

# Multimodal Transport Operators' Liability Regimes under the UN Multimodal Transport Convention 1980 and UNCTAD / ICC Rules 1992 - A Comparative Perspective

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**Abstract:** *With the development of international multimodal transports, the liability of multimodal transport operators (MTOs) has been a crisis drawing concerns of parties in international multimodal transport contracts (MT contracts). There have been attempts to create a global uniform regime governing the liability of MTOs such as the UN multimodal transport convention 1980 (MT convention) and UNCTAD/ICC Rules for multimodal transport documents 1992 (UNCTAD/ICC rules). However, none of these regimes have a mandatory effect. Even so, these regimes have significantly impacted on regional and national regulations on multimodal transport such as the ASEAN framework agreement on Multimodal transport or Mexico's 'Diario Oficial'. Especially, the UNCTAD/ICC rules have been widely accepted in commercial practice. This is proven by the incorporation of the Rules into Multimodal transport documents such as the FIATA bill of lading 1992 and BIMCO's Multidoc95. Therefore, to explore the advantages and disadvantages of the liability provisions as well as understand the failure, this paper will discuss comparatively liability regimes for MTOs who are involved in sea carriage of goods under the MT convention and UNCTAD/ICC rules. Particularly, the regulations related to the scope of liability, limitation and the time bar will be analysed and critically examined in this paper.*

**Keywords:** Multimodal transport operators, Multimodal transport convention, UNCTAD/ICC rules 1992

## 1. Introduction

With the emergence of international multimodal transport, which is involved in a combination of different modes of transport under a single contract from a place in one country to a place in a different country,<sup>1</sup> it is necessary to have a uniform liability regime to govern the liability of the multimodal transport operators (MTOs). In this situation, the UNCTAD<sup>2</sup> was requested by the UNECOSOC<sup>3</sup> to prepare a draft convention on multimodal transport.<sup>4</sup> The UN diplomatic conferences started to discuss a draft convention in 1979 and 1980.<sup>5</sup> After six years of attempting to draft a mandatory uniform convention on multimodal transport based largely upon the provisions of the Hamburg Rules, the UNCTAD finally adopted a convention on International Multimodal Transports of Goods consisting of 40 articles in Geneva in May 1980.<sup>6</sup> This convention contains provisions on liability of the MTOs in the case where the location of damages is both known as well as unknown, especially

where the goods are carried in a container. Unfortunately, this convention has not yet come into force as it has not gained sufficient consensus of members.

Pursuing ambition to create a uniform regime, in 1992 the UNCTAD and ICC experts introduced the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 (hereinafter the UNCTAD/ICC rules 1992). The UNCTAD/ICC Rules 1992, which replaced the ICC Uniform rules for a combined transport document 1975 (hereinafter the ICC Rules 1975),<sup>7</sup> contain thirteen provisions which are based upon not only the MT Convention but also the Hague (- Visby) and the ICC Uniform Rules. Under the Rules, where damages are localised, the liability of MTOs will be governed by unimodal liability regimes otherwise liability will be determined by the uniform regimes.<sup>8</sup> Commenting on this system, Schommer stated that both MTOs and cargo owners are able to predict which regimes will govern damages, additionally, conflicts between a uniform and unimodal liability regime will be reduced.<sup>9</sup> In contrast, Haak stated

<sup>1</sup> The United Nations Convention on International Multimodal Transports of Goods, 1980, art 1(1).

<sup>2</sup> The United Nations Conference on Trade and Development

<sup>3</sup> The United Nations Economic and Social Council.

<sup>4</sup> Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) *The International and Comparative Law Quarterly* 120, 135-137.

<sup>5</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) *Tulane Law Review* 193, 199.

<sup>6</sup> John A. Boyd, 'UNCTAD Convention on International Multimodal Transport' (1979) 73(3) *The American Journal of International Law* 523, 523.

<sup>7</sup> Ruth Banomyong, 'Multimodal Transport Corridors in South East Asia: A Case Study Approach' (Ph.D. thesis, University of Wales 2000) 16.

<sup>8</sup> Nicolas Martinez Devia, 'The Multimodal Transport System in the Andean Community: an analysis from legal perspective' (University Erasmus of Rotterdam, 2008).

<sup>9</sup> Tim Schommer, 'International Multimodal Transport. Some thoughts with regard to the "scope of application", "liability of carrier" and "other conventions" in the UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]' in Nicolas Martinez Devia, 'The Multimodal Transport System in the

that the application of this system is complex because this system 'provides neither the full benefits of a uniform system nor fully alleviates the concerns of those who favour a network system'.<sup>10</sup> Even so, the Rules have been widely used by commercial international bodies such as the International Federation of Freight Forwarders Associations (FIATA) and the Baltic and International Maritime Council (BIMCO).<sup>11</sup> However, the Rules do not have mandatory effect as they are a result of collaboration between the UNCTAD/ICC and the industry in the creation of 'model provisions for multimodal transport documents'.<sup>12</sup>

A lack of global mandatory uniform regimes generates problems in multimodal transport.<sup>13</sup> The main problem is the application of different unimodal international conventions for multimodal transport such as the Hague - Visby<sup>14</sup> and Hamburg Rules<sup>15</sup> for sea, the Warsaw Convention<sup>16</sup> for air, the CIM convention<sup>17</sup> for rail, and the CMR convention<sup>18</sup> for road.<sup>19</sup> This combination of unimodal conventions for multimodal transport causes problems such as different regimes for liability of the carrier through each mode of transport, determination of liability of the carrier in case of unlocalised loss or loss occurred outside of the scope of the conventions, conflicts between the conventions, protection of the actual carrier in tort, and friction costs.<sup>20</sup>

To solve the problems, two main 'alternative solutions have been advanced' including uniform and network approaches.<sup>21</sup> Uniform approaches consider one regime to govern the whole process of the carriage without respective of

localisation of loss,<sup>22</sup> and the MTO will be liable from the time the goods are taken into charge until their delivery.<sup>23</sup> These approaches, according to Hoek,<sup>24</sup> create simplicity and transparency in examination of the liability of the carrier, because shippers/cargo owners as well as MTOs know exactly which legal regime will be applicable to govern the liability. However, uniform regimes may encounter conflicts with existing unimodal regimes.<sup>25</sup> For example, the MT Convention gives cargo owners two years to claim liability for damages<sup>26</sup> while the Hague - Visby Rules give MTOs only one year to sue a sea carrier.<sup>27</sup> In this case, if cargo owners sue MTOs after the time limit of one year, MTOs will lose their right to recover compensation for which they are liable to cargo owners. Besides this, MTOs may be liable for a higher amount of damages than they can recover from the actual carriers.<sup>28</sup> This is also proved by the overlap between Article IV rule 5 of the Hague - Visby Rules regulating the limitation of 666.67 SDR per unit and Article 18 of the MT Convention limiting the liability for damages occurring during a sea leg at 920 SDR per unit.

