

15 LAW

MULTIMODAL TRANSPORT IN SOUTH AFRICA

A DISSERTATION PRESENTED TO
THE DEPARTMENT OF COMMERCIAL LAW
FACULTY OF LAW
UNIVERSITY OF CAPETOWN

In partial fulfillment of the requirements for the
degree of Master of Laws

By

JEB ANTHONY CLULOW

1998

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Introduction	2
The container revolution	3
The applicable law	6
1. Parties choice of law	7
2. SA statute and law according to section 6.1	7
Jurisdiction and section 1.3 of COGSA	8
The legal problems brought on by the containerization and multimodal transport ...	9
1. Physical Multimodal Transport: Problems relating to the carriage of containers on deck	10
a) Deviation at common law:	10
b) Application of Hague Visby Rules:.....	11
2. Contractual Multimodal Transport: The law's inability to keep pace with the development of multimodal transport	13
What is multimodal transport?	13
<input type="checkbox"/> Is a Multimodal Transport Document a document of title?	14
Mandatory carriage regimes:	20
International and regional unification of mandatory carriage regimes:.....	20
Mandatory Carriage Regimes in South Africa	21
The main features of some of the mandatory regimes	21
Hague Visby Rules:.....	21
CMR Convention	22
CIM Convention	23
Common Law Liability	24
The English law position:	24
The Roman Dutch law position:.....	25
The compulsory application of different regimes of liability to different stages of multimodal transport:	26
Reconciling Mandatory Carriage Regimes	27
The Theory	27
Network system:	28
The uniform system:	29
The modified network system:.....	29
Current Practice:	29
Contractual Solutions:	29
Statutory Solutions:.....	32
The Way Forward	33

Introduction

Both the physical and the contractual aspects of multimodal transport have caused and continue to cause significant legal problems. Physical multimodal transport, is the carriage of goods from place A to place B by more than one mode of transport. Contractual multimodal transport takes place when a single person assumes responsibility for the goods throughout the entire carriage from A to B regardless of whether he is physically involved in the carriage of the goods.

Physical multimodal transport can and often does stand alone. In such a case, one usually finds that a freight forwarder contracts, as agent of the consignor, with a number of carriers for carriage by a number of different modes of transport. The basis of physical multimodal transport has been containerization, which involves inter alia carriage on deck. The law has had difficulty in accepting the weather deck of a ship as a legitimate place for the carriage of cargo.

Contractual multimodal transport can only take place in conjunction with physical multimodal transport. The legal problems caused by contractual multimodal transport include whether a multimodal transport document is a document of title, whether the mandatory carriage regimes apply and how can the different mandatory carriage regimes be reconciled in the case of a multimodal transport operation.

This dissertation is an attempt to analyse the problems of, and the solutions to, physical and contractual multimodal transport. But first, the "stage must be set" by briefly setting out the history of containerization and addressing the question of what law applies to multimodal transport contracts.

The container revolution

Theoretically multimodal transport can occur with any cargo. In practice however only break-bulk cargoes, which have been consolidated into standard sized units, are subjects of door to door delivery. There are three main types of unitization; roll on roll off cargoes (ro ro), palletized cargoes and containerized cargoes. The most important system of unitization from the point of view of multimodal transport is the container.

Containerization is the consolidation of cargo in a standard size box. The impetus behind containerization was financial. Carriers wanted to increase the cargo capacity of their vessels, and decrease the time taken in loading or discharging the cargo.

Increased speed:

By the early sixties, ship designers were designing ships capable of speeds similar to that of modern ships. The major difference from contemporary sea trading was the time taken to load or discharge. By consolidating cargo which would otherwise have been shipped as break bulk, into 10-25 ton loads, container ships were able to be loaded or discharged in a fraction of the time needed for a conventional general cargo ship. Thus a container ship is able to save a number of days on each voyage, not by increasing speed and burning more fuel, but by decreasing time spent in port.

Increased capacity:

The size of general cargo ships was constrained by the speeds of loading and discharge. By substantially reducing the time taken to load and discharge, ship owners were able to take advantage of economies of scale by ordering ever larger container ships. In the late sixties, the majority of container ships had a capacity of less than 1000 TEU¹, whilst the largest vessels carried 1600 TEU. In the early eighties, the majority of container ships had capacities exceeding 1600 TEU, with the largest vessels carrying 2800-3000 TEU. Today, the largest class of containership has capacity for around 6000 TEU. This design has already been lengthened to produce the Sovereign Maersk, with a capacity thought to be around 8000

¹ Twenty Foot Equivalent Unit. The TEU, together with the FEU (Forty Foot Equivalent Unit) are the standard size containers in use worldwide.

TEU². The German government together with Germanischer Lloyd have finalized designs for a new 8000 TEU class of containership³.

Graham & Hughes comparison of the vital statistics of a 1950's break-bulk cargo liner and a 1970's containership illustrates the increase in speed of loading/discharging and capacity.

	1950's Break-bulk liner	1970's Containership
Tons handled per working day	1 000	19 000
Days loading and discharging	28	6
Tons carried	11 000	57 000

Multimodal transport:

Besides the reduction in costs and increase in speed, the major advantage of containerization was that it facilitated multimodal transport. The basis of multimodal transport is the door to door delivery. With the introduction of strong, secure and standard size boxes⁴, it became practical for a consignor to arrange transport of his goods by a combination of transport modes without fear of pilferage or damage to the goods and with the knowledge that the carriers involved would always accept the cargo and charge a set rate. It is this aspect of containerization that has allowed Johannesburg, a city 500 km from the ocean to become the largest inland harbour in Africa.

Most break bulk cargoes are now containerized. Sea, road, rail and to a lesser extent air⁵ carriers have facilities dedicated to the transport of the standard sized containers. It is thus technically relatively easy to have a twenty foot container transported from Johannesburg to Munich, as the various transport providers will have trucks, railway carriages and ships designed specifically for the transport of containers.

Whilst containerization has simplified the physical carriage of goods, it has not simplified the

² Lloyds List No. 56.766, Monday September 22 1997.

³ Lloyds List Africa Weekly, Friday November 14 1997.

⁴ This aspect of containerization is regulated by the International Convention for Safe Containers adopted in Geneva in 1972 which became law in South Africa through the International Convention for Safe Containers Act No. 11 of 1985.

⁵ Airlines usually use smaller, lighter containers, though wide bodied aircraft can take

legal aspects of carriage. The basic reason behind this has been that the law of the carriage of goods developed over hundreds of years, whilst the container revolution occurred comparatively recently. All the problems arise from an inability of the law to accommodate the changes to the way carriage of goods is performed when cargo is consolidated in a steel box. There are two major legal problems with the carriage of containers.

The applicable law

Before examining the problems experienced by the law with regard multimodal transport, it has to be demonstrated what law actually governs this type of carriage.

