

International Multimodal Transport Business and the Regulation of Electronic Commerce

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Abstract

In this age of globalisation, the forms of contracting, buying, selling and transportation of goods has transcended age long traditional methods of doing same and the society is being geared into a paperless and cashless society. One of the benefits of Information and Communication Technologies (ICTs) as well as globalisation is the introduction of electronic commerce. It is believed that establishing an electronic framework for international multimodal transport is a key initiative in creating an integrated goods transport system. While this area is thriving for many national jurisdictions, some jurisdictions are still far behind, particularly regions like Africa where many businesses engage in multimodal transport business. This article undertakes an appraisal of multi modal transport business in light of International Laws and the Law of Electronic Commerce. The article examines issues such as the applicable International Conventions that would govern the movement of goods using multimodal transport; the duties, rights and liabilities of parties under the applicable laws and furthermore, the validity and effect of electronic communication in contracts of carriage of goods.

Keywords: multimodal, transportation, electronic commerce, carriage, International

1. Introduction

The United Nations Convention on International Multimodal Transport of Goods 1980 (hereinafter “MT Convention”) defines international multimodal transport as “...the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country...”¹ Thus, the main features of a multimodal transport are the carriage of goods by two or more modes of transport, under one contract, one document and one responsible party of the entire carriage, who might subcontract the performance of some, or all modes, of the carriage to other carriers.

The convention under article 1(2) defines a multimodal transport operator as “...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 acts 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”² A multimodal operation is made up of a number of unimodal stages of transport, such as sea, road, rail or air, each of which is subject to a mandatory international convention or national law. “The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multi modal transport.”³

2. Legal Framework

There is no international law in force regulating multimodal transport contracts despite various efforts⁴. Based on the provisions of the MT Convention, the Convention does not affect and cannot be found incompatible with the application of any international convention or national law relating to the regulation and control of transport operations.⁵ In spite of various attempts to establish a uniform legal framework governing multimodal transport, no such international regime is in force. However, governments both at the national and regional levels have come up with their own multimodal transport laws.

The lack of a widely acceptable international legal framework on multimodal transport businesses has resulted in National governments and regional/sub regional intergovernmental bodies taking the initiative of enacting their

¹ United Nations Convention on International Multimodal Transport of Goods 1980 Art 1(1)

² Rule 2.2 of UNCTAD/ICC Rules 1992 also defines a multimodal transport operator as any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier

³ United Nations Convention on International Multimodal Transport of Goods 1980 Art 1(1)

⁴ United Nations Convention on International Multimodal Transport of Goods 1980

⁵ Article 4(1) United Nations Convention on International Multimodal Transport of Goods 1980

individual legislations in order to regulate multimodal transport business.¹

Lack of uniformity in the multimodal transport regulation brings about certain complexities in determining the issue of what laws would govern a multimodal transport contract and at what stage such laws will be applicable or cease to apply, the liabilities of parties in the event of delay, loss of or damage to goods especially where it is difficult to determine at what stage of transportation the loss or damage occurred².

To avoid such complexities, parties may incorporate private multimodal rules such as the UNCTAD/ICC Rules for Multimodal Transport Document 1992 or the International Chamber of Commerce Uniform Rules for a Combined Transport Document 1973 (as amended in 1975) into their contracts. These rules being private laws, will not take effect if it conflicts with international conventions or mandatory national laws. Thus, where an international convention or mandatory national laws would have provided another limit of liability for loss or damage of goods in a particular stage of multimodal transport, the applicable laws will be such conventions or the mandatory national laws of each unimodal stage of business. In the words of the MT Convention, the Convention does not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, between multimodal transport operators, shippers, shippers' organizations and appropriate national authorities on terms and conditions of service; licensing of multi modal transport operators; participation in transport; and all other steps in the national economic and commercial interest.³ Again, the multimodal transport operator must comply with the applicable law of the country in which he operates and in line with the provisions of the MT Convention.⁴

Since multimodal transport became common place, three sets of International rules for its regulation have been issued. The common objectives of these rules is to distribute the risks incident to multimodal transport between the multimodal operator and the cargo owner and each of these rules does this by establishing the scope of the responsibilities of the parties and the limit of liability of the multimodal operator in the event of default.⁵

