

# Multimodal Transport Operator's Liability during Sea Legs - Application of the Hague-Visby Rules and Hamburg Rules

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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 applicable to govern the liability of multimodal transport operators but none of these regimes have a mandatory effect. Therefore, until now different unimodal international conventions for multimodal transport will be applied to govern the liability of MTOs during sea, air, rail and road legs. As a result, this paper will discuss liability regimes for MTOs under the Hague-Visby Rules [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] and the Hamburg Rules [The Hamburg Rules mean the United Nations Convention on the Carriage of Goods by Sea 1978.] to discover liability of MTOs during a sea leg. Particularly, the regulations related to the scope of liability, limitation, and the time bar as well as problems to the multimodal transport of these regimes will be analysed and critically examined in this paper.*

**Keywords:** Multimodal transport operators, Liability, Hague-Visby Rules, Hamburg Rules

## 1. Introduction

The Hague-Visby Rules which amended the International Convention for the unification of certain rules of law relating to bills of lading (the Hague Rules) signed at Brussels on 25<sup>th</sup> August 1924 were formally signed at Brussels in 1968. [1] The Rules contain ten articles governing contracts of carriage of goods by sea which are covered by a bill of lading, or any similar document of title.<sup>1</sup> The question arising is whether or not the Hague Rules, as well as the Hague-Visby Rules, are applicable to govern the liability of the MTO in 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>2</sup> during a sea leg.<sup>3</sup> There are different opinions on the application of these Rules to the stage of sea carriage in multimodal transport contracts. [2] Within English jurisdiction, judges such as Devlin J in *Pyrene Co. LD. v Scindia Navigation Co. LD.*<sup>4</sup> and Bingham J in *Mayhew Foods Limited v Overseas Containers Ltd*<sup>5</sup> pointed out clearly that where a sea carriage is a stage of a single contract involved in different modes of transport, the Hague Rules will be applied only for sea transport. In contrast to this, the Italian courts believed that international unimodal conventions cannot be applied to multimodal

transport. [3] This opinion is confirmed in cases such as *Andrea Merzario S.p.A v Vismara Associates S.p.A. and others*,<sup>6</sup> and *Chinese Joint Stock Shipping Co. v ZustAmbrosetti S.p.A.*<sup>7</sup>

Similar to the Hague (-Visby) Rules, the Hamburg Rules which were drafted by the UNCITRAL<sup>8</sup> working group on transport law, and adopted at Hamburg in 1978 by sixty-eight United Nations state members, is one of the current international conventions applicable to govern the liability of the MTO during a sea carriage. [4] However, there are significant differences in the scope of responsibility, the basis of responsibility, limitation of liability, time bar, and the burden of proof between the two regimes. [5]

In this article, the liability provisions of the Hague (-Visby) Rules and the Hamburg Rules will be discussed critically and comparatively to discover how they govern the scope of liability, limitations, and time bars in the case where they are applicable to govern the liability of the MTO in a sea carriage. In addition, their problems in relation to multimodal transport will be analysed in this article.

## 2. The Hague-Visby Rules

<sup>1</sup> The Hague-Visby Rules art I(b).

<sup>2</sup> The United Nations Convention on International Multimodal Transports of Goods 1980 art 1(1).

<sup>3</sup> Although the Hague-Visby Rules have changed to the scope of application and the limitation of liability in comparison with the Hague-Rules, overall there are not many changes in the structure and meaning between them. Therefore in this article, I will consider both the Hague-Visby Rules and the Hague Rules in concert.

<sup>4</sup> *Pyrene Co. LD. v Scindia Navigation Co. LD.* [1954] 2 W.L.R. 1005.

<sup>5</sup> *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317.

<sup>6</sup> *Andrea Merzario S.p.A. v Vismara Associates S.p.A. and others* [2000] Dir. Mar. 1349 (The Italian Court of Cassation) where the court held that a contract of carriage performed partly by sea and partly by road is not governed by the Hague-Visby Rules but by the provisions of the Civil Code.

<sup>7</sup> *Chinese Joint Stock Shipping Co. v Zust Ambrosetti S.p.A* [2003] Dir. Mar 1024 (the Italian Tribunal of Turin) where the court held that the Hague-Visby Rules are not applicable to a mixed road/sea contract of carriage, even if the carriage is characterised by the absolute prevalence of the sea leg.

