‘The Applicable Law to Multimodal Carriage Contracts’
and
‘The Importance of Negotiable Documents in the Context of International Seaborne Trade’

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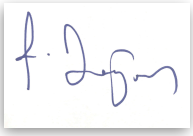
Candidate's signature  Date 26/09/2019

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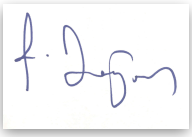
Signed  Date 26/09/2019

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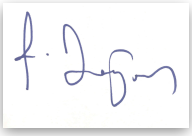
Signed  Date 26/09/2019

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I. Commercial Background

With the improvement of technology and introduction of containers, merchants' demands have evolved. In the past, delivery of the goods used to be made solely by one mode of transport for instance, by a sea-going ship from the port of loading to delivery and in case further carriage is needed, the custom was to arrange a separate contract for an inland transport. However, then, the shipper had to coordinate the goods to be at the right place and at the agreed time to enable the second carrier to take over. This was not a satisfactory way of transport due to high storage costs when a gap emerges between carriage stages or complex contracts to deal with as many parties involve. Thus, multimodal transport has appeared to satisfy the need of merchants.

Multimodal carriage arrangements are generally made by a multimodal carrier and it is possible for this carrier not to perform any part of the transport as he could only sub-contract the carriage stages between different actual carriers however, by this way, multimodal carrier still remains liable against the consignor for the entire carriage period. Therefore, the consignor does not suffer because of any unlocalised losses or damages occurred between carriage stages.[1] Moreover, shippers do not need to worry about different carriage documents, liability limits and storage costs as the only responsible party in the shoes of the consignor is multimodal carrier.

On the other side of the table, carriers prefer to deal with multimodal operators rather than individual shippers as this generally facilitate them not to tackle with packaging and sometimes evade their liability for damages or losses due to their commercial relations. This scene is in fact natural as professional capacity of multimodal operators to arrange the transportation is usually better than individuals.

The motive of multimodal carriage revolution is in fact the rise of containerisation[2] as it provides economic and operational advantages. This new approach catered a more standard way of transport and enabled the cargo to be transferred between different carriers with minimal adaptation. It notably lessened loading and discharging periods[3] and provided a faster and cheaper transport for

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[1] Michiel Spanjaart, *Multimodal Transport Law* (Routledge 2018) 2

[2] 'Container transport' (*OECD*, 2019) <https://data.oecd.org/transport/container-transport.htm> accessed 30 July 2019

[3] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwer 2010) 4

the goods. However, the applicable law to these contracts is still not clear and foreseeable at some points as some efforts to this way have failed.

II. The Lack of A Uniform Regime and Past Attempts

As the desire for multimodal carriage contracts has rapidly increased since the container revolution, the need for a uniform legal regime arose in order to simplify carriage documents into a single one which covers the entire transport period and enables shippers to bring their claims against multimodal carriers rather than several individual carriers. Although, there have been some other failed attempts to unify the regime, the main proposals were Rotterdam Rules[4] and The Convention on the Multimodal Transportation.[5]

A. The Rotterdam Rules

The purpose of the Rotterdam Rules was in fact to unify the legal regime concerning sea transport, however it went further and included multimodal transport which one of its legs involves carriage by sea. However, the convention failed to come into force as it was not ratified by enough 20 states.[6]

The Rotterdam Rules create a mandatory 'maritime plus' approach as they only apply where carriage by sea takes place.[7] Therefore, differing from the Hague-Visby Rules, it requires the issuance of a bill of lading or a similar document of title to be applicable. The rules apply where "contract of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States"[8] and where one of the following places is situated in a contracting state;

- "The place of receipt;
- The port of loading; or
- The place of delivery; or
- The port of discharge"[9]

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[4] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Signed in Rotterdam on 23 September 2009

[5] United Nations Convention on International Multimodal Transport of Goods

[6] The Rotterdam Rules, Article 94(1)

[7] The Rotterdam Rules, Article 1(1)

[8] The Rotterdam Rules, Article 5

[9] Ibid

The carrier's period of responsibility for the goods starts from take over and comes to an end with delivery.[10] Therefore, the tackle to tackle period of the Hague-Visby Rules has extended and by this way the multimodal character has adopted.

To prevent a conflict, Article 82 states that the Rotterdam Rules do not prevail over the existing non-maritime unimodal conventions. However conventions related to carriage by sea are exempted as the rules require the contracting states to abolish the Hague, the Hague-Visby and the Hamburg Rules.[11] However, in some instances, a sea stage may be regulated by existing conventions rather than the Rotterdam Rules, for example situations which fall into Article 18(4) of the Montreal Convention or Article 2(1) of the CMR.

B. The United Nations Convention on the Multimodal Transportation

The convention intended to create a mandatory applicable regime concerning multimodal transport as a whole. By this way, it lowers the number of documents which are issued during the carriage operations and set a uniform liability limit for the carriers.[12] Therefore, both localised and non-localised losses are considered same and the limit is concluded as 2.75 SDRs per kilo or 920 SDRs per package where carriage by sea takes place Otherwise, the carrier can be held responsible for any loss of or damage to goods to a maximum of 8.33 SDRs per kilo.[13] In case a localised loss occurs, the liability limit is determined due to any applicable convention or national law where they provide a higher limit.[14]

Even though the meetings for drafting the convention were attended by many parties such as representatives of states, intergovernmental and non governmental organisations, the convention has failed come into force. The reason was in fact the problem of desirability rather than feasibility as most states which are industrialised and share large portions of shipping industry did not ratify the convention because of its relatively higher liability limit vis-à-vis the Hague(Visby) Rules.

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[10] The Rotterdam Rules, Article 12(1)

[11] The Rotterdam Rules, Article 89

[12] Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwer 2010) 21

[13] The Convention on International Multimodal Transport of Goods, Article 18

[14] The Convention on International Multimodal Transport of Goods, Article 19

III. Possible Forms of an Applicable Regime

The past attempts to clarify the law concerning multimodal carriage contracts have failed. While there are several reasons for these unsuccessful efforts such as the lack of feasibility and desirability, one of the following three possibilities might come into view as an answer to the problem.

A. The Uniform System

A new uniform convention to govern contracts of combined carriage from the take over to delivery would be the best solution if it were feasible. However, present conventions that regulate individual carriage types are the biggest barriers.

The dream uniform convention, differing from the current regime, may set a simple and foreseeable liability limit for the whole period of carriage and so put an end to efforts for trying to locate the place of a loss, destruction or delay. As a result, the compensation of the cargo interests would not differ regarding to the carriage type which the remedy arises. However, at the same time, this is one of the carrier's reasons for not to desire a new convention as it will likely to increase their liability limit. For example, multimodal carriers are now able to keep their liability limits lower in most incidents in the absence of a compulsory regime. Thus they can contractually limit their responsibility for the gaps between transport types.[15]

Another problem herein is any potential liability difference which might arises between the actual carrier and multimodal carrier in case the whole or part of the transport is sub-contracted. For instance, in case multimodal carrier sublets one of the stages to, say, a sea carrier, then he can only be held responsible to a maximum liability which arises from the relevant convention which he is bound by. Thus, the multimodal carrier's liability becomes higher than the actual carrier. All in all, a uniform multimodal carriage convention does not seem as the possible way forward because of failed past attempts and mentioned obstacles above.

B. The Network System

The network system consists of the application of mandatory conventions when possible for carriage of goods by different modes of transport and the use of freedom of contract for the

[15] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 26

convention gaps as Baughen defines.[16] Thus, this system only links relevant conventions together where applicable and has no rules on its own.

While a flexibility is provided as in case any of the conventions is amended, the system can continue without being affected because it is just a chain of the relevant conventions. However, it is needed to ascertain the place and time of the loss, destruction or delay to enable the system to work properly as it does not deal with unlocalised problems. Further, it is likely in container transport for the losses to be spread over different stages and the network system lacks of an answer to this dilemma too.[17]

Lastly, it does not satisfy the need of a foreseeable legal regime for parties as the applications of the proceedings for carriage conventions differ. For instance, while the time bar is one year and three years in case of wilful misconduct where the goods are carried by road,[18] it is concluded as two years in air carriage without any exception.[19]

C. The Modified Network System

The modified system is in fact a combination of uniform and network approaches. Therefore, it may appear as an answer to the problems of previous systems and provide possible advantages. For example, it can find a solution for unlocalised losses, destructions or delays and might clarify the law for all relevant parties.[20] By this way, while relevant carriage conventions continue to regulate incidents which fall into their application scopes, some other situations can be clarified. However, at the same time, it would lead a complex network and cause different interpretations.

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[16] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 173

[17] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 29

[18] The CMR, Article 32

[19] Warsaw Convention System, Article 29(1) and Montreal Convention 1999, Article 35

[20] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 30

IV. Multimodal Aspects of Individual Conventions

A. Sea Carriage

International commerce is highly (over 90%) dependent on shipping industry[21] as it provides low-cost and efficient movements for the goods around the world.[22] Despite, there have been some amendment efforts, carriage of goods by sea is still being regulated by the Hague and Hague-Visby Rules.[23]

1. The Hague and Hague-Visby Rules

The intention of the Hague(-Visby) Rules was to create a mandatory and uniform law regime concerning sea carriage under bills of lading to balance the carrier's stronger bargaining power by providing some minimal standards especially on the carrier's part for the transport of the goods.[24] However, at the same time, some protection and limitation of liability clauses[25] are situated in the convention and any effort to provide greater exclusions by means of contractual terms are decided to be null and void.[26] The rules have enacted respectively by the COGSA 1924 and 1971[27] in the UK.

While it is always possible to adopt the rules voluntarily by a clause paramount, the application becomes mandatory to every bill of lading which is issued for the carriage of goods between different states' ports when;

- "the bill of lading is issued in a contracting State, or
- the carriage is from a port in a contracting State, or
- the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract"[28]

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[21] Ernst Frankel, 'Shipping and its role in economic development' (*Marine Policy*, 1989) <https://www.sciencedirect.com/science/article/pii/0308597X89900390> accessed 11 August 2019

[22] 'Maritime Transport Is Backbone of Global Trade and the Global Economy' (*UN*, 22 September 2016) <https://www.un.org/press/en/2016/sgsm18129.doc.htm> accessed 11 August 2019

[23] The Hague Rules as Amended by the Brussels Protocol 1968

[24] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 94

[25] The Hague-Visby Rules, Article IV

[26] The Hague-Visby Rules, Article III, Rule 8

[27] Carriage of Goods by Sea Act 1924 and Carriage of Goods by Sea Act 1971

[28] The Hague-Visby Rules, Article X

The rules only regulate a period from loading of the goods to the moment they are discharged which is called tackle to tackle,[29] therefore the rules do not apply when the goods are in custody of the carrier before or after the loading and discharging operations.