Because of these overlaps, and loss of the right to invoke advantages under unimodal conventions in favour of MTOs, there is the 'view of the continued existence of diverse unimodal liability regimes with different rules on incidence and extent of a carrier's liability'.<sup>29</sup> This view is also known as "network approaches". Haak stated that in network systems 'different regimes apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them'.<sup>30</sup> This system, according to Hoeks, 'creates a colourful patchwork in a variety of legal issues' because of the combination of different liability regimes in a contract.<sup>31</sup> However, the existence of different liability regimes in a contract leads to many problems such as failure of those regimes in the case of unlocalised damages, risks in the period of transit, and complicated application. Therefore, the UNECE secretariat stated that 'it is important to reconcile, in the longer term, civil liability rules for multimodal transport in a single regulation, thereby doing away with the present situation of legal uncertainty and forum shopping'.<sup>32</sup>

In the situation where the solution to create a new international mandatory uniform regime has been supported

Andean Community: an analysis from legal perspective' (University Erasmus of Rotterdam, 2008).

<sup>10</sup> K.F. Haak, 'The Harmonisation of Intermodal liability arrangements' (2005) XL(1) European Transport Law 11, 43.

<sup>11</sup> Ling Zhu, M.DenizGuner-Ozbek and Hong Yan, 'Carrier's Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU' (IFSPA 2010 – Integrated Transportation Logistics: From Low Cost to High Responsibility, China, 15<sup>th</sup> -18<sup>th</sup> October 2010).

<sup>12</sup>UNCTAD, 'Implementation of multimodal transport rules' (UNCTAD/SDTE/TLB/2001/2, 2001) [12].

<sup>13</sup> Nicolas Martinez Devia, 'The Multimodal Transport System in the Andean Community: an analysis from legal perspective' (University Erasmus of Rotterdam, 2008).

<sup>14</sup> The Hague – Visby Rules mean the International Convention for The Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25<sup>th</sup> August 1924 as amended by the Protocol signed at Brussels on 23<sup>rd</sup> February 1968.

<sup>15</sup> The Hamburg Rules mean the United Nations Convention on the Carriage of Goods by Sea 1978.

<sup>16</sup> The Warsaw Convention mean the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on 12<sup>th</sup> October 1929.

<sup>17</sup> The CIM Convention means the Uniform rules concerning the Contract for International Carriage of Goods by rail in appendix B to the Convention concerning International Carriage by Rail of 9 May 1980.

<sup>18</sup> The CMR Convention mean the Convention on the contract for the international carriage of goods by road signed at Geneva on 19<sup>th</sup> May 1956.

<sup>19</sup> John F Wilson, *Carriage of Goods by Sea* (7<sup>th</sup>edn, 2010) 254

<sup>20</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 10.

<sup>21</sup>John F Wilson, *Carriage of Goods by Sea* (7<sup>th</sup>edn, 2010) 254.

<sup>22</sup>Simon Baughen, *Shipping Law* (4<sup>th</sup>edn, 2009) 183.

<sup>23</sup> Nicolas Martinez Devia, 'The Multimodal Transport System in the Andean Community: an analysis from legal perspective'

<sup>24</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 21.

<sup>25</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 21.

<sup>26</sup>The MT convention, 1980, art 25(1).

<sup>27</sup>The Hague-Visby Rules, 1968, art III r6.

<sup>28</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 21.

<sup>29</sup> K.F. Haak, 'The Harmonisation of Intermodal liability arrangements' (2005) XL(1) European Transport Law 11, 27.

<sup>30</sup> K.F. Haak, 'The Harmonisation of Intermodal liability arrangements' (2005) XL(1) European Transport Law 11, 14.

<sup>31</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 22.

<sup>32</sup>UNECE, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport' (TRANS/WP.24/2000/3, 2000) [22].

by the majority of the UNCTAD experts,<sup>33</sup> provisions of the two past attempt uniform regimes for multimodal transport including the MT Convention 1980 and the UNCTAD/ICC rules 1992 should be analysed to explore the advantages and disadvantages of these regimes. Even though these regimes do not have a mandatory effect globally, they have significantly impacted on regional and national regulations on multimodal transport such as ASEAN framework agreement on Multimodal transport or Mexico's 'Diario Oficial'.<sup>34</sup> Especially, the UNCTAD/ICC rules 'have been incorporated in widely used multimodal transport documents' such as the FIATA bill of lading 1992 and BIMCO's Multidoc95.<sup>35</sup> Therefore, understanding the advantages and disadvantages of these regimes will produce a good reference source for future attempts pursuing either a global or regional or national uniform regime for multimodal transport.

Within the scope of this paper, liability provisions of the MT Convention 1980 and UNCTAD/ICC Rules 1992 including provisions on the scope of liability, limitations, and time bars will be examined comparatively to discover advantages and disadvantages of these provisions as well as understand the failure of the MT Convention 1980. Particularly, this paper will focus on the liability provisions in favour of the MTOs who are involved in sea carriage of goods, and attempt to answer the following questions:

- 1) How would the provisions of each regime help to deal with the current problems in multimodal transport?
- 2) What are the problems arising from each regime in the examination of the liability of multimodal transport operators?
- 3) How should the problems be improved?

## 2. MTOS' Liability Under the MT Convention 1980

### 2.1 The Scope of Responsibility

Under the convention, MTOs will be liable for the whole process of carriage from the time the goods are taken into their charge until their delivery.<sup>36</sup> According to this principle, from the point MTOs take the goods from a consigner or a person on behalf of a consigner, they will bear liability for damages to the goods irrespective of whether or not the location of the damages is known. This responsibility will be maintained until the MTO either hands the goods over to the consignee or a person on their behalf, or places the goods at the consignee's disposal according to the contract, local law, or commercial usages.<sup>37</sup> This principle has an important meaning in removing the risks and current problems in multimodal transport, especially risks arising from unlocalised damages. Additionally, the

application of the principle will help to release cargo owners' concerns related to risks in case of the damages occurring outside the governing scope of applicable unimodal conventions. Particularly, in the case of the applicability of Hague - Visby Rules, cargo owners under multimodal transport contracts cannot request the MTOs to be responsible against the damages of goods before loading and after discharging from a ship as the Rules only governs the liability of the carrier from the point of time the goods begin to be loaded on until they are completely discharged from a ship.<sup>38</sup> With this principle, cargo owners can claim against MTOs regardless of the location of damages and of which liability regimes will govern damages of their goods.<sup>39</sup>

