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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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**I would like to thank my supervisor Mr. Graham Bradfield for all his guidance.**

**I earnestly thank my parents for their support and for affording me this opportunity.**

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University of Cape Town

## DEDICATION

**I dedicate this to Anthony Gitonga, who has supported me and been an endless source of inspiration. Thank you for taking time to read this dissertation and for giving your comments.**

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## ABBREVIATIONS

<b>BIMCO</b>	Baltic and international maritime council
<b>CIM</b>	The Uniform Rules Concerning the Contract for International Carriage of Goods by Rail
<b>CIM-COITIF</b>	The Convention Concerning International Carriage by Rail
<b>CMI</b>	Comité Maritime International
<b>CMNI</b>	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways
<b>CMR</b>	Convention on the Contract for the International Carriage of Goods by Road
<b>COGSA</b>	Carriage of Goods by Sea Act (USA) 1936
<b>FIATA</b>	Fédération Internationale des Associations de Transitaires et Assimilés (International Federation of Freight Forwarders Associations)
<b>ICC</b>	International Chamber of Commerce
<b>ICC RULES</b>	Uniform Rules for a Combined Transport Document
<b>TCM</b>	Transport Combine de Marchandise
<b>UNCITRAL</b>	United Nations Commission on International Transport Law
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>UNCTAD/ICC</b>	
<b>RULES</b>	The UNCTAD/ICC Rules for Multimodal Transport Documents
<b>UNIDROIT</b>	International Institute for the Unification of Private Law

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# 1. CHAPTER ONE

## INTRODUCTION

### 1.1. The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea [“The Rotterdam Rules”]

The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted by the United Nations General Assembly on the 11<sup>th</sup> of December 2008.<sup>1</sup> Shortly afterwards, a signing ceremony in Rotterdam was authorised and a recommendation was made for the new Convention to be known as the ‘Rotterdam Rules.’<sup>2</sup> The signing ceremony took place on the 23<sup>rd</sup> of September 2009 and the Convention has thus far found wide acceptance with over 19 States having signed it.<sup>3</sup> Given that the Convention requires only 20 ratifications to come into force, the number of signatories seems a fair indication that the Convention will come into force and, perhaps, in the near future.<sup>4</sup>

The main objective<sup>5</sup> of the Rotterdam Rules is to supersede The Hague Rules,<sup>6</sup> The Hague-Visby Rules<sup>7</sup> and The Hamburg Rules<sup>8</sup> as the only applicable international convention on the carriage of goods by sea.<sup>9</sup> This decision to replace the previous

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<sup>1</sup>M F Sturley ‘The United Nations Commission on International Trade Law’s Transport Law Project: an interim view of work in progress’ (2004) 39 *Texas International Law Journal* 66 at 68. ‘The UNCITRAL Commission, at its 41st session from June 16 to July 3, 2008, adopted the Convention on the Contract of International Carriage of Goods Wholly or Partly by Sea. The United Nations General Assembly passed the Convention in December of 2008.’

<sup>2</sup> Rotterdam Rules signature ceremony.

Available at <http://www.rotterdamrules2009.com/cms/index.php?page=about> [Accessed on 29 September 2009].

<sup>3</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 94(1) states that; ‘this Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.’

<sup>4</sup> The United States joins major trading nations in endorsing the Rotterdam Rules. Available at [https://www.bimco.org/MembersArea/News/General\\_News/2009/09/23\\_Rotterdam\\_Rules.aspx](https://www.bimco.org/MembersArea/News/General_News/2009/09/23_Rotterdam_Rules.aspx) [Accessed on 29 September 2009].

<sup>5</sup>J Schelin ‘The UNCITRAL Convention on Carriage of Goods by Sea: harmonizing or disharmonizing’ (2009) 44 *Texas International Law Journal* 322 at 323.

<sup>6</sup>International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924.

<sup>7</sup>Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968. Hague Rules as amended by the Brussels protocol.

<sup>8</sup>United Nations Convention on the Carriage of Goods by Sea, 1978.

<sup>9</sup>A Diamond ‘UNCITRAL Draft Convention on the Carriage of Goods.’ Available at [www.uncitral.org/pdf/english/.../unc/unc-40/a-cn9-613-e.pdf](http://www.uncitral.org/pdf/english/.../unc/unc-40/a-cn9-613-e.pdf) [Accessed on 27 July 2009]. ‘In 1996, The United Nations Commission on International Trade Law accepted a proposal to review the current regimes on the carriage of goods by sea with a view of achieving uniformity in the field. This endeavour was met with enthusiasm and The Comité Maritime International (CMI) offered its assistance. A Draft outline

conventions was reached because, two main problems were identified with the existing carriage of goods by sea regimes; the first was that there are too many of them. It was a widely accepted fact among those in the shipping industry that a single carriage of goods by sea regime was needed with the aim of establishing a uniform law and practice.<sup>10</sup> Indeed, these conventions, despite their wide spread applicability; do not satisfactorily meet the world's needs for a modern uniform law.<sup>11</sup> For example; the Hague-Visby Rules alone exist in two versions.<sup>12</sup> Further, it is increasingly difficult to achieve international uniformity because many countries either adopt only select elements of the Hague-Visby Rules and the Hamburg Rules by incorporating them in their national laws or some countries adopt non-uniform versions of the conventions.<sup>13</sup>

Secondly, the previous regimes are simply outdated. The oldest convention, the Hague Rules, has been in effect since 1924 that is, 85 years, while the newest, the Hamburg Rules, has been in effect for 31 years. As a result, these Rules fail to address the astounding developments that have taken place in the transport industry. Three examples of these developments are the increased usage of containers and the rise of multimodal transportation, and e-commerce.<sup>14</sup> As a consequence, important parts of international trade are simply not covered.<sup>15</sup>

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instrument was prepared by a CMI International Sub-Committee and after having been approved by the CMI Conference held in Singapore, on February 2001, was submitted to UNCITRAL on December 2001 as the Preliminary Draft Instrument on Carriage of Goods by Sea.'

<sup>10</sup> Professor F Berlingieri 'The UNCITRAL Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea).' Available at [http://hrcak.srce.hr/index.php?show=clanak&id\\_clanak\\_jezik=32035&lang=en](http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=32035&lang=en) [Accessed on 27 July 2009].

<sup>11</sup> M H Carlson 'US participation in Private International Law negotiations: why UNICTRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is important to the United States' (2009) 44 *Texas International Law Journal* 269 at 270.

<sup>12</sup> M F Sturley 'The United Nations Commission on International Trade Law's Transport Law Project: an interim view of work in progress' (2004) 39 *Texas International Law Journal* 66 at 68. 'The Hague-Visby rules of 1968 have been further amended in many countries by the Protocol Amending the International Convention on the Unification of Certain Rules of Law Relating to Bills of Lading, 1979.'

<sup>13</sup> M F Sturley 'The United Nations Commission on International Trade Law's Transport Law Project: an interim view of work in progress' (2004) 39 *Texas International Law Journal* 66 at 67.

<sup>14</sup> M H Carlson 'US participation in Private International Law negotiations: why UNICTRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is important to the United States' (2009) 44 *Texas International Law Journal* 269 at 270.

<sup>15</sup> M F Sturley 'The United Nations Commission on International Trade Law's Transport Law Project: an interim view of work in progress' (2004) 39 *Texas International Law Journal* 66 at 68.

As part of their archaic nature, the previous conventions on the carriage of goods by sea, limit their application to maritime transport only.<sup>16</sup> Under these conventions, the carrier is responsible for the goods either from the point the goods were loaded on to the ship to the point the goods were unloaded from the ship,<sup>17</sup> or from the point the goods arrive at the port of loading to the point they reach the port of discharge.<sup>18</sup> With the increased usage of containerisation and multimodal transportation, there is increasingly a demand for carriers to assume responsibility for the cargo from the place of receipt of the cargo, which may be inland, to the place of delivery of the goods which may also be inland.<sup>19</sup> The carrier under a multimodal transport contract, will be responsible for the cargo not only at the port of loading or discharge, but for the whole transport process of the goods, that may include, inland carriage this is referred to as ‘door-to-door’ coverage. The Hague/Hague-Visby Rules and Hamburg Rules that adopt a port-to-port and tackle-to-tackle approach are now obsolete because they do not cover what happens to the cargo once the cargo leaves the port.<sup>20</sup> A single coherent liability regime that covers the whole period of transport beyond tackle-to-tackle or port-to-port was highly desired.<sup>21</sup>

In response to the limited scope of application of the Hague/Hague-Visby Rules and Hamburg Rules, the scope of application of the Rotterdam Rules was broadened,<sup>22</sup> such that, the Rotterdam Rules would not only supersede the existing maritime carriage regimes but also, the Rotterdam Rules would become a liability regime that covers the goods for the whole period of transportation.<sup>23</sup> The new Convention is therefore not only

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<sup>16</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>17</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 article 1(e) provides “‘carriage of goods’ covers the period from the time when the goods are loaded on to the time they are discharged from the ship.” This is called “tackle-to-tackle” coverage.

<sup>18</sup> United Nations Convention on the Carriage of Goods by Sea, 1978, article 1(6) provides that; ‘a “Contract of carriage by sea” means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another.’ This is called port-to-port coverage.

<sup>19</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>20</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>21</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>22</sup> M F Sturley ‘The United Nations Commission on International Trade Law’s Transport Law Project: an interim view of work in progress’ (2004) 39 *Texas International Law Journal* 66 at 68.

<sup>23</sup> Professor F Berlingieri ‘The UNCITRAL Draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea).’ Available at [http://hrcak.srce.hr/index.php?show=clanak&id\\_clanak\\_jezik=32035&lang=en](http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=32035&lang=en) [Accessed on 27 July 2009]. ‘On April 2002, the draft outline instrument, renamed “Preliminary Draft

a unimodal maritime convention, but, also a convention on multimodal transportation, which governs the transportation of the cargo on a door-to-door basis.<sup>24</sup>

The Rotterdam Rules are not the first convention aimed at governing contracts for multimodal transportation. Several attempts have been made at drafting a single convention that would satisfactorily govern multimodal transport contracts. Most of these attempts have, however, failed to be recognised and those that have been recognised have been adopted by only a few countries. The lack of a codified system of law to govern the multimodal transport contract has created unique problems arising from the multimodal transport contract.<sup>25</sup>

## **1.2. Aim of Dissertation**

The aim of this dissertation is to determine whether the Rotterdam Rules as a multimodal transport convention adequately address the problems arising from multimodal transportation, at least, where the multimodal transportation involves a sea leg. In other words, does the new Convention provide solutions to the problems arising in multimodal transport contracts, at least where one leg is carriage by sea, which previous multimodal conventions and other conventions on the carriage of goods by various modes of transportation have failed to solve? The thesis will focus on how the 'door-to-door' provisions of the Rotterdam Rules have attempted to solve the problems of; the lack of uniformity in carriage regimes governing different modes of transport, the difficulty of identifying the leg of transportation during which the loss of or damage to the goods being transported occurred, the difficulty of identifying the carriage regime applicable to any claim for loss of or damage to goods, conflicting conventions and the difficulty of identifying the carrier?

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Instrument on Carriage of Goods by Sea", was considered at the ninth session of UNCITRAL Working Group III on Transport Law, held in New York. Later that year, UNCITRAL approved the door-to-door application of the draft instrument at the Thirty-fifth session, The Draft Instrument, was subsequently renamed "Draft Convention on The Carriage of Goods [Wholly or partly] [By Sea]." Two sessions were held the following year in Vienna and New York to consider the new Draft Instrument this culminated to the third reading in 2007 so that, the UNCITRAL Commission could adopt the instrument as a Convention at its meeting in June 2008.'

<sup>24</sup> The Rotterdam Rules only apply to a multimodal contract of carriage where one of the legs is by sea. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(1), "'Contract of carriage' means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."

<sup>25</sup> The problems arising from multimodal transport are discussed in Chapter 1.

For clarity on the subject and as a point of reference, the first chapter will deal with a brief history of multimodal transportation, the problems arising therein and previous attempts at drafting a multimodal transport convention. In trying to determine whether the rules will succeed where others have failed, this thesis will examine the door-to-door provisions of the Rotterdam Rules. These provisions are: (a) the scope of application of the Rotterdam Rules; is it a door-to-door or a port-to-port convention? (b) carriers' liability where damage is localised and non-localised, (c) potential conflict of the Rotterdam Rules with other unimodal transport conventions.

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## 2. CHAPTER TWO

### BACK GROUND

#### 2.1. Containerization

Before the container became the preferred mode for transporting certain goods, goods in transit would often have to be loaded and unloaded piece by piece from one vehicle or vessel to another. As a consequence the goods would have to go through numerous handlers at different stages of movement before reaching the final destination.<sup>26</sup> The cost of transportation was very high because the shipper was charged separate transportation rates and handling costs every time the goods had to be transferred from one mode of transportation to the next.<sup>27</sup>

To reduce this inefficiency, merchants had from as early as the 1920's,<sup>28</sup> been known to use small wooden boxes to ship their cargo from an inland port to a terminal for ocean carriage and finally, to their point of destination.<sup>29</sup> It was not until the 1950's to the 1960's that the metal container was introduced. Shippers and entrepreneurs in the business believed that freight costs could be significantly reduced by consolidating cargo using containers.<sup>30</sup> By the 1970's containerisation had revolutionized the transportation industry,<sup>31</sup> and by using a single metal box it was now possible to integrate road, rail and ocean carriage. Containerisation had the advantage of making it quicker and easier to transport goods.<sup>32</sup> This, in turn, has had the effect of reducing freight costs. The cost of

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<sup>26</sup> J A E Faria 'Uniform law for international transport at UNCITRAL: new times, new players, and new rules' (2009) 44 *Texas International Law Journal* 277 at 289.

<sup>27</sup> J A E Faria 'Uniform law for international transport at UNCITRAL: new times, new players, and new rules' (2009) 44 *Texas International Law Journal* 277 at 290.

<sup>28</sup> Doctor T Schommer *International multimodal transport* (1999) Unpublished LLM Dissertation University of Cape Town, Cape Town.

<sup>29</sup> Professor D S Collinson 'Containerisation and intermodal service in ocean shipping' (1968-1969) 21 *Stanford Law Review* 1077.