<sup>8</sup> UNCITRAL means the United Nations Commission on International Trade Law.

## 2.1 The scope of liability

According to Article I(e) of the Hague (-Visby) Rules, these Rules are compulsory to the period from the time the goods are loaded on board until the time they are discharged from the ship. [6] Although these Rules pointed out the period of responsibility of the MTO which they govern compulsorily, there is no further interpretation on when the loading point commences and the discharge is completed under these Rules. [7] However, in practice, the goods are traditionally considered as loaded on board and as discharged from the ship from the moment they cross the ship's rail.<sup>9</sup> In contrast, in *Pyrene Co. LD. v Scindia Navigation Co. LD*<sup>10</sup> the judge interpreted that within English jurisdiction the scope of application of the Rules was not confined to the moment when the goods crossed the ship's rail, but applied to the whole operation of loading. In other words, in England these Rules apply from the time loading commences when the goods are hooked into the tackle.<sup>11</sup> Additionally, in the case of discharge, especially where the discharge is involved in lighters, a question arising is when the discharge is completed. For this question the court in *Goodwin Ferreira & Co. Ltd and others v Lamport & Holt Ltd*<sup>12</sup> stated clearly common opinion that the discharge is not considered as complete until all the goods are completely put into the lighters. This period under these Rules is also known as "tackle to tackle"<sup>13</sup>. [8] The court in *The Prins Willem III*<sup>14</sup> based upon this principle and stated that if damages occur outside of this tackle to tackle period, these Rules will not apply to govern the liability of the carrier. In light of multimodal transport where the goods are moved between different modes of transport, application of these Rules, under which the MTO's liability is not covered for the full period of the sea carriage, [9] punch a hole in the determination of the liability of the MTO before loading and after discharge during a sea carriage. [10]

However, these Rules do not prevent the parties from extending the scope of application beyond tackle to tackle. [11] Particularly, Article VII of the Hague (-Visby) Rules provides that the Rules shall not prevent shippers or carriers from extending the responsibility and liability of the carrier for damages or losses when the goods are in his care before loading and subsequently discharged from the ship. The judge in *The Prins Willem III*<sup>15</sup> affirmed that outside of the

scope of application of the Hague Rules, according to Article VII the parties are free to contract. Also in *Pyrene Co. LD. v Scindia Navigation Co. LD*<sup>16</sup> the court emphasised that he saw no reason why the Rules should not let the parties decide through their own contract the period of responsibility of the carrier. Therefore, to avoid the hole in liability of the MTO during the sea carriage, the parties in multimodal transport should add a clause that extends the scope of application of the Rules to before and after the period of tackle to tackle. However, it should be noted that as the court in *Hartford Ins. Co v M/V OOCL Bravery*<sup>17</sup> pointed out, the scope cannot be extended to the period governed by other unimodal regimes.

Unlike the MT convention,<sup>18</sup> under the Hague (-Visby) Rules, the MTO will not be liable for acts and faults of his servants, masters, and pilots in the navigation or the management of the ship and for a fire caused by their fault and privity.<sup>19</sup> This is called "the nautical error" exception. [12] However, if damages are not caused by faults of his servants and the actual carrier in the navigation or the management of the ship, or by a fire caused by their fault, the MTO will still be liable for their acts within their scope of liability. [13] This seems to be supported by the arguments of the court in *Leesh River Tea Co. Ltd and Others v British India Steam Navigation Co. Ltd*<sup>20</sup> where it held that although the stevedore who removed the cover was a servant of the carrier, his action was not an action in the management of the ship, so the carrier could not rely on the nautical error exception to escape his liability. This exception creates elasticity of the Hague (-Visby) Rules and serves the MTO's interest. [14] Therefore, the Hague (-Visby) Rules are chosen to be incorporated into multimodal transport documents such as Combiconbill published by the BIMCO.<sup>21</sup>

## 2.2 Liability

### 2.2.1 The basis of liability

Different from the Hamburg Rules, the MT Convention and UNCTAD/ICC Rules<sup>22</sup>, the basis of liability of the MTO under the Hague (-Visby) Rules is based upon the "due diligence" system and exception. [15] Particularly, Article IV rule 1 of these Rules regulates that 'neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier ...'. According to this rule the judge in *Maxine Footwear Co. Ltd. And another v*

<sup>9</sup>UNCTAD, 'Bills of Lading' (TD/B/C.4/ISL/6/Rev.1, 1971) [192].