Besides this, under the Convention, MTOs will also be liable for the acts of their servants, agents, and other persons whose service they make use of to complete the multimodal transport contract.<sup>40</sup> In other words, the MTO is liable for damages of the goods during the sea leg which is caused by the acts of the actual sea carrier because the acts of the actual sea carriers are, in this case, presumed to be his acts according to Article 14. In arguments on this responsibility, the economic groups of countries participating in the UNCTAD's process of drafting the convention gave contradicting opinions.<sup>41</sup> While the group of 77 believed that MTOs should be liable for sub - contractors whose service they have used to perform the multimodal transport contract, the group B insisted that this extension would lead to problems for MTOs if sub - contractors performed independent acts.<sup>42</sup> Therefore, Article 15 limits the scope of responsibility of MTOs. According to this Article, MTOs will be liable for sub - contractors provided that they act within the scope of their employment. What we can see is that in multimodal transport, cargo owners enter into a single contract covering the whole process of carriage with a MTO. Therefore, if the MTO is not liable for the acts of sub - contractors within the scope of their employment, cargo owners will have to localise damages to determine which actual carrier they can sue in tort. This leads to complexities, especially when the goods are carried in containers where it is not easy to localise damages. Thus, in light of shippers and cargo owners, Article 14 and 15 simplify the process of determining the liability. Under these articles, shippers/cargo owners merely need to sue MTOs instead of different sub - contractors in tort, and instead of encountering the complexities in the determination on who can be sued.<sup>43</sup>

<sup>38</sup> The Hague-Visby Rules, 1968, art I(e)

<sup>39</sup> KuroshNasseri, 'The Multimodal Transport' (1988) 19(2) Journal of Maritime Law and Commerce 231, 238.

<sup>40</sup> MT Convention, 1980, art 14(3) regulates that acts of MTOs will include acts of their servants, agents and any peoples of whose service they make use in the performance of the multimodal transport contract. Therefore if sub-contracts perform a part of the contract, their acts will be resumed as acts of MTOs. As a result, MTOs will be liable for these acts.

<sup>41</sup> William J. Driscoll, 'The Convention on International Multimodal Transport: A status report' (1977-1978) 9 Journal of Maritime Law and Commerce 441, 447.

<sup>42</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193,199.

<sup>43</sup> KuroshNasseri, 'The Multimodal Transport' (1988) 19(2) Journal of Maritime Law and Commerce 231, 238.

<sup>33</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [79].

<sup>34</sup> UNCTAD, 'Implementation of multimodal transport rules' (UNCTAD/SDTE/TLB/2001/2, 2001) [10].

<sup>35</sup> UNCTAD, 'Implementation of multimodal transport rules' (UNCTAD/SDTE/TLB/2001/2, 2001) [12].

<sup>36</sup> MT Convention, 1980, art 14(1).

<sup>37</sup> MT Convention, 1980, art 14(2).

## 2.2 Liabilities

### 2.2.1 The Basis of Liability

In adopting the principle of “presumed fault” of the Hamburg Rules and the Warsaw Convention,<sup>44</sup> Article 16 of the Convention regulates that MTOs will be liable for any damages, losses, and delays in delivery unless it can be proved that they took all reasonable measures to avoid the occurrence and its consequences. In other words, under the Convention, a presumption of liability is established against MTOs.<sup>45</sup> According to this, MTOs are always presumed to be at fault for damages, losses, and delays. Therefore, to escape liability MTOs have to prove that they and their servants, agents and sub - contractors took all reasonable measures to avoid the occurrence and its consequences.<sup>46</sup> Besides this, by proving that damages, losses, and delays are caused by the cargo owner or a person acting on his behalf, MTOs may also escape liability for damages of the goods.<sup>47</sup> Additionally, if the MTOs want to be liable for a part of damages which are caused partly by them and their servants, agents or sub - contractors, they will have to prove the part which they contributed to the damages, losses, and delay.<sup>48</sup> As a result, ‘the nature of the defence available to the MTO will depend on which interpretation is given to the word “reasonably”’.<sup>49</sup> However, there is no further explanation of “reasonable measures” in the convention. In commenting on this, while Mankabady believed that “reasonable measures” will be decided based upon particular situations,<sup>50</sup> Briant insisted that it is clear from the provisions of the Convention that the requirement of taking reasonable measures requires MTOs to exercise reasonable diligence in which they are ‘required to act with the standard of prudence and competence normally required of a “reasonable carrier”’.<sup>51</sup>

Under the principle of presumed fault, cargo owners' benefits are protected absolutely because damages, losses, and delays in delivery of goods are always attributable to MTOs' fault or neglect. Therefore, in theory, shippers or

cargo owners can recover damages of goods in the majority of cases. However, this principle creates a higher liability for MTOs. Particularly, MTOs may be liable for any damages, losses, and delay which may not be caused by their fault but by acts of God. As a result, the convention failed in attracting consensus of the countries which did not accept the incorporation of this principle into the Hamburg Rules.<sup>52</sup> The contribution of this principle in the failure of the Convention was affirmed by UNCTAD.<sup>53</sup>

### 1.2.2 Limitation of Liability

Although the Convention adopted ‘uniform systems’, it is regulated that the limitation is governed by unimodal conventions or mandatory national laws if the location of damages is known and such regimes regulate higher limitation than the Convention.<sup>54</sup> From this principle, the solution adopted by the Convention is not entirely a uniform system, but it ‘is known as modified network systems’.<sup>55</sup> The reason for the adoption of modified systems in the Convention is that the US wanted national law to be applied to govern the limitation for localised damages, and other countries also wanted reluctantly to ‘make the Convention more attractive to the United States’.<sup>56</sup> However, the application of this solution creates confusion because of the applicability of different unimodal conventions under one single contract for carriage.<sup>57</sup> Therefore, the current problems in multimodal transport are not resolved absolutely under the Convention.

In the case of unlocalised damages and losses, under the Convention, the liability of MTOs in the case of the carriage involving a sea carriage will be limited to an amount not exceeding 920 SDR per package or unit, or 2.75 SDR per kilogram,<sup>58</sup> and ‘equivalent to two and a half times the freight payable for the goods delayed but not exceeding the total freight payable under the multimodal transport contract’.<sup>59</sup> In comparison with the Hague - Visby Rules where the limitation is limited to an amount not exceeding 666.67 SDR/unit or 2 SDR/kg,<sup>60</sup> and the Hamburg Rules where the carrier will be liable in an amount equivalent to

<sup>44</sup> The Warsaw Convention governs the international carriage of goods in an air leg.

<sup>45</sup> Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)’ (Master thesis, McGill University 1996) 126.

<sup>46</sup> Indira Carr, ‘International Multimodal Transport – United Kingdom’ (1998) 4(3) International Trade Law and Regulation 99, 109.

<sup>47</sup> William Driscoll and Paul B. Larsen, ‘The convention on international multimodal transport of goods’ (1982) 57(2) Tulane Law Review 193, 232.

<sup>48</sup> MT Convention, 1980, art 17.

<sup>49</sup> Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)’ (Master thesis, McGill University 1996) 127.

<sup>50</sup> Samir Mankabady, ‘The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions’ (1983) 32(1) The International and Comparative Law Quarterly 120, 130.

<sup>51</sup> Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)’ (Master thesis, McGill University 1996) 127.