The Admiralty Jurisdiction Regulation Act⁶ (AJRA) confers on the High Court of South Africa exercising its admiralty jurisdiction the right to adjudicate any claim arising out of or relating to:

- the loss or damage of goods carried or which ought to have been carried in a ship⁷
- the carriage of goods in a ship, or any agreement for or relating to such carriage⁸
- any container and any agreement relating to any container⁹

Clearly multimodal transport which includes a sea-leg, falls within the Admiralty Jurisdiction of the High Court. Whether the AJRA envisages multimodal transport not involving a sea leg is unclear. Certainly the words "any agreement relating to a container" are extremely wide in scope. However the AJRA, as its title suggests, and as is confirmed by section 1.dd and 1.ee, is designed to regulate maritime matters. It is submitted that for instance, an agreement to paint a container being used on a permanent basis as a shop, would fall outside the scope of the Act. It is suggested that the same reasoning might apply to container transport not involving a sea leg.

The law applicable to multimodal transport involving a sea leg is determined by section 6.

The hierarchy of law contained within this section can be summarized as:

1. Parties choice of law subject to mandatory South African statutes OR (if no law chosen)
2. South African statute AND
English law as at 1 November 1983 OR Contemporary Roman Dutch Law (depending on section 6 1.)

⁶ Act 105 of 1983.

⁷ AJRA, Sec. 1. (1) (g)

⁸ AJRA, Sec. 1. (1) (h)

⁹ AJRA, Sec. 1. (1) (i)

1. Parties choice of law

Section 6. (5) raises the question of whether parties can avoid the application of The Carriage of Goods by Sea Act 1986 (COGSA) or other compulsory carriage regimes simply by specifying in their contract that the rules of another legal system shall apply.

Section 6.5 is a codification of the South African conflict of law rule which gives effect to the principle of party autonomy in contract.

“Parliament may, either expressly or by impliedly overrule the normal choice of law rules and provide that a statute apply to a particular case, notwithstanding the normal conflict rule”¹⁰

South African COGSA is based on the English Carriage of Goods by Sea Act 1971 (English COGSA). The learned authors of Scrutton on Charterparties and Bills of Lading state that the phrase “shall have the force of law” contained in the English COGSA

“...demonstrates that the Rules take effect, not merely as part of the proper law, where that law is English, but as part of the statute law of England, to which an English court must give effect, irrespective of the proper law, in all cases falling within section 1 and Article X.”¹¹

The South African COGSA contains the phrase “shall...have the force of law and apply in respect of the Republic in relation to and connection with”. It is submitted that this phrase has the same effect as the phrase in the English COGSA. It is thus clear that the South African Carriage of Goods by Sea Act is a mandatory rule of the forum which overrides choice of law rules whether contained in the common law or in statute.

2. SA statute and law according to section 6.1

If the parties to the contract of carriage fail to specify that another legal system shall regulate the contract, or choose the law of South Africa, the position will be the following:

a) English law, as it was on the 1st of November 1983, applies to

“any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any South African port, for damage done to the goods by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew

¹⁰ Forsyth, C.F. Private International Law, Juta & Co, 3rd edition, 1996.

¹¹ Scrutton, 20th Edition. P. 413 see also The Hollandia [1983] 1 AC 327

of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner was domiciled locally¹²

b) The modern Roman Dutch Law as practiced in South Africa today, applies to all other claims.

Thus where a bill of lading is issued, and the goods are carried into South Africa on a foreign registered ship, English law applies. The phrase "carried into" was given an extremely wide interpretation in the Aegean Sun¹³, to include the situation where a ship puts into port purely to remedy damage sustained at sea. It must be noted that carried into South Africa "means carried or to be carried".¹⁴ Thus if goods consigned to South Africa are completely lost en-route, English Law will apply despite there being no goods to physically carry into the country.

Whilst for goods exported from South Africa, or merely passing by the country, Roman Dutch Law applies. Roman Dutch Law will also apply to goods imported on a ship owned wholly or in part by a South African company or individual.

An important question is whether goods shipped under other transport documents, more specifically, multimodal transport documents (MTD's), fall within the old head of jurisdiction contained in the 1861 Act. Whether a MTD is a bill of lading is discussed below, but for the purposes of jurisdiction it is enough to simply state that a MTD can function as a bill of lading. Thus it is submitted that English law will apply to cargoes carried into South Africa on a multimodal transport document.

Jurisdiction and section 1.3 of COGSA

Mention must be made of section 3.(1) of COGSA which confers jurisdiction on a South African court regardless of the existence of an exclusive jurisdiction clause. This language of this section is wide enough to accommodate the holder of a multimodal transport document.

¹² Admiralty Court Act, 1861. (paraphrased)

¹³ Aegean Sun v Caisse Generale Aif de Prix 1982 (4) 639 CPD

¹⁴ The Danzig 1863 Br & L 102 quoted in the Aegean Sun.

The legal problems brought on by containerization and multimodal transport.

The container revolution and the consequent development of multimodal transport gave rise to a number of legal problems not all of which have been satisfactorily resolved. The problems can be split into two categories , physical multimodal transport and contractual multimodal transport. The former category involves problems relating to the practice of shipping cargo in containers which are designed to be carried on deck. The latter category deals with the problems relating to multimodal carriage contracts succeeding unimodal carriage contracts as the most common contract for the movement of containers.

1. Physical Multimodal Transport: Problems relating to the carriage of containers on deck.

a) Deviation at common law.

Until the 1960's all ships were designed for under-deck carriage. The law developed to reflect this norm.

The common law position is that the carrier has a duty to stow cargo below deck. Carriage on the weather deck is only permissible where the shipper has agreed to such carriage, or where there is a custom of the trade to carry the goods on deck.

Containerships are designed to carry containers on deck. The Hong Kong Producer¹⁵ demonstrates the courts initial reluctance to sanction on deck carriage. Here the carriers evidence that there was a custom at the port to stow containers on deck, was not accepted, a liberty clause was required if the on-deck carriage was not to amount to a breach of contract. However by the time of the Mormacvega¹⁶ the court was willing to accept that in the case of purpose built or converted containership, the weather deck was the normal place for the carriage of containers.

Today, the only situations where on deck carriage of a container could amount to a deviation, would be where the carrier stows on deck in breach of an agreement¹⁷, or where the ship is not designed to carry containers on deck.

¹⁵ Encyclopedia Britannica v. The Hong Kong Producer [1969] Lloyds Rep. 536

¹⁶ Du Pont de Nemours v. S.S.Mormacvega [1984] 1 Lloyds Rep. 296.

¹⁷ J. Evans & Sons (Portsmouth) Ltd v. Andrea Merzario Ltd. [1975] 1 Lloyds Rep. 162

b) Application of Hague Visby Rules:

The Hague Rules also predated containerization. Article 1.c. provides that the Rules do not apply to cargo "which by the contract of carriage is stated as being carried on deck and is so carried". The Hague Visby Amendments retained this article unchanged. This article was interpreted only to exclude deck cargo if there had been the necessary statement¹⁸. The statement envisaged by art 1.c. is a statement on the face of the Bill of Lading, and not a liberty to carry on deck clause. Thus the pure Hague Visby Rules (the Rules) will not apply to carriage on deck where

- a) goods are carried on deck AND
- b) there is a statement on the face of the bill of lading to that effect

The Carriage of Goods by Sea Act¹⁹ applies and widens the scope of Hague Visby Rules in South Africa. In widening the application of Hague Visby, COGSA reduces the possibility of the Rules not applying to deck cargo. COGSA provides that the Hague Visby Rules shall apply inter alia to:

"deck cargo, if and in so far as the contract contained in or evidenced by a bill of lading referred to in paragraph b) applies to deck cargo"²⁰

Paragraph b) refers to a bill of lading containing a clause paramount:

"any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract"²¹

Thus if a bill of lading has a clause paramount incorporating the Hague Visby Rules, COGSA will still apply despite the fact that goods are carried on deck, and stated as being carried on deck.