<sup>30</sup> A Donovan 'Impact of containerisation from Adam Smith to the 21<sup>st</sup> Century' (2004) 25 *Review of Business* 10 at 13. Available at [http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04\\_RB\\_impactCONTAINER.pdf](http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04_RB_impactCONTAINER.pdf) [Accessed on 22 July 2009].

<sup>31</sup> A Donovan 'Impact of containerisation from Adam Smith to the 21<sup>st</sup> Century' (2004) 25 *Review of Business* 10 at 13. Available at [http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04\\_RB\\_impactCONTAINER.pdf](http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04_RB_impactCONTAINER.pdf) [Accessed on 22 July 2009].

<sup>32</sup> M E Crowley 'The limited scope of cargo liability regime covering carriage of goods by sea: the multimodal problem' (2004-2005) 79 *Tulane Law Review* 1461 at 1462.

shipping goods in containers is now between one and two percent of the retail value that is, ninety percent less than it would have cost to ship cargo before containerisation.<sup>33</sup> Containers are now loaded and unloaded by machines this means, that it is no longer necessary to employ stevedores or third parties to transfer goods from one vessel to another. As a consequence, labour costs, shipping time in port, total transit time, losses due to breakage and theft and cargo-handling costs have been drastically reduced by consolidating numerous break-bulk parcels into a single unit.<sup>34</sup>

The introduction of the container<sup>35</sup> made it possible to effectively link different modes of carriage into an integrated transport chain.<sup>36</sup> The container gained popularity in the industry because now, cargo could easily be transferred from trailers on to trains and on to ships. This integration of road, rail and ocean carriage encouraged the growth of multimodal transportation.

## 2.2. Multimodal Transportation

'Multimodalism' is the term used in the transport industry to describe the transportation of goods from 'one place to another by different means of transport'.<sup>37</sup> In a multimodal system of carriage the goods may be transported over land, air or water consecutively or, a combination of any two modes of transport may be used.<sup>38</sup> Therefore, in a door-to-door contract of carriage, the carrier will undertake to transport the goods from the point of origin, usually the seller's warehouse, by land or air to a port, then by sea and finally by land or air to the final destination usually the buyer's warehouse.

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<sup>33</sup> A Donovan 'Impact of containerisation from Adam Smith to the 21<sup>st</sup> Century' (2004) 25 *Review of Business* 10 at 13. Available at [http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04\\_RB\\_impactCONTAINER.pdf](http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04_RB_impactCONTAINER.pdf) [Accessed on 22 July 2009].

<sup>34</sup> A Donovan 'Impact of containerisation from Adam Smith to the 21<sup>st</sup> Century' (2004) 25 *Review of Business* 10 at 13. Available at [http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04\\_RB\\_impactCONTAINER.pdf](http://courses.csusm.edu/lbst361bby/~DATA/~Containers/04_RB_impactCONTAINER.pdf) [Accessed on 22 July 2009].

<sup>35</sup> The history of containerisation has not been very well documented because not many scholars have researched into it. What is known for sure is that the container was invented by industrial practitioners rather than scientists and inventors working in other fields.

<sup>36</sup> J A E Faria 'Uniform law for international transport at UNCITRAL: new times, new players, and new rules' (2009) 44 *Texas International Law Journal* 277 at 289-290.

<sup>37</sup> D Faber 'The problems arising from multimodal transport' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 503 at 503.

<sup>38</sup> R W Palmer and F P DeGiulio 'Terminal operations and multimodal carriage: history and prognosis' (1989) 64 *Tulane Law Review* 281 at 285.

The most authoritative legal definition of the term is provided in the Convention on International Multimodal Transport of Goods.<sup>39</sup> Article 1(1) of the Convention, defines the term ‘International multimodal transport,’ under this article, the term means; ‘the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.’<sup>40</sup>

However, this definition does not completely describe what multimodal transport entails. For a complete definition, article 1(1) should be read in conjunction with the definition of the ‘multimodal transport operator’ provided in article 1(2) of the Multimodal Convention. This provides that a ‘Multimodal transport operator’ means, ‘any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.’<sup>41</sup>

Thus, the main features of international multimodal transportation are: the carriage of goods by two or more modes of transport, from one country to another, under one contract, one document and one responsible party, for the entire carriage,<sup>42</sup> who might subcontract the performance of some, or all modes, of the carriage to other carriers.<sup>43</sup>

However, the multimodal transport contract is governed by differing legal regimes aimed, at governing the different component modes in the multimodal transportation of cargo. This has aroused the commercial world’s dissatisfaction. Because of the myriad inconsistent protocols that govern the multimodal transport

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<sup>39</sup> United Nations Convention on International Multimodal Transport of Goods 1980, (The Multimodal Convention).

<sup>40</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 1(1).

<sup>41</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 1(2).

<sup>42</sup> R W Palmer and F P DeGiulio ‘Terminal operations and multimodal carriage: history and prognosis’ (1989) 64 *Tulane Law Review* 281 at 285.

<sup>43</sup> T R Denniston et al ‘Liabilities of multimodal operators and parties other than carriers and shippers’ (1989-1990) 64 *Tulane Law Review* 517 at 517.

contract, there is pressure for simplification and standardisation of documentation, standards and procedures.<sup>44</sup>

### **2.3. Problems arising from multimodal transport**

The principal international transport conventions, that regulate carrier liability for loss or damage to cargo, include; the CIM-COTIF, the CMR, the Warsaw Convention<sup>45</sup> now amended by the Montréal Convention<sup>46</sup> both of which are conventions on air transport, the Convention on inland waterways, CMNI, and finally, the Hague/Hague-Visby Rules and the Hamburg Rules that govern the international carriage of goods by sea.

Over the last century, numerous amendments have been made to these conventions and the legal regimes that they have created differ widely. Each convention relating to each different mode of transport has developed separately and independently from the rest. Furthermore, these conventions were all designed to apply only to a specific unimodal transport contract.<sup>47</sup> As a consequence, when any one of these conventions is applied to a multimodal transport contract, it will only effectively cover the mode of transport it was designed to govern and the rest of the combined transport chain is considered a subsidiary to the carriage in question.<sup>48</sup> There is therefore, a profound lack of uniformity in rules that govern a multimodal transport contract.

Therefore for example, under a multimodal transport contract, where, for instance; cargo is carried partly by sea and partly by air, two bills of lading are issued that will cover each part of the journey separately, a bill of lading under the Hague Rules will be issued to govern the sea leg and an air way bill will also be issued to cover the air leg of the transport. As a consequence, both these conventions will be applicable to this contract of carriage each applying to a specific leg of carriage. Where more than one transport document is issued some legal difficulties are bound to arise. For one, different rules are applicable to each document;<sup>49</sup> as a result, conflict may arise on how to resolve

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<sup>44</sup> T R Denniston et al 'Liabilities of multimodal operators and parties other than carriers and shippers' (1989-1990) 64 *Tulane Law Review* 517 at 518-519.

<sup>45</sup> Warsaw Convention as amended at The Hague 1955 and by protocol No. 4 in Montreal 1975.

<sup>46</sup> Unification of Certain Rules for International Carriage by Air, 1999,

<sup>47</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 232.

<sup>48</sup> S Mankabady 'The Multimodal Transport of Goods Convection: a challenge to unimodal transport conventions' (1983)32 *International and Comparative Law Quarterly* 120 at 120.

<sup>49</sup> S Mankabady 'The Multimodal Transport of Goods Convection: a challenge to unimodal transport conventions' (1983)32 *International and Comparative Law Quarterly* 120 at 120-121.

matters such as; the carrier's and shipper's liability and period of responsibility, limits to that liability, documentation, burden of proof and time limits.<sup>50</sup> The inability to successfully harmonize the various unimodal transport conventions into one transport convention that governs multimodal transportation is the largest impediment in multimodal transportation. Because of the lack of uniformity, carriers and shippers find themselves subject to conflicting rules. This lack of uniformity makes the multimodal contract unpredictable.<sup>51</sup>

A unique problem arose with the use of containers. Once cargo is loaded into a container, the container is sealed and it generally remains sealed until it reaches its final inland destination. The problem with this is that it is almost impossible to determine when the cargo was damaged and on which mode of transportation the damage occurred.<sup>52</sup> Unpredictability occurs because, different carriage regimes govern different modes of transportation, therefore if the parties cannot identify the point in transportation at which the damage occurred, they cannot determine what carriage regime will be applicable to them.<sup>53</sup> Another problem arising where damage was non-localised is that, the shipper would not be able to identify the party responsible for the loss or damage making the legal process long and drawn out.<sup>54</sup> 'Uncertainty arose on how to deal with problems such as who bears responsibility where loss or damage was non-localised, and to whom third parties turn to for compensation'<sup>55</sup>

As a result the, shipper as well as those who finance and insure cargo cannot accurately estimate the risks accompanying the contract of carriage, for the allocation of risk between the carrier and the shipper will vary depending on the contractual regime applicable.<sup>56</sup> The question of liability for non-localised loss or damage has not yet been

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<sup>50</sup> R Dunster *The quest for a uniform multimodal regime: preserve abandon or start again* (2006) Unpublished, LLM Dissertation, University of Cape Town, Cape Town.

<sup>51</sup> R Dunster *The quest for a uniform multimodal regime: preserve abandon or start again* (2006) Unpublished LLM Dissertation University of Cape Town, Cape Town.

<sup>52</sup> S Mankabady 'The Multimodal Transport of Goods Convection: a challenge to unimodal transport conventions' (1983) 32 *International and Comparative Law Quarterly* 120 at 120-121.

<sup>53</sup> Economic Commission for Europe 'Possibilities for reconciliation and harmonisation of civil liability regimes governing combined transport.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>54</sup> T R Denniston et al 'Liabilities of multimodal operators and parties other than carriers and shippers' (1989-1990) 64 *Tulane Law review* 517 at 519-520.

<sup>55</sup> T R Denniston et al 'Liabilities of multimodal operators and parties other than carriers and shippers' (1989-1990) 64 *Tulane Law Review* 517 at 519.

<sup>56</sup> S Zamora 'Carrier liability for damage or loss to cargo in international transport' (1975) 23 *American journal of comparative law* 391 at 392-394.

solved and continues to be one of the major problems in multimodal transportation. This uncertainty usually leads to long drawn out court battles, because the shipper usually tries to provide that the loss or damage occurred during the transport leg to which the highest liability limit applies and the transport operator tries to provide the opposite that the loss occurred during the leg to which the lowest liability limit applies.<sup>57</sup> Further, whereas, carrier's liability is always subject to a mandatory rule through the various transport conventions there exist periods during which the goods in multimodal transit are not subject to a mandatory regime. For instance the period during which the goods are in the custody of third parties such as stevedores or terminal operators. This creates uncertainty over which regime supersedes the other.<sup>58</sup>

In a standard export-import transaction, the seller will usually arrange for the overland carriage of the goods to the ship, and then either the buyer or the seller will arrange for the sea carriage of the goods finally, the buyer arranges for the overland carriage of the goods to the final inland destination. This has changed, under door-to-door transport contracts parties are relying more and more on freight forwarders who enter into contracts that involve a series of different modes of carriage and a number of different carriers.<sup>59</sup>

The freight forwarder may contract in essentially one of three ways. The freight forwarder may act as the shipper's agent. As agent, the freight forwarder will act on the shipper's behalf and contract with the relevant road, air, rail or sea carriers. This is the traditional role of the freight forwarder who does not act as a carrier and assumes no liability but simply enters into an agency contract. The various carriers are responsible for issuing separate and independent documents of title that are governed by the relevant carriage regimes.<sup>60</sup>

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<sup>57</sup>Economic Commission for Europe 'Possibilities for reconciliation and harmonisation of civil liability regimes governing combined transport.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>58</sup>Economic Commission for Europe 'Possibilities for reconciliation and harmonisation of civil liability regimes governing combined transport' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>59</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 98.

<sup>60</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 98.

Alternatively, the freight forwarder may act as principal for one stage of the carriage and as agent to the shipper for other stages for which independent contracts of carriage would be entered into. Finally, the freight forwarder may just conclude a single contract with the shipper for the door-to-door transportation of the cargo. Under such a contract the freight forwarder will conclude contracts of carriage with the relevant unimodal carriers and the shipper will be in a contract with the freight forwarder and not the actual carriers the freight forwarder will bear full responsibility for the cargo while they are in transit.<sup>61</sup>

The various roles that the freight forwarder may play in a door-to-door transport contract can cause confusion on the part of the shipper. This is because it is very hard for the shipper to determine when the freight forwarder is acting as agent and when it is acting as carrier or principal. Further, with no codification on the matter, shippers have found it very difficult to determine who to institute actions against. The shipper in a contract of agency with the freight forwarder will also find himself bound by contracts of carriage made between the freight forwarder and the unimodal transport operator. The problem with this arrangement is that the shipper has no control over who the freight forwarder contracts with and the shipper may find himself in an unfavourable situation.<sup>62</sup>

Finally, another problem arising from multimodal transportation is the question of how to determine the responsibilities and liabilities of parties other than the carrier. In executing a multimodal transport contract the freight forwarder may enter into third party contracts with stevedores, terminal operators and inland carriers whose function, is to transfer the cargo from one mode of transport to the next; for example, transferring the container from a railway station to the port or, from a truck to an ocean liner. The problem arises where loss of the container or damage to the goods occurs while the goods are in the custody of such third parties. Claims for lost or damaged cargo, raises the complex issues of overlapping application of legal provisions. Once again, it is

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<sup>61</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 99.

<sup>62</sup> R Dunster *The quest for a uniform multimodal regime: preserve abandon or start again* (2006) Unpublished LLM Dissertation, University of Cape Town, Cape Town.

unclear as to which contractual regime will be applicable in determining the responsibilities and liabilities of stevedores' terminal operators and inland carries.<sup>63</sup>

There was worldwide consensus that the shipping industry is in need of a unified and modern international legal regime that would effectively govern multimodal transportation.<sup>64</sup> Before the Rotterdam Rules, several attempts had been made to draft a convention that would govern the multimodal transportation of goods.