The application of the rules on carriage by sea is restricted to ones which a bill of lading or a similar document of title covers the contract,[30] thus, carriers still enjoy the freedom of contract to limit their liability where other documents are used i.e. a sea waybill.[31] A consensus on the usage of bills of lading is enough for the carriage contract to be regulated by the rules even if the bills were in fact never issued as was held in ***Pyrene v Scindia***.[32]

The question of application of the Hague-Visby Rules to multimodal carriage contracts in the UK has clarified in ***Pyrene v Scindia*** as Devlin J stated that the rules apply to "a contract or part of a contract"[33] On the contrary, German approach strictly differs as the rules only cover the carriage of goods solely by sea, but not sea parts of combined carriage.[34]

The above theory ensures the Hague-Visby Rules to govern sea legs of multimodal transport arrangements in the UK as approved by the Bingham J in ***Mayhew Foods v Overseas Containers***[35] which includes a sea stage and a 20 mile trucking. What happened was that the parties have contracted to transport the goods from Southampton to Saudi Arabia by sea however the goods were in fact first transported to Shoreham by a truck and then shipped to Saudi Arabia. The bill of lading included a liberty clause which enables the carrier to use other modes of transport without giving any notice. The court has determined the carrier's liability for the loss regarding to the Hague-Visby Rules.

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[29] The Hague-Visby Rules, Article I(e)

[30] The Hague-Visby Rules, Article I(b)

[31] John F Wilson, Carriage of Goods by Sea (7th edn, Pearson 2010) 177

[32] *Pyrene Co Ltd v Scindia Navigation Co* [1954] 2 QB 402

[33] *Ibid*

[34] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 313

[35] *Mayhew Foods Limited v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317

2. The Hamburg Rules

The Hamburg Rules[36] came into force in 1992 even though they have not been ratified my the most major trading countries including the UK. However, there is always a possibility for them to regulate a number of carriage contracts in the UK which the state of loading is a member country to the Rules. The application scope is stated under Article 2(1) as if;

- The port of loading is in a Contracting State; or
- The port of discharge, including an optional port of discharge that becomes an actual port of discharge, is in a Contracting State; or
- The bill of lading, or other document evidencing the contract of carriage, is issued in a Contracting State; or
- The bill of lading or other document evidencing the contract of carriage by sea incorporates the Hamburg Rules or the legislation of any State giving effect to them.

Therefore, differing from the Hague-Visby Rules, sea waybills fall into the application scope and the discharge port is attached importance to extend its coverage.[37] However, charterparties are excluded from the application of the Hamburg Rules similarly with the Hague-Visby Rules.[38]

The Hamburg Rules include a specific provision for multimodal carriage contracts[39] as international sea stages of combined carriage contracts fall into the scope of application. However, it is limited to a period which the sea carrier can be held responsible and this time is determined due to Article 4(1). Thus, the Hamburg Rules do not apply to the whole contract of affreightment but only to duration which the carrier is in charge of the goods from the port of loading to discharge.[40]

B. Road Carriage

Carriage of goods by road is an increasing trend for delivery of the goods,[41] at the same time it plays a significant role for the integration of transport by other modes. For example, road freight

[36] United Nations Convention on the Carriage of Goods by Sea 1978

[37] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 132

[38] The Hamburg Rules, Article 2(3)

[39] The Hamburg Rules, Article 1(6)

[40] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 332

[41] 'Road freight transport statistics' (*Eurostat*, August 2018) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Road_freight_transport_statistics#Growth_in_EU_road_freight_transport_for_the_fifth_consecutive_year> accessed 10 August 2019

appears when further carriage is needed e.g. from ports or airports to inland warehouses. The law concerning road carriage is determined regarding to the CMR[42] which came into force in the UK by the approval of Carriage of Goods by Road Act 1965.

The application scope of the CMR is mandatory to contracts of carriage by road for reward between two different states which at least one of them is a party state to the CMR.[43] Its compulsory application is ascertained due to the place of take over and designated delivery point. Hence, even if the goods in fact never left the country of loading, the CMR maintains its application to the contract of carriage. For instance, in ***Buchanan v Badco Forwarding***,[44] the Court held the CMR applicable to a freight from London to Paris which indeed never gained international feature as the goods were stolen in Dover, UK. The nature of the CMR is in fact to regulate unimodal road carriage however, it has two multimodal aspects respectively mode on mode and mode to mode transport.

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1. Mode on Mode Transport

Article 2 of the CMR maintains its application to the whole contract in case where the goods are carried by other modes of carriage but while still remaining loaded on the road vehicle.[45] For example, where the goods are being carried from Dover to France by a roll-on, roll-off or a piggy-back operation while the goods are still on the lorry.

On the contrary, Article 2(1) ceases its application and enables the relevant convention (i.e. Hague/ Visby Rules) to become applicable when following conditions are met unless there is no applicable convention;

- A loss, destruction or delay is occurred by an event which could only have occurred by other modes of carriage.
- The cause of the delay, destruction or delay cannot be attributable to any act or omission of the road carrier.

In ***Thermo Engineers v Ferrymasters***[46] the goods were damaged due to a fault during the loading operation of the cargo to the roll-on, roll-off vessel and there was no defect on the road carrier's

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[42] Convention on the Contract for the International Carriage of Goods by Road, Signed at Geneva on 19 May 1956

[43] The CMR, Article 1(1)

[44] *Buchanan & Co v Badco Forwarding and Shipping* [1978] AC 141

[45] Malcolm Clarke and David Yates, *Contracts of Carriage by Land and Air* (2nd edn, Informa 2014) 19

[46] [1981] 1 Lloyd's Rep 200; [1981] 1 All ER 11

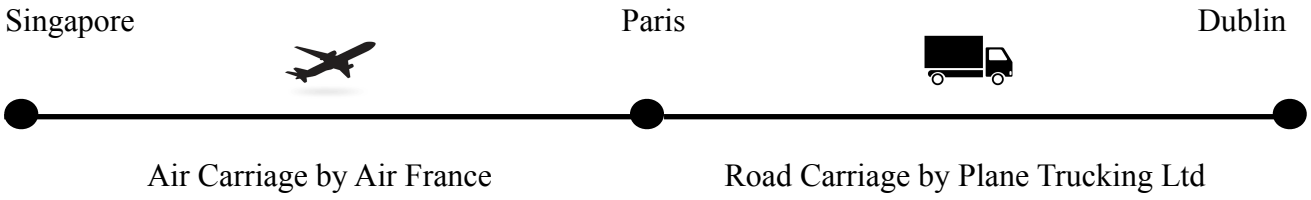
part. Hence, the Court applied the Hague-Visby Rules, not the CMR as the incident was unique to sea carriage.

2. Mode to Mode Transport

Mode to mode transport is such carriage which involves more than one mode of transport. Differing from mode on mode transport, the goods here are unloaded from the lorry and, say, loaded to an aircraft. The question of whether the CMR regulates the road segment here or not arises due to the uncertainty of the text. Therefore, party states has being interpreted the situation differently.

The understanding at Common Law is to apply the CMR to individual road stages of multimodal carriage contracts as was held in ***Quantum Corp Ltd v Plane Trucking Ltd***.[47] To illustrate;

Figure 1: Mode to Mode Transport (Quantum Corp Ltd v Plane Trucking Ltd)



An air waybill was issued by Air France for the whole carriage from Singapore to Dublin however, the goods were stolen during the road segment. The decision of the English Court was to apply the CMR. Accordingly, individual stages of combined carriage are divided in the UK and the relevant convention regulates its own scope of authority. Thus, for the road carriage, the application of the CMR starts when the goods are taken over by the road carrier until the final delivery or delivery to another carrier of other types.[48]

On the contrary, the view of German[49] and Dutch[50] courts is to apply the CMR to carriage of goods contracts solely by road and regulate the individual road segments of multimodal transport contracts by their national laws.(will be analysed below)

[47] [2002] 2 Lloyd's Rep. 25

[48] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 178

[49] [BGH] Jul. 17, 2008 (I ZR 181/05)

[50] 1 juni 2012, NJ 2012, 516 m.mt. K.F.H. (Godafoss) (Neth.).

C. Air Carriage

The law concerning carriage by air is dominated by Warsaw Convention System[51](Hereafter WCS) and its replacement Montreal Convention[52](Hereafter MC). Now, both conventions are in use together however, WCS will be abolished when all the parties ratify MC. Thus, today the applicable convention is clarified according to Article 30(3) and (4) of the Vienna Convention[53] which determines the law regarding to the principle of the highest common denominator. Therefore, both conventions will be analysed below.

Montreal Convention's application scope is stated as "all international carriage of persons, baggage or cargo performed by aircraft for reward"[54] with slight differences from the WCS. However, the meaning of 'international carriage' needs further understanding to clarify the coverage of the conventions. Accordingly, any flight from a party state of the convention to another without considering any break between or flights in the territory of a single party state with an agreed stopping point in another place even when the agreed stopping place is not a party are considered as an international transport.[55]

The application of Warsaw System is restricted within the airport as Article 18(2) provides,[56] thus, it is needed to describe what is an airport. The understanding of state parties' jurisdictions have differences at this point as there is no clear definition in the convention. Some, specifically continental European countries, qualify an area as airport according to the precise boundaries (the fence) and so apply the WCS within this range which is called restrictive implementation. Courts have taken different approaches in the USA on how to qualify an area as an airport. For instance in ***Victoria Sales Corp v Emery Air Freight, Inc***,[57] a warehouse where just half a mile away from the fence of the airport was not considered as an area which falls into the application of WCS, however

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[51] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929

[52] Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999

[53] Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969

[54] Montreal Convention 1999, Article 1(1)

[55] Warsaw Convention 1929, Article 1(2) and Montreal Convention 1999, Article 1(2)

[56] "…the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."

[57] 917 F 2d 705 (2 Cir., 1990)

a strong minority of American courts have begun to favour WCS as the applicable law regime even to road stages when an air waybill covers both road and air segments as in ***Magnus Electronics, Inc v Royal Bank of Canada***[58] and ***Nikolai Kuropatkin* v *TRT International, Ltd***.[59] The idea behind this is the belief that the air waybill incorporates WCS to the carriage contract and so it regulates the whole carriage process.