Section 1 of COGSA thus reduces the operation of the article 1.c exception to the situation where

- a) goods are carried on deck AND
- b) there is a statement on the face of the bill of lading to that effect AND
- c) the bill of lading does not contain a clause paramount (or the clause paramount is worded

¹⁸ Svenska Tractor 1953 2 KB 300

¹⁹ Act 1 of 1986.

²⁰ COGSA sec. 1.d. (paraphrased)

²¹ COGSA sec. 1.b.

so not to apply to deck cargo)²².

²² Staniland, H. The new Carriage of Goods by Sea Act in South Africa, LMCQ, 1987, p. 305.

2. Contractual Multimodal Transport: The law's inability to keep pace with the development of multimodal transport.

What is multimodal transport?

Physical multimodal transport:

The containerization of cargo allowed cargoes to be easily and safely transferred from one mode of transport to another. Merchants and their agents physical involvement in the carriage of goods was reduced to handing them over at the point of departure, and ensuring someone would receive them at the destination.

Contractual multimodal transport:

The law has no problem if the consignor (usually through a freight forwarder) contracts separately with each carrier. However today, the contractual relationships involved in multimodal carriage, have also evolved.

With his physical involvement in the carriage of goods being reduced, the next step was to reduce the number of contracts required for the entire carriage and hence reduce the consignor's risk of having to sue a unknown carrier on a contract the terms of which are unknown in a faraway country subject to unfamiliar laws²³. Carriers began to contractually take responsibility for the performance of the entire carriage.

International multimodal transport is defined in the 1980 Multimodal Convention as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in

²³ This is the type of situation which can arise if the initial carrier contracts as agent of the consignor.

charge by the multimodal transport operator to a place designated for delivery situated in a different country.”²⁴

This definition should be read together with the definition of the multimodal transport operator “any person who concludes a multimodal transport contract and who acts as principal, not as an agent of the consignor or the carrier participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.”

The constituent elements of a multimodal carriage of goods are thus:

1. contract between consignor and multimodal transport operator
2. whereby the multimodal transport operator agrees to arrange
3. and accept responsibility for
4. the transport of the consignor's goods from X place to Y place
5. by more than one mode of transport
6. with the right to subcontract some or all of the legs of carriage to another carrier

a) Is a Multimodal Transport Document a document of title?

At common law, the significance of a document of title is that delivery of the document amounts to delivery of the goods²⁵. Whether a document is a document of title is also important from the point of view of the application of the Hague Visby Rules and the Bills of Lading Act. Both statutes only apply to documents of titles²⁶.

A document of title is a document that represents the physical possession of particular goods²⁷.

Bills of lading are either negotiable or not negotiable. A negotiable bill of lading is one which is a document of title. The word negotiable is somewhat of a misnomer. In the law relating to negotiable instruments, the word negotiable refers to the ability of a transferor to transfer better title than he himself has. This is not what the word means when used in respect of a bill of lading.

²⁴ 1980 Multimodal Convention, art 1.1.

²⁵ E. Clements Horst v Biddell Bros [1912] AC 18 HL

²⁶ For reasoning see page 15.

²⁷ Sanders Bros v Maclean (1883) 11 QBD 327 @ 341

"a bill of lading is negotiable only in a popular, and not in a technical sense. For it is negotiable to the same extent as a cheque marked not negotiable, i.e. it is transferable"²⁸

The authorities prefer to describe bills of lading as documents of title, that is documents which represent the goods, so that transfer of the goods is effected merely by transfer of the bill of lading (providing parties intend for ownership to pass). It is for this reason that the court held in E.Clements Horst v Biddel Bros²⁹ that a seller in a CIF contract had complied with his obligation to deliver the goods, and hence was entitled to payment, on delivery of the bill of lading.

Both Benjamin and De Wit agree that it is uncertain whether a MTD is a document of title.

The reasons given are:

Firstly, the MTD may be issued by an agent of the consignor, the freight forwarder. Since the carrier has not issued it, the document cannot be a bill of lading. Neither is it a document of title. Authority for this statement can be found in the UCP 500 which permits banks to refuse to accept (and hence pay for) a transport document issued by a freight forwarder not acting as carrier.

Secondly, it is uncertain whether the MTD should take on the characteristics of a bill of lading or a land carriage document. The former can be a document of title, whilst the latter is not such a document. There is authority for the proposition that a bill of lading which includes a land leg can be a document of title, however is no authority as to how a MTD, not a bill of lading would be treated.

The final reason given is that MTD's are usually issued on receipt of the goods. A received bill of lading is not a document of title - Diamond Alkali³⁰

The learned authors thus conclude that it is unlikely that a MTD is a document of title within the custom established in Lickbarrow's case. They do however point out that like the bill of lading 200 years ago, MTD's can acquire the status of documents of title if a mercantile custom equating the possession of a MTD with the possession of the goods can be proved.

²⁸ Scrutton, 20th edition. P. 185

²⁹ E. Clements Horst v Biddel Bros [1912] AC 18 HL

³⁰ Diamond Alkali Export Corp v. Fl. Bourgeois [1921] 3 K.B. 443.

"The now common use of such documents, the increasing degree of their standardization and their acceptability to banks under documentary credits may support the view that a custom, similar to that established in Lickbarrow v. Mason,³¹ exists in relation to such documents, at least where they are issued by, or on behalf of sea carriers, but for the present it awaits judicial recognition."³²

De Wit supports the recognition of a mercantile custom treating MTD's as being documents of title. He argues that restricted recognition of only shipped bills of lading for sea carriage is based on a situation which no longer exists. This rule developed in an era when a ship was an isolated secure floating warehouse. Today ships are in constant contact with the shore, the number of safe ports has rocketed, and the cargoes are routinely transhipped to feeder vessels.

"The total indisposability of the goods is not, it is submitted, in itself a legal condition for the existence of a document of title to goods. Rather it is simply a factor which has had a determining influence on the parties decision to use such documents in commercial transactions. It would therefore be wrong.....to submit that a document which does not fulfil the conditions of a classic bill of lading cannot be a document of title."³³

The ICC/UNCTAD Rules provides for MTD's which are documents of title. As they do not have the force of law, they cannot bestow qualities upon MTD's, but they can help prove the existence of a custom allowing the holder of a MTD to acquire delivery of the goods.

b) Do the Hague Visby Rules apply to multimodal transport contracts?

Article 1(b) provides that the Rules apply only to contracts

"covered by a bill of lading or other similar document of title, in so far as such document relates to the carriage of goods by sea"

COGSA extends the application of the Rules to non negotiable receipts incorporating the Hague Visby Rules, but the position in respect of MTD's remains unchanged.

It is clear from article III 3 "after receiving the goods into his charge the carrier shall on

³¹ (1787) 2 T.R. 63; reversed (1790) H.Bl. 357, but restored by the House of Lords (1793) 2 H.Bl. 211.