## **2.4. Previous conventions on multimodal transport**

### **2.4.1. The TCM Draft Convention**

The unique problems arising out of containerization and multimodal transportation, led to the first negotiations aimed at developing a multimodal transport convention.<sup>65</sup> UNIDROIT and CMI began work on a draft convention in the 1930's and by 1969 the Tokyo Rules<sup>66</sup> had been produced. The efforts made by UNIDROIT and the CMI culminated in a round table conference in Rome in 1970, which resulted in the TCM Draft Convention.<sup>67</sup> The aim of the TCM Draft Convention was to promote uniform rules that would eradicate the application of differing and often times conflicting contractual regimes to a multimodal transport contract by providing a minimum standard available to operators whose starting point could be from different modal bases.<sup>68</sup> However, the TCM Draft Convention was never adopted at a diplomatic conference.

The TCM Draft Convention had two principal characteristics; first the draft convention was not mandatory, the application of the Draft Convention was voluntary.<sup>69</sup> This means, that both the shipper and the carrier would have to agree to the application of the Draft Convention to their contract of carriage. Secondly, the Draft Convention adopted the 'network system' of liability<sup>70</sup> under which, 'the TCM limit of liability

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<sup>63</sup> T R Denniston et al 'Liabilities of multimodal operators and parties other than carriers and shippers' (1989-1990) 64 *Tulane Law Review* 517 at 519.

<sup>64</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>65</sup> D Sassoon 'Liability for the international carriage of goods by sea, land and air: some comparisons' (1971-1972) 3 *Journal of Maritime Law and Commerce* 759 at 761.

<sup>66</sup> The CMI draft of the Combined Transport Convention known as the 'Tokyo Rules of 1969' only applied to combined transport where part of the journey was by sea.

<sup>67</sup> D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

<sup>68</sup> D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

<sup>69</sup> K Nasser 'The Multimodal Convention' (1988) 19 *Journal of Maritime Law and Commerce* 231 at 235.

<sup>70</sup> D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

would only apply if the damage could not be determined to have occurred on a particular leg of carriage (that is non-localised damage).<sup>71</sup> Where the damage is localised, and the leg of carriage during which damage occurred can be determined then, the unimodal transport convention that governs that leg of carriage is applicable and not the TCM Draft Convention.<sup>72</sup>

Ironically, these very principles led to the failure of the convention. To begin with, the 'network system' of liability meant the preservation of the existing unimodal transport conventions that would still be applicable despite the inclusion of the Draft Convention in the contract of carriage.<sup>73</sup> Further, the application of both the TCM Draft Convention and the unimodal transport conventions meant the addition of yet another document of title to the already mandatory existing ones.<sup>74</sup> As a result, the TCM Draft Convention was perceived as too weak to achieve the objectives of uniformity and efficiency that the transport industry was looking for.<sup>75</sup> In addition to this, it was already the practice for parties to voluntarily include in the contracts of carriage with the freight forwarder provisions for a 'network liability system' with a rule for non-localised damage.<sup>76</sup> Consequently, the TCM Draft Convention was not considered worth ratifying as an international treaty. However, the provisions of the Draft Convention have been adopted by many commercial bodies to provide the basis for standard form contracts used in container transport.<sup>77</sup>

#### **2.4.2. The ICC Rules**

The failure of the TCM Draft Convention meant that there was still the lack of a convention to govern the multimodal transport contract. Hence, in 1973 the ICC produced the the ICC Rules.<sup>78</sup> The ICC rules are based on the TCM Draft convention

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<sup>71</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 235.

<sup>72</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 235.

<sup>73</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 236.

<sup>74</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 236.

<sup>75</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 236.

<sup>76</sup> K Nasser 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 236.

<sup>77</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 102.

<sup>78</sup> D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

and like its predecessor, the rules aimed to provide a uniform law that would effectively govern the multimodal transport contract.<sup>79</sup>

The ICC Rules adopt the same principles as the TCM Draft Convention. They are voluntary, and are given effect by their 'incorporation in the contract concluded for the performance or the procurement for performance of combined transport of goods as evidenced by the combined transport document.'<sup>80</sup> The ICC rules recognised the role played by the combined transport operator also known as a freight forwarder. The basis of the rules is that, the combined transport operator acting as a principal,<sup>81</sup> may perform the carriage by personally providing the necessary modes of transportation or the combined transport operator may outsource the carriage to different unimodal carriers who can complete each leg of the transportation separately.<sup>82</sup> For this reason, under the ICC Rules the 'combined transport operator accepts complete responsibility for ensuring the performance of the combined transport as required by the contract and accepts liability for the act and omissions of its agents or servants when they are acting within the scope of their employment and those he uses for such performance.'<sup>83</sup>

In addition, the ICC Rules also adopted the 'network system' of liability.<sup>84</sup> Similarly to the TCM Draft Convention, the ICC rules will be applicable when the damage is non-localised, and where the damage is localised the relevant unimodal transport convention applicable to the leg of transportation at which the damage occurred will apply.<sup>85</sup> It is also worth noting that, the ICC Rules will apply even where the goods are transported by a single mode of transportation as long as the intention was for the transport to be by two or more modes of transportation.<sup>86</sup>

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<sup>79</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 102.

<sup>80</sup> Uniform Rules for a Combined Transport Document Brochure No. 298, rule 1.

<sup>81</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 103.

<sup>82</sup> C Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 103.

<sup>83</sup> Uniform Rules for a Combined Transport Document Brochure No. 298, rule 5.

<sup>84</sup> Uniform Rules for a Combined Transport Document Brochure No. 298, rule 13, in D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

<sup>85</sup> D A Glass *Freight Forwarding and multimodal transport contracts* (2004) 236.

<sup>86</sup> S Mankabady 'The multimodal transport of goods convention: a challenge to unimodal transport conventions' (1983) 32 *International and Comparative Law Quarterly* 120 at 123.

The ICC rules form the basis of a number of standard forms of transport documents issued by the BIMCO and FIATA. However, there was still the lack of a convention to govern multimodal transport contracts.

### **2.4.3. The Multimodal Convention**

This convention was adopted in 1980 as a result of work done by UNCTAD. The aim of this convention was to create a uniform international legal regime which would regulate a contract for the multimodal transportation of goods. Although the convention has not succeeded in attracting sufficient ratifications to enter into force, its provisions have significantly influenced the type of legislation enacted in a number of countries.<sup>87</sup>

The convention has two major achievements; first it divides the legal relations in a multimodal contract of carriage into two.<sup>88</sup> The first relation is that between the consignor and the multimodal transport operator,<sup>89</sup> while the second relationship is that between the multimodal transport operator and the actual carrier.<sup>90</sup> As a result of the first relationship, the consignor only deals with the multimodal transport operator.<sup>91</sup> Under the Multimodal Convention, the multimodal transport operator may either perform the various portions of the multimodal carriage itself or subcontract with unimodal carriers for the various legs of the transportation.<sup>92</sup> Either way, the multimodal transport operator is liable to the consignor throughout the contract of carriage for any loss or damage to the goods regardless of which mode of transportation is involved at the time of loss.<sup>93</sup> Therefore, under the Multimodal Convention, The consignor need only institute a claim against the multimodal transport operator instead of going after the unimodal carrier responsible for the loss or damage of the goods. The multimodal transport operator may in turn claim from the unimodal carrier responsible for the damage to the goods.

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<sup>87</sup> Report prepared by the UNCTAD Secretary 'Implementation of multimodal transport rules.' Available at [www.unctad.org/en/docs/posdtetlbd2.en.pdf](http://www.unctad.org/en/docs/posdtetlbd2.en.pdf) [Accessed on 20 July 2009].

<sup>88</sup> Kurosh Nasserri 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 238.

<sup>89</sup> K Nasserri 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 238.

<sup>90</sup> K Nasserri 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 239.

<sup>91</sup> K Nasserri 'The Multimodal Convention' (1988)19 *Journal of Maritime Law and Commerce* 231 at 239.

<sup>92</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 1(3)

“‘Multimodal transport contract’ means a contract whereby a multimodal transport operator undertakes against payment of freight to perform or to procure the performance of international multimodal transport.”

<sup>93</sup> United Nations Convention on International Multimodal Transport of Goods,1980, article 14(1) ‘The responsibility of the multimodal transport operator for the goods under this convention covers the period from the time he takes the goods in his charge to the time of their delivery.’

The second achievement is that the multimodal transport convention adopts a 'modified network system' of liability.<sup>94</sup> This system provides for the liability of the multimodal transport operator both for localised and non-localised damage.<sup>95</sup> Under this approach, limits of liability for localised damage are determined by reference to the applicable international convention or mandatory national law that governs the mode of transportation involved at the time of loss or damage, which provides a higher limit of liability than that of the Convention.<sup>96</sup> Where the damage is non-localised, the Multimodal Convention will apply.

#### **2.4.4. The UNCTAD/ICC Rules**

When it became obvious that the United Nations Convention of International Multimodal Transportation of Goods was not going to enter into force, UNCTAD was requested, together with the private sector, to develop a set of voluntary rules that would fill in the gap until the convention came into force. UNCTAD therefore, established a working party together with the ICC to develop such voluntary rules with the participation of the full range of the private sector, the shippers, FIATA and insurers. A number of meetings were held and several drafts were circulated until in 1991, the final draft was approved by all participating organisations and the result was the UNCTAD/ICC Rules. The draft was finally adopted in 1992 and the old ICC Rules for Combined Transport Documents were withdrawn.<sup>97</sup>

The UNCTAD/ICC Rules for Multimodal Transport Documents were thus a replacement for the old ICC rules and not for the United Nations Convention of International Multimodal Transportation of Goods.<sup>98</sup> The new rules were meant for use by private parties who might base their contract of carriage on the new rules, but they

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<sup>94</sup> Report prepared by the UNCTAD Secretary 'Implementation of multimodal transport rules.' Available at [www.unctad.org/en/docs/posdtetlbd2.en.pdf](http://www.unctad.org/en/docs/posdtetlbd2.en.pdf) [accessed on 20 July 2009].

<sup>95</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 16(1).

<sup>96</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 19.

<sup>97</sup> H Carl 'Future developments in the regulatory aspects of international multimodal transportation of goods.' Available at <http://www.aimu.org/IUMI%20PAPERS/LIABILITY/Future%20Developments%20in%20the%20Regulatory%20Aspects.pdf> [Accessed on 1 August 2009].

<sup>98</sup> Carol Proctor *The legal role of the bill of lading, sea waybill and multimodal transport document* vol 1 (1997) 104.

were not supposed to serve as the basis for national legislation on multimodal transportation.<sup>99</sup>

## **2.5. Conclusion**

It has been over 40 years since the first multimodal transport convention was drafted and still no one convention has been generally accepted to govern multimodal transport. Therefore, there is still the lack of a convention that will govern multimodal transport contracts generally. The door-to-door provisions in the Rotterdam Rules will be the most recent rules that govern multimodal transport contracts, at least where one of the legs of transportation is a sea leg.

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<sup>99</sup> H Carl 'Future developments in the regulatory aspects of international multimodal transportation of goods.' Available at <http://www.aimu.org/IUMI%20PAPERS/LIABILITY/Future%20Developments%20in%20the%20Regulatory%20Aspects.pdf> [Accessed on 1 August 2009].

### 3. CHAPTER THREE

#### SCOPE OF APPLICATION

##### 3.1. Introduction

In an attempt to unify and harmonise the international maritime law on cargo liability, several uniform international laws were drafted. These include among others: the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. None of these attempts, however, achieved the level of uniformity necessary.<sup>100</sup> This is because; the Hague/Hague-Visby Rules and Hamburg Rules do not form a complete code on sea carriage leaving common law or national laws to apply to fill in the gaps.<sup>101</sup>

Whereas, the Hague-Visby Rules adopt a ‘tackle-to-tackle’<sup>102</sup> approach with the Rules covering the carriage of the goods from the time they are loaded to their discharge.<sup>103</sup> By contrast the Hamburg Rules expand the scope of responsibility from the port of loading to the port of discharge, commonly referred to as the ‘port-to port approach’. The problem with both these conventions was that neither covered what happened to the cargo once it left the port. The Rotterdam Rules were therefore designed to replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, as the convention on the carriage of goods by sea and to act concurrently as a multimodal transport convention; at least where one of the legs of transportation is a sea leg, to govern the transit of the cargo once it left the port. When drafting the Rotterdam Rules it was decided that its scope of application would be door-to-door. Therefore, in the Rotterdam Rules reference is made instead to the place of receipt and to the place of delivery, which may both be inland.<sup>104</sup> The question that arises is to what extent are the Rotterdam Rules a door-to-door convention?

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<sup>100</sup> Professor Doctor D M Bovio ‘Ocean carriers’ duty of care to cargo in port: The Rotterdam Rules of 2009’ (2009) 32 *Fordham International Law Journal* 1162 at 1165.

<sup>101</sup> S P Fat *carriers liability under The Hague, Hague-Visby and Hamburg Rules* (2002) 25.

<sup>102</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 Article 1(e) provides “‘carriage of goods’ covers the period from the time when the goods are loaded on to the time they are discharged from the ship.” This is called tackle-to-tackle.”

<sup>103</sup> T Fujita ‘The comprehensive coverage of the new Convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 350.

<sup>104</sup> Professor F Berlingieri ‘The UNCITRAL Draft Convention on the Carriage Of Goods (Wholly or Partly) (by Sea).’ Available at [hrcak.srce.hr/file/32035](http://hrcak.srce.hr/file/32035) [Accessed on 16 August 2009].

During discussions, both the UNCITRAL committee and the Comité Maritime International sub-committee recognised the need to replace the old port-to-port and tackle-to-tackle regime with a door-to-door regime.<sup>105</sup> To this end, the door-to-door application of the Rotterdam Rules is first established in chapter 1, under which article 1 of the Rules, provides a long list of definitions. The definitions relevant to this discussion are in article 1(1) to 1(4) all dealing with scope of application.<sup>106</sup> Articles 5 to 7 in chapter 2 of the Rotterdam Rules set out the substantive provisions on scope of application.