In 1980, the MT Convention was promulgated. The convention recognizes the right of each state to regulate and control Multimodal operations at the national level.⁶ The Convention applies to all contracts of multimodal transport between places in two States, if the place of taking charge or delivery of the goods is located in a member State.⁷ While the Convention recognizes the right of the consignee to choose between multimodal and segmented transport, its provisions are to apply mandatorily to all contracts of multimodal transport falling within the provisions of the Convention⁸. The MT Convention has not been sufficiently ratified by States thus preventing it from coming into force. One of such countries that are yet to ratify the Convention is the United Kingdom.⁹

The UNCTAD/ICC Rules¹⁰ for multimodal transport documents came into force in 1992 and they are standard contract terms for incorporation into multimodal transport documents. However, the Rules do not have the force of law and being contractual in nature, will have no effect in the event of conflict with mandatory law. They will

¹ Regional Instruments include: Andean Community Decision 331 of 4 March 1993 as modified by Decision 393 of 9 July 1996: "International Multimodal Transport"; Asociación Latinoamericana de Integración(ALADI) Agreement on International Multimodal Transport 1996. Some National Instruments include; Argentina: Law No.24.921: Multimodal Transport of Goods, *official Bulletin*, 12 January 1998; Brazil: Law No. 9.61 of 19 February 1998 on Multimodal Transport of Goods; Germany: Transport Law Act 1998; India: Multimodal Transportation of Goods Act 1993 (No.28 of 1993); China; The Contract Law, 1999, Chapter 17, Section 4: Contracts for Multimodal Transportation; Regulation Governing International Multimodal Transport of Goods by Containers 1997; The Maritime Code, 1993 , Chapter IV, Section 8 : Special Provisions Regarding Multimodal Transport Contract.

² See generally the United Nations Conference on Trade and Development report (2001) on the Implementation of Multimodal Transport Rules especially at pages 8-9. Available from <http://www.unctad.org/en/docs/posdtetlbd2.en.pdf>. Accessed 04/12/14

³ Article 4(2)

⁴ Article 4(3)

⁵ H Kindred and M Brooks Multimodal Transport Rules. Kluwer Law International. Available from <http://books.google.co.uk/books?id=5X1flh97yjMC&pg=PA11&lpg=PA11&dq=multimodal+business&source=web&ots=gNb7ATQk2p&sig=9V9h2ZL-7ePB9oDoX_TB7O2ETI&hl=en&sa=X&oi=book_result&resnum=5&ct=result#PPA16,M1> Accessed 15/12/14

⁶ MT Convention. Preamble(F)

⁷ Ibid. Article 2

⁸ Ibid. Article 3

⁹ I Carr "International Multimodal Transport – United Kingdom [1998] Int.T.L.R. 99-110 pg. 109; Generally, in relation to a hindrance on the coming into force of the MT Convention, Art. 38, allows courts or arbitral tribunals to give effect to provisions of other international conventions they believe to be also and primarily applicable

¹⁰ United Nations Conference on Trade and Development/International Chamber of Commerce Rules (hereinafter "UNCTAD/ICC Rules")

apply only if they are incorporated into a multimodal transport document, without any formal requirement for writing and irrespective of whether it is a contract for unimodal or multimodal transport.¹ Where the parties incorporating the Rules agree, the Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with the Rules.²

As earlier stated the UNCTAD/ICC Rules and the ICC Uniform Rules for a combined transport document are private Rules and although once they are incorporated, they override any conflicting contractual provision,³ the rules will have no effect if it conflicts with international conventions or mandatory national laws.⁴ A multimodal operation is made up of a combination of unimodal stages of transport, such as sea, road, rail or air, with each being subject to an international convention or a national law and where an international convention or mandatory national law makes provisions for a particular stage of multi modal transport, the applicable law will be such conventions or the national law relating to the particular unimodal stage.⁵

The United Kingdom does not have a specific legislation regulating multimodal transport, thus, multimodal transport in UK is based on contract law, law of bailment, law of tort and the voluntary incorporation by the parties of UNCTAD/ICC Rules or the standard trading conditions of the British International Freight Association (Hereinafter “BIFA”) by its members.⁶

3. Choice of Law

It is important that the Multimodal Rules desired by parties are incorporated into every multimodal transport document to be used. Where a jurisdiction has no national multimodal transport Legislation, in consideration of commercial related issues such as risks and liabilities, parties are better off applying the UNCTAD/ICC Rules for Multimodal Transport Documents however, subject to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to every multimodal transport contract they enter into. It is in light of the provisions of the Rules that issue of rights and obligations, liabilities, Jurisdiction and settlement of dispute will be determined.