<sup>52</sup> Jean Grosdidier de Matons, ‘Facilitation of Transport and Trade in Sub-Saharan Africa: A review of International Legal Instruments: Treaties, Conventions, Protocols, Decisions, Directives’

<<https://openknowledge.worldbank.org/bitstream/handle/10986/17688/297320ENGLISH0SSATPWP73010Legal0Review.pdf?sequence=1&isAllowed=y>> accessed on 2<sup>nd</sup> June 2022.

<sup>53</sup> Particularly the UNCTAD pointed out that the Convention failed in entering into force because under the Convention the basic of liability ‘modelled after the Hamburg Rules rather than the Hague-Visby Rules’ increases the liability of the carrier. See UNCTAD, ‘Multimodal Transport: the Feasibility of An International Legal Instrument’ (UNCTAD/SDTE/TLB/2003/1, 2003) [25].

<sup>54</sup> MT Convention, 1980, art 18-19.

<sup>55</sup> UNCTAD, ‘Implement of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/2, 2001) [22].

<sup>56</sup> William Driscoll and Paul B. Larsen, ‘The convention on international multimodal transport of goods’ (1982) 57(2) Tulane Law Review 193, 236.

<sup>57</sup> William Driscoll and Paul B. Larsen, ‘The convention on international multimodal transport of goods’ (1982) 57(2) Tulane Law Review 193, 236.

<sup>58</sup> MT Convention, 1980, art 18(1).

<sup>59</sup> MT Convention, 1980, art 18(4).

<sup>60</sup> The Hague-Visby Rules, 1968, art IV r 5.

835 SDR/unit or 2.5 SDR/Kg,<sup>61</sup> MTOs will bear higher liability for damages or losses of the goods under the Convention. Particularly, the limitation of liability of MTOs under the Convention is about ten percent higher than that under the Hamburg Rules and twenty percent higher than that under the Hague - Visby Rules.<sup>62</sup> In commenting on this, Haak pointed out that this limitation of the Convention is considered too high by some.<sup>63</sup> This opinion was also cited by the UNCTAD as a reason for the failure of the Convention in entering into force.<sup>64</sup> With the same opinion as to the UNCTAD, Hoeks believed that regulation of higher liability is one of the reasons leading to the fact that the Convention has failed to come into force.<sup>65</sup>

Under the Convention, determination of the amount of the limitation is based upon either per package, or shipping unit, or the weight, whichever is the higher.<sup>66</sup> In light of the carriage of container goods, a question arising is whether or not one container is considered as one package. As modelled after the Hamburg and Hague -Visby Rules, under the Convention, the answer to this question depends on enumeration in the multimodal transport document.<sup>67</sup> This means that the amount of limitation when the goods are containerised is calculated based upon packages or shipping units if the packages or the shipping units of the goods are enumerated in the document. In contrast, if the packages or the shipping units are not enumerated separately in the document, each container will be considered as one package or shipping unit.<sup>68</sup> From this principle, it seems that the Convention does not distinguish between the case of the container load where the container contains fully the goods of only one shipper<sup>69</sup> and the container load where the container usually provided by the carrier consolidates the goods belonging to different shippers<sup>70</sup> when determining

the amount of the liability.<sup>71</sup> If the document states that the full container load consolidates the packages of goods, under the Convention calculation, the amount of limitation, in this case, will be based upon the packages or shipping units. However, there are cases where the document states so but the exact number of packages will not be known by the carrier because he usually does not open the container for inspection. As a result, there is no difference in calculation of the amount of liability in the case of full container load and the less than full container load where the carrier putting the packages of goods in the container knows the exact number of packages if the packages are stated in the document. This leads to the case in theory that the carrier may be liable for higher amounts of liability based upon the number of packages which the shippers inform the carrier, but in fact, the packages do not reach that number. However, to avoid this case, the convention recommends that the carrier should insert "the absence of reasonable means of checking" in the document.<sup>72</sup> Also, article 12 regulates that the shipper has to guarantee accuracies of the number of packages and weight stated in the document. If he fails to do this, he shall indemnify against loss resulting from inaccuracies.<sup>73</sup> Additionally, the carrier can take advantage from this principle to minimize his limitation by not stating in the multimodal transport document that a container contains packages of goods as in *Royal Typewriter Co. v M. V Kulmerland*<sup>74</sup>.<sup>75</sup> Therefore, to avoid this case, the shipper should enumerate accurately the packages or shipping units of the goods containerised in the multimodal transport document.

Although there is no contractual relationship between the actual carrier and cargo owner in multimodal transport, under common law the actual carrier may be sued by the cargo owner in tort<sup>76</sup> as in the US case of *Railway Co. v James N. Kirby, Pty Ltd*.<sup>77</sup> The question arising is whether a sub - contractor, especially an actual sea carrier, can invoke the limitation available for MTOs under the Convention to

<sup>61</sup> The Hamburg Rules, 1978, art 6(1).

<sup>62</sup> Adeline M Briant, 'A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)' (Master thesis, McGill University 1996) 129-130.

<sup>63</sup> K.F. Haak, 'The Harmonisation of Intermodal liability arrangements' (2005) XL(1) European Transport Law 11, 38.

<sup>64</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [25].

<sup>65</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 17.

<sup>66</sup> Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) The International and Comparative Law Quarterly 120, 130.

<sup>67</sup> MT Convention, 1980, art 18(2) regulates that where the goods are containerised, if the multimodal transport document presents the goods packed in the container as packages or shipping units, the container will be considered as the packages or the shipping units, otherwise, the whole container will be considered as one package or one shipping unit.

<sup>68</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193, 238.

<sup>69</sup> James H. Porter, 'Notes: Multimodal Transport, Containerization, and Risks of Loss' (1984-1985) 25 Virginia Journal of International Law 171, 172.

<sup>70</sup> James H. Porter, 'Notes: Multimodal Transport, Containerization, and Risks of Loss' (1984-1985) 25 Virginia Journal of International Law 171, 172-173.

<sup>71</sup> Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) The International and Comparative Law Quarterly 120, 130.

<sup>72</sup> MT Convention, 1980, art 9(1).

<sup>73</sup> MT Convention, 1980, art 12.

<sup>74</sup> *Royal Typewriter Co. v M.V Kulmerland* [1973] A.M.C. 1784 (the United States Court of Appeal for the Second Circuit) where the bill of lading described that the carrier would carry a container containing machinery to the consignee, the court affected by the same principle in the Hague Rules incorporated in the US Carriage of Goods by Sea Act 1936 held that the amount of limits of liability of the carrier would be based upon one package.

<sup>75</sup> N. W. Palmieri Egger, 'The Unworkable per-package limitation of the carrier's liability under the Hague (or Hamburg) Rules' (1978) 24 McGill Law Journal 459, 474.

<sup>76</sup> Abhinayan Basu Bal, 'Multimodal Aspect of the Rotterdam Rules: a Critical analysis of the liability of the MTO' (Master Thesis, Lund University 2011) 45.