### **3.2. CMI Draft Instrument**

Since the tackle-to-tackle and port-to-port approach of previous conventions had proved unsatisfactory, the international sub-committee of the Comité Maritime International, from the early stages of discussion, thought it necessary that the Rotterdam Rules should cover the whole period of transport. CMI prepared and presented a draft instrument to UNCITRAL article 1(5) of which defined the term contract of carriage as ‘a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another,’<sup>107</sup> thereby indicating the intention to include a multimodal concept in the instrument. This CMI definition, was rejected because it was too broad and as a consequence, the convention would be applicable not only to a contract for international carriage but also to contracts for domestic carriage.<sup>108</sup> This interference with domestic carriage would cause conflict between the Rotterdam Rules and national laws, which was not the aim of the Draft Convention.

The UNCITRAL working group later added a few minor changes to the wording making an additional requirement that a contract of carriage should include international sea carriage. Article 5, of the final draft Convention provides ‘the port of loading of a sea

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<sup>105</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 78.

<sup>106</sup> Professor H Honka ‘UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.’ Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>107</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea, U.N. Doc .A/CN.9/WG.III/WP.21 Article 1(5) Available at <http://daccess-ods.un.org/TMP/6425081.html> [Accessed on 19 August 2009].

<sup>108</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea, U.N. Doc .A/CN.9/WG.III/WP.21. Available at <http://daccess-ods.un.org/TMP/6425081.html> [Accessed on 19 August 2009].

carriage and the port of discharge of the same sea of carriage must be in different States'<sup>109</sup> for the Convention to apply. The emphasis on sea carriage was made because the UNCITRAL working group<sup>110</sup> thought it prudent to make clear that despite its extended scope the Rotterdam Rules are still a maritime law convention rather than a purely multimodal transport law convention. The 'maritime plus' idea as it was called by the working group was the most feasible method of achieving this goal.

### 3.3. 'Maritime plus Approach'

The Multimodal Transport Convention was designed to apply to the carriage of goods by at least two different modes of transport from a place in one country for delivery situated in another country.<sup>111</sup> The modes of transport that the Multimodal Transport Convention is applicable to are the three traditional modes of carriage; air, sea and inland carriage (road, rail and inland waterways.) Thus, the two conditions required are that the carriage of the goods be international and by any two or more modes of transport.<sup>112</sup>

However, unlike its predecessor, the Multimodal Convention, which regulated multimodal transport of goods generally, the Rotterdam Rules door-to-door coverage is somewhat narrower than what is expected in a full multimodal coverage. In a proper multimodal regime, such as the Multimodal Convention,<sup>113</sup> the scope of coverage would be for any two or more modes of carriage. Thus, the contract of carriage could involve; road and rail transport to the exclusion of a maritime leg. In contrast, however, the Rotterdam Rules require an international maritime leg. This is what makes the Rotterdam Rules a 'maritime plus' convention.<sup>114</sup> Article 1(1) of the Rotterdam Rules reflects the intention of the Rotterdam Rules to regulate both the transport of goods by sea and the transport of goods by other modes which are complementary to transport by sea.<sup>115</sup>

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<sup>109</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 5.

<sup>110</sup> Preliminary Draft Instrument on the Carriage of Goods by Sea, U.N. Doc .A/CN.9/WG.III/WP.2 Available at <http://daccess-ods.un.org/TMP/6425081.html> [Accessed on 19 August 2009].

<sup>111</sup> United Nations Convention on International Multimodal Transport of Goods 1980, article 1(1).

<sup>112</sup> S Mankabady 'The multimodal transport of goods convention: a challenge to unimodal transport conventions' (1983) 32 *International and Comparative Law Quarterly* 120 at 125.

<sup>113</sup> United Nations Convention on International Multimodal Transport of Goods 1980.

<sup>114</sup> M F Sturley 'United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress' (2003-2004) 39 *Texas International Law Journal* 65 at 77.

<sup>115</sup> Professor F Berlingieri 'A new Convention on the carriage of goods by sea: port-to-port or door-to-door?' (2003) 8 *Uniform Law Review* 265 at 267.

The 'maritime plus approach' is articulated in the definition of 'contract of carriage'<sup>116</sup> defined as 'a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.' The significance of this definition is that, it provides the specific provision that makes it possible for a sea leg to be combined with other modes of transport. The sea leg is, however, an absolute requirement but the other modes of transportation are not.<sup>117</sup> Hence, for the Rotterdam Rules to apply, it is sufficient that the carrier has undertaken to carry the goods partly by sea. Even if in most cases, the carriage by other modes will be ancillary to the carriage by sea. Therefore, the Rotterdam Rules will still apply even if for instance, the sea leg was shorter than the road or rail leg, or the contracting carrier (the freight forwarder or multimodal transport operator) was not a carrier by sea.<sup>118</sup>

Some scholars on the subject contend that the Rotterdam Rules merely give the carrier the option to include other modes of carriage in the contract as the Rotterdam Rules do not actually cover transport additional to maritime transport.<sup>119</sup> 'The definition does not clarify whether the sea leg should be based on what has been agreed or what has factually happened.'<sup>120</sup> Therefore, as a result, the Rotterdam Rules may be applicable to a multimodal transport contract where a sea leg was contemplated but was actually not carried out.<sup>121</sup> This may result in considerable difficulties for shippers and consignees to determine whether or not the carrier has exercised that option.

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<sup>116</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122 article 1(1).

<sup>117</sup> Professor Hannu Honka 'UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.' Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>118</sup> Professor F Berlingieri 'A new Convention on the carriage of goods by sea: port-to-port or door-to-door?' (2003)8 *Uniform Law Review* 265 at 268.

<sup>119</sup> J Ramberg 'Carrier liability under global and regional regimes.' Available at [www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf](http://www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf) [Accessed on 13 August 2009].

<sup>120</sup> Professor H Honka 'UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.' Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>121</sup> J Ramberg 'Carrier liability under global and regional regimes.' Available at [www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf](http://www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf) [Accessed on 13 August 2009].

This is not the first time such an approach has been adopted. On the contrary, in the new text of COTIF-CIM, carriage by rail is supplemented by a list of services provided for in article 24(1). Therefore, for this convention to apply the carriage by rail must be included and the convention will apply only in respect of one of the listed services supplementing the rail transport.

Similarly, pursuant to article 2(1) of the CMR the scope of the Convention is extended from road carriage to apply to the carriage of the goods by sea. The Convention will apply to the sea leg of a contract of carriage only when a vehicle that is transporting goods on an international road carriage is loaded onto a vessel while the goods are still loaded on the vehicle. If the goods are unloaded from the vehicle on to the vessel, the CMR will not apply. Finally, similarly to the Hamburg Rules that applies port-to-port, the Warsaw Convention and the subsequent Montréal Convention apply airport-to-airport. The two Conventions provide that the period of carriage by air, does not extend to any carriage by land, sea or rail performed outside the airport. All these Conventions apply to carriage by other modes ancillary to the mode of transport regulated by each of the respective Convention.<sup>122</sup>

The ‘maritime plus’ approach adopted by the Rotterdam Rules means, the expansion of the Convention to cover not only the maritime segment of a carriage but also carriage by other modes of transportation.<sup>123</sup> In effect, the Convention covers the entire contract of carriage, including; the inland carriage preceding the loading of the vessel and inland carriage subsequent to the unloading of the vessel.

Under the Hague-Visby Rules and the Hamburg Rules; where the period of application is tackle-to-tackle and port-to-port and the main connecting factor is the location of the port of loading and the port of discharge. The Rotterdam Rules’ scope of application on the other hand is based on the geographical connection of the carriage with a contracting state. In the Rotterdam Rules where the period of application is door-

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<sup>122</sup> Professor F Berlingieri ‘A new Convention on the carriage of goods by sea: port-to-pot or door-to-door?’ (2003)8 *Uniform Law Review* 265 at 268.

<sup>123</sup> J Ramberg ‘Carrier liability under global and regional regimes.’ Available at [www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf](http://www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf) [Accessed on 13 August 2009].

to-door, reference is made instead to the place of receipt and the place of delivery<sup>124</sup> where one or both may be inland. However, because the sea leg is always required for the Rotterdam Rules to apply, it was decided; ‘that the ports of loading onto and discharge from a ship must still be considered relevant alternative connecting factors. Therefore, for the Convention to apply it is sufficient that the place of receipt, the port of loading, the port of discharge or the place of delivery be in a contracting state.’<sup>125</sup>

Therefore, Rotterdam Rules, in continuing the current international rule, are strictly limited to international shipments. Indeed, for the new Convention to apply to a particular contract, both the sea voyage and the overall contractual carriage must be international.<sup>126</sup> ‘The port of loading of a sea carriage and the port of discharge of the same sea carriage must be in different States’<sup>127</sup> for the Convention to apply.<sup>128</sup>

The scope of application adopted by the Rotterdam Rules is a combination of the approaches adopted by previous regimes. The Hague and Hague-Visby Rules employ what has been termed a ‘documentary approach’ to the scope of application. Under this approach, the type of document determines whether or not those rules apply to govern the relationship between the parties to the contract of carriage. The Hamburg Rule’s approach applies ‘to contracts of carriage between a carrier and shipper irrespective of the type of document used as evidence of a contract,’<sup>129</sup> the ‘contract approach.’ The Rotterdam Rules on the other hand combines both the ‘documentary (trade) approach’ and the ‘contract approach.’ The ‘contract approach’ is evidenced by the fact that the

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<sup>124</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 5.

<sup>125</sup> Professor H Honka ‘UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.’ Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>126</sup> M F Sturley ‘Modernizing and reforming U.S. maritime law: the impact of the Rotterdam Rules in the United States’ (2009) 44 *Texas International Law Journal* 427 at 434.

<sup>127</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 5(1) reads; ‘Subject to article 6, this Convention applies to contracts 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, if, according to the contract of carriage, any one of the following places is located in a Contracting State: (a) The place of receipt; (b) The port of loading; (c) The place of delivery; or (d) The port of discharge.’

<sup>128</sup> T Fujita ‘The comprehensive coverage of the new Convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 353.

<sup>129</sup> Transport Canada International Marine policy ‘United Nations International Trade Law Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.’ Available at [www.tc.gc.ca/policy/report/acf/tp14858/menu.htm](http://www.tc.gc.ca/policy/report/acf/tp14858/menu.htm) [Accessed on 19 August 2009].

Rotterdam Rules applies to ‘all contracts of carriage where the carrier has agreed to carry goods from one port to another provided it includes an international sea leg.’<sup>130</sup> Whereas the ‘trade approach’ is established where the new Convention applies to contracts in both the liner and non-liner trades.<sup>131</sup>

Finally, article 6<sup>132</sup> when read together with article 1(3) and 1(4),<sup>133</sup> denotes that, contracts of carriage in liner transportation are within the Convention’s scope of application, whereas, contracts of carriage in non-liner transportation are outside the Convention’s scope of application.<sup>134</sup> Like other cargo liability regimes, the Rotterdam Rules do not purport to cover most bulk cargo which is carried under charterparties.<sup>135</sup> The exclusion of non-liner trade within the Convention’s scope of application is fully in accordance with the Hamburg Rules.<sup>136</sup> In article 6(2), however, there is an exception; contracts of carriage in non-liner trade are within the Rotterdam Rules scope of application so long as, a transport document or an electronic transport record is issued to parties that are not charterparties or similar contracts between parties.<sup>137</sup> This means that if a bill of lading is issued pursuant to a charter party, the Rotterdam Rules will only apply to the parties to the contract that are not parties to the charterparty. Therefore, the

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<sup>130</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(1)

<sup>131</sup> Transport Canada International Marine policy ‘United Nations International Trade Law Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.’ Available at [www.tc.gc.ca/policy/report/acf/tp14858/menu.htm](http://www.tc.gc.ca/policy/report/acf/tp14858/menu.htm) [Accessed on 19 August 2009].

<sup>132</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 6 states that; (1) ‘This Convention does not apply to the following contracts in liner transportation; (a) Charter parties; and (b) Other contracts for the use of a ship or of any space thereon.

(2) This Convention does not apply to contracts of carriage in non-liner transportation except when:

(a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and

(b) A transport document or an electronic transport record is issued.’

<sup>133</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(3) reads “‘Liner transportation’ means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.” Article 1(4) further states, “‘Non-liner transportation’ means any transportation that is not liner transportation.”

<sup>134</sup> Professor H Honka ‘UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.’ Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>135</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 6.1.

<sup>136</sup> United Nations Convention on The Carriage Of Goods By Sea, 1978, article 2(3).

<sup>137</sup> N Kelso and S Downing ‘UNCITRAL Draft Convention on the Carriage of Goods [wholly or partly][by sea].’ Available at [http://esvc000873.wic005u.server-web.com/docs/Downing\\_paper.pdf](http://esvc000873.wic005u.server-web.com/docs/Downing_paper.pdf) [Accessed on 19 August 2009].

Rotterdam Rules will only govern the bill of lading, its parties and the holder of the bill of lading. The Rotterdam Rules will not govern the rights and liability of the parties to the charterparty that is, the charterer and the ship owner.<sup>138</sup>

The purpose behind the addition of this rule was to ensure coordination between the Rotterdam Rules and The Hague and Hague-Visby Rules. The Hague and Hague-Visby Rules have no explicit exclusion of non-liner trade and the Rules are applicable when a bill of lading or a similar document of title is issued. Unlike the Hague Rules, but similar to the Hamburg Rules, the Rotterdam Rules do not require the use of a particular transport document or corresponding electronic transport document.<sup>139</sup> In other words, the liner trade has been expanded beyond bill of lading or similar documents of title to all contracts except charterparties and other contracts for the use of space on a ship.<sup>140</sup> The one exception is in the case of non-liner carriage, clarified by article 6(2) (b) in that, the Convention will apply in the case of non-liner transportation only when a transport document or an electronic transport document is issued.<sup>141</sup> This provision is significant because it means that non-liner trade is confined to transport documents or electronic records that are not between parties to a charter party.<sup>142</sup>

### 3.4. Conclusion

The scope of coverage of the Rotterdam Rules is such that it may be door-to-door or port-to-port. If the contract of carriage covers land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel then the Convention does to, this would be a door-to-door application of the Rotterdam Rules. Conversely, if

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<sup>138</sup> Report of the Working Group to the MLA Committee on Carriage of Goods on ‘The Convention on Contracts for the International carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).’ Available at [www.mlaus.org/article.ihtml?id=1903&folder=109](http://www.mlaus.org/article.ihtml?id=1903&folder=109) [Accessed on 31 August 2009].