<sup>10</sup>Pyrene Co. LD. v Scindia Navigation Co. LD. [1954] 2 W.L.R. 1005 where the cargo was being lifted onto the ship by the ship's rail and dropped before it crossed the ship's rail.

<sup>11</sup>UNCTAD, 'Bills of Lading' (TD/B/C.4/ISL/6/Rev.1, 1971) [193].

<sup>12</sup>Goodwin Ferreira & Co. Ltd and others v Lamport & Holt Ltd [1929] 34 Lloyd's Rep. 192.

<sup>13</sup>Which is traditionally the period from the time when the ship's tackle is hooked onto the goods at the loading port until the hook is released at the discharge port.

<sup>14</sup>Robert Simpson (Montreal) v Canadian Overseas Shipping Ltd (The Prins Willem III) [1972] 2 Lloyd's Rep. 124.

<sup>15</sup>Robert Simpson (Montreal) v Canadian Overseas Shipping Ltd (The Prins Willem III) [1972] 2 Lloyd's Rep. 124.

<sup>16</sup>Pyrene Co. LD. v Scindia Navigation Co. LD. [1954] 2 W.L.R. 1005.

<sup>17</sup>Hartford Ins. Co v M/V OOCL Bravery [2000] 1 Lloyd's Rep. 394.

<sup>18</sup>The MT Convention means the United Nations convention on International multimodal transport of goods 1980.

<sup>19</sup>The Hague (-Visby) Rules art IV r2.

<sup>20</sup>Leesh River Tea Co. Ltd and Others v British India Steam Navigation Co. Ltd [1967] 2 Q.B. 250.

<sup>21</sup>UNECE, 'Possibilities for reconciliation and harmonization of civil liability regimes governing combined transport' (TRANS/WP.24/2000/3, 2000) p 31.

<sup>22</sup>UNCTAD/ICC Rules mean the UNCTAD/ICC rules for multimodal transport documents 1992.

*Canadian Government Merchant Marine Ltd*<sup>23</sup> stated that the carrier could only escape his liability if due diligence was exercised not only by himself but also by his servants and agents. In other words, unless the MTO, his servants, and agents exercise due diligence to make the ship seaworthy and care for the goods, he will be liable for damages and losses of the goods.<sup>24</sup> In conclusion, due diligence is the fundamental basis to determine the liability of the MTO under the Hague (-Visby) Rules.

In addition, due diligence duty is an important condition for the MTO to avail himself of the protection under Article IV rule 2.<sup>25</sup> The judges affirmed that the obligation of due diligence is overriding, so the carrier is not able to rely on the exemptions of Article IV rule 2 if the duty is not fulfilled and damages are caused by the nonfulfillment in cases such as *Maxine Footwear Co. Ltd. And another v Canadian Government Merchant Marine Ltd*,<sup>26</sup> and *the Aconcagua*.<sup>27</sup> However, the burdens of proving the exercise of due diligence are on the carrier or other person who claims an exemption under Article IV of the Rules.<sup>28</sup> This principle is applied in *Leesh River Tea Co. Ltd and Others v British India Steam Navigation Co. Ltd*<sup>29</sup> and in *the Kamsar Voyager*.<sup>30</sup> From this principle, if the MTO cannot prove exercise of due diligence, he will be liable for damages, as well as, being denied recovery from the insurers. Therefore, Tong-jiang and Peng believed that except for the exemption of fire and errors in the management and navigation, the basis of liability of the MTO under the Hague (-Visby) Rules are based upon presumed fault plus exception. [16] In contrast, Kassem insisted that the basis of liability of the MTO under these Rules is based upon "proved fault"<sup>31, 32</sup>. However in *The Lendoudis Evangelos II*<sup>33</sup> the court asserted that the burden of proof of unseaworthiness of the ship and its contribution to or result in damages and losses of the

goods relies on the cargo owner, while the carrier has to prove that damages and losses are not caused by want of due diligence on his part, servants, or agents. In other words, if there are proven damages of the goods and their relevance to violation of the obligation of the carrier, the carrier will be liable for damages unless he can prove that himself, his servants, and agents exercised due diligence. Under the Hague (-Visby) Rules, the cargo owner is not expected to prove more than damages of his cargo, and the relevance between damages and violation of the carrier's obligation. Instead, the carrier has to prove his due diligence if he wants to escape liability. Therefore, I disagree with Kassem's opinion on a proven fault-based liability system under the Hague (-Visby) Rules.