On the contrary, a wider reading of Article 18(2) is adopted at Common Law. According to this functional interpretation, an extended operative area is qualified as an airport rather than the physical fence. Regarding the decision in ***Rolls Royce v Heavylift-Volga***[60] a land falls within the description of an airport provided that "used for the carriage by air of freight" and "part of the facilities required for the operation of any airport and for the international carriage by air of cargo"[61]

Table 1: Different Interpretations of the Meaning of Carriage by Air (WCS)

USA	UK	Continental Europe
Restrictive Interpretation *Victoria Sales Corp v Emery Air Freight, Inc*	**Functional Interpretation** *Rolls Royce plc and another v Heavylift-Volga DNEPR Ltd and another*	**Restrictive Interpretation**
Incorporation of Warsaw Convention Theory *Magnus Electronics v Royal Bank of Canada* *Nikolai Kuropatkin v TRT International, Ltd*		

[58] 611 F.Supp 436 (1985)

[59] 2010 U.S. Dist. LEXIS 60788 (NJD, 2010)

[60] *Rolls Royce plc and another v Heavylift-Volga DNEPR Ltd and another* [2000] 1 Lloyd's Rep. 653

[61] Malcolm Clarke, *Contracts of Carriage by Air* (2nd edn, Lloyd's, 2010) 117

While both of the conventions are loyal to their unimodal character, article 18(3) of WCS provides the only multimodal aspect of the convention as it clearly extends the application of WCS to an area outside of an airport when following three conditions are met;[62]

- Road segment must be for the purposes of delivery, transshipment or delivery
- Carriage contract must cover both air and road segments.
- The place of loss, delay or destruction must be unlocalised.

Likewise, Article 18(4) of MC is the only exception of the convention's unimodal nature. Hence, the convention continues to regulate the following two situations;

- When carriage by other modes takes place for loading, delivery or transshipment purposes and covered by a contract for carriage by air.[63]
- Any carriage by another modes of transport which took place without the consent of the consignor for the whole or part of the carriage by relying on the agreement between parties.

While WCS's multimodal provision is clear, the removal of the last part of Article 18(2) of WCS in MC (aerodrome or on board an aircraft) raised a question mark in the minds as it has expanded the meaning of carriage by air. Accordingly, differing from WCS, it now means a period when the goods are in the charge of the carrier,[64] however the article does not anymore require being in an aerodrome or on board an aircraft. This situation leads problems because of different interpretations between party states.

German view on the topic is to apply MC to airports and warehouses even if these are located outside an airport area when the carrier is in charge of the goods. However, German courts suspend the application of MC whilst the road carriage between airports and warehouses and apply German national law instead of the CMR. (has been analysed above)

Similarly with the situation in WCS, courts in the USA have taken different views. First approach is originated from the decision in ***Commercial Union Ins. v Airlines***[65] as the court held WCS as the

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[62] Georgios Leloudas, "Door-to-door application of international air law conventions: commercially convenient, but doctrinally dubious" (2015) LMCLQ 374-375

[63] Georgios Leloudas, 'Multimodal Transport Under the Warsaw and Montreal Convention Regimes: A Velvet Revolution?' in Baris Soyer and Andrew Tettenborn (eds), Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century (Informa Law 2014) 86

[64] Montreal Convention 1999, Article 18(3)

[65] 347 F.3d 448 (2d Cir. 2003)

applicable law to a road carriage which was some 150 miles distance from JFK because it was covered by an air waybill. Some other courts have followed this interpretation and applied MC to everywhere when the carriage is covered by an air waybill as in ***AIG Property***[66] and ***Fega Express***[67] cases. On the contrary, recently the court did not apply MC to the road stage of a multimodal transport in ***Underwriters at Lloyds v Expeditors Korea Ltd***[68] as the Judge Jill Pryor of the case stated "if an intercity, multi-hour journey over land does not qualify as carriage by land, the term essentially would be meaningless."

While the UK lacks of a case on the topic, it is hard to make a comment. However, Leloudas believes that the English court would interpret the situation as in WCS and apply MC to warehouses only within the functional area of an airport.[69]

Table 2: Different Interpretations of the Meaning of Carriage by Air (MC)

USA	UK	Continental Europe
MC Applies Everywhere *AIG Property* *Fega Express*	**No Case Law**	**1. MC Applies to Airports and Warehouses** **2. MC Suspends to Apply During Transport Between Airports and Warehouses**
MC Does Not Cover All Stages *Underwriters at Lloyds v Expeditors Korea Ltd*		

Article 31 of WCS clearly prevents its application to whole of a multimodal carriage but only to air segments. Similarly, Article 38 of the MC provides that the convention only regulates carriage of

[66] *AIG Property and Casualty Co v Federal Express Corp* 37 Avi 17,461 (SD NY, 2016), at pp 16-17.

[67] *Batteries 'r' Us Co v Fega Express Corp*. (SD Fla, 2015)

[68] 882 F 3d 1033 (11th Cir, 2018), 38 Avi. 15,201.

[69] Georgios Leloudas, 'Is The Commercial Paradox of the Montreal Convention 1999 in the Carriage of Goods by Air Finally Resolved?' (*IISTL*, 21 November 2018) <https://iistl.blog/2018/11/21/is-the-commercial-paradox-of-the-montreal-convention-1999-in-the-carriage-of-goods-by-air-finally-resolved/ > accessed 5 May 2019

goods by air, however it requires the situation to be connected with Article 18. Accordingly, some two situations have counted in the period of carriage by air, respectively;

- Any movement for the purposes of delivery, loading or transshipment
- Any transport by other modes which took place without the consent of the consignor to perform a contract which was intended to be an air transport by the parties.

D. Rail Carriage

The law concerning international freight of goods by rail is uniformed by COTIF-CIM.[70] As in air law conventions, COTIF has been modified several times, hence the highest common denominator principle applies as well regarding to Article 30(4) of the Vienna Convention.[71]

The scope of application has not stated as broader as the CMR and requires a contract of carriage by rail for reward which both the place of take over and the place designated for delivery must be located in different member states.[72]

A multimodal carriage contract does not fall into the application scope of the COTIF-CIM as a whole. However, in the absence of any case law, the convention regulates the rail stages of combined carriage as Article 1(3) and (4) provides.[73] Accordingly, while the first one deals only with domestic carriage by road and inland waterways, the latter handles supplemental transfrontier carriage by inland waterways or sea.

1. Supplemental Domestic Carriage by Road or Inland Waterway [Article 1(3)]

It is now needed to determine how to qualify a carriage as a supplemental one and find a solution to the question of whether the convention covers only ancillary operations or different stages of a multimodal transport contract. The German Supreme Court interpreted the situation in one of its

[70] Convention concerning International Carriage by Rail as amended by the Vilnius Protocol in force from 1 July 2006

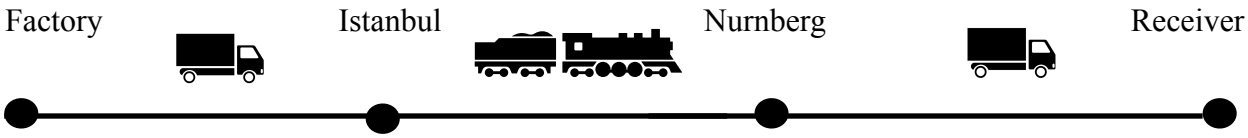
[71] Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969

[72] The COTIF 1999-CIM, Article 1(1)

[73] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 266

decisions as COTIF-CIM regulates different legs of rail predominated combined carriage as well as ancillary services.[74] What happened was;

Figure 2: Application of the CIM to Multimodal Carriage (BGH 9 October 2013)



Some of the goods were missing on arrival and so insurers of the manufacturer brought a claim against the carrier. The decision was to apply the COTIF-CIM to the conflict relying on two main points, respectively, it was a multimodal carriage contract which involves transport by rail and the road part of the carriage was short in relation to the rail stage.

2. Supplemental Cross-Border Carriage by Inland Waterway or Sea [Article 1(4)]

The article requires the following conditions to apply the COTIF-CIM to transfrontier carriages by inland waterway or sea;

1. A single contract of carriage includes carriage by sea or inland waterway
2. The carriage by sea or inland waterway must be a supplement to the carriage by rail
3. The carriage by sea or inland waterway must be performed on services which are listed in Article 24(1) of the COTIF

While the list mostly contains main ferry lines, the convention allows member states to make a reservation as carriage by sea involves additional dangers and liabilities.[75] However, these reservations, if any made, only apply tackle to tackle period unless it is proved that the carrier has fault on his part.[76]

V. Pitfalls in Current Legal Regime

A. Unlocalised Loss

Sometimes, a loss, destruction or delay on the goods is discovered on arrival and the place of the occurrence cannot be located. For instance, a container will be carried from Swansea to London by a road carrier and then to Paris by an aircraft. On the arrival, it is discovered that the goods were

[74] BGH 9 October 2013 - I ZR 115/12

[75] Michiel Spanjaart, *Multimodal Transport Law* (Routledge 2018) 128

[76] The COTIF 1999, Article 38(3)

damaged, however in the absence of any evidence it is unlikely to find out where the loss happened.

The applicable law to multimodal carriage contracts is normally ascertained due to the segment which the loss, destruction or delay occurs and the relevant unimodal convention which regulates that particular stage applies to the conflict.[77] For example, if the loss happened in the road stage of a combined transport, the conflict is resolved according to the CMR. However, in a situation where the place of the incident cannot be determined and so cannot be attributable to one of the legs, problems arise. This is because the occurrence does not fall into the application scopes of unimodal conventions and so the applicable national law becomes more of an issue.[78]

There is only one exception for the governance of the relevant national law when the contract comprises of air and road segments. Pursuant thereto, a carriage by air convention might apply to non-localised losses as both the WCS and MC includes provisions for these events.[79]

B. Conflicts Between Applicable Conventions

In some instances, an occurrence falls into scopes of more than one unimodal carriage conventions. For example, a loss happened in an airport while the goods were being carried by a road vehicle. In this case, the CMR is applicable regarding to Article 1(1) as the responsibility of the road carrier begins after the goods were taken over. However, at the same time, the relevant air carriage convention shall regulate the conflict as the incident happened in an airport. While these kind of conflicts might arise between other unimodal carriage conventions as well, it is not clear how to determine which one should prevail in the absence of any case law.

C. Prescription and Different Liability Regimes

All the unimodal carriage conventions discharge the carrier's liability after a while. For example in sea carriage, the time bar is one year and it will not be possible to incur responsibility to a sea carrier since then.[80] However, in case where the goods are being carried by more than one mode of

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[77] *Quantum Corp Ltd v Plane Trucking Ltd* [2002] 2 Lloyd's Rep. 25

[78] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 17

[79] Article 18(3) of the WCS and Article 18(4) of the MC

[80] The Hague-Visby Rules, Article III, Rule 6

transport, it is not clear when the said period starts. The question of whether it starts from the end of that particular stage or after all the carriage stages performed needs to be answered. Further, when the loss cannot be localised, another legal difficulty appears as which convention's time bar shall cover the situation.

