limitations.

This problem seems not to be solved even with the relaxation of the privity doctrine by, e.g. the Adams-Brownswords' proposal because although applying the proposal the privity doctrine would be relaxed as between network contractors, the Convention itself has restricted its application only to the parties to a multimodal transport contract. In other words, the proposal would not lift the restrictions imposed by the Convention. This will obviously be a problem for the Member States to the Convention, and it may result in 1) - national laws of the Member States allowing consignors to evade the Multimodal Convention by permitting them to sue third parties to the contract in tort, for example; 2) - national laws of the Member States allowing third parties, e.g. the consignees, to sue the MTO which will prevent the MTO from relying on the Multimodal Convention's limitations.

As seen the result of resolving that problem of the Convention by Member States

will firstly be to weaken the effect of the Convention on the parties to a multimodal transport contract because on the one hand the consignor can evade the Convention, and on the other hand, the MTO cannot rely on the Multimodal Convention's limits, and secondly to prevent the unification intended by the Convention from being attained. The solution to this problem is, as already stated, an International Convention on network contracts, or at least on multimodal transport contracts, which solves the privity doctrine problem.

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U

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V

Vita Food Products Inc. v. Unus Shipping Co. Ltd., [1939] A.C. 277 (P.C.).

W

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The signatory States to, and the States ratifying or accepting the 1980 MT Convention as of 3 November 1989[1]

Parties	Date of signature	instr. of	Date of deposit	Date of entry into force
Chile	09/07/1981	rati.	07/04/1982	
Malawi		acce.	02/02/1984	
Mexico	10/10/1980	rati.	11/02/1982	
Morocco	25/11/1980			
Norway	28/08/1981			
Rwanda		acce.	15/09/1987	
Senegal	02/07/1981	rati.	25/10/1984	
Venezuela	31/08/1981			

[1] See The Ratification of Maritime Conventions, Published by Lloyd's of London Press Ltd, London, 1990, p. 1.5-100.

The signatory States to, and the States ratifying or accepting the 1978 Hamburg Rules as of 30 January 1991[2]

Parties	Date of signature	instr. of	Date of deposit	Date of entry into force
Austria	30/04/1979			
Barbados		acce.	02/02/1981	
Botswana		acce.	16/02/1988	
Brazil	31/03/1978			
Burkina Faso		acce.	14/08/1989	
Chile	31/03/1978	rati.	09/07/1982	
Czechoslovakia	06/03/1979			
Denmark	18/04/1979			
Ecuador	31/03/1978			
Egypt	31/03/1978	rati.	23/04/1979	
Finland	18/04/1979			
France	18/04/1979			
Germany, F.R. of	31/03/1978			
Ghana	31/03/1978			
Guinea		acce.	23/01/1991	
Holy See	31/03/1978			
Hungary	23/04/1979	rati.	05/07/1984	
Kenya		acce.	31/07/1989	
Lebanon		acce.	04/04/1983	
Lesotho		acce.	24/10/1989	
Madagascar	31/03/1978			
Mexico	31/03/1978			
Morocco		acce.	12/06/1978	

[2] Id., pp. 1.5-97 to 1.5-98.

Nigeria		acce.	07/11/1988
Norway	18/04/1979		
Pakistan	08/03/1979		
Panama	31/03/1978		
Philippines	14/06/1978		
Portugal	31/03/1978		
Romania		acce.	07/01/1982
Senegal	31/03/1978	rati.	17/03/1976
Sierra Leone	15/08/1978	rati.	07/10/1988
Singapore	31/03/1978		
Sweden	18/04/1979		
Tanzania, R. of		acce.	24/07/1979
Tunisia		acce.	15/09/1980
Uganda		acce.	06/07/1979
U.S. of America	30/04/1979		
Venezuela	13/03/1978		
Zaire	19/04/1979		

The signatory States to, and the States ratifying or accepting the 1968 Hague-Visby Rules as of 31 October 1989[3]