Besides due diligence, the MTO can also escape his liability if he is successful in invoking the exception of liability under Article IV of the Hague-Visby Rules.<sup>34</sup>

### 2.2.2 Limitation

Liability for damages or losses of goods under the Hague-Visby Rules will be limited to an amount not exceeding either the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogram if there is no declaration on the value of goods inserted in the bill of lading before shipment.<sup>35</sup> Although the limitation of liability under the Hague-Visby Rules is higher than under the Hague Rules,<sup>36</sup> the limitation of liability of the MTO under the Rules is still lower in comparison with the MT Convention. At present, the Hague-Visby Rules limitation of liability seems to satisfy transporters and logistic service operators. Particularly, the limitation under the UNCTAD/ICC Rules 1992 incorporating the limitation of liability under the Hague-Visby Rules is used widely in multimodal transport documents such as the FIATA Bill of Lading 1992, BIMCO's Multidoc 1995, and Combiconbill. However, both these Rules have no provision on liability for delay. [17] Therefore, these Rules do not satisfy a majority demand for the determination of MTOs' liability for delays in multimodal transport.<sup>37</sup>

Unlike the MT Convention and the UNCTAD/ICC Rules 1992, sub-contractors will not be protected by provisions under the Hague (-Visby) Rules. [18] In other words, under the Hague (-Visby) Rules, the actual carriers in multimodal transport are not able to avail themselves of the defences and limitation of liability which the MTO is entitled to invoke under these Rules.<sup>38</sup> Therefore, in multimodal transport where the carriage is often performed by sub-carriers, there is a decrease in application of Article IV bis rule 2 of the Hague-Visby Rules due to its applicability. [19] However, to prevent cargo owners attempting to sue the actual carrier to avoid limitation available for the MTO, under the Hague (-

<sup>23</sup> *Maxine Footwear Co. Ltd. And another v Canadian Government Merchant Marine Ltd* [1959] A.C. 589. (the Supreme Court of Canada)

<sup>24</sup> Ahmad Hussam Kassem, 'The Legal Aspects of Seaworthiness: Current Law and Development' (PhD thesis, Swansea University 2006) 77.

<sup>25</sup> Wuthichai Chongcharoenrungrat, 'The Common Law, the Hague-Visby Rules, and the Thai Carriage of Goods by Sea Act regarding Carrier's obligation and liability: A Comparative Study' (Master thesis, Lund University 2010) 16.

<sup>26</sup> *Maxine Footwear Co. Ltd. And another v Canadian Government Merchant Marine Ltd* [1959] A.C. 589. (the Supreme Court of Canada).

<sup>27</sup> *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp (the Aconcagua)* [2009] EWHC 1880 (Comm).

<sup>28</sup> The Hague (-Visby) Rules art IV r1.

<sup>29</sup> *Leesh River Tea Co. Ltd and Others v British India Steam Navigation Co. Ltd* [1967] 2 Q.B. 250.

<sup>30</sup> *Guinomar of Conakry v Samsung Fire & Marine Insurance Co Ltd (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57.

<sup>31</sup> Which means that unless the cargo owner proves that the action or omissions of the carrier, or his servants or agents contributed to the loss the carrier will not be liable for the loss or damage.

<sup>32</sup> Ahmad Hussam Kassem, 'The Legal Aspects of Seaworthiness: Current Law and Development' (PhD thesis, Swansea University 2006) 77.

<sup>33</sup> *Demand Shipping Co Ltd v Ministry of Food, Government of Bangladesh & Anor (The Lendoudis Evangelos II)* [2001] C.L.C. 1598.

<sup>34</sup> The Hague (-Visby) Rules art IV r2.

<sup>35</sup> The Hague-Visby Rules art IV r5(a).