The limitation of liability on the other hand, dramatically differs among the conventions. While it is 17 Special Drawing Rights per kilogram in carriage by air,[81] it has almost limited to its half for road carriage as 8.33 SDR per kilogram. Therefore, there is an unpredictability for the compensation, if any is available, because of differing liability regimes. Moreover, the liability for a carrier because of its sub-contractors or events which might lead a compensation distinct between the conventions.[82] For example, while a road carrier is liable for the driver's failure, a sea carrier cannot be held responsible because of navigational errors.[83]

Table 3: Different Liability Limits of Unimodal Carriage Conventions

Sea Carriage	Road Carriage	Air Carriage	Rail Carriage
The Hague Rules **GBP 100/package**	**The CMR** **8.33 SDR/kg**	**WCS and MC** **17 SDR/kg**	**COTIF-CIM** **17 SDR/kg**
The Hague-Visby Rules **2 SDR/kg** **or** **666. 67 SDR/package**			
The Hamburg Rules **2.5 SDR/kg** **or** **835 SDR/package**			

D. Situations Where Non of the Conventions Apply

It is always possible for the goods to be stored in a warehouse between two different types of carriage. For instance, after the road stage is over the goods might wait until the air carrier takes

[81] The Montreal Convention, Article 22(3)

[82] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 15

[83] The Hague-Visby Rules, Article IV, Rule 2(a)

over. In this case, the responsibility of the road carrier has already over.[84] However, at the same time, the application of air carriage conventions has not yet started. Therefore both the CMR and air conventions do not cover these gaps. The applicable law for these situations where non of the conventions apply, is determined according to the relevant national law however this causes uncertainty, unpredictably and sometimes high liability levels when the governing national law does not limit the liability.

VI. Multimodal Transport Documents

The lack of a clear and predictable multimodal transport law has led the trade and transport associations to adopt some standard contractual solutions. Carriage processes are arranged by a Multimodal Transport Operator (Hereafter MTO) and it is possible for him to be a non-vehicle owning carrier (Hereafter NVOC) as well, who undertakes the shipment of the goods by sub-contracting the actual performance.[85]

Multimodal transport documents generally correspond with bills of lading or sea waybills. Thus, they share two of the three functions of an ordinary bill of lading with no doubt. These are being an evidence for the contract of carriage and a receipt for the goods. However, the status of a multimodal transport document is questionable in terms of being a document of title or not. Reynolds believes that, "A mercantile custom, similar to that established in ***Lickbarrow v Mason***[86] exists" for these documents however "it still awaits judicial recognition."[87] On the same direction, BIMCO's Multidoc 95 includes the term of 'consigned to order of' in its consignee box. As a result, there is no reason to treat them differently than any ordinary bill of lading.

Multimodal bills of lading are acceptable documents for the purposes of documentary credits as stated by Article 19 of UCP 600. Further, in case the transport involves a sea stage, both multimodal bills of lading and sea waybill are covered by the COGSA 92.[88] However, if the carriage is being performed by other modes, then the COGSA 92 will not cover the situation, but international conventions for instance the CMR.

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[84] The CMR, Article 17(1)

[85] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 167

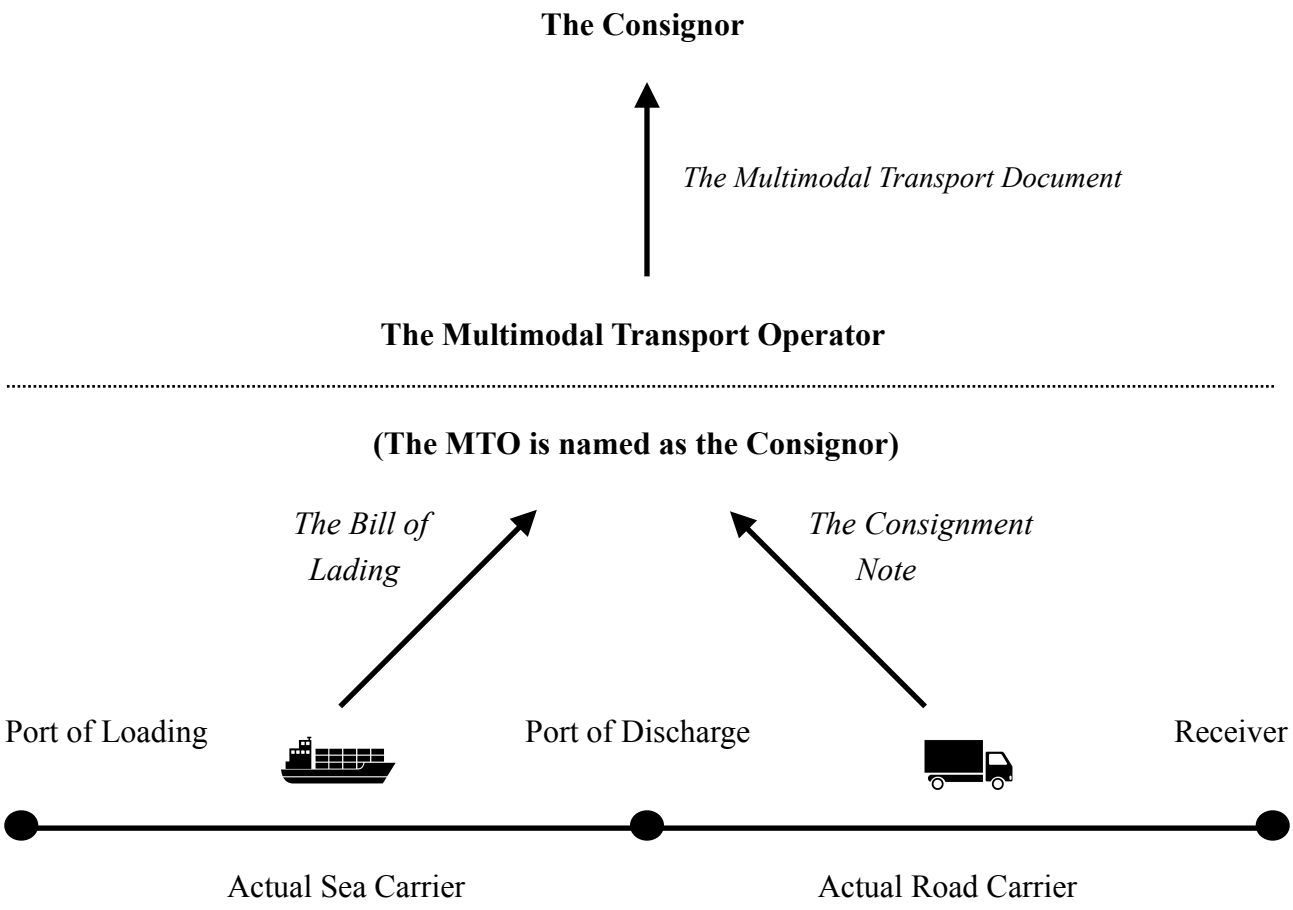
[86] (1787) 2 TR 63, 100 ER 35

[87] G.H. Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (Sweet & Maxwell, 2011) 577

[88] Carriage of Goods by Sea Act 1992, Section 2

The MTO is the only party who can be held responsible for the transport in the shoes of the consignor. However, in case the MTO sub-contracts the whole or some parts of the shipment, unimodal carriers will issue their own documents for instance, a bill of lading for carriage by sea. The MTO will be stated as the consignor in these unimodal documents as the real consignor in fact does not deal with the sub-contractors but only the MTO.

Figure 3: Documentation in Multimodal Carriage



A. UNCTAD/ICC Rules for Multimodal Carriage Documents

After the efforts to unify the law concerning multimodal carriage have failed, UNCTAD[89] and ICC[90] have provided some non-obligatory rules which are incorporated in much-used multimodal documents such as Multidoc and Combicon Bill. The rules, when they are referred to, prevail and

[89] United Nations Conference on Trade and Development

[90] International Chamber of Commerce

abolish any other provision of the multimodal carriage contract which are inconsistent with them.[91] However, the situations which are mandatorily regulated by the international conventions are concluded as exceptions.

The responsibility period of the MTO is decided as all times when he is in charge of the goods and he will be responsible for the acts and omissions of his servants, employees, agents.[92] However, if it is proved that the MTO has "no fault of his own', his servants or agents for the occurrence of any loss, damage or delay",[93] he shall be discharged from liability. The rules provide some other defences which can only be relied on when the carriage involves a sea stage. These are

- "Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,
- Fire, unless caused by the actual fault or privity of the carrier"[94]
- A proof that "due diligence has been exercised to make the ship seaworthy at the commencement of the voyage"[95] (when the loss is caused by unseaworthiness)

The limitation of the MTO's liability is determined regarding to the applicable mandatory convention, however, in case of an unlocalised loss, destruction or delay, the liability of the MTO is limited to a maximum of 666.67 SDRs per package or 2 SDRs per kilo as the Hague-Visby Rules. However, if multimodal carriage does not include a sea stage, then the liability is determined according to the CMR which is 8.33 SDR per kilo.[96]

A nine-month time limit will apply to any claim unless the situation is regulated by an international convention which its application is compulsory.[97]

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[91] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 1

[92] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 4

[93] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 5(1)

[94] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 5(4)

[95] *Ibid*

[96] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 6

[97] UNCTAD/ICC Rules for Multimodal Carriage Documents, Rule 10

Table 4: Limitation of Liability in UNCTAD/ICC Rules

Unlocalised Loss	Localised loss
If carriage by sea takes place *2 SDR/kg* *or* *666. 67 SDR/package* *whichever is greater*	*The limit is determined according to the applicable international convention*
If carriage by sea does not involve *8.33 SDR/kilo*	

B. A Comparison of COMBICONBILL and MULTIDOC 95

BIMCO[98] has produced two standard multimodal documents are widely used around the world as a contractual solution namely, Multidoc 95 and Combicon Bill. Although both of them incorporate UNCTAD/ICC Rules, some amendments have been made.

1. MULTIDOC 95

1. When loss or destruction occurs during the sea stage or inland waterways, the carrier has all the defences which are provided by Article IV, Rule 2 of the Hague Rules except the sub-article (q).

2. Where the law is determined regarding to the US COGSA, the package limit is $500

3. Unless the MTO has accepted the interest of the consignor in timely delivery, he cannot be held liable for delay. The declaration of the consignor and the acceptance of the MTO must be in writing.

2. COMBICONBILL

1. The specified defences of the MTO are stated in Clause 9 of the bill for the period of his responsibility which is concluded as all times when he is in charge of the goods.

2. The only liability limit is 2 SDRs per kilo[99] as there is no determination due to package unless the MTO is responsible for delay or consequential loss. In that case the limit is an amount not exceeding the freight or the value of the goods, whichever is lesser.[100] Where US COGSA applies, the package limit is $500.