Parties	Date of signature	instr. of	Date of deposit	Date of entry into force
Argentina	23/02/1968			
Belgium	23/02/1968	rati.	06/09/1978	06/12 1978
Cameroon	26/04/1968			
Canada	23/02/1968			
China, R. of	23/02/1968			
Denmark	20/11/1975	rati.	20/11/1975	23/11/1977
Ecuador		acce.	23/03/1977	23/06/1977
Egypt Arab R. of	04/06/1973	rati.	31/03/1983	30/04/1983
Finland	23/02/1968	rati.	01/12/1984	01/03/1985
France	04/12/1968	rati.	10/03/1977	23/06/1977
German D. R.		acce.	14/02/1979	14/05/1979
Germany, F.R. of	23/02/1968			
Greece	23/02/1968			
Holy see	23/02/1968			
Italy	23/02/1968	rati.	22/08/1985	22/11/1985
Lebanon		acce.	19/07/1975	23/06/1977
Liberia	23/02/1968			
Mauritania	23/02/1968			
Netherlands	05/02/1979	rati.	26/04/1982	26/07/1982
Norway	13/04/1973	rati.	19/03/1974	23/06/1977
Paraguay	30/04/1968			
Philippines	23/02/1968			
Pholand	23/02/1968	rati.	12/02/1980	12/05/1980

[3] Id., pp. 1.5-11 to 1.5-12.

Singapore		rati.	25/04/1972	23/06/1977
Spain	23/08/1972			
Sri Lanka		acce.	21/10/1981	21/01/1982
Sweden	23/02/1968	rati.	09/12/1974	23/06/1977
Switzerland	23/02/1968	rati.	11/12/1975	23/06/1977
Syria, Arab R.		acce.	01/08/1974	23/06/1977
Tonga		acce.	13/06/1978	13/09/1978
U.S. of America	23/02/1968			
United Kingdom	23/02/1968	rati.	01/10/1976	23/06/1977
Uruguay	23/02/1968			
Zaire	23/02/1968			

The signatory States to, and States ratifying or accepting the 1924 Hague Rules as of 15 September 1990[4]

Parties	Date of signature	instr. of	Date of deposit	Date of entry into force
Algeria		acce.	13/04/1964	13/10/1964
Angola		acce.	02/02/1952	02/08/1952
Antigua & Barbuda		acce.	02/12/1930	02/06/1931
Argentina		acce.	19/04/1961	19/10/1961
Australia		acce.	04/07/1955	04/01/1956
Bahamas		acce.	02/12/1930	02/06/1931
Barbados		acce.	02/12/1930	02/06/1931
Belgium	08/09/1924	rati.	02/06/1930	02/06/1931
Belize		acce.	02/12/1930	02/06/1931
Bolivia		acce.	28/05/1982	28/11/1982
Cameroon		acce.	02/12/1930	02/06/1931
Cape Verdo Islands		acce.	02/02/1952	02/08/1952
Chile	25/08/1924			
Cuba		acce.	25/07/1977	25/01/1978
Cyprus		acce.	02/12/1930	02/06/1931
Denmark		acce.	01/07/1938	01/01/1939
Dominica, R. of		acce.	02/12/1930	02/06/1931
Ecuador		acce.	23/03/1977	23/09/1977
Egypt		acce.	29/11/1943	01/05/1944
Estonia	25/08/1924			
Fiji		acce.	02/12/1930	02/06/1931
Finland		acce.	01/07/1939	01/01/1940
France	12/03/1925	rati.	04/01/1937	04/07/1937

[4] Id., pp. 1.5-3 to 1.5-5.