³² Guest, A.G. Benjamin's Sale of Goods, Sweet & Maxwell, 1992 p.1357.

³³ De Wit, R. Multimodal Transport, LLP, 1995, p. 310.

demand of the shipper issue a bill of lading³⁴ that the phrase bill of lading includes a received for shipment bill of lading. The phrase "in so far as such document relates to the carriage of goods by sea" indicates that the Hague Visby Rules are intended to cover transport by more than one mode of transport. However the transport document is still required to be either a bill of lading or a document of title before the rules will apply.

Both COGSA and the Rules refer to bills of lading. The bill of lading has been defined as "a document issued by or on behalf of a carrier of goods by sea to the person (usually known as shipper) with whom he has contracted for the carriage of goods, which serves as a receipt acknowledging that the goods have been delivered for carriage and which contains an undertaking to deliver them at the agreed destination upon presentation of the document by the rightful holder"³⁵

The three functions of usually ascribed to a bill of lading do not have to coexist for a document to be a bill of lading. Of these functions the bill of lading is only always a receipt for goods. Sometimes it is a document of title as well, and sometimes it is also evidence of the contract.³⁶ It is submitted that the Hague Visby Rules applies only to bills of lading which perform all three functions. There are two basis for such a conclusion.

The first is that parliament in England³⁷ saw fit to extend the application of the rules to non negotiable receipts. If the word bill of lading as contained in article 1.(b) referred to bills of lading that were not documents of title, then there would be no need to specifically extend the Convention to include non negotiable receipts. Non negotiable receipts also function as evidence of the contract of carriage and as receipts. A non negotiable receipt or sea-waybill differs from a bill of lading in that the consignor obtains delivery not by presentation of bill, but by proving that he is the person named on the waybill, and thus entitled to delivery. The NNR is not a document of title.

The second argument is based on the words "or any similar document of title". It is submitted that this phrase indicates that one of the prerequisites for the application of the Hague Visby Rules, is that a document, which enables the holder to obtain delivery of the goods, must be

³⁴ Article III 3 (paraphrased)

³⁵ De Wit, R. Multimodal Transport, LLP, 1995, p. 287

³⁶ Tetley p. 215

issued by the carrier.

c) Do the CMR and CIM Carriage Conventions apply to Multimodal Transport Contracts?

Article 2 of the CMR Convention provides for the application of the Convention to carriage other than by road in the case of Ro Ro³⁸ traffic where the goods are not unloaded from the road vehicle, and the road vehicle is itself carried on the next mode of transport. In such a case, the CMR only regulates the relationship between the road carrier and cargo.

It is clear thus that the CMR does contemplate multimodal transport. In the absence of any provisions to the contrary, it is submitted that the CMR must have been intended to apply to a multimodal transport contract in so far as it relates to carriage by land.

The CIM does not contain any provisions on multimodal transport. It does however provide that if a railway line crosses a state not party to the Convention, that the Convention will not apply. De Wit submits that as long as the railways used in the journey are included in the relevant list, then the CIM can apply to the rail transport despite the use of other modes of transport for other parts of the journey³⁹.

d) Title to sue and MTD's

At common law, transfer of a bill of lading does not transfer any contractual rights or duties⁴⁰. This proved problematic especially for cargoes that were to be sold en route, as the new owner wanted to be able to bring sue on the contract a negligent carrier for any damage to his property.

The consignee could get around this problem by proceeding in delict. Or if the final consignee was known at date of shipment, the consignor could contract for the carriage as agent of the final consignee. Consignee would thus be a party to the contract and be

³⁷ South Africa did the same with COGSA 1986.

³⁸ Roll on Roll off ships are common on short sea routes such as Dover to Calais.

³⁹ De Wit P. 123

⁴⁰ Payne & Ivamy P. 121

able to sue the carrier on the contract for an breach of the terms of carriage. A third option available was for the consignor to sue the carrier on the consignee's behalf.

Thus the consignor had to rely on the consignor's or the carrier's co-operation if he was to recover on the basis of the contract. The courts recognized this problem in Brandt v. Liverpool⁴¹, holding that when a bill of lading is presented, and goods delivered by the carrier, an implied contract arose that the carrier would deliver on the terms of the bill of lading. This did still did not completely solve the problem. In 1855 the Bill of Lading Act was passed in order to solve this legal black hole.

The 1855 Act provides

"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading, to whom the *property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement* shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract had been made with himself."⁴²

It is clear from the decision in The Delfini⁴³ that the 1855 Act applies only to documents of title. The question here was whether the buyer of the cargo could sue on the contract evidenced by the bill of lading. Phillips J adopted the view taken in the Elafi⁴⁴ and held

"The act cannot apply if the endorsement and transfer of the bill of lading is in no way instrumental in conferring upon the endorsee either possessory or proprietary title"

Thus Section 1 of the 1855 Act will not apply if the bill of lading is not a document of title.

In Roman Dutch law, there is no legislation dealing with this problem. Thus if Roman Dutch law applies to the multimodal transport contract, the consignee if a third party to the contract will have difficulties proceeding with a claim in contract. Hopefully this problem will be resolved in the near future by the proposed Title to Sue Act.

⁴¹ Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. [1924] 1 KB 575

⁴² Bills of Lading Act 1855 Section 1 (my emphasis)

⁴³ The Delfini [1988] 2 Lloyd's Rep 599

⁴⁴ The Elafi [1981] 2 Lloyds Rep. 679

e) *Mandatory carriage regimes:*

The essence of a carriage regime is the distributions of risk between carrier and consignor. Carriage regimes are usually mandatorily applicable. This means that the operation of the regime cannot be avoided by the parties agreeing to another law governing the contract. The underlying assumption of most mandatory carriage regimes, is that the consignor is in a weaker bargaining position than the carrier. They thus usually provide that the parties cannot change the system of liability imposed by the convention in a way that will increase the risk exposure of the consignor or consignee⁴⁵.

International and regional unification of mandatory carriage regimes:

The international community has attempted to unify the laws relating to sea transport by way of the Hague, Hague-Visby and Hamburg Conventions. In a similar fashion the Warsaw Convention is an attempt to regulate air transport.

The various modes of carriage by land and carriage by inland waterway have not been the subjects of international Convention. The reason for this is simple. Unlike sea and air carriage, carriage by land and by inland waterway is not by its very nature international. Land and inland waterway carriage is either entirely domestic or at most limited to a specific region. It is for this reason that in Europe carriage by road, rail and inland waterway are regulated by the CMR, COTIF and CMN Conventions respectively. Another regional carriage convention is the Inter-American Convention regulating road transport, which has been ratified by a number of South American States.

Whilst it is desirable for trading partners to unify relevant carriage regimes. Every country is entitled to enact its own mandatory carriage laws. This is currently the situation in North America.

⁴⁵I.E. Hague Visby Rules Article III 8.

Mandatory Carriage Regimes in South Africa

South Africa has given effect to, and expanded the ambit of, the Hague Visby Rules by virtue of the Carriage of Goods by Sea Act. COGSA gives effect to all amendments of the Hague Visby Rules, up to and including the SDR protocol⁴⁶.

The Carriage by Air Act⁴⁷ (COAA) has given effect to the Warsaw Convention. COAA gives effect to the Warsaw Convention as amended by the Hague Protocol of 1955.