<sup>77</sup> *Railway Co. v James N. Kirby, Pty Ltd* [2004] A.M.C 2705 (the Supreme Court of the United States) where Kirby entered into a multimodal transport contract with the International Cargo Control (ICC) and the ICC then contracted with other actual carriers to perform the contract, Kirby sued the Norfolk Southern which is the actual carrier in the train leg for loss of the goods occurring in the train leg.

protect himself in this case. Under the Convention, if sub - contractors acted within the performance of the contract, they shall be entitled to avail themselves of the defences and limits of liability available for the MTO to protect themselves from claims in tort.<sup>78</sup> This provision of the Convention protects sub - contractors, and resolves the problems in the case where cargo owners prefer to sue sub - contractors rather than contractual carriers as they want to be free from the exceptions and limitations of liability in the bill of lading.<sup>79</sup> However, to obtain the benefits from the Convention, the actual carrier has to prove successfully that he acted within the scope of the contract.<sup>80</sup>

The Limitation of liability under the Convention is invoked to limit the liability of MTOs and the actual carriers only if they do not intend or are not reckless to cause damages, delays, or know that damages or losses or delays will probably occur as a result of actions or omissions.<sup>81</sup> This means that if cargo owners can prove MTOs or the actual carriers' intent, or recklessness to cause damages or delays, or the knowledge about the probability of damages, delays of their actions or omissions, they will waive their right to limit liability under the Convention.<sup>82</sup> However, from the language of this provision, if it cannot be proved that MTOs themselves acted or omitted intentionally or recklessly to cause damages, or with the knowledge that the action or omission would probably cause damages, they will still be entitled to the benefits of limitation of liability under the convention while their sub - contractors or servants and agents may waive the right to limit liability.<sup>83</sup> In linking to Article 15, Driscoll and Larsen stated that 'the relationship between Article 15 and Article 21 is not clearly expressed in the language of the two articles'.<sup>84</sup> Particularly, Article 15 regulates that MTOs will be liable for the acts of their servants, agents or sub - contractors when they act within the scope of their employment.<sup>85</sup> As a result, MTOs should not be entitled to the benefits of the limitation while their sub - contractors, servants, and agents lose the right to limit liability under the Convention. However, from the language of Article 21, it can be argued that sub - contractors can lose the right to limit liability under the Convention when damages or delays are caused by their intentional or reckless acts, while the liability of MTOs is still limited.<sup>86</sup> The existence of this conflict may lead to the case that cargo owners prefer to sue the actual carrier instead of MTOs because in theory, as it is easier to prove the intent or recklessness of the actual carrier rather than that of MTOs.

<sup>78</sup> MT Convention, 1980, art 20(2).

<sup>79</sup> John F Wilson, *Carriage of Goods by Sea* (7<sup>th</sup>edn, 2010) 143.

<sup>80</sup> MT Convention, 1980, art 20(2).

<sup>81</sup> MT Convention, 1980, art 21.

<sup>82</sup> UNCTAD, 'Implement of Multimodal Transport Rules' (UNCTAD/SDTE/TLB/2, 2001) [24].

<sup>83</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193, 231.

<sup>84</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193, 231.

<sup>85</sup> MT Convention, 1980, art 15.

<sup>86</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193, 231.

### 2.3 Time Bars

As modelled after the Hamburg Rules, time limits under the Convention will be two years if cargo owners give MTO's notification stating claims in writing within six months, otherwise, time limits will be six months.<sup>87</sup> Avoiding the case where the MTO may lose the right to sue the actual carrier, Article 25 regulates that MTOs are allowed to bring a recourse action for indemnity against actual carriers even after the time bar of two years established under the Convention expires.<sup>88</sup> However, since unimodal conventions such as the Hague - Visby Rules only give MTOs one year to sue the actual carrier, the time bar seems unreasonable as MTOs may still be at risk if cargo owners sue after the time limit of one year.<sup>89</sup> Therefore, the UNCTAD<sup>90</sup> and Marian<sup>91</sup> believed that the provisions on unreasonable time bars contributed to the failure of the Convention.

As with adopted uniform approaches, the MT Convention governs the liability of MTOs from the time goods are taken into charge until their delivery. The MT Convention attempted to resolve the problems in multimodal transport. However, as modelled after the Hamburg Rules which 'failed to gain acceptance in most major trading nations',<sup>92</sup> the provisions on presumed faults, the high monetary limitation of liability and unreasonable time bars in relating to a recourse action made the MT Convention fail in attracting sufficient signature and ratification of the member states to come into force.<sup>93</sup> In addition, network systems are applied to determine the limitation of the liability in the case of localised damages under the Convention. This causes complexities in the application of different unimodal regimes. Also, the application of the MT Convention may lead to conflict with other mandatory international unimodal conventions such as the CMR Convention<sup>94</sup> where its scope of application can expand to the whole process of carriage if there is no loading and discharge from the road vehicles in transit.<sup>95</sup> To improve on this conflict, Mankabady suggested that as unimodal conventions are applicable to contracts of carriage where modes of transport are specified, the MT Convention should require no statement of the modes of

<sup>87</sup> Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) The International and Comparative Law Quarterly 130, 132.

<sup>88</sup> William Driscoll and Paul B. Larsen, 'The convention on international multimodal transport of goods' (1982) 57(2) Tulane Law Review 193, 240.

<sup>89</sup> The Hague-Visby Rules, 1968, art III r6.

<sup>90</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [25].

<sup>91</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 17.

<sup>92</sup> Lachmi Sign, *The Law of Carriage of Goods by Sea* (2011) 42.

<sup>93</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [25].

<sup>94</sup> The CMR Convention, 1956, art 2.

<sup>95</sup> Samir Mankabady, 'The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions' (1983) 32(1) The International and Comparative Law Quarterly 120, 135-137.

transport in the documents.<sup>96</sup> However, overall Carr commented that although the MT Convention provides simplicity of determination of the liability, this does not mean that it is ‘the perfect solution to a complex situation’.<sup>97</sup>

To improve upon the problems of the MT Convention, a joint work group between the UNCTAD and ICC<sup>98</sup> was established. This group considered the exceptions of liability for the MTO in the case of the transport involved in a sea carriage, reducing the monetary limitations of liability and time limits with respect to a recourse action. At the end of the project, the UNCTAD/ICC Rules for Multimodal Transport Documents were adopted in 1991 and came into force on 1<sup>st</sup> January 1992.<sup>99</sup> To find out how the problems of the MT Convention were improved upon, the next part will analyse in - depth the improvements in the UNCTAD/ICC Rules.