<sup>139</sup> Professor H Honka ‘UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.’ Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>140</sup> C D Hooper ‘Forum selection and arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the definition of *fora conveniens* set forth in the Rotterdam Rules’ (2009) 44 *Texas International Law Journal* 417 at 419.

<sup>141</sup> Professor H Honka ‘UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: scope of application, freedom of contract.’ Available at <http://www.cmi2008athens.gr/sub3.10b.pdf> [Accessed on 13 August 2009].

<sup>142</sup> C D Hooper ‘Forum selection and arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the definition of *fora conveniens* set forth in the Rotterdam Rules’ (2009) 44 *Texas International Law Journal* 417 at 419.

the contract of carriage involves only carriage by sea the Rotterdam Rules does so to, this would be port-to-port coverage application of the Convention.<sup>143</sup>

Although, it has been established that a Convention regulating multimodal transportation is long overdue, it has been argued that it is unhelpful to expand a unimodal transport convention to cover other modes of transport as well.<sup>144</sup> This approach has, however, already been adopted by other international transport conventions so the Rotterdam Rules are not unique in this respect. From the scope of application of the rules, it is evident that the rules are not the multimodal transport convention that the industry has been waiting for. Instead, of creating uniformity and harmonisation the rules have created a situation whereby, it does not set a standard set of rules for multimodal transportation but simply introduces yet another regime on the carriage of goods by sea.

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<sup>143</sup>M F Sturley 'Transport law the treatment of performing parties.' Available at [www.comitemaritime.org/future/pdf/performing\\_parties.pdf](http://www.comitemaritime.org/future/pdf/performing_parties.pdf) [Accessed on 19 August 2009].

<sup>144</sup>J Ramberg 'Carrier liability under global and regional regimes.' Available at [www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf](http://www.helsinki.fi/.../JanRamberg-IntegratedServicesintheIntermodalChain.doc.pdf) [Accessed on 13 August 2009].

## 4. CHAPTER FOUR

### CARRIERS LIABILITY

#### 4.1. Introduction

##### 4.1.1. Liability of contracting and actual carrier

Sometimes, when executing a contract of carriage, the contracting carrier performs the contract of carriage alone and transports the goods from the place of receipt, through to their final destination without assistance from other carriers. However, in other instances, the contracting carrier may entrust performance of the contract to another carrier (the actual carrier).<sup>145</sup> Under such an arrangement, the actual carrier, merely performs the contract on behalf of the contracting carrier, the contracting carrier is however, always liable to the shipper on the original contract as principal.<sup>146</sup> The term ‘carrier’ and the responsibilities and liability of the carrier differ from one transport convention to the next.

##### 4.1.2. Hague/ Hague-Visby Rules

Under these rules, the term ‘carrier’ includes the owner or the charterer of a vessel who enters into a contract of carriage with a shipper.<sup>147</sup> The Rules make it clear that, the term carrier is limited to the contracting carrier and that the rules do not apply to the actual carrier.<sup>148</sup> The Rules also exclude sub-contractors, combined transport operators, servants or agents. Nonetheless, the carrier is ordinarily liable for loss or damage caused by its sub-contractor or combined transport operators.<sup>149</sup> Similar provisions are made in the Warsaw convention, including the Montréal Convention, the CMR and COTIF-CIM, which all apply to the contractual carriers only.<sup>150</sup>

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<sup>145</sup> S P Fat *Carriers’ liability under the Hague, Hague-Visby and Hamburg Rules* (2002) 24.

<sup>146</sup> S P Fat *Carriers’ liability under the Hague, Hague-Visby and Hamburg Rules* (2002) 25.

<sup>147</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968, article 1(a).

<sup>148</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968, article 1(a).

<sup>149</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 78.

<sup>150</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and multimodal implications’ (2009)44 *Texas International Law Journal* 349 at 366.

### 4.1.3. Hamburg Rules

The Hamburg Rules introduced the concept of ‘actual carrier’ to address problems arising from the Hague/Hague-Visby Rules’ restrictive application to contracting carriers. The Rules distinguish between contracting carrier and actual carrier where they are different parties. Article 1(2) of the Rules<sup>151</sup> provides that an actual carrier is, ‘any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.’ This article read together with article 10<sup>152</sup> ‘limits the responsibility of the actual carrier to the part of carriage performed by him or his servants or agents whilst rendering the contracting carrier always liable throughout the voyage.’<sup>153</sup>

### 4.1.4. Problems arising from the previous definitions on the term ‘carrier’

Although the definitions of the term ‘carrier’ in the Hague/Hague-Visby Rules and the Hamburg Rules are suitable for the carriage of goods by sea, they are not suitable for multimodal transportation. Therefore, there is still no definition of the term ‘carrier’ that has been specifically tailored for multimodal transportation. This is mainly because, multimodal transportation, although greatly advantageous, remains un-codified under one legal regime. This has caused a lot of uncertainty as to how to deal with certain legal problems as they arise. Some of the uncertainties relevant to this chapter include: uncertainty concerning the identity of the carrier, where there is uncertainty as to the point at which the loss or damage occurred. This especially applies if the multimodal transport operator (forwarder, agent) is not the carrier; uncertainty as to the applicable legal regime and its effects where, there is uncertainty over the location where the loss occurred. This may cause problems because, the various legal regimes that may apply to a particular multimodal journey, have different requirements for the successful institution

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<sup>151</sup> United Nations Convention on the Carriage of Goods by Sea, 1978, article 1(2).

<sup>152</sup> United Nations Convention on the Carriage of Goods by Sea, 1978, article 10(1) reads; ‘Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.’

<sup>153</sup> S P Fat *Carriers’ liability under The Hague, Hague-Visby and Hamburg Rules* (2002) 27.

of legal proceedings, for example; time limits and different onus of proof.<sup>154</sup> For a particular loss, there may also be a choice of country where proceedings may be brought, and the uncertainty caused by the conflict of other applicable conventions and national laws on international sale of goods.<sup>155</sup> The Rotterdam Rules have attempted to solve these problems by introducing the terms ‘performing party’<sup>156</sup> and ‘maritime performing party’<sup>157</sup> and assigning them liability separate from the carrier.<sup>158</sup>

#### **4.2. Liability of the Performing party and maritime performing party**

The Rotterdam Rules divide performing parties into two categories; ‘maritime performing parties’ and ‘performing parties.’<sup>159</sup> A performing party is ‘any person other than the carrier that performs, or undertakes to perform, any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.’<sup>160</sup> On the other hand, the maritime performing party is ‘a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and

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<sup>154</sup>European Commission final report on ‘The economic impact of carrier liability on intermodal freight transport’ (2001). Available at [www.unece.org/trans/wp24/documents/wp24-0207e.pdf](http://www.unece.org/trans/wp24/documents/wp24-0207e.pdf) [Accessed on July 15, 2009].

<sup>155</sup> D Faber ‘The problems arising from multimodal transport’ (1996) *Lloyd’s Maritime and Commercial Law Quarterly* 503 at 517.

<sup>156</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(6).

<sup>157</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(7).

<sup>158</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 80.

<sup>159</sup>CMI Draft Instrument on Transport law, 2001, article 1(17) Available at [www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf](http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf) [Accessed on 31 August 2009]. ‘The CMI draft instrument introduced the concept of ‘performing party.’ Although very controversial it was argued that a broad definition would be preferable article 1(17) of the CMI preliminary draft instrument provides that; ‘Performing party means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term ‘performing party’ does not include any; person who is retained by a shipper or consignee, or is an employee, agent, contractor, or sub-contractor of a person (other than the carrier) who is retained by a shipper or consignee.’ Under the relatively inclusive definition, the class of “performing parties” would include not only the carrier’s immediate sub-contractor but also the entire line of subsidiary persons that perform the contract These would include; the sub-contractor’ sub-contractors, that party’s sub-contractors, and so on down the line to the party that physically performs the carrier’s duties.’

<sup>160</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(6).

their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.’<sup>161</sup>

The following example illustrates how the Rotterdam Rules assign liability to these parties. The example involves cargo to be shipped from Toronto to Johannesburg. The consignor enters into a contract of carriage with the carrier to transport the goods by rail from Toronto to Vancouver, then by sea from Vancouver to Cape Town and finally by road from Cape Town to Johannesburg. Assume that; Canada is a contracting state to the Rotterdam Rules but, South Africa is not. Article 19,<sup>162</sup> provides that, ‘a maritime performing party who receives goods in a contracting state is liable for any loss or damage to the goods from the time of receipt to the point of discharge.’<sup>163</sup> Therefore, as the maritime performing party, the ocean carrier will be liable for any loss or damage to the goods that occur between Vancouver and Cape Town.<sup>164</sup> Further, because the place of delivery of the goods was in a contracting state<sup>165</sup> (Canada) the claimant may sue the carrier regardless of where the loss or damage occurred. This is because, article 12, of

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<sup>161</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(7).

<sup>162</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 19(1) provides that;

‘A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.’

<sup>163</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 80.

<sup>164</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 19(1).

<sup>165</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 5 reads;

‘Subject to article 6, this Convention applies to contracts 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, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

(a) The place of receipt;  
(b) The port of loading;  
(c) The place of delivery; or  
(d) The port of discharge.’

the Rotterdam Rules provides that; the ‘period of responsibility of the carrier for the goods begins, when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.’ In addition, the Rotterdam Rules impose on the maritime performing party the obligations and liability limits of the carrier while at the same time entitling the performing party to the defenses and limits of liability available to the carrier.<sup>166</sup>

Further, the Rotterdam Rules provide that, the stevedores and terminal operators who handle the goods at the port in Vancouver will be liable for any loss or damage that occurs to the cargo while in their custody. The claimant in this case may sue either the carrier or the stevedores and terminal operators. The stevedores and terminal operators are considered maritime performing parties under the Rotterdam Rules because, an ‘inland carrier who performs their activities in the port of a contracting state is liable under the Rotterdam Rules as a maritime performing party.’<sup>167</sup> However, the Convention will not apply to the stevedores and terminal operators in Cape Town because it is not a contracting state and the Convention makes no provision for their liability. Finally, the claimant also has the option to sue the carrier. This is because, under article 18, the carrier is liable for any breach of its obligations under the Convention caused by the acts or omissions of any performing party which includes a maritime performing party or the employees of both the carrier and the performing party.<sup>168</sup>

Finally, if the damage to the goods occurred between Toronto and Vancouver, this is assuming that the parties to the contract agreed to apply to the contract of carriage the laws of a country that is a contracting state to COTIF, then the rail carrier will not be liable under the Rotterdam Rules instead liability will be governed by COTIF. Similarly,

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<sup>166</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 19(1).

<sup>167</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1(7).

<sup>168</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 18 provides that;

‘The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.’

if the cargo were to be damaged between Cape Town and Johannesburg, the road transporter's liability will not be governed by the Rotterdam Rules but by South African National law.<sup>169</sup>

#### **4.2.1. The network liability regime**

The liability system described above is called the 'network liability regime'. Under a full network system, each leg of the cargo's transit is governed by the rules that would otherwise govern that leg. Therefore, using the above hypothetical scenario, the railroad leg from Toronto to Vancouver is governed by COTIF; the road leg from Cape Town to Johannesburg is governed by South African law and the sea leg by the Rotterdam Rules. Further, whatever rule is applicable to the performing party is applicable to the carrier. This liability regime has the advantage of predictability and would avoid conflict with other conventions. The disadvantage of this system is that for it to apply parties must know during which leg of transportation the damage to the cargo occurred. However, because containers are sealed once the goods are loaded and unsealed only when they reach the final destination it is usually impossible to determine when the damage occurred. Similarly since the damage to the goods may be gradual over the course of transportation it is very hard to determine an exact location where the damage occurred.<sup>170</sup> This liability regime is especially disadvantageous to the shipper who will be unable to predict which laws will be applicable to him and as a consequence which liability regime will apply this will leave the shipper uncertain as to liability limits, exemption grounds and time-bars. The inability to determine when and where damage occurred has always been the problem with multimodal transportation and the full network system does not solve the problem.<sup>171</sup>

For the sake of uniformity, the Rotterdam Rules adopt the network system in a narrower sense (the 'modified network system'). Article 26<sup>172</sup> provides that, 'The

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<sup>169</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and multimodal implications' (2009)44 *Texas International Law Journal* 349 at 369.

<sup>170</sup> Doctor T Schommer *International multimodal transport* (1999) Unpublished LLM Dissertation University of Cape Town, Cape Town.

<sup>171</sup> Doctor T Schommer *International multimodal transport* (1999) Unpublished LLM Dissertation University of Cape Town, Cape Town.

<sup>172</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 26 provides that;

Rotterdam Rules are only displaced where a convention which constitutes mandatory law for inland carriage is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland carriage. This means that where the damage occurred during more than one leg of the carriage, or where it cannot be proved where the loss or damage occurred, the Rotterdam Rules will prevail during the whole door-to-door transit period<sup>173</sup> as long as a sea leg is involved. The essence of this system is that only international instruments can supersede the Rotterdam Rules whereas, pre-existing domestic law cannot override the Rules unless the domestic law is made mandatory. Once again using the hypothetical, since the parties to the contract agreed to apply to their contract of carriage the laws of a country that is a contracting state to COTIF, which, is an international convention, the rail or road leg will be governed by the pre-existing international convention. On the other hand, since the road leg of the carriage from Cape Town to Johannesburg is only governed by domestic law unless that law is made mandatory, the liability regime of Rotterdam Rules will be applicable.<sup>174</sup>

#### **4.2.2. The uniform liability regime**

The CMI sub-committee initially proposed the adoption of a uniform liability regime. Although this proposal was rejected in favour of the adoption of the modified network liability regime, a discussion of the uniform liability regime is helpful as a point of comparison.<sup>175</sup> Under a uniform liability regime, ‘the same rules would apply for any cargo loss or damage, regardless of where the loss or damage occurred and regardless of

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‘When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay: (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred; (b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.’

<sup>173</sup> CMI Draft Instrument on Transport law, 2001. Available at [www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf](http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf) [Accessed on 31 August 2009].

<sup>174</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 84.