South Africa has no legislation governing carriage of goods by road or rail⁴⁸.

The main features of some of the mandatory regimes

Hague Visby Rules:

The Hague Visby Rules have the force of law in South Africa by virtue of COGSA. COGSA has extended the application of the Hague Visby Rules to⁴⁹

- a) the carriage of goods by sea from a SA port of shipment. (including local shipments)
- b) every BOL or non negotiable receipt if the contract evidenced therein provides expressly that the Rules are to govern that contract.
- c) every BOL relating to the international carriage of goods by sea
 - I. from a port in a contracting state
 - II. if that BOL was issued in a contracting state.
 - III. if the contract of carriage contained in or evidenced by the BOL provides that the Hague Visby Rules apply, or that the legislation of any state giving effect to the rules are to govern the contract.

The Rules only regulate the carriage of goods by sea⁵⁰

⁴⁶ General Law Amendment Act, 1992.

⁴⁷ Act No.17 of 1946.

⁴⁸ South Africa does not transport goods via a system of inland waterways.

⁴⁹ Sec. 1. read together with Art. XX.

⁵⁰ Art. 1.(b). Though it is submitted by Scrutton that the reference in 4.2.(c) to other navigable waters indicates that carriage by sea includes "carriage on rivers and other

The Rules hold the carrier liable for damage to or loss of goods unless the loss or damage was caused by one of the excepted perils provided that the carrier exercised due diligence in ensuring that the ship was seaworthy at the beginning of the voyage⁵¹. Any agreement to reduce the carriers liability under the Rules is void⁵².

The Rules limit the carriers liability to either 666.7 SDR's per package or 2 SDR's per kg whichever is higher⁵³. The limit can however be broken by the insertion of a declaration of the nature and value of the goods on the bill of lading⁵⁴.

The period of prescription provided for in the Rules is one year from the date of delivery, or from the date on which the goods should have been delivered⁵⁵.

CMR Convention

The CMR Convention has the force of law in most European states. The CMR Convention is part of the law of the United Kingdom by virtue of the Carriage of Goods by Road Act 1965.

This Act applies as part of South African law in the case where goods exported from a European State are carried into⁵⁶ South Africa under a multimodal transport contract⁵⁷. The Act will only govern the relationships which fall within the scope of the AJRA, that is the contract between consignor/consignee and the multimodal transport operator.

It applies when the journey of carriage begins or ends in a state party to the Convention.⁵⁸

waters where great ships go." P.423

⁵¹ Art. 3.1. & 4.2.

⁵² Art. 3.8.

⁵³ Gold Francs were replaced by SDR's in the 1979 Protocol, which became law in South Africa by virtue of the Shipping General Law Amendment Act of 1997.

⁵⁴ Art 4.5.

⁵⁵ Art 3.6.

⁵⁶ Not on a ship owned either in part or wholly by a South African company.

⁵⁷ See page 26.

⁵⁸ Art. 1.1.

The Convention provides that if a consignment note is issued for the carriage, then the note is prime facie evidence of the contract and the receipt of the goods.

The basic principle governing liability is that the carrier is liable for any loss, damage or delay, unless the carrier can prove that he was unable to prevent the loss, damage or delay.⁵⁹ The carrier will also escape liability if he can show that the loss was due to the cargo claimant's negligence, his instructions or by inherent vice.⁶⁰ Parties to the contract of carriage cannot contract out of the provisions of the CMR Convention.

The Convention limits the carriers liability to 8.37 SDR's per kg.⁶¹ This limit can however be broken if the value of the cargo is declared in the consignment note.⁶²

The period of prescription provided for by the Convention is 1 year from date of delivery in the case of damage or partial loss, or effectively 1 year and 2 months from the scheduled date of delivery in the case of a total loss.⁶³

CIM Convention

The Convention on International Carriage by Rail (COTIF) provides for an international organization whose purpose is to develop and implement the rules for international rail carriage contained in the CIM and CIV Rules which are appended to the Convention. The CIM Rules deal with the carriage of goods by rail, whilst the CIV Rules deal with the carriage of passengers by rail.

The CIM Rules apply to carriage by rail for which a consignment note is issued, and which takes place in the territories of at least two contracting states exclusively along railway lines that are listed at the end of the Convention.⁶⁴

⁵⁹ Art 17.1 & 18.1

⁶⁰ Art 17.2

⁶¹ Art 23.3

⁶² Art 24

⁶³ Art 32.1

⁶⁴ Art 1.1

The consignment note is evidence of the contract, but only functions as a receipt where the railway loads the goods, or the where the railway could have verified the weight and number of packages.⁶⁵

The general rule regarding liability is that the railway is liable unless it can prove that it could not have prevented the loss, damage or delay, or that the loss, damage or delay was caused by inherent vice, negligence of the cargo claimant or by the consignor's instructions.⁶⁶

Liability is limited to 17 SDR's per kg or the amount declared in the consignment note,

Common Law Liability

As demonstrated above, the common law governing a cargo claim in a South African court will be determined by section 6. The effect of this section is that either the contractually chosen law, or English law, as it was in 1983, or Roman Dutch law will apply. This section will examine the differences between the English and the Roman Dutch common law and the consequences thereof.

Both systems provide for strict carrier liability for damage to, or loss of, goods. In English law distinction is made between common and private carriers, the former attracting strict liability. In Roman Dutch law ocean carriers are strictly liable, but land carriers are not.

The English law position:

The English law of carriage as a branch of the law of bailment. Bailment is the legal term for the situation where one person is in the possession of another's moveable property. The law of bailment prescribes the standard of care a bailee must exercise in the care of the goods. In the field of carriage, two different standards of care are provided for, one for common carriers and one for private carriers.

A common carrier is one who habitually will accept goods for carriage at a standard or

⁶⁵ Art 11.4

reasonable provided that he has space, whilst a private carrier is one that reserves the right to strike a different bargain every time. The common carrier is strictly liable for any loss to or damage of the goods whilst they are in his custody. This strict liability is mitigated by the exceptions, act of God, Queens enemies, inherent vice and fraud or fault of the consignor or consignee.

The private carrier on the other hand is liable loss or damage caused by his negligence. The standard required of private carriers is that of the reasonably cautious and skilled carrier - the usual standard of care required of any profession. The difference as far as private carriers are concerned, relates to the evidentiary difficulties of proving carrier negligence. The onus is on the carrier to show that he was not negligent, or that the negligence did not cause the loss.

"the carrier's liability is presumed, but the presumption may be rebutted"⁶⁷

For the purposes of container transport, it is generally accepted that road hauliers are private carriers, and that sea carriers are common carriers.

The Roman Dutch law position:

Roman Dutch law as a general rule will hold a carrier liable for loss or damage caused by his negligence. This general rule was changed by the Praetor's Edict Nautae Caupones Stabulari ut Recepta Restituant. The Edict imposes strict liability on inter-alia the owner of a ship which is employed as a general ship⁶⁸. Liability can only be escaped if the ship owner can show that the loss or damage was caused by a *damnum fatale* or *vis maior*. Thus with regards sea carriers, the Roman Dutch position is very similar to that in England.