### 3. MTOS’ Liability Under the UNCTAD/ICC Rules 1992

#### 3.1 The Scope of Responsibility

Similar to the MT Convention, Rule 4.1 regulates that the MTO will be liable for the entire carriage of goods from the time the goods are taken into charge until their delivery. However, the Rules provide a more simplified explanation on when the goods are considered as taken into the MTO's charge by eliminating the list of people whom the MTO takes goods from.<sup>100</sup> According to the Rules, the goods are taken into the MTO's charge when they are handed over to and accepted by him.<sup>101</sup> In contrast, the delivery of the goods under the Rules is still explained as similar to that under the MT Convention.<sup>102</sup> Particularly, the goods are considered as delivered at destination if they are handed over to a consignee or a person whom they must be handed over to, or placed at the place of delivery according to the law or usage of the particular trade applicable or at the disposal of the consignee according to the contract.<sup>103</sup>

As modelled after the MT Convention, Rule 4.2 provides that the MTO will also be liable for the acts and omissions

<sup>96</sup> Samir Mankabady, ‘The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions’ (1983) 32(1) *The International and Comparative Law Quarterly* 120, 140.

<sup>97</sup> Indira Carr, ‘International Multimodal Transport – United Kingdom’ (1998) 4(3) *International Trade Law and Regulation* 99, 109.

<sup>98</sup> The International Chamber of Commerce.

<sup>99</sup> Hugh M. Kindred and Mary R. Brooks, ‘New and Improved? The UNCTAD/ICC Multimodal Rules Reviewed’ (1994) 33(3) *Transportation Journal* 5, 5.

<sup>100</sup> Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)’ (Master thesis, McGill University 1996) 144.

<sup>101</sup> The UNCTAD/ICC Rules, 1992, rule 2.7.

<sup>102</sup> Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)’ (Master thesis, McGill University 1996) 144.

<sup>103</sup> The UNCTAD/ICC Rules, 1992, rule 2.8.

of his servants, agents, and any persons whose service he makes use of for the performance of the contract when they act within the scope of their employment and that of their contract.<sup>104</sup> However, there is an important improvement in the Rules in comparison with the MT Convention. Particularly, the MTO will not be liable for any damages, losses, and delays in delivery caused by acts, neglect, and default of the master, mariner, pilot and the servants of the carrier in the navigation or the management of the ship in a sea carriage.<sup>105</sup> Nevertheless, in the case of relating to damages or losses caused by the unseaworthiness of the ship, this defence is only invoked if the MTO can prove that he exercised due diligence to make the ship seaworthy at the commencement of the voyage.<sup>106</sup> Simply, ‘the provision of the Rule 5.4 is intended to make the liability of the MTO compatible with the Hague/Visby Rules for carriage of sea or inland waterways’.<sup>107</sup> With the simplification and improvement of the scope of responsibility of the MTO, under the UNCTAD/ICC Rules 1992, the problem in multimodal transport<sup>108</sup> and the controversy on the scope of liability of the MTO to acts of his servants, agents, and sub-contractors during a sea leg in the MT Convention seems to be resolved. These principles of the UNCTAD/ICC Rules 1992 are adopted and incorporated into the FIATA Bill of Lading 1992<sup>109</sup> and BIMCO's Multidoc 1995<sup>110, 111</sup>.

#### 3.2 Liability

##### 3.2.1 The Basis of Liability

Under the UNCTAD/ICC Rules 1992, liability of the MTO is based upon the principle of presumed fault as under the MT Convention.<sup>112</sup> According to Rule 5.1, the MTO will be liable for any damages, losses, and delays in delivery occurring when the goods are in his charge unless he can prove that damages, losses, and delays in delivery are caused by no fault and neglect of his servants, agents, and sub-contractors.<sup>113</sup> However, there is an important difference on the basis of liability of the MTO between the Rules and the MT Convention.<sup>114</sup> Adopting the approaches of the Hague - Visby Rules, under the UNCTAD/ICC Rules 1992 although liability of the MTO is always presumed to be at fault, in a

<sup>104</sup> UNCTAD, ‘Implement of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/2, 2001) [34].

<sup>105</sup> The UNCTAD/ICC Rules, 1992, rule 5.4.

<sup>106</sup> The UNCTAD/ICC Rules, 1992, rule 5.4.

<sup>107</sup> UNCTAD, ‘Implement of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/2, 2001) [33].

<sup>108</sup> Which is risks of cargo owners in the period of transit since the liability of the MTO is governed by different unimodal conventions which may not cover the liability in the period of transit such as the Hague-Visby Rules where art I(e) regulates that the Hague-Visby Rules will govern the carriage of goods from the time the goods are loaded on to the time they are discharged from the ship.

<sup>109</sup> FIATA Bill of Lading 1992 clause 2.2, 6.1 and 6.6.

<sup>110</sup> BIMCO's Multidoc 1995 Clause 10 and 11.

<sup>111</sup> UNECE, ‘Possibilities for harmonization of civil liability regimes governing multimodal transport’ (TRANS/WP.24/2002/6, 2002) [9].

<sup>112</sup> The UNCTAD/ICC Rules, 1992, rule 5.1.

<sup>113</sup> UNCTAD, ‘Implement of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/2, 2001) [32].

<sup>114</sup> MahinFaghfour, ‘International Regulation of Liability for Multimodal Transport’ (2006) 5(1) *WMU Journal of Maritime Affairs* 95, 99.

sea carriage he will not be liable in the case of nautical fault and fire.<sup>115</sup> In accordance with Rule 5.4, the MTO will escape his liability, if he can prove that damages, losses, and delays in delivery are caused either by acts, neglects or defaults of the master, pilot, mariner, or the servants of the actual carrier in the navigation or the management of the ship. Besides this, reasons such as a fire caused by no fault of the carrier, or due diligence exercised by the MTO to make the ship seaworthy at the beginning of the voyage in the case of unseaworthiness of the ship causing the damages can help the MTO to avoid the liability if they are proved successfully.<sup>116</sup> This improvement of the UNCTAD/ICC not only simplifies the determination of the basis of liability of the MTO but also abates liability of the MTO in a sea carriage. This is understandable as a sea carriage is a long voyage with unforeseen high risks. Therefore, the MTO may not be able to recover indemnity from the actual carrier in the situations above if the Hague - Visby Rules<sup>117</sup> are applicable to govern the contract between the MTO and the actual carrier. In addition, it also resolves the MTO's problem of the basis of liability in the MT Convention and brings 'the Convention into line with current commercial practice'.<sup>118</sup>

Unlike the MT Convention, the MTO under the Rules is only liable for losses following from delays in delivery if the shipper declares an interest in timely delivery, and the MTO accepts this.<sup>119</sup> This provision of the Rules is a new point 'which did not exist under the MT Convention'.<sup>120</sup>

### 3.2.2 Limitation of Liability

Similar to the MT Convention, the UNCTAD/ICC Rules 1992 contains special provisions of limitation of liability in the case of localised damages.<sup>121</sup> According to Rule 6, where the location of damages is known and there is a separate contract of carriage for that particular mode of transport, the limitation will be determined by reference to the provisions of an applicable unimodal convention or national mandatory law which provides different limits of liability.<sup>122</sup> In other cases, limitation of liability will be based upon the provisions of the Rules. From the language

of Rule 6, unlike the MT Convention, under the Rules unimodal conventions or mandatory national laws may be applied to determine the limitation in the case of localised damages irrespective of whether or not the limit under applicable unimodal conventions or mandatory national laws is higher than that under the Rules. As a result, the parties can 'introduce a lower limit of liability by inserting in the contract a reference to a Convention which could have been applied to the relevant stage'.<sup>123</sup> This improvement opens the opportunity for the MTO to fully exploit the advantages of international unimodal conventions in limitation of liability.