<sup>175</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 78.

the role played by the particular defendant.’<sup>176</sup> Hypothetically, a manufacture from Uganda wishes to send a container of goods from Kampala to Cape Town and therefore enters in to a contract of carriage with a Ugandan freight forwarder who undertakes to deliver the goods to its final destination within Cape Town. The sub-contractor in turn engages two performing parties; A Ugandan trucker to carry the container form Uganda to Mombasa and an ocean carrier to ship the container to Cape Town. Assume that all three countries are contracting states to the Rotterdam Rules. Under a uniform liability regime, the liability rules of the Rotterdam Rules will apply whether the point at which damage occurred is known or unknown. Therefore, if damage occurred during the road carriage the claimant may sue either the Ugandan trucker as performing party or the freight forwarder as the contracting carrier.<sup>177</sup> The trucker in this example will be subject to the liability regime of the Rotterdam Rules as a performing party whether the point at which damage occurred is known or unknown. The Rotterdam Rules will in effect displace any national laws or international conventions on road transport. If the ocean carrier damaged the goods the claimant could sue either the ocean carrier as the maritime performing party or the freight forwarder under the liability regime of the Rotterdam Rules.<sup>178</sup>

The main advantage of this system is that; it would simplify an already complex myriad of national laws and international conventions that govern a multimodal transport contract and creates uniformity and predictability in the rules that govern international multimodal transport. The complications caused when parties are uncertain as to the point at which loss or damage occurred would be minimized because the performing parties and contracting carriers would be equally liable under the liability regime of one convention. As a consequence, disputes would be settled faster because; there would be no opportunity to forum shop for the convention that imposes the highest limits of liability.<sup>179</sup>

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<sup>176</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 80.

<sup>177</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 83.

<sup>178</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 80.

<sup>179</sup> M F Sturley ‘United Nations Commission on International Trade Laws Transport Law Project: an interim view of work in progress’ (2003-2004) 39 *Texas International Law Journal* 65 at 83.

### 4.3. Liability of the carrier

#### 4.3.1. Difference between carrier and performing party

It is important to distinguish the liability of the performing party from the liability of the carrier. Subject to the Rotterdam Rules, the carrier is liable under the contract of carriage for the entire period of the door-to-door transaction.<sup>180</sup> A performing party on the other hand assumes liability only for the period it has custody of the goods or when otherwise participating in the performance of the contract of carriage<sup>181</sup>

#### 4.3.2. Liability of the carrier for other persons<sup>182</sup>

Whereas, the liability of the carrier under The Hague/ Hague-Visby Rules was limited to 'the period from the time when the goods are loaded on, to the time when they are discharged from the ship,'<sup>183</sup> the tackle-to-tackle approach and the Hamburg Rules adopt a port-to-port approach. The Rotterdam Rules on the other hand adopt a door-to-door approach where;<sup>184</sup> the carrier is responsible for the entire contractual period of carriage.<sup>185</sup> This means that, under a multimodal contract of carriage, the carrier is responsible for the goods from the 'time of the carriers' receipt of the goods at an inland location, in the country of origin, all the way to the carriers' delivery of the goods at an inland location in the country of destination.'<sup>186</sup> Article 18, is a product of this principle. It provides that the carrier is liable for the acts or omissions of any performing party.<sup>187</sup>

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<sup>180</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 12.

<sup>181</sup> CMI Draft Instrument on Transport law, 2001 article 4(2) (1). Available at [www.comitemaritime.org/singapore2/singafter/issues/cmiraft.pdf](http://www.comitemaritime.org/singapore2/singafter/issues/cmiraft.pdf) [Accessed on 31 August 2009].

<sup>182</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 18.

<sup>183</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968. article 1(e).

<sup>184</sup> Where at least one of the legs in the journey is a sea leg.

<sup>185</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 12(1).

<sup>186</sup> M F Sturley 'Modernizing and reforming US Maritime Law: the impact of the Rotterdam Rules in the United States' (2009)44 *Texas International Law Journal* 427 at 435.

<sup>187</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 18 provides that;

'The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or

Therefore, where loss or damage is localised, the claimant may choose to sue either the carrier, because it is responsible for the goods for the entire period of carriage regardless of who is responsible for the actual loss or damage, or the performing party, who is responsible for the loss or damage. Where the damage is non-localised the claimant may sue the carrier directly without the need to prove who was actually responsible for the loss or damage.<sup>188</sup>

#### **4.3.3. Liability of the carrier for loss, damage or delay<sup>189</sup>**

Although, the carrier's liability under the Rotterdam Rules is based on the provisions of The Hague/ Hague-Visby Rules it differs slightly. Article 4(2) of the Hague/ Hague-Visby Rules, commonly referred to as the 'excepted perils', has essentially been reproduced in the Rotterdam Rules but with the omission of the 'fault in navigation and management of the ship'<sup>190</sup> exception and the 'actual fault or privity' exception.<sup>191</sup> The 'fault in navigation and management of the ship'<sup>192</sup> exception, which, has long been a contentious exception, was removed as 'an important step towards harmonizing and modernizing international transport law and as essential in the context of establishing international rules for door-to-door transport.'<sup>193</sup> However, both the omissions were made to accommodate article 18 of the Rotterdam Rules, which, provides for the carrier's liability for the acts and omissions of the performing parties, the master and the crew as well as their employees.<sup>194</sup>

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(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.'

<sup>188</sup> F Berlingieri 'The UNCITRAL Draft Convention on the Carriage Of Goods (Wholly or Partly) (by Sea).' Available at [hrcak.srce.hr/file/32035](http://hrcak.srce.hr/file/32035) [Accessed on 16 August 2009].

<sup>189</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, chapter 5.

<sup>190</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(3).

<sup>191</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(3),

<sup>192</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968, article 4(2)(a). States that; 'neither the carrier nor the shipper shall be responsible for loss or damage arising or resulting from: 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.'

<sup>193</sup> Report of the Working Group to the MLA Committee on Carriage of Goods on 'The Convention on Contracts for the International carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).' Available at [www.mlaus.org/article.ihtml?id=1903&folder=109](http://www.mlaus.org/article.ihtml?id=1903&folder=109) [Accessed on 31 August 2009].

<sup>194</sup> Report of the Working Group to the MLA Committee on Carriage of Goods on 'The Convention on Contracts for the International carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).' Available at [www.mlaus.org/article.ihtml?id=1903&folder=109](http://www.mlaus.org/article.ihtml?id=1903&folder=109) [Accessed on 31 August 2009].

#### 4.3.4. 'Vallescura Rule'

Article 17 of the Rotterdam Rules,<sup>195</sup> sets out the burden of proof between the parties, this provision is similar to the Hamburg Rule's<sup>196</sup> 'Vallescura Rule'.<sup>197</sup> This is a complex scheme of shifting burdens of proof. The claimant has the burden of proving that the loss or damage or delay or the event that caused or contributed to it took place during the period of the carrier's responsibility.<sup>198</sup> This initial burden of proof rests on the claimant to establish a *prima facie* case by proving that the goods were delivered to the carrier in good condition but were latter delivered to the buyer in damaged condition, attributable, to the carriers fault.<sup>199</sup> Hence, the carrier is not protected if 'the claimant proves the carrier caused or contributed to an event on which the carrier relies to excuse his fault'<sup>200</sup> Once the claimant has met the burden of proof,<sup>201</sup> 'the carrier is relieved of all or part of its liability if it proves, that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault'<sup>202</sup> of the performing party the master or crew of the ship or employees of the carrier or performing party.<sup>203</sup> The carrier may also be exonerated from liability if it can prove that the actual cause for the loss or damage was one of the expected perils.<sup>204</sup> This is because the carrier is in a better position than the shipper to know what happened while the goods were in the carrier's custody.<sup>205</sup> However, even if the carrier succeeds in bringing itself within one of the excepted perils,

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<sup>195</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(4) (5) (6).

<sup>196</sup> United Nations Convention on the Carriage of Goods by Sea, 1978, article 5(7).

<sup>197</sup> *Schnell v. Vallescura* [1934] 293 U.S. 296, 304. This rule was established by the Supreme Court.

<sup>198</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(1).

<sup>199</sup> M F Sturley 'Modernizing and reforming US Maritime Law: the impact of the Rotterdam Rules in the United States' (2009)44 *Texas International Law Journal* 427 at 435.

<sup>200</sup> Report of the Working Group to the MLA Committee on Carriage of Goods 'The Convention on Contracts for the International carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).' Available at [www.mlaus.org/article.ihtml?id=1903&folder=109](http://www.mlaus.org/article.ihtml?id=1903&folder=109) [Accessed on 31 August 2009].

<sup>201</sup> Professor F Berlingieri 'The UNCITRAL Draft Convention on the Carriage Of Goods (Wholly or Partly) (by Sea).' Available at [hrcak.srce.hr/file/32035](http://hrcak.srce.hr/file/32035) [Accessed on 16 August 2009].

<sup>202</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(2).

<sup>203</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 18.

<sup>204</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(4)(b).

<sup>205</sup> Australia comments on the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)22 *Australia and New Zealand Maritime Law Journal* 121 at 126.

it remains open to the cargo claimant to prove that the loss, damage or delay was in fact caused by the carrier's negligence.<sup>206</sup>

The 'Vallescura Rule' becomes applicable where; there is more than one cause for the loss, damage or delay. Where, the claimant can prove, that the loss, damage or delay was in part caused by the carrier's negligence and the carrier can in turn, prove that one of the expected perils was in part, a cause of the loss or damage to the goods. The burden falls on the carrier to show what part of the damages were caused by his negligence and what part was caused by one of the expected perils.<sup>207</sup> The carrier is only liable for the part of loss damage or delay caused by its negligence, but it will not be liable for the part of loss or damage caused by the expected peril, as long as the carrier can prove the extent to which any expected peril may have caused any further loss or damage.<sup>208</sup> In the past, it has proven to be very difficult for the carrier to prove this and the courts usually hold the carrier responsible for the loss damage or delay where concurrent causes are established.<sup>209</sup>

#### **4.4. 'Automatic Himalaya Clause'**

As mentioned in the section above both 'performing parties' and 'maritime performing parties' are afforded the same limits to liability and defenses as the carrier. Under the Rotterdam Rules these defenses and protections have been extended to inland maritime performing parties such as stevedores and terminal operators by use of the 'Himalaya clause'

The Himalaya clause<sup>210</sup> is an 'exculpatory clause in a bill of lading used to extend the carrier's defenses and protections to non-carriers'<sup>211</sup> such as independent

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<sup>206</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(5).

<sup>207</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 17(6) states that; 'When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.'

<sup>208</sup> M F Sturley 'Modernizing and reforming US Maritime Law: the impact of the Rotterdam Rules in the United States' (2009)44 *Texas International Law Journal* 427 at 448.

<sup>209</sup> M F Sturley 'Modernizing and reforming US Maritime Law: the impact of the Rotterdam Rules in the United States' (2009)44 *Texas International Law Journal* 427 at 448.

<sup>210</sup> *Adler v Dickson*, [1954] 2 Lloyd's Rep. 267, in this case the court of appeal held that, in a contract for the carriage of passengers and cargo, the terms of the contract extend not only to the carrier but also to

contractors, stevedores and terminal operators. In the case of *Certain Underwriters at Lloyd's v Barber Blue Sea*<sup>212</sup> the courts held that 'a Himalaya clause should either name the stevedores and terminal operators expressly or extend the carriers COGSA benefits to independent contractors employed by the carrier. When the terms of the contract of carriage express a clear intention to extend the protections of the contract to a well defined class of easily identifiable persons and the contractor seeking such benefit falls within the class the clarity requirement is satisfied.'<sup>213</sup> The Hague/ Hague-Visby Rules<sup>214</sup> and the Hamburg Rules<sup>215</sup> both contain provisions that extend 'Himalaya' protection to carriers, servants and agents. However, there has been considerable disagreement as to exactly who the 'Himalaya' protection under these two rules extends to; this is mainly due to the fact that the provisions are ambiguous.<sup>216</sup>

Article 4 of the Rotterdam Rules, extends the defenses and limits of liability provided to the carrier to the maritime performing party; 'the master, crew or any other person that performs services on board the ship or employees of the carrier or a maritime performing party'<sup>217</sup> regardless of the forum or the basis of the suit. This has come to be known as the automatic Himalaya clause under which, protection extends to every maritime performing party regardless of whether the relevant contract includes a Himalaya clause. Himalaya protection does not extend to non maritime performing parties because they don't assume any of the carrier's obligations under the Rotterdam

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those parties the carrier relies on to carry out the contract of carriage. It was also held that this provision may be expressly articulated in the contract or implied. After this decision, specially drafted Himalaya clauses benefiting stevedores and others began to be included in bills of lading.

<sup>211</sup> R W Palmer and F P DeGiulio 'Terminal operations and multimodal carriage; history and prognosis' (1989-1990)64 *Tulane Law Review* 281 at 345.

<sup>212</sup> *Certain Underwriters at Lloyds v Barber Blue Sea* [1982] AMC 2638 2642 11<sup>th</sup> cir.

<sup>213</sup> R W Palmer and F P DeGiulio 'Terminal operations and multimodal carriage; history and prognosis' (1989-1990)64 *Tulane Law Review* 281 at 345.

<sup>214</sup> Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968, article 4.

<sup>215</sup> United Nations Convention on the Carriage of Goods by Sea, 1978, article 7(2).

<sup>216</sup> M F Sturley 'The United Nations Commission on International Trade Law's Transport Law Project: an interim view of work in progress' (2004) 39 *Texas International Law Journal* 66 at 99.

<sup>217</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 4 provides that;

'Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:

- (a) The carrier or a maritime performing party;
- (b) The master, crew or any other person that performs services on board the ship; or
- (c) Employees of the carrier or a maritime performing party.'

Rules they thus, cannot benefit from the carriers defenses.<sup>218</sup> The automatic Himalaya protection was incorporated into the Rotterdam Rules to attain an amount of uniformity. This gives claimants less incentive to pursue multiple law suits against all the potential defendants in a law suit.<sup>219</sup>

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<sup>218</sup> M F Sturley 'Modernizing and reforming US Maritime Law: the impact of the Rotterdam Rules in the United States' (2009)44 *Texas International Law Journal* 427 at 449.