Roman Dutch law differs to English law with regard land carriers. There is no question as to whether road hauliers or railways are common or private carriers, the Praetor's Edict simply does not apply.

"the edict is not applicable to public carriers by land. Even in the land of its birth, the Edict as *ius honorarium* existed side by side with the *ius civile*. We have need

⁶⁶ Art 35 & 36

⁶⁷ De Wit, R. *Multimodal Transport*, LLP, 1995. P. 31

⁶⁸ Bamford, 3rd Edition. P. 101.

for such duality. To impose the absolute liability of the Edict on public carriers by land would be an anomaly, while the liability of private carriers by land would be based on *dolus* and *culpa levis*. The general principles of our law favouring liability based on *dolus* and *culpa levis* should be applied to both kinds of carriers by land."⁶⁹

The position of the South African land carrier and sea carrier not operating a general ship, is governed by the law of deposit. The law of deposit is similar to the English law of bailment. The carrier is liable for damage done to the *res* whilst in his possession unless he can prove that that he did not negligently allow the *res* to be damaged. The essence of the contract of deposit is that it reverses the onus of proof.

The above discussion is largely academic. Carriers contract out of their common law liability subject only to the limits imposed by the applicable mandatory carriage regimes such as COGSA and in certain circumstances the CMR Convention.

The compulsory application of different regimes of liability to different stages of multimodal transport:

Different modes of carriage are governed by different laws. A multimodal contract of carriage will thus often be subject to different regimes of liability. For example carriage by road from Vienna to Hamburg and by sea to London will be subject to the Hague Visby Rules for the sea carriage and the CMR Convention for the road carriage.

If the cargo in the above example is damaged en route, which of the mandatory conventions will apply? The answer depends entirely on the forum. If the case was adjudicated in England, then the Court, by way of the domestic enactments of the two conventions, would apply both Conventions.

If the forum was South Africa, the Hague Visby Rules would apply by way of COGSA (carriage from a port in a contracting state). South Africa however has no statute which will apply the CMR Rules simply because good have been carried through two contracting

⁶⁹ Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd 1995 (3) SA 42 AD p.50

states. The CMR Rules can only apply if the South African conflict of laws rules hold that the proper law of the contract is that of a country which has enacted the CMR convention (ie the law of a European state must be the proper law of the contract.) A South African court will not apply the CMR Rules simply because it is a mandatorily applicable carriage regime⁷⁰.

This is the usual position in respect of the application of mandatory laws not of the forum. However South Africa by virtue of the AJRA is in a unique position. If through section 6, English law applies, then all English Legislation in force on the 1st of November 1983 applies.⁷¹ This includes the English Carriage of Goods by Road Act of 1965. Thus in South Africa, the CMR Convention may also apply by virtue of section 6. The English Carriage of Goods by Road Act applies in South Africa in the case of cargo carried into South Africa on a ship not owned by a South African company. The Act itself further restricts its applications to international carriage where either the place of taking over or the place of delivery is located in a contracting state. South Africa is not a contracting state, however most of Europe is. Thus if cargo is exported from a European State to an inland destination in South Africa under a multimodal transport contract, the multimodal transport operators liability for any damage occurring during a road-leg performed in South Africa will be governed by the English Carriage of Goods by Road Act 1965.

Carriage regimes can of course be incorporated by way of contract.

Thus it is possible and indeed likely that the different stages of multimodal carriage will be subject to varying liability regimes. It is the differences between the legal regimes that govern a multimodal transport contract that are problematic.

⁷⁰ The South African conflict of laws rules do not provide for the application of laws other than the law of the forum and the proper law of the contract. See Forsyth C.F. *Private International Law*. P. 61

⁷¹ Transol Bunker B.V. v m.v. Andrico Unity and Others 1989 (4) SA 325

Reconciling Mandatory Carriage Regimes

The Theory

There are three different solutions to this problem:

Network system:

The simplest way of resolving this problem, is to allow each system of liability to govern the relevant leg of the journey as if this was a unimodal carriage. This is also called the chameleon system

“because the multimodal transport operator changes colour, as it were, each time the mode of transport by which the contract is performed changes.”⁷²

The basis of the network system of liability is that the carrier’s liability for damage is determined according to the legal system governing the mode of transport in which the damage occurs. Thus if the container is washed overboard, the carrier’s liability will be determined by COGSA, while if the containers is smashed in a road accident, the liability will be regulated by the CMR Convention.

A significant problem arises when the damage is not confined to a single mode of transport, or when the place of the damage cannot be identified. What legal regime will govern the loss?

“While transport operators continue to integrate their services, lawyers keep thinking unimodally. Precisely that, it is submitted here, is the all encompassing fundamental defect of the network system: it wants to cut up an integrated transport operation into its constitutive elements, and apply to each of these elements the rules of the older unimodal transport conventions. In doing so, it forgets that one cannot uncook a meal or decompose a symphony.”⁷³

⁷² De Wit, R. *Multimodal Transport*, LLP, 1995, p. 138.

⁷³ De Wit, R. *Multimodal Transport*, LLP, 1995, p.142.

The uniform system:

The most radical solution to the differing liability regimes is to displace the unimodal transport conventions with a new liability regime for multimodal transport. The basis for this system would be an international convention governing multimodal transport operations. The same system of liability would apply throughout the carriage no matter how many different modes of transport were used. Multimodal transport would thus stand legally separate from unimodal transport.

No convention creating a uniform system of liability is presently in operation.

The modified network system:

Carrier liability is still determined by the mandatory carriage regime covering the mode of transport in which the goods were damaged. The difference from the pure network system, is that if the damage occurs during a mode of transport which is not subject to a mandatory carriage regime, or if one cannot establish during which mode of transport the damage occurred, then the liability will be governed by the provisions of the multimodal contract itself.

Current Practice:

In practice attempts have been made to utilise each of the above systems to solve the problems caused by multimodal transport.

Contractual Solutions:

ICC Rules 1973 and ICC Rules 1975

These Rules are classic examples of a modified network system of liability. Liability depends on whether the leg during which the damage occurred can be identified. The provisions of these Rules also form the basis of many combined transport bills of lading in use today.

The Rules divide liability according to whether the place of damage is known or unknown. If the place of loss is known then the applicable mandatory carriage regime applies. If there is no mandatory carriage regime, or the place of loss is unknown, then the system of liability contained in the Rules is used⁷⁴. This system of liability is drawn from the Hague Visby Rules.

UNCTAD/ICC Rules⁷⁵

First published in 1992, these Rules attempt to give effect contractually to the substance of the failed Multimodal Convention. One of the substantial differences between these Rules and the failed Convention is that the provisions in the Rules relating to carriage by sea mirror those in the Hague Visby Rules whilst the Convention parallels provisions in the Hamburg Rules.

As with the ICC Rules 1973/1975 these Rules give effect to any mandatory carriage regime where it is applicable. The UNCTAD/ICC Rules differ however where in the case where no mandatory carriage regime applies. Unlike the ICC 1973/1975 Rules the UNCTAD/ICC Rules do not automatically default to the Hague Visby exceptions and limitations. Rather the UNCTAD/ICC Rules allow for the application of both a rigorous land carriage regime of liability and the "kinder to carrier" Hague Visby regime without thrusting cargo owners and carriers into a expensive battle to prove where the loss occurred. The Rules simply provide that if the journey involved a sea leg then X system of liability and limitation applies, whilst if the journey does not involve a land leg then Y system of liability and limitation will apply.