In the cases of damages and losses where unimodal conventions or mandatory national laws are inapplicable, the liability of the MTO will be limited in an amount not exceeding the equivalent of either 666.7 SDR per package/unit or 2 SDR per kilogram if the nature and value of the goods are not declared before the goods are taken into charge and inserted into the document.<sup>124</sup> Unlike the MT Convention, the limits of liability under the Rules correspond to those under the Hague - Visby Rules whose limitation of liability is accepted widely by more than 90 countries<sup>125</sup> around the world.<sup>126</sup> Therefore, the limitation of liability under the Rules is lower than that under the MT Convention.<sup>127</sup> With this approach, the Rules protect not only the MTO by the provisions on limitation of liability but also the cargo owner by regulating how the cargo owner can recover the whole value of the goods if the value is declared before the MTO takes the goods in his charge and is presented in the document. This seems to mollify the arguments of scholars such as Haak<sup>128</sup> and Hoeks<sup>129</sup> who believe that the limitation of liability under the MT Convention is quite high. Additionally, the lower limitation of liability under the UNCTAD/ICC Rules 1992 seems to be more attractive to the acceptance of trade transporters than the MT Convention. This is proven by the widespread use of the UNCTAD/ICC Rules 1992.<sup>130</sup>

Unlike the MT Convention, the determination of limitation of liability for losses caused by delays in delivery under the UNCTAD/ICC Rules 1992 is only based upon freight under the multimodal transport contract.<sup>131</sup> According to Rule 6.5, the liability of the MTO for the delay in delivery is limited to an amount not exceeding the equivalent of the freight

<sup>115</sup> The UNCTAD/ICC Rules, 1992, rule 5.4.

<sup>116</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [56].

<sup>117</sup> The Hague-Visby Rules, 1968, art IV r2 regulates that the carrier will not be liable in the case of fire not caused by his fault, as well as, for acts, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or the management of the ship.

<sup>118</sup> Adeline M Briant, 'A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)' (Master thesis, McGill University 1996) 146.

<sup>119</sup> The UNCTAD/ICC Rules, 1992, rule 5.1

<sup>120</sup> Adeline M Briant, 'A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)' (Master thesis, McGill University 1996) 145.

<sup>121</sup> Vibe Ulfbeck, 'Multimodal Transports in the United States and Europe – Global or Regional Liability Rules' (2009-2010) 34 *Tulane Maritime Law Journal* 37, 47.

<sup>122</sup> UNCTAD, 'Implement of Multimodal Transport Rules' (UNCTAD/SDTE/TLB/2, 2001) [36].

<sup>123</sup> Adeline M Briant, 'A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24<sup>th</sup> May 1980)' (Master thesis, McGill University 1996) 145.

<sup>124</sup> The UNCTAD/ICC Rules 1992, rule 6.1.

<sup>125</sup> See footnotes 136.

<sup>126</sup> Abhinayan Basu Bal, 'Multimodal Aspect of the Rotterdam Rules: a Critical analysis of the liability of the MTO' (Master Thesis, Lund University 2011) 39.

<sup>127</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 20.

<sup>128</sup> K.F. Haak, 'The Harmonisation of Intermodal liability arrangements' (2005) *XL(1) European Transport Law* 11, 38.

<sup>129</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 17.

<sup>130</sup> Abhinayan Basu Bal, 'Multimodal Aspect of the Rotterdam Rules: a Critical analysis of the liability of the MTO' (Master Thesis, Lund University 2011) 65.

<sup>131</sup> The UNCTAD/ICC Rules, 1992, rule 6.5



under the contract.<sup>132</sup>The UNCTAD/ICC Rules 1992 simplified the complexity of the determination of limitation of liability for delay in delivery under the MT Convention which is the determination of the limitation for the delay in delivery based upon two kinds of freight including the freight payable for the goods delayed and the freight under the contract.<sup>133</sup>

In relation to the actual carriers in the multimodal transport contract, similar to the MT Convention, the Rules also protect the actual carriers from the cargo owner's claims in tort relating to the performance of the contract. This is proven by the provision of Rule 12. According to Rule 12, the actual carrier is entitled to invoke limitation of liability under the UNCTAD/ICC Rules 1992 to protect himself from claims in tort relating to his performance of the contract.<sup>134</sup>

Similar to the MT Convention, Rule 7 regulates that the MTO will lose his right to the limitation of liability under the Rules if it can be proved that damages, losses or delays caused by a personal act or omission of the MTO intentionally, or recklessly or with the knowledge that such damages, losses or delays would probably result. Although the language seems to model after the MT Convention, the language of Rules 7 removes confusion between Art 15 and Art 21 under the MT convention. Particularly the words of 'personal acts or omissions' under Rule 7 make it clear that the limitation of liability of the MTO is only affected by his own intentional, reckless action. Therefore, the MTO is clearly entitled to limitation of liability when damages, losses or delays are caused by his servants, sub-contractors' fault or their intentional acts or omissions, but not by either his own fault or his intentional acts or omissions.

### 3.3 TIME BAR

Unlike the MT Convention, the UNCTAD/ICC Rules 1992 gives the cargo owner nine months to sue the MTO for damages, losses or delays in delivery.<sup>135</sup> In commenting about the time bar of nine months, the judge in the case of *Granville Oil v Chemicals Ltd v Davis Turner & Co Ltd*<sup>136</sup> also stated that the time limit of nine months was reasonable for claims against loss or damages of the goods in transit, and also necessary for the freight forwarder to claim the actual carrier within the time limit of twelve months.

The UNCTAD/ICC Rules have improved provisions on the basis of liability, monetary limitation of liability, limitation of liability of non-contractual parties, and time bars in comparison with the MT Convention. Therefore, they appear to resolve the current problems in multimodal transport and

attract commercial recognition rather than the MT Convention.<sup>137</sup> This is proven by incorporating the Rules into Multimodal transport documents such as the FIATA bill of lading 1992 and BIMCO's Multidoc95.<sup>138</sup> Thus, some of the UNECE experts who are 'satisfied with the existing private law arrangements' suggested that there was 'no need for a new regulatory system' at present.<sup>139</sup> However, in practice the Rules are contractual.<sup>140</sup> As a result, to govern the liability of the MTO in multimodal transport contracts, the Rules have to be incorporated into the contract by paramount clauses. In other words, the Rules 'lack the stature of the mandatory international legislation'.<sup>141</sup> Consequently, it 'creates considerable uncertainty as to the law applicable to multimodal transport operations and the ensuring financial consequences for the shipper and the MTO'.<sup>142</sup> Therefore, the majority of all UNCTAD respondents support the idea of a new mandatory uniform regime.<sup>143</sup> In addition, the UNCTAD/ICC Rules mainly contain only the provisions of liability of the parties in multimodal transport contracts. Thus, the parties who want to incorporate the Rules into their contract would have to add other clauses to deal with other issues in a multimodal transport contract such as jurisdiction, arbitration, and applicable law.<sup>144</sup>