Gambia		acce.	02/12/1930	02/06/1931
German D. R.		acce.	20/01/1958	20/07/1958
Germany,F.R.of	24/08/1925	rati.	01/07/1939	01/01/1940
Ghana		acce.	02/12/1930	02/06/1931
Goa		acce.	02/02/1952	02/08/1952
Grenada		acce.	02/12/1930	02/06/1931
Guinea Bissau		acce.	02/02/1952	02/08/1952
Guyana		acce.	02/12/1930	02/06/1931
Hungary	08/04/1926	rati.	02/06/1930	02/06/1931
Iran		acce.	26/04/1966	26/10/1966
Ireland		acce.	30/01/1962	30/07/1962
Israel		acce.	05/09/1959	05/03/1960
Italy	17/09/1925	rati.	07/10/1938	07/04/1939
Ivory Coast		acce.	15/12/1961	15/06/1962
Jamaica		acce.	02/12/1930	02/06/1931
Japan	28/05/1925	rati.	01/07/1957	01/01/1958
Kenya		acce.	02/12/1930	02/06/1931
Kingdom of Serbia	25/08/1924			
Kiribati		acce.	02/12/1930	02/06/1931
Kuwait		acce.	25/07/1969	25/01/1970
Malagasy R.		acce.	13/07/1965	13/01/1966
Malay, Fed. States of		acce.	02/12/1930	02/06/1931
Malay, Non-fed. States of		acce.	02/12/1930	02/06/1931
Mauritius		acce.	24/08/1970	12/03/1968
Monaco		acce.	15/05/1931	15/11/1931
Mozambique		acce.	02/02/1952	02/08/1952
Nauru		acce.	04/07/1955	04/01/1956
Netherlands		acce.	18/08/1956	18/02/1957
Nigeria		acce.	02/12/1930	02/06/1931

North Borneo		acce.	02/12/1930	02/06/1931
Norway		acce.	01/07/1938	01/01/1939
Palestine		acce.	02/12/1930	02/06/1931
Papua New Guinea		acce.	22/11/1967	22/05/1968
Paraguay		acce.	22/11/1967	22/05/1968
Peru		acce.	29/10/1964	29/04/1965
Poland	22/08/1925	rati.	26/10/1936	26/04/1937
Portugal		acce.	24/12/1931	24/06/1932
Romania	12/03/1925	rati.	04/08/1937	04/02/1938
Sao Tome & Principe		acce.	02/02/1952	02/08/1952
Sarawak		acce.	03/11/1931	03/05/1932
Senegal		acce.	14/02/1978	14/08/1978
Seychelles		acce.	02/12/1930	02/06/1931
Sierra-leone		acce.	02/12/1930	02/06/1931
Singapore		acce.	02/12/1930	02/06/1931
Solomon Islands		acce.	02/12/1930	02/06/1931
Somalia		acce.	02/12/1930	02/06/1931
Spain	25/08/1924	rati.	02/06/1930	02/06/1931
Sri Lanka		acce.	02/12/1930	02/06/1931
St. Christopher-Nevis		acce.	02/12/1930	02/06/1931
St. Lucia		acce.	02/12/1930	02/06/1931
St. Vincent & Grenadines		acce.	02/12/1930	02/06/1931
Sweden		acce.	01/07/1938	01/01/1939
Switzerland		acce.	28/05/1954	28/11/1954
Syria, Arab R. of		acce.	01/08/1974	01/02/1975
Tanganyika		acce.	03/12/1962	09/12/1963
Timores		acce.	02/02/1952	02/08/1952
Tonga		acce.	02/12/1930	02/06/1931
Trinidad & Tobago		acce.	02/12/1930	02/06/1931

Turkey		acce.	04/07/1955	04/01/1956
Tuvalu		acce.	02/12/1930	02/06/1931
United Kingdom	15/11/1924	rati.	02/06/1930	02/06/1931
U.S. of America	23/06/1925	rati.	29/06/1937	29/12/1937
Yogoslavia	10/04/1926	rati.	17/04/1959	17/10/1959
Zaire		acce.	17/07/1967	17/01/1968

The signatory States to, and States ratifying or accepting the 1929 Warsaw Convention as of 18 September 1990[5]