The Rules apply whenever the contract of carriage incorporates them⁷⁶. The Rules override any provisions in the contract of carriage which purport to lower the liability of the multimodal transport operator.⁷⁷

Rule 4.1 provides that a the multimodal transport operator is responsible for the goods from time the goods are accepted to the time they are delivered.

⁷⁴ Rule 11 & Rule 12

⁷⁵ UNCTAD/ICC Rules for Multimodal Transport Documents ICC Publication No. 481

⁷⁶ Rule 1.1.

Actual place of loss unknown or no mandatory carriage regime applies:

The Multimodal transport operator is liable for loss, damage or delay occurring during this period of responsibility. The exception to this Rule is based on the provision in the European land carriage convention. It provides that the MTO is not responsible in situations where he can prove that

"no fault or neglect of his own, his servants or his agents (or any other person whose services he makes use of for the performance of the contract) has caused or contributed to the loss, damage or delay"⁷⁸

There are additional exceptions available to the MTO where the carriage includes a sea-leg (or inland water-leg) and damage occurred during that sea leg.⁷⁹ These are the exceptions of article IV.2.(a) and (b) of the Hague Visby Rules. That is act, neglect or default in the navigation or management of the ship and fire not caused by the fault or privity of the carrier. As in the Hague Visby Rules these two exceptions can only operate where unseaworthiness caused the loss, damage or delay if the MTO can prove that due diligence to make the ship seaworthy was exercised at the beginning of the voyage.

The MTO's liability is pegged at the same level as the Hague Visby Rules if the transport involves a sea-leg regardless of where the damage occurred⁸⁰. If there has been no sea leg, then liability is limited to that of the CMR Convention⁸¹. In both cases, the limit is broken where the value of the goods is declared in the transport document. Liability for delay or consequential loss is limited to the freight charge under the contract of carriage⁸².

The MTO loses his right to limit in the same circumstances under the UNCTAD/ICC Rules as he would under the Hague Visby Rules, that is if it is proved that the loss was caused by the carriers intentional or reckless act or omission⁸³.

⁷⁷ Rule 1.2.

⁷⁸ Rule 5.1.

⁷⁹ Rule 5.4.

⁸⁰ Rule 6.1.

⁸¹ Rule 6.3.

⁸² Rule 6.5.

The time limit for claims differs from the one year period provided for in the Hague Visby Rules. Rule 10 provides for the prescription of the claim 9 months after delivery or the date the goods were due to be delivered.

Place of damage known and mandatory carriage regime applies:

The mandatory unimodal carriage regimes are accommodated by rule 6.4 and rule 13. Rule 6.4 deals specifically with limitation providing that where the loss or damage occurred during one stage then the limitation shall be determined by any applicable international convention or mandatory law. Rule 13 provides that the entire rules are subject to the application of any mandatory laws or conventions.

"These Rules shall only take effect to the extent to which they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract."

Statutory Solutions:

1980 Multimodal Convention

Tetley has called the Convention "an intelligent answer to most of the problems of combined carriage"⁸⁴ Most governments failed to see the Convention in the same light as Professor Tetley, and 17 years down the line, it has still failed to attract sufficient support⁸⁵ to enter into force. Because the Convention has failed to be adopted, its provisions will not be analysed in detail⁸⁶.

The Convention combines elements of both the uniform and the modified network systems. In essence the Conventions provisions are the same as the ICC/UNCTAD Rules except where the Rules are based on the Hague Visby liability regime, the Convention is based on the Hamburg Rules.

⁸³ Rule 7.

⁸⁴ Tetley, W. *Marine Cargo Claims*, 3rd Edition. P. 937.

⁸⁵ 30 states are required to ratify the Convention - Art 36.

⁸⁶ Mankabady, S. *The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions*. *International and Comparative Law Quarterly*, Vol. 32, January 1983. P. 120.

The Way Forward

Containerization and multimodal transport contracts have not created insurmountable legal problems. Indeed the legal problems caused by the way in which multimodal transport is physically performed have been resolved. A currently unsolved problem is how to reconcile the differing systems of liability imposed by the mandatory carriage regimes. The fact that a merchant is often unprotected by mandatory carriage regimes in certain jurisdictions is also a problem.

The ultimate goal of the carriage of goods is the promotion of trade by allowing business the opportunity to get its products to any market on the planet at a reasonable price. Multimodalism seeks to achieve that goal by reducing the consignors'/consignees' (merchants') risk in transporting their goods. This is achieved, firstly by minimizing the chance of the cargo being physically damaged and secondly by reducing the chance that the merchant⁸⁷ will be unable to recover in the case where cargo is damaged through the fault of the carrier.

The reduction of the risk of cargoes being physically damaged is achieved by packing the goods in a strong steel container and by standardising the vessels, vehicles and cranes which handle these containers.

In the event that the cargo is actually damaged, the merchants' risk is reduced in that he can look to a single person, the multimodal transport operator, to make good his loss. In this respect the multimodal transport contract was a giant leap forward for merchants allowing complete control over who accepts responsibility for the safe carriage of cargo⁸⁸. This single contractual carrier (MTO) responsibility significantly reduces a merchant's risk of having to recover from a company with no assets, or from having to recover in an inconvenient jurisdiction.

⁸⁷ In reality cargo underwriters pay for cargo damage. Underwriters then attempt to recover on the subrogated rights of claim. If the underwriter cannot recover, the loss is passed on to the merchant by way of increased insurance premiums.

⁸⁸ As opposed to the situation where a freight forwarder acting as agent arranges the different legs of the carriage with different carriers

Contemporary multimodal transport contracts and laws fail to reduce the merchants' risk in two important areas. Firstly, there are many jurisdictions like South Africa with no mandatory carriage regimes⁸⁹. In such a case the applicable carriage regime is that chosen by the MTO and incorporated in the standard terms and conditions displayed on the reverse of the bill of lading. Not unnaturally these bills of lading contain many exclusions of liability and in the event of the MTO becoming liable, that liability is limited to a relatively small amount.

The second instance where current multimodal transport contracts fail to minimise the merchant's risk exposure, is in the application of extremely different mandatory carriage regimes dependant on where damage occurred. Cargo has to go beyond simply showing that he delivered the goods to the MTO in good condition and they were redelivered damaged. He also has to show during which stage of the journey the damage occurred. From the cargo owners perspective, the existence of different liability and limitation regimes dependant on where loss occurred, demonstrates that from the point of view of minimizing risk and encouraging trade, true multimodal transport has not yet been attained.

The best contractual solution:

Both the ICC and the ICC/UNCTAD Rules are examples of modified network solutions and hence sidestep the problem of whether the place of loss can be determined or not. However where a mandatory carriage regime applies neither set of rules free the cargo interests from the often difficult and expensive problem of proving where the loss occurred.

The UNCTAD/ICC Rules provide the best solution to this problem by bringing the statutory liability regimes closer to the contractual liability regimes. It is submitted that the UNCTAD/ICC Rules in smoothing out the discrepancies between the mandatory carriage liability and limitation regimes and the contractual liability and limitation regimes, represents the lowest risk option currently available to cargo interests. It can thus be said that the UNCTAD/ICC Rules are the purest form of multimodal transport contract currently available.