<sup>219</sup> R KF Haak and M Hoeks 'Arrangements of intermodal transport in the field of conflicting conventions' (2004)5 *Journal on International Maritime Law* 422 at 426.

## 5. CHAPTER FIVE

### CONFLICTS OF CONVENTIONS

#### 5.1. Back ground

As stated in the preceding chapters, due to the lack of a codified regime for multimodal transportation, the contract for multimodal carriage is governed by a chain of unimodal carriage regimes that were designed to regulate each unimodal part of the transport chain. As a consequence, the system is unpredictable and parties to a door-to-door contract of carriage are faced with conflicting contractual regimes.<sup>220</sup>

However, several attempts have been made to try to solve the problem of conflicting provisions in interrelating conventions applicable to a multimodal transport contract. One proposed solution was the use of the 'standard contract rule.'<sup>221</sup> This 'standard contract rule' that was adopted by the UNCTAD/ICC Rules is a set of rules that the parties must incorporate into the contract of carriage. The Rules have the effect of supplementing the existing legal regimes by providing rules that will govern the parties where conflict arises between conventions. However, these rules are effectively only private contracts and the mandatory rules regarding liability set in the international transport laws still remain and ultimately the conflict still remains.<sup>222</sup> The standard contract rule is given expression in standard form multimodal transport documents,<sup>223</sup> such as; the FIATA FBL 1992 and the Multidoc 95 of the BIMCO.<sup>224</sup>

Another solution that was adopted is the annexation of other transport modes into originally unimodal conventions. This practice was adopted by the CMR<sup>225</sup> which, provides that; 'the provisions of the CMR will be applicable not only to the road leg of

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<sup>220</sup> Doctor K F Haak and M Hoeks ' Arrangements of intermodal transport in the field of conflicting Conventions' (2004)5 *Journal of International Maritime Law* 422 at 423.

<sup>221</sup> Doctor K F Haak and M Hoeks ' Arrangements of intermodal transport in the field of conflicting Conventions' (2004)5 *Journal of International Maritime Law* 422 at 423.

<sup>222</sup> Doctor K F Haak and M Hoeks ' Arrangements of intermodal transport in the field of conflicting Conventions' (2004)5 *Journal of International Maritime Law* 422 at 423.

<sup>223</sup> C Proctor *The legal role of the bill of lading, sea way bill and multimodal transport document* vol 1 (1997) 110.

<sup>224</sup> Doctor K F Haak and M Hoeks ' Arrangements of intermodal transport in the field of conflicting Conventions' (2004)5 *Journal of International Maritime Law* 422 at 423.

<sup>225</sup> Convention on the Contract for the International Carriage of Goods by Road, 1956, article 2.

the contract, but also to a sea leg where the truck is loaded onto the ship.’ Later the CIM/COTI<sup>226</sup> extended its scope of application from only railway transport to ‘other transport modes if this transport occurs regularly and complementary to the rail transport’ the practice of annexation was adopted by the Rotterdam Rules.<sup>227</sup>

## 5.2. Conflicts of conventions in The Rotterdam Rules

The ‘maritime plus’ approach of the Rotterdam Rules may prove problematic in its application, in that, it may create the potential problem of overlapping conventions. This is because, the different unimodal transport legs involved in the transportation of the goods, may trigger the provisions of various international transport conventions and national laws applicable to each leg. In terms of this provision, the Rotterdam Rules might therefore inadvertently overlap with the international conventions on the carriage of goods by road, rail, air and inland waterways.<sup>228</sup>

The foreseeable overlap between the Rotterdam Rules and other international conventions and national laws, made it imperative for drafters to include conflict of conventions provisions. Therefore, when determining what liability system to apply to the Rotterdam Rules the manner in which the Rotterdam Rules will interrelate with other pre-existing conventions on international carriage had to be considered.

In considering possible solutions, the working group rejected the proposal of a uniform liability regime. This was mainly due to the fact that if it had it been adopted, the liability rules of the Rotterdam Rules would apply to any cargo loss, damage or delay in delivery whether, it was localised or non-localised or occurred gradually during several transport legs.<sup>229</sup> This would have ultimately caused conflict between the Rotterdam Rules and the mandatory provisions of other international unimodal transport conventions currently in force. This would happen because at any given point the

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<sup>226</sup> Uniform Rules Concerning the International Carriage of Goods by Rail, Appendix to COTIF, 1999, article 2(2).

<sup>227</sup> Doctor KF Haak and M Hoeks ‘Arrangements of intermodal transport in the field of conflicting Conventions’ (2004)5 *Journal of International Maritime Law* 422 at 425.

<sup>228</sup> T Nikaki ‘Conflicting laws in “wet” multimodal carriage of goods: the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]’ (2006)37 *Journal of Maritime Law and Commerce* 521 at 523.

<sup>229</sup> T Nikaki “Conflicting laws in “wet” multimodal carriage of goods: the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]’ (2006)37 *Journal of Maritime Law and Commerce* 521 at 527.

contract of carriage would be subject to two applicable international conventions on the carriage of goods. So for instance, if damage occurred to cargo while on the road leg of a multimodal transport contract that involves a sea leg,<sup>230</sup> then, the Rotterdam Rules and the CMR; that is the mandatory law on international road carriage will both be applicable.<sup>231</sup> The pure liability network system was also rejected because it posed the same problem as the uniform liability regime. If it was enforced, then the Rotterdam Rules would be applicable alongside any other transport convention or national law applicable to the mode of transport under which the loss, damage or delay occurred.

Finally, consensus was reached to apply a modified liability regime. This is embodied in article 26 of the Rotterdam Rules. The aim of applying this liability regime is to resolve any possible conflicts between the Rotterdam Rules and international unimodal transport laws.<sup>232</sup>

Article 26 of the Rotterdam Rules states that;

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- (b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

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<sup>230</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 1.

<sup>231</sup> T Nikaki "Conflicting laws in "wet" multimodal carriage of goods: the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]' (2006)37 *Journal of Maritime Law and Commerce* 521 at 528.

<sup>232</sup> T Nikaki 'Conflicting laws in wet multimodal carriage of goods: the UNICITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]' (2006)37 *Journal of Maritime Law and Commerce* 521 at 529.

### 5.3. Application of article 26

First, under the article, it must be possible to establish where the loss or damage occurred. This is because, the article only applies where loss of or damage to goods, occurs before the 'loading of the goods onto the ship or solely after their discharge from the ship.'<sup>233</sup> Therefore, the loss or damage to the goods must occur outside the sea-leg and the circumstance that caused the loss or damage also must have occurred outside the sea leg.<sup>234</sup>

Once again, using a hypothetical, where a container is to be transported from France to a port in Italy by international road carriage and by sea carriage from Italy to Greece. Assuming once again that all three states are contracting states to the Rotterdam Rules, and the goods are damaged somewhere during the transport but it cannot be determined when or where the damage occurred.<sup>235</sup> Then, the modified network liability system provides that the Rotterdam Rules will be applicable.<sup>236</sup> However, where the loss or damage is localised and it is determined that damage occurred during the road leg of the carriage then the article dictates that the international convention applicable to that leg of transportation will be applicable in this case the CMR will be the applicable convention.

Secondly, where damage is localised, only the provisions of an international convention can override the Rotterdam Rules. It is important to note however, that for an international convention to override the Rotterdam Rules the convention must provide specifically for the carrier's liability, limitation of liability, or time for suit. Therefore, assume that a container is transported from France to Italy, by international road carriage and by sea carriage from Italy to Greece. Assuming, also that all three states are contracting parties to the Rotterdam Rules. The cargo in this example is damaged during the road carriage and the consignee sues the carrier in an Italian court. Since, Italy and France are contracting states to CMR which is a mandatory international convention that

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<sup>233</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 26.

<sup>234</sup> A Diamond 'UNCITRAL Draft Convention on the Carriage of Goods' Available at [www.uncitral.org/pdf/english/.../unc/unc-40/a-cn9-613-e.pdf](http://www.uncitral.org/pdf/english/.../unc/unc-40/a-cn9-613-e.pdf) [Accessed on 27 July 2009].

<sup>235</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 363.

<sup>236</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 363.

contains specific provisions on the carrier's liability, limitation of liability and time for suit. The criterion in article 26 is met and the Courts in Italy can apply the rules of the CMR because the Rotterdam Rules cannot supersede the provisions of the CMR.<sup>237</sup>

It is important also to note, that article 26 simply states that the provisions of the Rotterdam Rules do not prevail over those of any other international convention. The significance of this provision is that, it does not compel any court to apply the provisions of any other international convention.<sup>238</sup> Hence, in the above hypothetical contract of carriage the courts in Italy are not compelled by the provision of article 26 to apply the principles of liability set out in the CMR instead, they may choose to determine the matter using the provisions of the Rotterdam Rules.

On the other hand, if damage to goods occurs while the goods are on the road leg of an international carriage and the consignee brings an action in a state that is not a contracting state to the CMR. Since the provisions of the CMR do not apply the national laws of the state the action is brought in will apply. Unlike the CMR whose rules prevail over those of the Rotterdam Rules national laws do not fall under the ambit of article 26. The courts will have to apply the provisions of the Rotterdam Rules to govern the liability for the damage to the goods.<sup>239</sup>

#### **5.4. Application of Article 82**

Contingency has also been made under the Rotterdam Rules for situations where a state that has contracted into other international conventions faces incompatible obligations imposed under the Rotterdam Rules. Article 82<sup>240</sup> provides that:

International Conventions in force at the time this Convention enters into force, including any future amendment to such Conventions that regulate the liability of the carrier for loss of or damage to the goods:

(a) Any Convention governing the carriage of goods by air to the extent that such Convention according to its provisions applies to any part of the contract of carriage;

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<sup>237</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 360.

<sup>238</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 360.

<sup>239</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 361.

<sup>240</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 82.

- (b) Any Convention governing the carriage of goods by road to the extent that such Convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
- (c) Any Convention governing the carriage of goods by rail to the extent that such Convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
- (d) Any Convention governing the carriage of goods by inland waterways to the extent that such Convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

Therefore under this article for example, if parties enter into a contract of carriage from Columbia to the United Kingdom via Canada and the goods are carried by air from Columbia to a port in Québec, and by sea from Québec to London, assuming once again, that all three states are contracting states to the Rotterdam Rules. In this case however, the event that caused the damage to the cargo occurred during the carriage by air and the actual damage occurs while on the sea voyage.<sup>241</sup>

In this situation, courts may be compelled to apply two conventions the Rotterdam Rules and the Montréal Convention. The Montréal Convention like the Rotterdam Rules will apply because both the place of receipt and the place of destination of the cargo are within contracting states.<sup>242</sup> Further, the Montréal Convention like the Rotterdam Rules applies to multimodal transportation. It states in article 38(1) that ‘in the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply to the carriage by air.’ Similar to the Rotterdam Rules which only apply if the multimodal contract includes a sea leg, the Montréal Convention is restricted to contracts of carriage that include carriage by air. Lastly, the Montréal Convention will apply because article 18(1) provides that ‘the carrier is liable for damage sustained... on condition only that the event which caused the damage took place during the carriage by air.’

Article 26 of the Rotterdam Rules will not apply in this case because; the article only applies when the damage to the goods occurs before loading on to a vessel or after discharge. It does not apply to damage that is non-localised. The network liability system will also be unhelpful since both Conventions clearly apply to the dispute. Article 82 makes a contingency for such an occurrence, by allowing courts to apply the provisions

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<sup>241</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 362.

<sup>242</sup> Unification of Certain Rules for International Carriage by Air, 1999, article 1(2).

of previously existing international Conventions instead of those of the Rotterdam Rules where both are applicable and where it is impossible to avoid conflicting obligations between the two conventions.<sup>243</sup> Therefore, article 82(a) provides that the courts in this example may apply the provisions of the Montréal Convention instead of the Rotterdam Rules.

The Rotterdam Rules may also conflict with the CMR. For example, if parties enter into a contract of carriage from; France to Naples by international road carriage and finally the truck is then loaded on to a vessel while the goods are still loaded on board the truck for sea carriage from Naples to Athens. In this case the goods are damaged during the sea voyage. The CMR will apply to the contract of carriage from France to Italy. This is because it was a contract for international road carriage between parties whose states are contracting states to the Convention. The CMR will also apply by virtue of article 2 which provides that ‘where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air... and the goods are not unloaded from the vehicle, this Convention shall apply to the whole carriage.’ This contract of carriage will also fall within the ambit of the Rotterdam Rules because an international sea-leg is involved. This conflict of laws is resolved under article 82(b) similar to 82(a) it provides that the courts may apply the provisions set out in any pre-existing international Conventions on road carriage, such as the CMR.<sup>244</sup>

Article 82 ( c ) and (d) also provides that where the Rotterdam Rules conflict with pre-existing conventions governing the international carriage of goods by rail or by inland water ways the courts may apply the provisions of the pre-existing conventions. For instance under article 82(d) provisions of the CMNI will prevail over those of the Rotterdam Rules. The CMNI rules apply to ‘carriage of goods without transshipment both on inland waterways and to waters to which maritime regulations apply if such transport is not covered by a maritime bill of lading and the sea leg is supplementary to the inland waterways transport.’<sup>245</sup>

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<sup>243</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 364.

<sup>244</sup> T Fujita ‘The comprehensive coverage of the new convention: performing parties and the multimodal implications’ (2009) 44 *Texas International Law Journal* 349 at 365.

<sup>245</sup> Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, 2000, article 2(2).