Parties	Date of signature	instr. of	Date of deposit	Date of entry into force
Afghanistan		acce.	20/02/1969	21/05/1969
Algeria		acce.	02/06/1964	31/08/1964
Argentina		acce.	21/03/1952	19/06/1952
Australia	12/10/1929	rati.	01/08/1935	30/10/1936
Austria	12/10/1929	rati.	28/09/1961	27/12/1961
Bahamas		acce.	15/05/1975	10/07/1973
Bangladesh		acce.	01/03/1979	26/03/1971
Barbados		acce.	08/01/1970	30/11/1966
Belgium	12/10/1929	rati.	13/07/1936	11/10/1936
Benin		acce.	09/01/1962	01/08/1960
Botswana		acce.	21/03/1977	30/09/1966
Brazil	12/10/1929	rati.	02/05/1931	13/02/1933
Brunei Darussalam		acce.	28/02/1984	28/02/1984
Bulgaria		acce.	25/06/1949	23/09/1949
Burkina Faso		acce.	09/12/1961	09/03/1962
Byelorussian S.S.R.		acce.	26/09/1959	25/12/1959
Cameroon		acce.	21/08/1959	01/01/1960
Canada		acce.	10/01/1947	08/09/1947
Chile		acce.	02/03/1979	31/05/1979
China		acce.	20/07/1958	18/10/1958
Colombia		acce.	15/08/1966	13/11/1966
Congo		acce.	05/01/1962	15/08/1960
Costa Rica		acce.	10/05/1984	08/08/1984
Cuba	21/07/1964	acce.	19/10/1964	19/10/1964

[5] Id., pp. 1.5-17 to 1.5-19.

Cyprus		acce.	23/04/1963	16/08/1960
Czechoslovakia	12/10/1929	rati.	17/11/1934	15/02/1935
Denmark	12/10/1929	rati.	03/07/1937	01/10/1937
Dominican, R.		acce.	25/02/1972	25/05/1972
Ecuador		acce.	01/12/1969	01/03/1970
Egypt		acce.	06/09/1955	05/12/1955
Equatorial Guinea		acce.	20/12/1988	19/03/1989
Ethiopia		acce.	14/08/1950	12/11/1950
Fiji		acce.	15/03/1972	10/10/1970
Finland		acce.	03/07/1937	01/10/1937
France	12/10/1929	rati.	15/11/1932	13/02/1933
Gabon		acce.	15/02/1969	15/05/1969
German D. R.	12/10/1929	rati.	30/09/1933	29/12/1933
Germany,F.R.of	12/10/1929	rati.	30/09/1933	29/12/1933
Greece	12/10/1929	rati.	11/01/1938	11/04/1938
Guinea		acce.	11/09/1961	10/12/1961
Hungary		acce.	29/05/1936	27/08/1936
Iceland		acce.	21/08/1948	19/11/1948
India		acce.	29/01/1970	15/08/1947
Indonesia		acce.	02/02/1952	17/08/1945
Iran, Islamic R. of		acce.	08/07/1975	06/10/1975
Iraq		acce.	28/06/1972	26/09/1972
Ireland		acce.	20/09/1935	19/12/1935
Israel		acce.	08/10/1949	06/01/1950
Italy	12/10/1929	rati.	14/02/1933	15/05/1933
Ivory Coast		acce.	07/02/1962	07/08/1960
Japan	12/10/1929	rati.	20/05/1953	18/08/1953
Jordon		acce.	17/11/1969	25/05/1946
Kenya		acce.	07/10/1964	12/12/1963