3. Where there is a localised loss, the merchant can demand the determination of his liability due to any applicable convention or national law as if it were a separate contract.

VII. National Multimodal Transport Law

A number of legislations have adopted on multimodal carriage contracts in regional, subregional and national levels. Netherlands and Germany have both national laws on multimodal transport and their provisions will be analysed below.

[98] The Baltic and International Maritime Council

[99] COMBICONBILL, Clause 10(3)

[100] COMBICONBILL, Clause 12

A. Netherlands

Combined carriage contracts are recognised as an accumulative series of different unimodal agreements under the Dutch System similarly with the decision in ***Quantum Corp Ltd v Plane Trucking Ltd***.[101] Accordingly, each stage is regulated by the applicable provisions to that specific leg as if it were a separate contract.[102]

Where carriage by sea or inland waterway takes place for the performance of the contract, the multimodal transport document is considered as a bill of lading rather than a sea waybill.[103] By this way, the system does not allow the carriers to exclude or limit their liability greater than the Hague-Visby Rules. The reason for that is the Rules normally apply only to carriage by sea when a bill of lading is issued.[104] On the other hand, other modes of carriage lack of this necessity as their application is determined regardless to the document.

The liability of the carrier for loss of or damage to the goods or delay in delivery, is determined due to the applicable convention for that specific stage and any contractual stipulation will be null.[105] Further, in case, the place of the loss, damage or delay cannot be ascertained, the highest amount of liability applies. This limit is concluded due to the conventions which regulate the stages of that specific multimodal transport.[106]

Lastly, the time limit is set according to the conventions however where the place of the event is not known, then the most favourable one of the involving stages applies.[107]

B. Germany

The law concerning multimodal carriage is set by Articles 452 to 452d of the German Commercial Code (Hereafter HGB) however, its application is limited to ‘specific’ multimodal contracts which demand some three requirements;

- There must be a single contract of carriage, and

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[101] [2002] 2 Lloyd's Rep. 25

[102] The Dutch Civil Code, Article 40

[103] The Dutch Civil Code, Article 46

[104] The Hague-Visby Rules, Article X

[105] The Dutch Civil Code, Article 42

[106] The Dutch Civil Code, Article 43

[107] The Dutch Civil Code, Article 1722

- The performance of the contract must involve more than one mode of transport, and
- At least two of the stages must be subject to different legal rules if they were concluded as separate contracts.[108]

The last requirement forms a basis for the application of German transport law[109] which regulates carriage by road, rail, air and inland waterway. Hence, although different types of transport are employed for the performance of a single contract, the contract might not governed by the multimodal aspects of HGB where all the stages are subject to same rules. For instance,

The above performance does not constitute a multimodal carriage in the eyes of the German law as it lacks of the last requirement of being subject to dissimilar rules. Accordingly, in this case even if all the stages were concluded as separate contracts, they would still be subject to the same legal regime, German transport law. Therefore, a contract of carriage can only gain a multimodal character if the performance involves a carriage by sea stage or if international conventions apply.[110]

The German law employs a 'network system' for the carrier's liability as where the occurrence of delay, damage or delay can be localised, the applicable law is determined due to "the legal provisions which would apply to a contract of carriage covering this stage"[111] By this way, the application of German multimodal provisions have been excluded for localised losses and damages. On the contrary, some problems arise due to different interpretations, for instance German courts do not apply the CMR to road stages of multimodal contracts as their reading on the application scope of the CMR only covers carriage solely by road.[112] (has been analysed above)

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[108] The German Commercial Code, Article 452 (HGB)

[109] The German Commercial Code, Articles 407 to 450 (HGB)

[110] 'Implementation of Multimodal Transport Rules'(*UNCTAD*, June 2001) <https://unctad.org/en/Docs/posdtetlbd2.en.pdf> accessed 19 August 2019

[111] The German Commercial Code, Article 452a (HGB)

[112] Marien Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law 2010) 463

The law enables parties to agree on the application of German multimodal carriage provisions even for localised losses and it is possible to be agreed upon different liability rules unless these exclude the application of international conventions which apply mandatorily.[113] The time bar is set as one year, however in cases of a fault on the carrier's part or intentional acts, it is extended to three years.[114]

These provisions are mostly based on the CMR and so the carrier is liable for the period between the take over and delivery while he is charge of the goods.[115] However, where the loss or damage is caused by an event which the carrier could not avoid, he shall be discharged from liability.[116] Further, some specific grounds for the exclusion of the carrier's liability have been stated, respectively,

- "Use of an open, unsheeted vehicle or loading on deck, if such a mode of carriage had been agreed or was customary;
- Insufficient packaging by the sender;
- Handling, loading or unloading of the goods by the sender or consignee;
- Nature of the goods which particularly exposes them to damage, especially through breakage, rust, decay, desiccation, leakage or normal wastage;
- Insufficient labelling of packages by the sender;
- Carriage of livestock"[117]

The limit of liability for loss of or damage to the goods is 8.33 SDRs per kilo,[118] however it is concluded as three times the freight for delay in delivery.[119] It is possible to modify these limits by an agreement after 'detailed negotiations'. Finally, Article 435 prevents the carrier to limit his liability where the damage is caused by an intentional or reckless act of the carrier or his servants.

[113] The German Commercial Code, Article 452d(2) (HGB)

[114] The German Commercial Code, Article 439(1) and (2) (HGB)

[115] The German Commercial Code, Article 425(1) (HGB)

[116] The German Commercial Code, Article 426 (HGB)

[117] The German Commercial Code, Article 427 (HGB)

[118] The German Commercial Code, Article 427(1) (HGB)

[119] The German Commercial Code, Article 431(3) (HGB)

VIII. Conclusion

It has not been possible to unify the law applicable to multimodal carriage contracts up until today due to problems in feasibility and desirability. Further, a dream uniform regime does not seem the way forward. Therefore, while some countries have adopted provisions on combined carriage into their national laws, some others carry on with contractual clauses.

A. Feasibility

Achieving a feasible uniform law on multimodal transport can only be possible with either abolishing or changing the existing unimodal conventions as they are the biggest barriers. This is because of their application scopes as in fact all of them have drafted to regulate unimodal transport types but not combined carriage. Hence, while an incident might not fall into the application scope of any of the conventions, on the other hand it may be regulated by more than one. For instance, say a loss occurred while the goods are being carried by a truck but in an airport. In that case, the CMR becomes applicable as the loss happened after the road carrier took over. However, at the same time a conflict arises due to air law conventions because the incident took place in an airport. As a result current legal framework constitutes the biggest obstacle for a feasible uniform legal regime and it is not likely to change and accommodate all the unimodal conventions due to complex drafting and ratification processes.

B. Desirability

Transportation business affects many different areas as it satisfies the supply chain. Thus, it has an undeniable impact on governments of both shipping and manufacturing countries. Accordingly, neither carriers nor shippers has been satisfied by any uniform law proposal until now although both suffer the lack of a clarified legal framework.

The problem in desirability mostly arises from sea carriers as they now continue to enjoy low liability limits and available defences of the Hague-Visby Rules. Other carriers share the same scene and do not desire to change what they used to do.

C. Comment

From my perspective, the current modified network system (which is set by contractual multimodal documents) is sufficient to satisfy parties. By this way, gaps which appear from unimodal conventions are filled. Further, as mentioned above, drafting a dream uniform system has many problems due to feasibility and desirability. As a result the best thing to do in the UK might be

legitimating the provisions of current multimodal documents and apply them by force of law where they are not incorporated contractually. However, even if that is not possible, the existing law works properly and a new convention is not needed.

D. Advice

A piece of advice on legislation might be as follows:

Article 1 - Scope of Application

A. In this Act,

(a) 'Multimodal contract for the carriage of good' means a contract which is evidenced by a single document and includes carriage by more than one mode.

(b) 'International conventions' means conventions which regulate unimodal transport types and are ratified in the UK.

(c) 'Carrier' means a party who contracted to perform delivery of the goods in accordance with the contract.

B. This Act applies in the following circumstances,

(a) where more than one international conventions becomes applicable on a situation which occurs during the period of carriage of goods

(b) where a situation does not fall into the application scope of any of the international conventions

C. Where a conflict arises between this Act and international conventions, provisions of the latter will prevail.

Article 2 - The Liability Period of the Carrier

The responsibility period of the carrier for the goods is the time which starts with taking over and comes to an end with final delivery unless the loss is caused by inherent vice or an act of the shipper.

Article 3 - Unlocalised Loss, Damage or Delay

A. Where

(a) the event which causes a loss of or damage to the goods cannot be attributable to any of the legs of carriage, or

(b) the reason of the incident is spread over more than one stages

The carrier is liable for the minimum amount according to international conventions which apply at least one stages of that specific transport.

B. Where the goods does not delivered at the agreed time, the carrier is liable from the highest amount according to international conventions which apply at least one stages of that specific transport.

Article 4 - Conflicts Between Conventions

Where an event is regulated by more than one international conventions, the dominant and most closely linked one will prevail.

Article 5 - Storage Operations

A. Operations to store the goods between different legs of a multimodal carriage is governed by international convention which is the most closely linked.

B. In case above paragraph fails, the lowest amount of the two conventions which the storage took place between them, shall be applicable.

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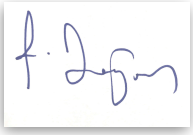
Candidate's signature  Date 26/09/2019

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The Importance of Negotiable Documents in the Context of International Seaborne Trade

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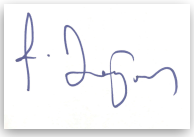
Signed  Date 26/09/2019

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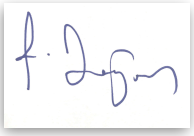
Signed  Date 26/09/2019

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I. The Nature of International Sales

International sale of goods comprises greater risks than domestic sales such as physical hazards for the goods whilst carriage, concerns for the payment of the price and legal difficulties. However, it is possible to reduce these risks with convenient insurance policies and carefully drafted contracts. Further, the performance of international commercial contracts are mostly based on documentation to enable a faster and more secure trade.[1]

Due to insolvency risks and reliability problems, sellers are willing to secure the payment before the property passes. On the other hand, the desire of buyers is to obtain the delivery earlier than making a payment as they can never be sure about the condition of the goods in case of a problem on quality or description. Some standard contractual terms which are provided by trade associations deal with these issues, for instance, INCOTERMS. Accordingly, a CIF contract will require three documents to be tendered by the seller respectively, the bill of lading, insurance policy and the commercial invoice. By this way, risks are largely reduced as in this example the property prima facie passes when the documents have been tendered[2] in exchange of the payment.[3]

Where an international sale takes place, the need for carriage of goods arises. Several documents are issued to clarify these complex operations which can be classified as follows;

Negotiable Documents	Non-Negotiable Documents
- Order Bills of Lading	- Straight Bills of Lading
- Bearer Bills of Lading	- Sea Waybills
	- Mate's Receipts
	- Ship's Delivery Orders

The bill of lading constitutes the only negotiable document as it symbolises possession of the goods. Therefore, the lawful holder can only obtain delivery of the goods with producing an original bill.[4] On the other hand, non-negotiable documents only share two out of three basic

[1] Arnhold Karberg & Co v Blythe, Green, Jourdain & Co [1915] 2 K.B. 379 at 388; [1916] 1 K.B. 495 CA

[2] *Ross T. Smyth & Co Ltd v TD Bailey & Co* [1940] 3 All E.R. 60

[3] *The Miramichi* [1915] P 71. See also: Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin Books, 2010) 1044

[4] Paul Todd, Bills of Lading and Bankers' Documentary Credits (4th edn, Informa, 2007) 3

functions of negotiable documents. However, they have the lack of being documents of title. Thus, the delivery can be made to the named consignee without surrounding the original document. This situation simplifies bureaucratic demands at customs and discharges the carrier's liability where an original bill cannot be surrounded. Negotiable documents enable lawful holders to resell the goods whilst they are still being carried at the sea. On the contrary, non-negotiable documents are generally issued for manufactured goods as a resale is not expected.