<sup>36</sup> The Hague Rules art IV r5.

<sup>37</sup> UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) p 26 showed that 90% of UNCTAD respondents believed that a possible instrument governing multimodal transport should cover liability for delay.

<sup>38</sup> The Hague-Visby Rules art IV bis r2.

Visby) Rules, Lord Goff of Chieveley in *The Mahkutai*<sup>39</sup> recommended that a Himalaya clause inserted into a bill of lading is useful in this case. In a situation where there is no special provision on protection of the actual carrier, Himalaya clauses seem to help to resolve the problem by extending the defences and limitations of liability available to the MTO under the Hague-Visby Rules to the actual carrier. [20] Particularly, in *The New York Star*<sup>40</sup> it was found that because there was a Himalaya clause extending limitation of the time bar to sub-contractors, the sub-contractor was entitled to avail himself of the limitation available to the carrier under the Hague Rules.

Similar to the MT Convention and the UNCTAD/ICC Rules 1992, Article IV rule 5(e) of the Hague (-Visby) Rules regulates that the MTO will waive his right to the limitation under the Rules if it can be proved that the MTO caused damages or losses by his intentional or reckless acts, omissions, or by the knowledge that damage would probably result. [21] For example in *The Chanda*<sup>41</sup> where the control cabin was damaged by the carrier's decision to store it on deck instead of under deck, it held that the carrier was not entitled to rely on the limitation under the Hague-Visby Rules because the damage was resulting from his decision.

### 2.3 Time Bar

In contrast to the MT Convention and UNCTAD/ICC Rules 1992, the Hague-Visby Rules provide one-year time bars. [22] This means that the MTO, as in *The Stephanos*<sup>42</sup> will be released from all liability if there is no claim against damages or losses of the goods within one year of their delivery or expected delivery date.<sup>43</sup>

To prevent a situation where the MTO may lose the right to claim from the actual carrier if the cargo owner sues him just before the end of the time limit, Article III rule 6 bis of the Hague-Visby Rules gives the parties liberty to extend the time limit for indemnity. [23] This has an important meaning in the settlement of the problem in multimodal transport.

### 2.4 Conclusion

Although the Hague (-Visby) Rules are adopted by the majority of shipping countries around the world, they 'are not exactly tailor made for multimodal transport'. [24] The reason for this is that the scope of liability under these Rules covers only the tackle to tackle period. This period creates a hole in the determination of the liability under the network system. In addition, the scope of application of these rules, where the rules only apply for contracts of carriage covered under documents of title,<sup>44</sup> limits the application of these Rules to multimodal transport where its documents such as a "received for shipment" or through bill of lading may not be

considered as documents of title. Also, non-application of these rules to deck cargos, such as containers carried on deck, contributes to a decrease in the application in multimodal transport where it is often involved in deck containers.<sup>45</sup> Besides this, these Rules do not cover protection for actual carriers or sub-carriers who actually carry and care for the goods in a multimodal carriage, and liability for delays which most people believe are necessary to be contained within an instrument for multimodal transport.<sup>46</sup> However, it is still chosen to govern the liability in a sea carriage in multimodal transport, because of the monetary limitation of liability which seems to satisfy not only marine carriers but also multimodal transporters.

## 3. The Hamburg Rules

### 3.1 The scope of responsibility

Different from the Hague (-Visby) Rules, the scope of liability of the MTO under the Hamburg Rules<sup>47</sup> will be extended to the period from the time the goods are taken in charge at the port of loading until they are delivered at the port of discharge. [25] In other words, under the Hamburg Rules, the period of liability covers entirely the period from port to port. This resolves the problem of responsibility between the periods before loading and after unloading which is unclear under the Hague (-Visby) Rules. [26] In addition to the provision of the period of liability from port to port, the Hamburg Rules link to other unimodal conventions to create a chain of liability regimes governing the liability of the MTO for the whole carriage in multimodal transport. [27] However, this change is not fundamental as the Rules only cover the time when the goods are taken in charge of the sea carrier, so the Hamburg Rules are still a unimodal convention. [28]

Under the Hamburg Rules, the carrier will be liable for a delay in delivery<sup>48</sup> as well as for sub-carriers<sup>49</sup> when they act within their scope of employment. [29] Particularly, Article 10 regulates that although the carriage is performed partly by actual carriers, the MTO still remains liable for the entire carriage, and acts or omissions of the actual carrier acting within their scope of employment. [30] In summary, the Hamburg Rules improve upon the problems which the Hague (-Visby) Rules have not resolved clearly and absolutely.