## 4. Conclusion

In an attempt for a uniform regime governing multimodal transport, the MT Convention and the UNCTAD/ICC Rules 1992 were created. The Convention and the UNCTAD/ICC Rules 1992 resolve the problems which the network system encounters such as determination of liability of the MTO in the case of unlocalised damages, conflicts between different unimodal liability regimes, and holes of liability in which some regimes do not cover the whole period of carriage in one mode of transport. However, the MT Convention contains provisions on the monetary limitation of liability, time bars, and the basis of liability which are not attractive to shipping countries, and a subject of controversies. Therefore, it has not obtained enough consensuses of UN members to come into force. In contrast, to the MT Convention, the UNCTAD/ICC Rules 1992 seem to be

<sup>137</sup> David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (2004) chapter 1 para. 1.38.

<sup>138</sup> Ling Zhu, M.DenizGuner-Ozbek and Hong Yan, 'Carrier's Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU' (IFSPA 2010 – Integrated Transportation Logistics: From Low Cost to High Responsibility, China, 15<sup>th</sup>-18<sup>th</sup> October 2010).

<sup>139</sup> UNECE, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport' (TRANS/WP.24/2000/3, 2000) [36].

<sup>140</sup> UNCTAD, 'Development of Multimodal Transport and Logistics Services' (TD/B/COM.3/EM.20/2, 2003) [27].

<sup>141</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 19.

<sup>142</sup> UNECE, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport' (TRANS/WP.24/2002/6, 2002) [11].

<sup>143</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [79].

<sup>144</sup> Marian Hoeks, *Multimodal Transport Law: The Law applicable to the Multimodal contract for the carriage of goods* (2009) 19.

<sup>132</sup> UNCTAD, 'Implement of Multimodal Transport Rules' (UNCTAD/SDTE/TLB/2, 2001) [37].

<sup>133</sup> The MT Convention, 1980, art 18(4) regulates that liability of the MTO for the delay in delivery will be limited to an amount equivalent to two and a half times of the freight payable for the goods delayed, but not exceeding the total freight under the contract.

<sup>134</sup> The UNCTAD/ICC Rules, 1992, rule 12.

<sup>135</sup> The UNCTAD/ICC Rules 1992, rule 10.

<sup>136</sup> *Granville Oil v Chemicals Ltd v Davis Turner & Co Ltd* [2003] EWCA Civ 570.

attractive to transport traders. As a result, it is incorporated into multimodal transport documents such as the FIATA bill of lading 1992 and BIMCO's Multidoc95 which have been used widely by multimodal transport operators. Unfortunately, the Rules are voluntary.

In the case where it seems very difficult to reach a valid uniform regime globally, many scholars who adopt a network approach considered 'unimodal plus' solutions to deal with legal problems in international multimodal transport. With ambiguity for a uniform regime in the area of sea carriage providing for 'modern industry needs in terms of door to door carriage',<sup>145</sup> in 2008 the UN General Assembly adopted the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as Rotterdam Rules.<sup>146</sup> The Rules are considered as a global solution for multimodal transport and the problems which the existing regimes on sea carriage of goods encounter.<sup>147</sup> Particularly, the scope of application of the Rules covers not only contracts of marine carriage of goods but also multimodal transport contracts involving a sea carriage.<sup>148</sup> The Rules also adopt the principle of door - to door period of liability.<sup>149</sup> According to this principle, the carrier will be liable from the time the goods are received for carriage until their delivery.<sup>150</sup> Although the extension of the period of responsibility makes the Rules applicable for multimodal transport and fills the gap of liability in the case of unlocalised damages in multimodal transport, this may produce conflicts between the Rules and other unimodal liability regimes such as the CMR Convention.<sup>151</sup> In addition, the Rules contain particular provisions on liability of marine performing carriers distinguished from the MTO which is a new point of the Rules.<sup>152</sup> Improving on the

principle of the basis of liability under the Hamburg Rules, the Rotterdam Rules adopt exceptions of liability under the Hague (- Visby) Rules besides the principle of presumed fault.<sup>153</sup> Similar to the MT Convention and the UNCTAD/ICC Rules 1992, the Rules also adopt the network system in the determination of limitation of liability and time bars in the case of localised damages.<sup>154</sup> However, where unimodal regimes are inapplicable, the monetary limitation of liability under the Rules is 875 SDR per unit or package or 3 SDR per kilogram which is higher than the limitation under the Hague (- Visby) Rules and the Hamburg Rules.<sup>155</sup> As modelled in the Hamburg Rules, the Rules provide the time limit of two years for claims against loss or damage of the goods and delay in delivery.<sup>156</sup> Overall, if the Rules come into force, they will have a significant meaning in contributing to the settlement of problems in multimodal transport.

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<sup>145</sup>Ling Zhu, M.DenizGuner-Ozbek and Hong Yan, 'Carrier's Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU' (IFSPA 2010 – Integrated Transportation Logistics: From Low Cost to High Responsibility, China, 15<sup>th</sup> -18<sup>th</sup> October 2010).

<sup>146</sup>Jose Angelo Estrella Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules' (2008-2009) 44 Texas International Law Journal 277, 312.

<sup>147</sup>Vibe Ulfbeck, 'Multimodal Transport in the United States and Europe – Global or Regional Liability Rules?' (2009-2010) 34 Tulane Maritime Journal37, 84.

<sup>148</sup>The Rotterdam Rules art 1(1) regulates that contract of carriage under the Rules means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another place. The contract will provide for the carriage of goods by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

<sup>149</sup>Lachmi Singh, *The Law of Carriage of Goods by Sea* (2011) 45.

<sup>150</sup>The Rotterdam Rules, 2008, art 12.

<sup>151</sup>Although Article 26 of the Rules provide a network approach for determination of liability in which unimodal regimes relating to the mode of transport where the damage is localised will apply to determine liability of the carrier in that mode, this approach is applied only if there is a separate contract made directly with the carrier for that particular mode of transport. Therefore in the case where the requirement for the network system applicable is not met, the conflicts between the Rules and another unimodal regime such as the CMR Convention will occur because the Article 2 of the Convention regulates that the Convention will apply not only for road carriage but also for the whole carriage involved in another mode of transport if the goods are not unloaded from the vehicle.

<sup>152</sup>The Rotterdam Rules, 2008, art 19.

<sup>153</sup>The Rotterdam Rules, 2008, art 17.

<sup>154</sup>The Rotterdam Rules, 2008, art 26.

<sup>155</sup>The Rotterdam Rules, 2008, art 59.

<sup>156</sup>The Rotterdam Rules, 2008, art 62.

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