⁸⁹ South Africa has no mandatory land carriage regimes bar the UK COGRA which applies certain circumstances.

Statutory solutions:

Multimodal transport is of particular importance in South Africa because of the existence of an industrial heartland some 500km from the sea. The success of multimodalism in South Africa has prompted government sponsored investigations into turning Pietermaritzburg, the agricultural heartland of KwaZulu-Natal, into an "inland port"⁹⁰ similar to Johannesburg. Such a project would increase the percentage of cargoes being imported and exported from South Africa under multimodal transport contracts.

With approximately 2/3rds⁹¹ of container cargoes out of Durban being moved by foreign shipping lines, it can be said that South Africa, with regard the container trade, is more a nation traders than a nation of ship-owners. The South African Government has a policy of encouraging foreign trade utilizing such measures as Industrial Development Zones (IDZ's) and Spatial Development Initiatives (SDI's) as well as becoming a member of GATT '94.

The real solution to the problem of different liability regimes governing different parts of a multimodal transport operation would of course be an international convention with exclusive jurisdiction over multimodal transport contracts. No such Convention is currently planned. It is possible for South Africa to create a network system of liability for multimodal transport, but such a system would inevitably effect the application of COGSA. It is submitted that it is not in South Africa's interests to step out of line with the many of the important shipping nations in this regard.

If it is accepted that a new network system of liability for multimodal transport is not on the cards in the immediate future, then it is submitted that the way forward lies in the creation of mandatory carriage regimes for carriage by road and by rail in South Africa. Such laws could be restricted in their scope to international multimodal transport, or they could encompass all carriage by land in South Africa. It would also be possible to make land carriage through-out Southern Africa the subject of a regional convention. A regional carriage convention would complement the South African Customs Union (SACU), in the same way that the CMR and CIM Conventions complement the European Union.

A mandatory carriage regime is needed to even out the inequalities between the

⁹⁰ The Natal Mercury, 6 February 1998.

⁹¹ Portnet's statistics for 1997.

bargaining positions of carrier and consignor in multimodal transport. A mandatory road carriage regime would also put an end to the anomaly created by section 6 of the AJRA where the UK Carriage of Goods by Road Act applies to the road leg of a multimodal carriage operation into South Africa, but not to the road leg of a multimodal carriage out of South Africa.

It is submitted that enacting legislation loosely based on the European land carriage conventions would provide a fairer deal for the consignee of both import and export cargoes to or from South Africa.

Sources

Books:

- Bamford, The Law of Shipping, 3rd Edition. Juta & Co. 1983.
- Benjamin's Sale of Goods, 4th Edition. Sweet & Maxwell, 1992.
- Carver's Carriage of Goods by Sea, 13th Edition. Steven & Sons, 1982.
- Lord Chorley & Giles, O.C. Shipping Law, 6th Edition. Pittman Publishing, 1970.
- Debattista, C. Sale of Goods, Steven & Sons. 1990.
- De Wit, R. Multimodal Transport, Carrier Liability and Documentation. LLP. 1995
- Forsyth, C.F. Private International Law, Juta & Co, 3rd edition, 1996.
- Glass, D & Cashmore, C. Introduction to the Law of Carriage of Goods. Sweet & Maxwell, 1989.
- Hardy Ivamy, E.R. Payne & Ivamy's Carriage of Goods by Sea, 13TH Edition. Butterworths. 1989.
- Scmitthoff, C.M. Export Trade. Steven & Sons, 1989
- Scrutton on Charterparties, 20th edition. Sweet & Maxwell, 1995.
- Tetley, W. Marine Cargo Claims, 3RD edition. BLAIS. 1988.

Articles:

- Edwards, P. A comparative study of the liability of the carrier by sea and the carrier by land in South African Law. UCT Dissertation. 1997.
- Faber, D. Problems with Multimodal Transport. Lloyd's Maritime and Commercial Law Quarterly. 1996. P. 503
- Mankabady, S. The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions. International and Comparative Law Quarterly, Vol. 32, January 1983. P. 120.
- Nasser, K. The Multimodal Convention. Journal of International Law and Commerce, Vol. 19, No.2, April 1988. P. 231.
- Palmer, R. & De Gulio, F. Admiralty Law Institute Symposium: Terminal Operators and Multimodalism. Tulane Law Review, December 1989, Vol. 64. P 283-359.
- Sorkin, S. Limited Liability in Multimodal Transportation and the Effect of Deregulation. Tulane Maritime Law Journal. 1989. Vol 13.P. 295-307.

Staniland, H. The New Carriage of Goods by Sea Act in South Africa, LMCQ, 1987, p. 305.

Statutes:

South Africa

Carriage by Air Act No. 17 of 1946

International Convention for Safe Containers Act No. 11 of 1985

Carriage of Goods by Sea Act No. 1 of 1986

Shipping Law General Amendment Act No. 23 of 1997

United Kingdom

Bills of Lading Act, 1855

Admiralty Court Act, 1861

Carriage of Goods by Road Act, 1965

Carriage of Goods by Sea Act, 1971

Carriage of Goods by Sea Act, 1992

International Conventions:

CMR (Convention on the International Carriage of Goods by Road, 1956)

COTIF/CIM (Carriage of Good by Rail Convention, 1970)

Hague Rules, 1924

Hague Visby Rules (Hague Convention as amended by the 1968 and 1979 Protocols)

Hamburg Rules (UNCITRAL Convention on the Carriage of Goods by Sea, 1978)

Inter-American Convention on the International Carriage of Goods by Road, 1989

Multimodal Transport Convention (UN Convention in the International Multimodal Transport of Goods, 1980)

UN Convention on Safe Containers, 1972

Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage by Air, 1929 as amended by the Hague Protocol, 1955)
the Guatemala Protocol 1971
the Montreal Protocol 1975

International Contract Rules :

ICC Rules, 1973

ICC Rules, 1975

Cases:**South Africa**

Aegean Sun v Caisse Generale Aif de Prix 1982 (4) 639 CPD

Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd 1995 (3) SA 42 AD p.50

Transol Bunker B.V. v m.v. Andrico Unity and Others 1989 (4) SA 325

United Kingdom

Brandt v Liverpool, Brazil and River Plate Steam Navigation Co. [1924] 1 KB 575

The Danzig 1863 Br & L 102

The Delfini [1988] 2 Lloyd's Rep 599

Diamond Alkali Export Corp v. Fl. Bourgeois [1921] 3 K.B. 443.

Du Pont de Nemours v. S.S.Mormacvega [1984] 1 Lloyds Rep. 296.

E. Clements Horst v Biddel Bros [1912] AC 18 HL

The Elafi [1981] 2 Lloyds Rep. 679

Encyclopedia Britannica v. The Hong Kong Producer [1969] Lloyds Rep. 536

The Hollandia [1983] 1 AC 327

J. Evans & Sons (Portsmouth) Ltd v. Andrea Merzario Ltd. [1975] 1 Lloyds Rep. 162

Sanders Bros v Maclean (1883) 11 QBD 327 @ 341

Svenska Tractor 1953 2 KB 300