### 3.2 Liability

#### 3.2.1 The basis of liability

Similar to the MT Convention and UNCTAD/ICC Rules, the liability of the MTO is based upon the principle of presumed fault. [31] Article 5 regulates that the carrier will be liable for damages and losses of goods or delays in delivery since the goods are in his charge unless he can prove that he, his

<sup>39</sup>The Mahkutai [1996] A.C. 650.

<sup>40</sup>Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty (the New York Star) [1981] 1 W.L.R. 138.

<sup>41</sup>WibauMaschinefabrik Hartman SA v Mackinon Mackenzie (The Chanda) [1989] 2 Lloyd's Rep. 494.

<sup>42</sup>Sparta Navigation Co v Transocean America Inc (The Stephanos) [1989] 1 Lloyd's Rep. 625.

<sup>43</sup>The Hague-Visby Rule art III r6 and the Hague Rule art II r6.

<sup>44</sup>The Hague-Visby Rules art I(b) and the Hague Rules art I(b).

<sup>45</sup>The Hague-Visby Rules art I(c) and the Hague Rules art I(c).

<sup>46</sup>UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) p 26.

<sup>47</sup>The Hamburg Rules art 4.

<sup>48</sup>The Hamburg Rules art 5(1).

<sup>49</sup>The Hamburg Rule art 10.

servants, or agents took all reasonable measures to avoid the occurrence and its consequence. Different from the Hague (-Visby) Rules in which the MTO is not exempted from faults of his servants or agents in the navigation or management of the vessel, [32] this change in the Hamburg Rules seems to satisfy the prevailing view which stated that the carrier should not be protected from liability for acts of the master or crew because of the development of communication. [33]

However, the Rules give the MTO a chance to escape his liability in cases of fire. [34] According to Article 5 rule 4, the MTO may escape from liability if the claimant cannot prove that fire is caused by fault or neglect of the carrier, his servants, or agents. Lee commented that although this modification under the Hamburg Rules clarifies who will bear the burden of proof in comparison with the Hague (-Visby) Rules, it makes it impossible in practice for the cargo owner to prove the cause of fire during the voyage because he is not in the ship when a fire happens. [35]

Under the Hamburg Rules the liability of the MTO is stricter than under the Hague (-Visby) Rules because the chance for the MTO to escape his liability is very low. Particularly, there are two cases in which the MTO may rely on to escape the liability including fire and taking reasonable measures. Therefore 'the carriers are primarily anxious about restrictions in the defence available to them by removal of the catalogues of exceptions under the Hague-Visby Rules'. [36]

### 3.2.2 Limitation of liability

In comparison with the Hague (-Visby) Rules, the monetary limitation of liability for damages or losses under the Hamburg Rules increases to 835 SDR per package or unit, or 2.5 per kilogram.<sup>50</sup> This monetary limitation is unattractive as the majority of UNCTAD respondents agreed that monetary limitation for a sea carriage should be modelled on the Hague (-Visby) Rules.<sup>51</sup> Therefore, although the Rules seem to supplement the Hague (-Visby) Rules, [37] the higher monetary limitation makes the Hamburg Rules internationally unsuccessful. [38] However, different from the Hague (-Visby) Rules which lack provisions of liability for delays in delivery, Article 6 of the Hamburg Rules regulates that liability of the carrier for the delay is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed but not exceeding the total freight under the contract of carriage. [39]

While there is no particular provision on protection in the Rules to the actual carriers, Article 7(2) regulates that the carrier's servants or agents are entitled to invoke defences and limitations available to the carrier if they act within their scope of employment. However, the language of the Hamburg Rules is not clear enough to answer the question of whether or not the servants or agents under Article 7(2) include independent contractors such as actual carriers in multimodal transport. [40] Therefore, while Berlingieri insisted that the agents or servants under the Hamburg Rules

include independent contractors, [41] Force recommended that in this situation the parties should use Himalaya clauses to extend expressly the defences and limitations to the actual carriers. [42]