Documentation constitutes one of the most important subjects in the context of international trade. For example, say, the goods perfectly comply with the contract however a document contains misstatements (either negotiable or non-negotiable). In that case, the buyer might be able to reject the goods as Common Law lacks of good faith (*bona fide*) doctrine.

In this work, after bills of lading and sea waybills will be described briefly, their advantages and disadvantages will be compared step by step in terms of international seaborne trade.

II. The Bill of Lading

The bill of lading is a multipurpose document which is generally issued in sets of three originals by or on behalf of the carrier to the consignor. With signing of a bill of lading, the carrier undertakes to carry the goods to the agreed discharge port and make the delivery where an original bill is produced. Although, bills are normally issued after a short period of the loading operation, it is also possible to issue them when the carrier takes in charge of the goods i.e. at his warehouse. The latter one is called 'received for shipment bill', however it is generally accepted that they can be then turned into a 'shipped bill' by noting the shipment date on it. Most international transactions require a 'clean' and 'shipped' bill instead of a 'received' bill because shipment date is generally the moment when the risk passes i.e. under a cif or fob contract unless an express agreement states otherwise. Further, in case documentary credits involve in the transaction, a 'shipped' bill is generally expected to be tendered in order to obtain payment.

A. Functions

The importance of bills of lading arises from its three functions respectively, a receipt for the goods, an evidence for the contract of affreightment and a document of title when includes ‘to order’ or ‘to assigns’.

1. As Receipt for the Shipped Goods

The bill of lading constitutes information on the status of the shipped goods as of their description, quality, apparent order and condition. Except that, the bill identifies the carrying vessel, the port of loading and discharge. By this way, it plays an important role in terms of international trade as follows;

- Disposal of the Goods: Being a receipt for the shipped goods makes the document credible as third parties will naturally check and rely on the statements of the bill about the description and quality of the goods.
- Cargo Claims: It enables parties to discover if any variation in the goods occurred during the transport as it has already noted the situation of the cargo at the loading time.
- Documentary Credits: Banks will check the condition of the goods to make the payment. Therefore a bill of lading will be required to be tendered in most international transactions.[5]

Where a bill of lading is issued, the Hague-Visby Rules apply by force of law in the UK by virtue of the COGSA 71.[6] Accordingly, the shipper is entitled to demand the issue of a bill of lading which includes certain specific information from the carrier.[7] The purpose here is to enable the consignor to fulfil his other obligations which arise from different contracts for example in case of a re-sale or where particular statements are required to raise a documentary credit. In return the consignor indemnifies the carrier for the accuracy of the information that he provides.[8] The bill of lading is recognised by the rules as a prima facie evidence for the goods and moreover, it becomes a conclusive evidence in the hands of a third party acting in good faith.[9] Lastly, the carrier is under no obligation to include such specific information unless the shipper demands and even if it is

[5] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 116

[6] Carriage of Goods by Sea Act 1971, Section 1

[7] The Hague-Visby Rules, Article III, Rule 3

[8] The Hague-Visby Rules, Article III, Rule 5

[9] The Hague-Visby Rules, Article III, Rule 4

demanded,[10] he can always refuse to include such specific statement where he has reasonable grounds.[11]

2. As Evidence of the Contract of Carriage

The bill of lading contains some terms in the reverse side which evidences the contract of affreightment that has made long before the issuance of the bill. Thus, it should be noted that these terms generally do not comprise a carriage contract themselves. The importance of this principle comes from the decision in ***Pyrene v Scindia Navigation Co***[12] where the goods were damaged before the issuance of the bill of lading. By this way, the shipper can still compensate his loss in the absence of a bill of lading.

3. As Document of Title

The custom of merchants on bills of lading has recognised in ***Lickbarrow v Mason***[13] as they could transfer ownership rights, when intended by parties.[14] Thus, bills of lading have gained the status of being the only negotiable document at Common Law[15] when they contain 'to order' or 'to order or assigns'. However, this characteristic is restricted as the endorser cannot transfer greater rights than he already has.

Negotiable bills of lading can be classified as follows;

(1) The Order Bill of Lading; which names a consignee and can be transferred by signing the reverse.

(2) The Bearer Bill of Lading; which does not identify a consignee and can be transferred by merely handing over

As a result a bill of lading can be used to obtain delivery, transfer ownership and as a security for documentary credits.

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[10] *The Mata K* [1998] 2 Lloyd's Rep 614

[11] *The Esmeralda* [1988] 1 Lloyd's Rep 206

[12] [1954] 2 QB 402

[13] [1794] 5 TR 683

[14] Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa 2007) 65

[15] *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC

B. Electronic Bills of Lading

It is a common problem where the original bill of lading arrives at the port of discharge later than the carrying vessel as the receiver needs to produce the original bill (will be analysed below). The electronic bill of lading has developed to enable parties to endorse the bill faster by the help of computer systems.

While some technological developments have already adopted in the industry for the purposes of transmitting information (i.e., vessel manifests and bill of lading data), the use of electronic bills of lading has not widely accepted yet[16] due to the uncertainty of their legal status. Three systems have approved up to now by the International Group of P&I Clubs to issue e-bills respectively BOLERO, ESS and E-Title.[17] However, the main problem remains same on whether these documents can be recognised by the law as replacements of traditional bills of lading with all three functions. Accordingly, the situation of e-bills on falling into the application of the Carriage of Goods Acts 1971 and 1992 is doubtful.[18] Although, the Secretary of State has been given the power to apply the Act where technological developments are used,[19] a regulation has not yet made. Thus, where the bill is transferred, in the absence of a statutory solution, the title to sue can only arise from contractual rights or bailment.

Similarly, application of the Hague-Visby Rules involves uncertainty which might prevent carriers to rely on defences and liability limits. The problem was in fact answered by the Rotterdam Rules as e-bills were recognised and concluded as to the same effect with paper ones,[20] however they never came into force.

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[16] 'The Use of Transport Documents in International Trade' (*UNCTAD*, 26 November 2003) <https://unctad.org/en/Docs/sdtetlb20033_en.pdf> accessed 25 August 2019

[17] Charlotte Winter and Matthew Plaistowe, 'E-Bills of Lading' (Norton Rose Fulbright, February 2018) <https://www.nortonrosefulbright.com/en/knowledge/publications/b20094b6/e-bills-of-lading#section3 accessed 25 August 2019

[18] Clarke, M, 'Transport documents: their transferability as documents of title; electronic documents' [2002] LMCLQ 356 at p 359.

[19] The Carriage of Goods Act 1992, Section 1(5)

[20] The Rotterdam Rules, Article 8

III. The Sea Waybill

Waybills are in fact non-negotiable versions of bills of lading and they were first developed to be used in air and road carriage. However, due to the problems in delivery where a bill of lading is issued, they have started to be used in sea carriage as well. These documents are mostly used in transfer of goods between different branches of a single company, contracts with long standing and trustworthy buyers and cargo which is not expected to be re-sold.

While sea waybills share two of the three functions of bills of lading, they are neither negotiable nor documents of title. Therefore, delivery shall be made to the named consignee without a need for producing an original document. By this was, the late arrival problem of documents and inconvenience of carriers are resolved.[21]

IV. Importance of Negotiable Characteristic for International Seaborne Trade

Where international sales take place, the status of the documents become more of an issue because of concerns on payment, the quality of the goods and other risks which involve in the transaction. While the bill of lading has had a long history to meet the requirements of merchants, recently sea waybills have started to be used increasingly especially in container trade and short sea courses.[22] However, bills of lading are still in service and has not been replaced totally by waybills until now. This situation indicates the importance and the need for negotiable documents due to several reasons. The necessity can especially be seen in terms of documentary credits, ability to re-sale and problems in delivery. These will be analysed now to provide a better understanding.

A. Obtaining Delivery

The processes for the delivery of the goods at the port of discharge distinct between negotiable and non-negotiable documents.[23] Where a bill of lading is issued the receiver will need to present the original bill in order to take delivery of the goods or a misdelivery will occur notwithstanding the

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[21] John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson 2010) 157

[22] A.Lloyd, *The bill of lading: do we really need it?* [1989] Lloyd's Maritime & Commercial Law Quarterly 47

[23] However parties may agree on contrary terms in very exceptional instances. See; *Chilewich Partners* v *MV Alligator Fortune* [1994] 2 Lloyd's Rep 314

receiver is the named consignee[24] or the owner of the goods[25] or entitled to possession of the goods. By this way both the carrier and the person who is entitled to obtain delivery is protected and this obligation brings the bill in easily transferable status as any sub-buyer can be sure that the delivery will only made against an original bill.

On the other hand, the delivery will basically be made to the named consignee when a sea waybill is issued without a need to surrender the original document.[26] This is because a re-sale is not expected and the carrier can be able to identify the person whom the delivery will be made.

1. Problems in Delivery of the Goods

The delivery proceeding contains some problems when the contract is evidenced by a bill of lading due to long processes of banks and slow postal services.[27]. Accordingly, the goods often reach the port of discharge earlier than the original bill of lading especially where the goods are re-sold many times or the course of sea carriage is short. Thus, in the absence of the original bill of lading, the delivery cannot take place as it will then cause a misdelivery. Further, this situation will lead a cost of demurrage in case the vessel waits the bill to arrive or more commonly where the goods are discharged and kept in a warehouse a storage expense will arise.