### **5.5. Do the Rotterdam Rules achieve a successful conflict of conventions provision?**

The following criticisms have been made of these provisions: First, under article 26, the claimant has the burden of proving that the loss or damage to the goods occurred before or after carriage by sea, in order to obtain the application of a different convention. Under the Rotterdam Rules, the burden of proof benefits the carrier more than it benefits the claimant.<sup>246</sup> This is because under the Rotterdam Rules, the burden is on the party who will stand to gain by producing proof of loss or damage; in this case it first rests on the claimant. The problem is that, with the introduction of the single bill of lading and containerisation, parties can now rely on a single contract of carriage and a single transport document. This means that once the container is sealed at the beginning of the transport chain, it is not unsealed until it is delivered to the final destination. Hence the cargo will not be inspected for defects before loading onto the ship or after discharge from the ship. Making it almost impossible to determine at what stage the cargo was damaged and therefore, the application of article 26 may be hard to determine.<sup>247</sup>

Secondly, the provisions of article 26 and 82 only provide for conflict of conventions in the area of carriers' liability,<sup>248</sup> the limit of such liability and the time to sue. However, there are other areas where conflict may arise between the Rotterdam Rules and other transport conventions.<sup>249</sup> The Rotterdam Rules provide no conflict rules for areas such as: the provisions relating to the transport documents to be issued by the carrier on demand of the shipper or the provisions on the rights and obligations of the parties in respect to delivery of the goods at their final destination and the provisions on the right of control during transport. The above mentioned matters are regulated separately by all international transport conventions including the Rotterdam Rules.

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<sup>246</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>247</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>248</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>249</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged.' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

To begin with, conflict may arise in the issuance of transport documents. For instance, in a contract of carriage where a sea leg and a road leg are involved; both the provisions in chapter 8 of the Rotterdam Rules on electronic transport documents will apply and the provisions of chapter 2 of the CMR on document rules will apply. Both these rules on documentation will apply regardless of whether the liability rules of the CMR apply to the contract of carriage by virtue of article 82.<sup>250</sup> The conflict arises because article 4 of the CMR ‘provides an absolute right for the sender to have a CMR Convention consignment note’<sup>251</sup> and disallows the use of any other form of documentation such as the electronic bill of lading issued under the Rotterdam Rules.<sup>252</sup>

Closely linked to the rules on cargo documentation are the rules on delivery and disposal. Since there is a conflict on which documents of title are to be used in a multimodal transport contract it follows that there will be a conflict in the rules on delivery and disposal. Conflict will also arise on determining the rules on presentation of documents, and the rules for non collected goods among other things.<sup>253</sup>

Therefore, the question that will arise is should it be assumed that where a CMR consignment note is issued it will trigger the CMR Convention rules on delivery and disposal and similarly where the Rotterdam Rules electronic bill of lading is issued the Rotterdam Rules provisions on delivery and disposal will be triggered?<sup>254</sup> Another question that arises is how it will be determined which document the issuer intended to issue especially since article 4 of the CMR provides for the mandatory use of the Convention consignment note and states that the Convention’s rules will apply regardless of the form due.<sup>255</sup>

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<sup>250</sup> E Rosceg ‘Conflicts of Conventions in the Rotterdam Rules’ Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29<sup>th</sup> August 2009].

<sup>251</sup> D Sasson ‘Liability for the international carriage of goods by sea, land and air; some comparisons’ (1979) 3 *Journal of Maritime Law and Commerce* 759 at 769.

<sup>252</sup> Economic Commission for Europe ‘The Rotterdam Rules: an attempt to clarify certain concerns that have emerged’ Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>253</sup> R KF Haak and M Hoeks ‘Arrangements of intermodal transport in the field of conflicting conventions’ (2004) 5 *Journal on International Maritime Law* 422 at 426.

<sup>254</sup> E Rosceg ‘Conflicts of Conventions in the Rotterdam Rules.’ Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29<sup>th</sup> August 2009].

<sup>255</sup> Convention on the Contract for the International Carriage of Goods by Road, 1956, article 4 reads; ‘the absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention.’

Further, the provisions on shipper's liability under all the conventions on the international carriage by air, land, rail and inland water ways differ from the provisions set out in the Rotterdam Rules.<sup>256</sup> The shipper is therefore subject to two liability regimes one of which may be stricter than the other.

Conflict between these conventions and the Rotterdam Rules may also arise in areas such as rules of the evidentiary effect of the transport documents, time bars, and conditions for breaking the limits and so on.<sup>257</sup> These separate but distinct conflicts are contrary to the intended clarity and uniformity that the Rotterdam Rules are intended to create.<sup>258</sup>

Finally, the European shipping industry raised concerns that, the more favourable terms and conditions of CMR and CIM, would not extend to short sea shipping. However this concern is unfounded because article 82 of the Rotterdam Rules is very clear that, where CMR and CIM apply to maritime carriage, these Conventions prevail and the shipper's obligations under the other conventions do not substantially differ from those under the Rotterdam Rules.<sup>259</sup>

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<sup>256</sup> E Rosceg 'Conflicts of Conventions in the Rotterdam Rules.' Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29<sup>th</sup> August 2009].

<sup>257</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

<sup>258</sup> E Rosceg 'Conflicts of Conventions in the Rotterdam Rules' Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29<sup>th</sup> August 2009].

<sup>259</sup> Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20<sup>th</sup> July 2009].

## 6. CHAPTER SIX

### CONCLUSION

Although the Rotterdam Rules contain improvements, they appear unsuitable as a multimodal transport convention, at least where one of the modes of transportation is an international sea leg. There still seems to be room for improvement as, certain provisions set out in it 'are at best uncertain as they are usually qualified in such a way that they prove illusory.'<sup>260</sup> This may be seen in the gaps contained in the application of articles 26 and 82 as explained in the previous chapter. Therefore, despite the numerous amendments made the Rotterdam Rules are still unsuitable as a global multimodal transport convention, at least where one of the modes of transportation is an international sea leg.

The Rotterdam Rules are first and foremost a maritime transport instrument whose original purpose was to replace The Hague/ Hague-Visby Rules and Hamburg Rules. The decision to include multimodal elements was made later and the effects of this can be seen in the final instrument. 'It is evident that the multimodal elements in the convention are reluctantly bolted on without regard for the needs of land transport or of modern trade logistics.'<sup>261</sup> For example; despite the conflict of law provisions set out in the Rotterdam Rules,<sup>262</sup> there are still too many conflicting provisions between the Rotterdam Rules and other pre-existing unimodal conventions such as the CMR and CIM. The applicability of the Rotterdam Rules is not incontrovertible and may be superseded by the existing unimodal carriage regimes.

Another aim of the Rotterdam Rules is to bring some uniformity to multimodal transport law where one of the transport modes is international sea carriage. However, when it comes to multimodal transport where one of the transport modes is international sea carriage, the Rotterdam Rules do not achieve this uniformity, because, the rules only add yet another regime for inland transport without removing any other convention.

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<sup>260</sup>European Shipper's Councils Position Paper on The Draft Maritime Instrument of The United Nations Commission on International Trade Law A/CN.9/WG.III/WP.81. Available at [www.europeanshippers.com/docs/esc\\_analysis\\_paperfin.pdf](http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf) [Accessed on 29th August 2009].

<sup>261</sup> European Shipper's Councils Position Paper on The Draft Maritime Instrument of The United Nations Commission on International Trade Law A/CN.9/WG.III/WP.81. Available at [www.europeanshippers.com/docs/esc\\_analysis\\_paperfin.pdf](http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf) [Accessed on 29th August 2009].

<sup>262</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 26 and 82.

Therefore, it is not a conclusive convention on either the carriage of goods by sea or the carriage of goods by any other mode. Hence, even if all State Parties involved implement the Rotterdam Rules, parties to a multimodal transport contract involving an international sea carriage leg may still be subjected to additional rules of other international transport conventions and mandatory national laws.<sup>263</sup> It is feared that eventually the conflict of conventions will lead to numerous litigations and conflicting jurisdictions.<sup>264</sup>

A further reason why the Rotterdam Rules may fail to achieve their objective of uniformity is; the Rules may end up with different interpretations which will in effect lead to additional transaction costs and invite misunderstandings and misinterpretations.<sup>265</sup> The complication will arise because when the Rotterdam Rules come into force it will apply to areas that are already codified in other transport conventions. The danger in this is that different interpretations are possible. The consensus seems to be that many of the new features of the Rotterdam Rules if compared with old liability regimes both on maritime and inland transport seem to provide hardly anything of additional value. The Convention merely developed into a complex legal instrument that causes more uncertainty than uniformity that may lead to too many different interpretations in local and international courts.<sup>266</sup> Especially since its provision on interpretation is so vague.<sup>267</sup>

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<sup>263</sup> E Rosceg 'Conflicts of Conventions in the Rotterdam Rules' Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29th August 2009].

<sup>264</sup> The European Voice of Freight Logistics and Customs Representatives, Position Paper 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the Rotterdam Rules.' Available at [www.clecat.org/.../PP010OMama090529PosPapRottRules.pdf](http://www.clecat.org/.../PP010OMama090529PosPapRottRules.pdf) [Accessed on 29th August 2009].

<sup>265</sup> The paper of the Working Group on Sea Transport of FIATA, Annex II, FIATA document MTJ/507 2009 in Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged' Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20th July 2009].

<sup>266</sup> The European Voice of Freight Logistics and Customs Representatives, Position Paper 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the Rotterdam Rules.' Available at [www.clecat.org/.../PP010OMama090529PosPapRottRules.pdf](http://www.clecat.org/.../PP010OMama090529PosPapRottRules.pdf) [Accessed on 29th August 2009].

<sup>267</sup> United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/RES/63/122, article 2 reads; 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

The Rotterdam Rules do not 'seem to be a step towards a simple, transparent, uniform and strict liability system of modern transport chains providing a level playing field among unimodal and multimodal transport operations.'<sup>268</sup> The fact that the Rotterdam Rules do not cater for multimodal transport that does not include a sea leg, means there is still a need for a multimodal convention that makes provisions for all modes of transport.<sup>269</sup>

Another weakness of the door-to-door approach of the Rotterdam Rules; is that the rules are too complicated.<sup>270</sup> Despite the fact that the network liability system was intended to simplify the process of identifying what rules are applicable, it tends to create confusion for example the confusion between the Rotterdam Rules and other conventions on the varying rules on documentation and carriers liability.<sup>271</sup>

Finally, the use of the modified or partial network system instead of the full network system that most parties in the freight forwarding industry sought means that only international conventions and mandatory national laws can override the Rotterdam Rules. This has caused some dissatisfaction because it leaves no room for any private conditions. Over the years, private conditions have become widely used in the shipping industry and have served the industry well.<sup>272</sup>

However, despite all the criticisms, it has been widely agreed that there is a great need for harmonisation concerning carriage of good by sea. The shipping industry is widely expanding with great volumes of cargo being shipped internationally every day it

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<sup>268</sup> UNECE Report, in Economic Commission for Europe 'The Rotterdam Rules: an attempt to clarify certain concerns that have emerged' Paragraph 41. Available at [www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf](http://www.unece.org/trans/wp24/wp24-inf-docs/.../id09-02e.pdf) [Accessed on 20th July 2009].

<sup>269</sup> European Shipper's Councils Position Paper on The Draft Maritime Instrument of The United Nations Commission on International Trade Law A/CN.9/WG.III/WP.81 . Available at [www.europeanshippers.com/docs/esc\\_analysis\\_paperfin.pdf](http://www.europeanshippers.com/docs/esc_analysis_paperfin.pdf) [Accessed on 29th August 2009].

<sup>270</sup> E Rosceg 'Conflicts of Conventions in the Rotterdam Rules' Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29th August 2009].

<sup>271</sup> E Rosceg 'Conflicts of Conventions in the Rotterdam Rules' Available at [folk.uioi.no/erikro](http://folk.uioi.no/erikro) [Accessed on 29th August 2009].

<sup>272</sup> The European Voice of Freight Logistics and Customs Representatives, Position Paper 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the Rotterdam Rules.' Available at [www.clecat.org/.../PP0100MAma090529PosPapRottRules.pdf](http://www.clecat.org/.../PP0100MAma090529PosPapRottRules.pdf) [Accessed on 29th August 2009].

is important to create a legal frame work that is similar everywhere so that problems due to varying national solutions would be minimised.<sup>273</sup>

In conclusion, it is important to establish that, the Rotterdam Rules are not designed to be purely a convention on multimodal transport but it is designed primarily as a maritime carriage regime. It is therefore meant, to be a maritime convention that governs not only the sea leg of the contract of carriage but also any other modes of transportation supplementary to the sea leg. As mentioned earlier, the Rotterdam Rules share this and many other provisions with existing bodies of law both national and international. As both a maritime convention and a multimodal convention, however, the Rotterdam Rules make several departures from and add new elements to the law on multimodal transportation that may prove useful when it comes to simplifying and unifying multimodal transportation.<sup>274</sup> Unlike the conventions that preceded it the Rotterdam Rules greatly expands its scope of coverage not only to carriers and performing parties but also to persons other than the carrier by use of the automatic Himalaya clause. It provides solutions for problems such as; where damage is localised or un-localised and conflict of conventions. As a Convention that covers both the carriage of goods by sea and multimodal transportation, the Rotterdam Rules are a comprehensive legal regime for the international carriage of goods by sea and is an invaluable contribution to the uniformity at least in this area of transport law. On the other hand, the Rotterdam Rules are not perfect and the complexity of the Convention is cause for one of the main criticisms of it. However due to the complex nature of the issues being dealt with it was perhaps unavoidable that the Convention would attain a certain level of complexity and although the text is detailed, the ideas behind the text are much simpler than what the industry had to deal with before.<sup>275</sup>

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<sup>273</sup> Professor H Honka 'The legislative future of carriage of goods by sea. Could it not be the UNCITRAL Draft? an academic's view.' Available at <http://www.heinonline.org/HOL/PDF?handle=hein.journals/brklr38&collection=journals&id=933&print=8&sectioncount=1&ext=.pdf> [Accessed on 31 August 2009].

<sup>274</sup> Report of the Working Group to the MLA Committee on Carriage of Goods on 'The Convention on Contracts for the International carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules).' Available at [www.mlaus.org/article.ihtml?id=1903&folder=109](http://www.mlaus.org/article.ihtml?id=1903&folder=109) [Accessed on 31 August 2009].

<sup>275</sup> T Fujita 'The comprehensive coverage of the new convention: performing parties and the multimodal implications' (2009) 44 *Texas International Law Journal* 349 at 372.

It is difficult to predict whether the Rotterdam Rules will be ratified and replace the Hague-Visby rules as the dominant international liability regime for maritime carriage. Many think that the Convention is likely to be a huge success.<sup>276</sup>

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<sup>276</sup> J Schelin 'The UNCITRAL Convention on Carriage of Goods by Sea: harmonizing or disharmonizing' (2009) 44 *Texas International Law Journal* 322 at 327.

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