Korea, D.P.R.		acce.	01/03/1961	30/05/1961
Kuwait		acce.	11/08/1975	09/11/1975
Laos P.D.R.		acce.	14/03/1956	19/07/1949
Lebanon		acce.	10/02/1962	22/11/1943
Lesotho		acce.	03/03/1975	04/10/1966
Liberia		acce.	02/05/1942	31/07/1942
Libyan Arab Jamahiriya		acce.	16/05/1969	14/08/1969
Liechtenstein		acce.	09/05/1934	07/08/1934
Luxembourg	12/10/1929	rati.	07/10/1949	05/01/1950
Madagascar		acce.	17/08/1962	26/06/1960
Malaysia		acce.	03/09/1970	16/09/1963
Mali		acce.	26/01/1961	26/04/1961
Malta		acce.	19/02/1986	21/09/1964
Mauritania		acce.	06/08/1962	04/11/1962
Mauritius		acce.	17/10/1989	15/11/1990
Mexico		acce.	14/02/1933	15/05/1933
Mongolia		acce.	30/04/1962	29/07/1962
Morocco		acce.	05/01/1958	05/04/1958
Myanmar		acce.	02/01/1952	04/01/1948
Nauru		acce.	04/11/1970	31/01/1968
Nepal		acce.	12/02/1966	13/05/1966
Netherlands	12/10/1929	rati.	01/07/1933	29/09/1933
New Zealand		acce.	06/04/1937	05/07/1937
Niger		acce.	20/02/1962	03/08/1960
Nigeria		acce.	09/10/1963	01/10/1960
Norway	12/10/1929	rati.	03/07/1937	01/10/1937
Oman		acce.	06/08/1976	04/11/1976
Pakistan		acce.	26/12/1969	14/08/1947
Papua New Guinea		acce.	06/11/1975	16/09/1975

Paraguay		acce.	28/08/1969	26/11/1969
Peru		acce.	05/07/1988	03/10/1988
Philippines		acce.	09/11/1950	07/02/1951
Poland	12/10/1929	acce.	15/11/1932	13/02/1933
Portugal		acce.	20/03/1947	18/06/1947
Qatar		acce.	22/12/1986	22/03/1987
Romania	12/10/1929	rati.	08/07/1931	13/02/1933
Rwanda		acce.	01/12/1964	01/07/1962
Samoa		acce.	16/10/1963	01/01/1962
Saudi Arabia		acce.	27/01/1969	27/04/1969
Senegal		acce.	19/06/1964	17/09/1964
Seychelles		acce.	24/06/1980	22/09/1980
Sierra-leone		acce.	21/03/1968	27/04/1961
Solomon Islands		acce.	09/09/1981	07/07/1978
South Africa	12/10/1929	rati.	22/12/1954	22/03/1955
Spain	12/10/1929	rati.	31/03/1930	13/02/1933
Sri Lanka		acce.	24/04/1951	04/02/1948
Sudan		acce.	11/02/1975	12/05/1975
Sweden		acce.	03/07/1937	01/10/1937
Switzerland	12/10/1929	rati.	09/05/1934	07/08/1934
Syria, Arab R. of		acce.	13/04/1964	05/12/1955
Tanzania, United R. of		acce.	07/04/1965	06/07/1965
Togo		acce.	02/07/1980	30/09/1980
Tonga		acce.	31/01/1971	04/06/1970
Trinidad & Tobago		acce.	10/05/1983	31/08/1962
Tunisia		acce.	15/11/1963	13/02/1964
Turkey		acce.	25/03/1978	26/03/1978
U.S.S.R.	12/10/1929	rati.	20/08/1934	18/11/1934
Uganda		acce.	24/07/1963	22/10/1963

Ukrainian S.S.R.		acce.	14/08/1959	12/11/1959
United Arab Emirate		acce.	04/04/1986	03/07/1986
United Kingdom	12/10/1929	rati.	14/02/1933	15/05/1933
U.S. of America		acce.	31/07/1934	29/10/1934
Uruguay		acce.	04/07/1979	02/10/1979
Vanuatu		acce.	26/10/1981	24/01/1982
Venezuela		acce.	15/06/1955	13/09/1955
Viet Nam		acce.	11/10/1982	09/01/1983
Yemen		acce.	06/05/1982	04/08/1982
Yogoslavia	12/10/1929	rati.	27/05/1931	13/02/1933
Zaire		acce.	27/07/1962	30/06/1960
Zambia		acce.	25/03/1970	24/10/1964
Zimbabwe		acce.	27/10/1980	25/01/1981