Second, the custom of bills of lading to be issued in sets of three to six may result in a dilemma as the carrier will make the delivery only against production of an original copy without knowing whether that person is entitled or not. For example, say three bills are issued and then two of them are endorsed to two different parties separately. In that case, even if the delivery is made to the wrong party, the carrier will have a defence as he delivered against an original bill.[28]

[24] *The Stettin* (1889) 14 PD 142

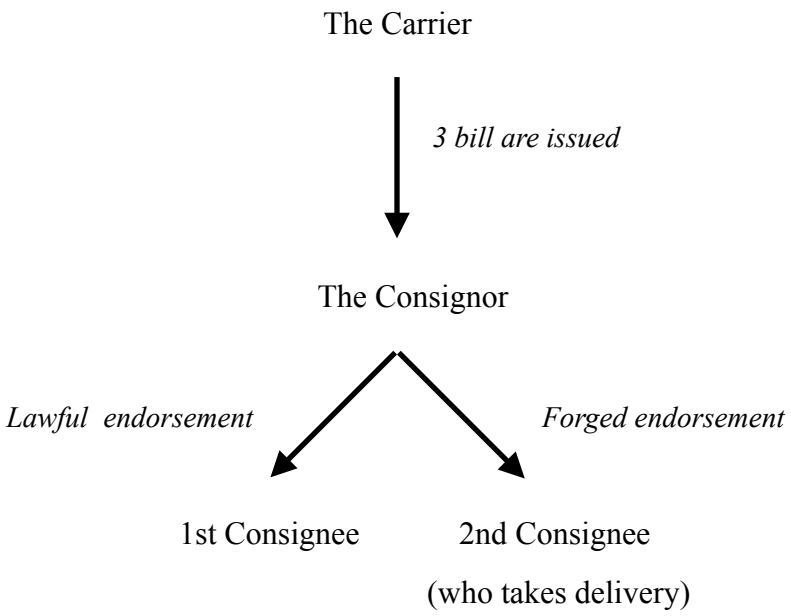
[25] *The Jag Shakti* [1986] AC 337

[26] 'Letters of Indemnity' (*UK P&I Club*, 2016) <https://www.ukpandi.com/knowledge-publications/article/letters-of-indemnity-1161/> accessed 30 August 2019

[27] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 59

[28] *Glyn Mills Curie & Co v The East and West India Dock Co* (1882) 7 App Cas 591

Figure 2: Delivery to Wrong Party



2. Delivery Without Presentation of the Bill of Lading

Where the carrier delivers the goods without presentation of the original bill, he runs the risk of being sued for misdelivery by the lawful holder of the bill of lading and may be held responsible for the full value of cargo. In that case the carrier cannot rely on any defences or P&I cover due to the breach of his basic duty.[29] Further, the insurance protection may be lost too.

Even though delivery without presentation of an original bill contains great risks for the shipowner, on the other it cannot be reasonably expected from a shipowner to wait until the bill arrives due to considerable expenses and the schedule of the vessel. Thus, the carrier can be offered to be indemnified for potential claims and asked to deliver the cargo without the presentation of the bill. While, the carrier here is protected by a letter of indemnity, he is not obliged to deliver the goods as this situation contains great risks for a carrier.

Result: Sea waybills are much more advantageous for carriers to avoid any claim for misdelivery, however in the shoes of receivers, waybills are not secure enough due to the basic delivery process.

[29] 'Discharge of Cargo Without Original Bills of Lading And Letters of Indemnity (LoI): One of the Biggest Risks a Shipowner or Charterer Can Take' (*HFW*, March 2018) <http://www.hfw.com/Discharge-of-cargo-without-original-bills-of-lading-and-letters-of-indemnity-LOI-one-of-the-biggest-risks-a-shipowner-or-charterer-can-take-March-2018> accessed 30 August 2019

B. Payment Against Documents

1. Transfer of Risk

In case a loss of or damage to goods occurs, the question of who is to suffer this casualty arises. While the court gives effect to the intention of the parties to transfer the property,[30] in international seaborne trade, the moment for transferring the property is generally determined by standard terms of the contract for instance in a CIF contract, it prima facie passes when the documents have been tendered[31] in exchange for the payment.[32] However, these documents must be able to fulfil the requirements of the sales contract or otherwise the buyer might become able to reject. In the same way, the passing of the risk is clarified according to the documents.

Result: Negotiable and non-negotiable documents do not differ in the context of passing of risk or property.

2. The Right to Reject

Where the contract of sale is governed by English Law, a number of implied obligations applies by force of law as the Sales of Goods Act 1976 provides. Excluding the duty to give good and clear title,[33] the rest can always be expelled by an express agreement. Accordingly, the goods shall be of satisfactory quality[34] where sold in the course of business[35] and reasonably fit for the purpose where it is known.[36] Further, the goods shall correspond with the description of the contract.[37]

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[30] Sales of Goods Act 1976, 17(1)

[31] *Ross T. Smyth & Co Ltd v TD Bailey & Co* [1940] 3 All E.R. 60.

[32] *The Miramichi* [1915] P 71. See also: Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin Books, 2010) 1044.

[33] The Sales of Goods Act 1976, Section 12

[34] The Sales of Goods Act 1976, Section 14(2)

[35] *Macdonald v Pollock* [2012] 1 Lloyd's Rep. 425

[36] The Sales of Goods Act 1976, Section 13(4) See also: *Jewson v Kelly* [2004] 1 Lloyd's Rep 505

[37] The Sales of Goods Act 1976, Section 13(1) See also: *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 (HL) and *Bowes v Shand* (1877) 2 App Cas 455

International seaborne transactions are mostly performed by documents which one of them is for the carriage of goods by sea. Pursuant thereto, the situation of the goods regarding to their apparent order and condition is noted on either bills of lading or sea waybills. Where a misstatement arises on the document evidencing the contract of carriage for example, in terms of shipment date or quality of the goods, the buyer then might be able to reject the goods.

Result: In this sense, bills of lading and sea waybills have no differences as both constitute receipts for the shipped goods.

C. Re-sales and Pledges

Where a bill of lading is issued, the consignor then will be able to re-sale the goods by endorsement as it is a symbol for the goods. Moreover, it has referred as synonyms with cif contracts.[38] The logic here lies on the feature of endorsement as the lawful holder of a bill does not need to worry about the real condition of the goods but only about the statements of the bill. Excluding manufactured goods and container trade, it is the common practise in both bulk dry sales and bulk oil cargo as no body in fact takes a risk including the last person in the endorsement chain as he is already protected by insurance policy and contract of carriage.[39] Moreover, the bill of lading can be used as pledge to banks because of its negotiable status. By this way, banks can obtain the rights of a bill of lading holder and secure the re-payment of the credit. (will be analysed below)

Result: While bills of lading enable the lawful holder to re-sale the goods during the course of transport, it is not possible where a waybill is issued to evidence the contract.

D. INCOTERMS

International Chamber of Commerce has laid down some standard contractual terms to be applied by merchants where international sales take place. Although these terms are totally contractual, they are commonly in use. Contracts which concluded on ‘free on board’ (FOB) or ‘cost, insurance, freight’ (CIF) terms are the most popular ones.

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[38] *Esteve Trading Corp v Agropec International (The Golden Rio)* [1990] 2 Lloyd’s Rep. 273, 276

[39] Paul Todd, *Bills of Lading and Bankers’ Documentary Credits* (4th edn, Informa 2007) 9

Incoterms normally require a bill of lading to be tendered rather than a sea waybill although it is possible for the parties to agree otherwise.[40] This is because of the security which the bill provides as the buyer pays the price relying on the statements of documents. For instance, a CIF contract will only require a shipped and clean bill.

Result: Sea waybills are not acceptable documents to satisfy Incoterms. Thus, bills of lading are more advantageous for merchants here. There is no difference between them in the shoes of carriers.

E. Documentary Credits

The terms of international sales on obtaining the payment in exchange for possession of the goods are generally satisfied by delivery of the documents rather than physical delivery of the goods.[41] The payment can be made either in cash or by a letter of credit which the latter one is more common to see for the purposes of financing or securing the transaction.[42] For instance, a cif contract will normally require the necessary documents to be tendered to make a payment.

A letter of credit appears as a result of several different agreements containing the buyer, the seller and their banks.[43] These are generally regulated by the UCP 600[44] which is provided by International Chamber of Commerce. Even though it lacks the statutory force of law, the voluntary adoption is the common practice.[45] Thus, parties are entitled to agree on contrary terms to the provision of UCP in the UK.[46]

Provisions on documentation is concluded between Articles 18 and 28. The process is simply performed as follow;

- After a contract of sales made, the buyer instructs his bank (the issuing bank) to open a documentary credit in favour of the seller. [*Contract 1*]

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[40] Incoterms® 2010 Rules

[41] Filippo Lorenzon, *Sassoon CIF and FOB Contracts* (6th edn, Sweet&Maxwell 2017) Para 8-004

[42] Malcolm Clarke and others, *Commercial Law: Text, Cases and Materials* (5th edn, Oxford, 2017) 769

[43] *The Bank of Baroda v The Vysya Bank Ltd* [1994] 2 Lloyd's Rep. 87 at 90

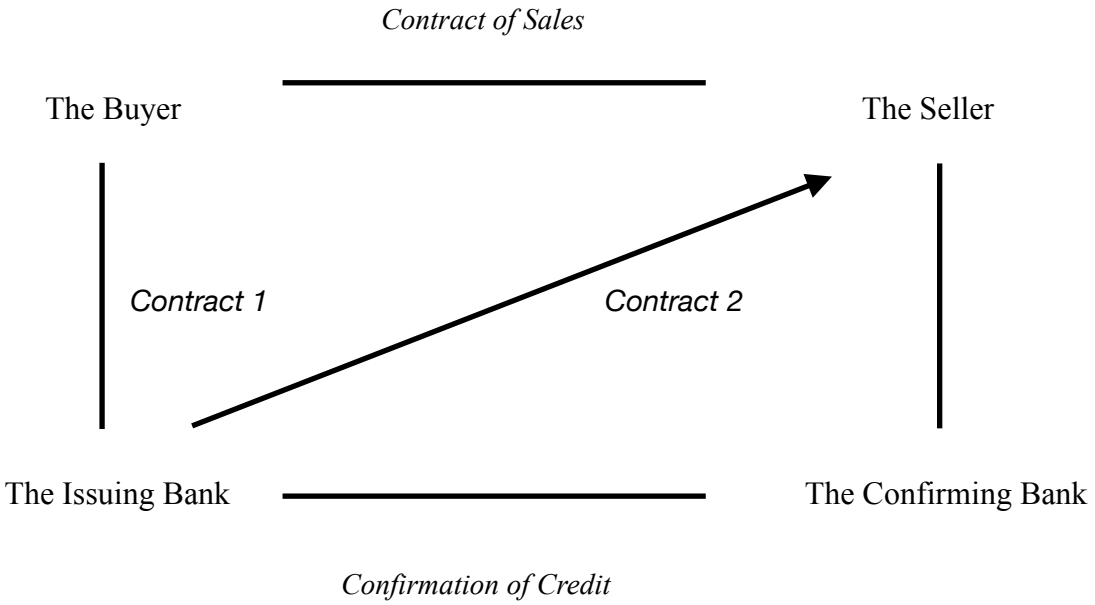
[44] Uniform Customs & Practice for Documentary Credits

[45] Paul Todd, *Bills of Lading and Bankers' Documentary Credits* (4th edn, Informa, 2007) 22

[46] *The Royal Bank of Scotland plc v Cassa di Risparmio delle Provincie Lombard,* Financial Times, 21 January 1992, otherwise unreported

- The issuing bank undertakes to make the payment in exchange of the required documents. [*Contract 2*]
- The seller dispatches the goods and tenders the documents to the bank generally via his own bank (as an agent)
- The issuing bank releases the documents to the buyer to enable him to obtain delivery after the buyer pays the contract price.