It is similar to the regimes discussed, the MTO under the Hamburg Rules will waive his rights to the limitation of liability if it can be proved that damages or losses or delay in delivery are caused by faults or neglects of the MTO.<sup>52</sup>

### 3.3 Time bars

Similar to the MT Convention, under the Hamburg Rules, the MTO will be able to discharge his liability if there is no claim against damages or losses brought within two years.<sup>53</sup> The Hamburg Rules also regulate that the MTO can sue the actual carrier for indemnity after two years if the MTO's claim is brought within the time limit allowed by the law of the state.<sup>54</sup> It seems that the time bar of two years under the Hamburg Rules is in favour of the cargo owner because the Rules give them more time to claim from the MTO.

### 3.4 Conclusion

The Hamburg Rules improved upon the problems of the Hague (-Visby) Rules to make the Rules suitable for the development of multimodal transport. For example, the scope of application of the Rule is wider than the Hague (-Visby) Rules because they apply for contracts of carriage of goods by sea regardless of whether the contracts are contained in a document of title or not.<sup>55</sup> Also, containerised goods are contained within the Rules.<sup>56</sup> In addition, the scope of responsibility under the Rules covers the period from port to port. Besides this, the Hamburg Rules express the responsibility in relating to the actual carrier. However, there are some points still unclear such as whether or not the actual carrier can invoke the defences and limitations available for the MTO under the Hamburg Rules. Additionally, the basis of liability based upon the principle of the presumed fault and the higher monetary limits of liability cause the Hamburg Rules not to be adopted by major shipping countries or trading partners of the United States. [43]

## 4 Conclusion

Currently, there are three international conventions operating liability of sea carriers including the Hague, Hague-Visby and Hamburg Rules. Overall the Hague (-Visby) Rules were not made for multimodal transport. [44] Particularly there is controversy about whether these Rules are applicable for a contract of sea carriage which is a part of a multimodal transport contract. In addition, the scope of responsibility within these Rules mandatorily covers only the tackle to tackle period. This, in multimodal transport, creates a hole in the determination of liability of the carrier before and after the tackle to tackle period. However, the principle of the basis of liability which is based upon 'due

<sup>50</sup>The Hamburg Rules art 6.

<sup>51</sup>UNCTAD, 'Multimodal Transport: the Feasibility of An International Legal Instrument' (UNCTAD/SDTE/TLB/2003/1, 2003) [70-71].

<sup>52</sup>The Hamburg Rules art 8.

<sup>53</sup>The Hamburg Rules art 20.

<sup>54</sup>The Hamburg Rules art 20.

<sup>55</sup>The Hamburg Rules art 2.

<sup>56</sup>The Hamburg Rules art 1(5).

diligence' and exceptions, monetary limitation and time limits under these Rules seem to satisfy marine carriers and shipping countries rather than the Hamburg Rules. In contrast to the Hague (-Visby) Rules, the Hamburg Rules are clearly applicable for multimodal carriage. For example, Article 1(6) regulates that the Rules cover contracts of sea carriage regardless of whether they are a separate contract or a part of multimodal transport contracts. Besides this, the Rules cover the port to port period of liability. Therefore, the Hamburg Rules improved the unclear problems of the Hague (-Visby) Rule in relation to multimodal transport. Unfortunately 'the Hamburg Rules are not widely ratified convention'. [45] Particularly, there are few countries which are members of the Hamburg Rules within Europe including Austria, the Czech Republic, Hungary, and Romania. [46] In total as of July 2012 only 34 countries around the world ratified the Convention while the Hague (-Visby) Rules got ratification of about 94 [47] countries as of October 2011. [48]

Although there are unimodal conventions applicable for a sea leg in multimodal transport, some conventions do not really work well in multimodal transport while some do not satisfy marine carriers and shipping countries. Therefore, 98% of the UNECE respondents believe that there should be a new uniform instrument for multimodal transport.<sup>57</sup> However, in the situation in which there is no uniform international convention mandatory applicable to govern the liability of the MTO, these unimodal conventions are still applied even though there are problems in their application. To fulfill holes in the application of these Conventions in the case of no agreement made in a contract of carriage, the provisions of national laws are applied.

## References

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