Figure 1: The Contractual Network of Documentary Credits:



While both bills of lading and waybills are acceptable documents under UCP, the latter is not well suited to raise a credit as the purpose is security here more than solving the problems in delivery. Where a waybill is issued, the goods will not be ready to be disposed by the bank in case of a difficulty for the buyer to credit back payment since the bank is not a party to contract and cannot obtain delivery with. Another, a security gap might arise as the shipper can instruct the vessel to deliver the goods to somebody else other than the designated consignee. Thus, bills of lading contain more advantageous on waybills in terms of documentary credits.

Result: While both are acceptable, bills of lading are more advantageous here for both banks and merchants.

F. Impact of the Hague-Visby Rules

It was a common practise to draft very broad exclusion clauses concerning liability of carriers in the absence of any restriction on total freedom of contract. The Hague and Hague-Visby rules were first introduced to balance this dominant bargaining power of carriers. Therefore, the rules imposed a minimum level of obligations on carriers to avert their extensive contractual exclusions and limitations.[47] On the other hand, the maximum liability, if any available, which the carriers must borne was concluded to equalise the position of parties. Further, contractual terms which seek greater defences or lower obligations are determined null and void.[48] The Rules were ratified by Carriage of Goods by Sea Act 1971 in the UK.[49]

1. Limitation of Liability

Limitation of liability arises as an important concern for international trade because of the transportation period of the goods to overseas. Naturally, shippers will wish to get maximum compensation as possible for any loss of or damage to goods. On the other hand, carriers need to limit their liability to avoid huge amounts of responsibility.

The application of the Hague-Visby Rules is mandatory where a negotiable bill of lading or a similar document of title is issued.[50] The uncertainty of straight bills on whether they should be regulated by the Rules was clarified in ***The Rafaela S***.[51] Accordingly, even tough they do not constitute documents of title, the Rules apply where a straight bill of lading is issued as delivery must only be made when the original bill is produced.

Sea waybills normally do not fall into the application scope as they lack of being documents of title but both the Rules and Carriage of Goods by Sea Act 1971 enabled a voluntarily incorporation by a 'clause paramount'[52] However, then, it will be possible to set lower liability limits or greater

[47] The Hague-Visby Rules, Article III

[48] The Hague-Visby Rules, Article III(8)

[49] The Carriage of Goods by Sea Act 1971, Section 1(2)

[50] The Hague-Visby Rules, Article X

[51] [2005] UKHL 11; [2005] 2AC 423

[52] The Carriage of Goods by Sea Act 1971, Section 1(6)

exclusions by contractual clauses as the Rules do not have the force of law and conflicting terms will be determined due to general principles of contractual construction.[53]

After all, the bill of lading has an important position in terms of being subject to the Hague-Visby Rules. By this way, both the carriers and consignors have some protections which cannot be eliminated by other terms.[54] For instance, the minimum liability limit is 2 SDRs per kilo or 666.67 SDRs per package or unit whichever is higher where any loss of or damage to the goods occurs.[55]

Result: Abolishing the use of bills of lading will not be advantageous in this sense for both the carriers and shippers.

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2. Duties and Defences of the Carrier

The carrier has imposed two other duties concerning the care of the cargo under the Rules except the obligation to issue a bill of lading on demand of the shipper.[56] Accordingly, the carrier obliges to exercise due diligence to provide a seaworthy vessel before and at the beginning of voyage.[57] This burden in fact, differing from the Common Law, only requires to exercise due diligence rather than a strict duty to provide a seaworthy ship. Secondly, the carrier shall act properly and carefully during the loading, handling, stowing, carrying, and discharging operations. Both duties are subject to their own exceptions under Article IV.

The Hague-Visby Rules entitles the carrier to rely on some defences and exclusions in respect of loss or damage.[58] These are certain and cannot be increased by contractual terms.[59] The carrier can only be discharged from liability where he has no fault, excluding two situations, specifically, any loss of or damage to goods caused by the navigation of the vessel and fire.

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[53] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 103

[54] The Hague-Visby Rules, Article III(8)

[55] The Hague-Visby Rules, Article IV(5)

[56] The Hague-Visby Rules, Article III(3)

[57] The Hague-Visby Rules, Article III(1)

[58] The Hague-Visby Rules, Article IV(2)

[59] The Hague-Visby Rules, Article III(8)

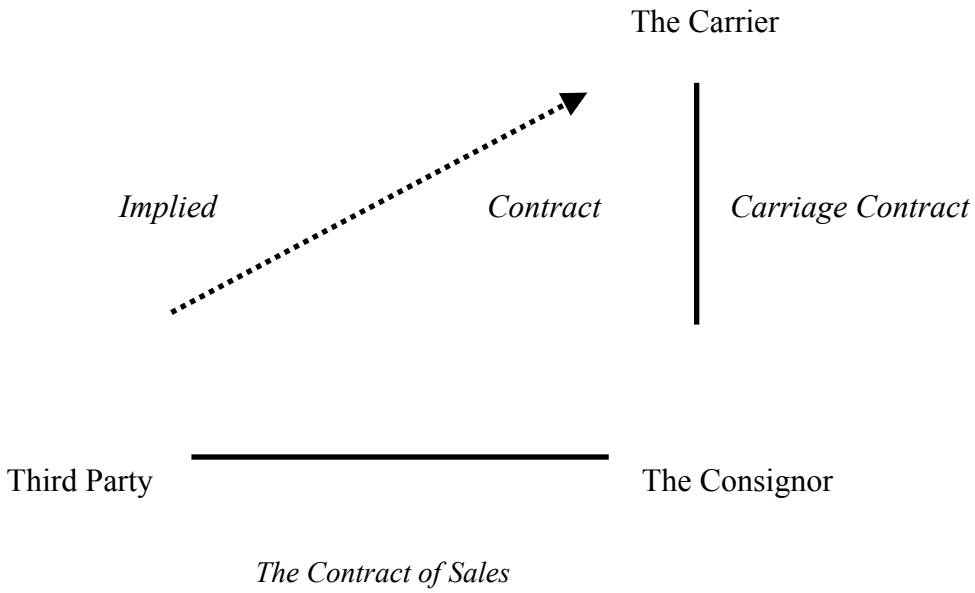
The protection for the carrier and duties for the sake of shippers will certainly be available where a bill of lading is issued as the Rules then apply mandatorily. However, in case a waybill evidences the contract, Article III(8) will not have the force of law even if the Rules are incorporated. Therefore, it will be possible to exclude some of the rules or include some additional ones depending on the bargaining power of parties. For example, where petroleum products will be carried, the shipowner will not have much power to negotiate terms or vice-versa in other instances.

Result: Bills of lading are still important for the international seaborne trade in the context of the application of Hague-Visby Rules.

G. Title to Sue

The bill of lading is a statutory exception to the doctrine of privity of contract as it leads formation of some other implied contracts where the bill is transferred.[60] For example,

Figure 1: The Bill of Lading as an Implied Contract:



Therefore, persons (sellers, buyers, banks) in the transfer chain of the bill of lading will have the exact same rights which arise from the carriage of contract unless the goods are discharged from the vessel. The same situation can be seen for waybills too regarding to Section 2(1)(c) of COGSA 92. Thus, the person whom the delivery will be made or the lawful holder of a bill of lading will have the right to sue as they were parties to the contract of carriage.

[60] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 8

The difference arises due to concerns on security of the delivery as the consignee can be sure that the goods will be delivered to the port which is stated by the bill of lading where a bill of lading is issued. This is because the consignor loses his rights to direct the vessel or dispose the goods after the endorsement. However, where a sea waybill is issued, the consignor can always instruct the vessel to proceed somewhere different because the consignee will never be a party to the contract although title to sue is provided by COGSA 92.[61]

Result: Bills of lading are more secure than waybills in order to obtain delivery of the goods although the title to sue is provided.

V. A Table of Comparison

	Negotiable Documents	Non-negotiable Documents
Ability to Transfer Ownership Rights	✓	✗
Security for Documentary Credits	✓	✗
Application of the Hague-Visby Rules	✓	✗
Being Acceptable Under INCOTERMS	✓	✗
Receipt for the Condition of Shipped Goods	✓	✓
Evidence for the Contract of Carriage	✓	✓
Title to Sue for Other Parties	✓	✓
Delivery to the Named Party	✗	✓

[61] Simon Baughen, *Shipping Law* (7th edn, Routledge 2019) 19

VI. Conclusion

Both negotiable and non-negotiable documents have different functions in terms of their legal status and importance for merchants. Thus, the decision to issue a negotiable or non-negotiable document should be made according to terms of the contract of sale to benefit more. For example, in case manufactured goods are sold and a re-sale is not expected, a non-negotiable document would be more advantageous over bills of lading to simplify custom processes and avoid problems in delivery. On the contrary, where it is likely for the goods to be sold during the carriage operation or the document is wanted to be used as a security, a bill of lading would serve better.

The bill of lading, along with its history, plays an important role to reduce concerns of parties as international sales contain serious risks. Although, the use of sea waybills shows an increasing trend, they could not replaced the bill of lading completely due to the need of merchants. Thus, from my point of view, a proposal of abolishing the use of negotiable documents is not necessary and advantageous for now as they are still in use and satisfy parties which involve in international transactions. This is because of the third function of negotiable documents, being documents of title.

Electronic bills of lading in fact would be more advantageous than abolishing the traditional bills if they could be recognised as documents of title. By this way, problems in delivery could be avoided and risks can be reduced.

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