4. Responsibilities and Obligations of the Multimodal Transport Operator (MTO)

According to Schommer,⁷ “one of the most important differences from other transport contracts is that the MTO under a multimodal transport contract is acting as a principal, not as an agent for the shipper. If the organizer of the transport in contracts is acting as an agent, entering into contracts with the carrier and others involved in the transportation, with the legal effect that it is not him but the cargo owner who is party to the contract, such contracts are normally referred to as “through transport contracts”.⁸ Furthermore, under multimodal transport, the carrier may be the multimodal operator or the subcontractor to the operator.⁹

The MTO has the responsibility to choose the mode of transport for the goods, the route and procedure of handling and storage of goods and the responsibility of the MTO for the goods under cover the period from the time the MTO has taken the goods in his charge to the time of their delivery.¹⁰ A multimodal transport operator also has the responsibility to undertake to perform or to procure the performance of all acts necessary to ensure

¹ UNCTAD/ICC RULES. Rule 1.1; T Schommer. International Multimodal Transport. Some thoughts with regard to the “Scope of application”, “Liability of carrier” and “Other Conventions” in the UNICITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by sea] available from:

<<http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/591/SchommerT+2005.pdf>> Accessed 14/12/14

² UNCTAD/ICC RULES. Rule 1.2

³ Ibid Rule 1.2

⁴ Ibid Rule 13

⁵ International conventions applicable to unimodal transport include: Transport by sea: International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules); Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, as Amended by the Brussels Protocol of 1968, Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, (Hague/Visby Rules), United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). Transport by road: - Convention on the Contract for the International Carriage of Goods by Road (CMR) 1956. Transport by rail: Uniform Rules Concerning the Contract for International Carriage of Goods by Rail CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 1980. - Protocol to amend CIM-COTIF, 1999. Transport by air: Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929; - The Hague Protocol, 1955; - Montreal Protocol No. 4, 1975; - The Montreal Convention, 1999.

⁶ The formulation of standard terms and conditions, such as the BIFA Standard Trading Conditions and the FIATA Bill for use by freight forwarders, has brought about some harmonization and certainty in the area of multimodal transport. These Standard terms, however, apply only when incorporated in the multimodal contract.

⁷ Op Cit. Schommer, T. See foot note 17

⁸ ibid

⁹ Rule 2.3 provides that Carrier means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not.

¹⁰ Rule 4.1

delivery of the goods.¹

4.1 Liabilities of the Multimodal Transport Operator (MTO)

The basis of liability of the MTO will depend on whether the operator will be held responsible for every casualty that befalls the goods while they are in its charge or only for loss that is caused through the carelessness or negligence of the operator, its employees and agents.

It should be noted that generally, the operator is liable for any loss, damage as well as for delay in delivery on the presumption that it was their fault until they prove otherwise.² The MTO shall be responsible for the acts and omissions of his servant(s), agent(s) or other person(s), whom it has engaged its services in performing multimodal transport.³ Furthermore, the UNCTAD/ICC Rules will apply whenever claims relating to the performance of the multimodal transport contract are made against any servant, agent or other person whose services the MTO has used in order to perform the multimodal transport contract.⁴

According to Rule 9 of the UNCTAD/ICC Rules, unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the MTO when the goods are handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the MTO of the goods as described in the MT document and where the loss or damage is not apparent, the same *prima facie* effect shall apply if notice in writing is not given within six(6) consecutive days after the day when the goods were handed over to the consignee.

When the multimodal movement involves a marine segment, the MTO has two defences for losses at sea. The MTO will be excused from liability if the loss, damage or delay in delivery with respect to goods was caused by the 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 and if caused by fire, unless caused by the actual fault or privity of the carrier.⁵ However, whenever loss or damage has resulted from unseaworthiness of the ship, the MTO has to prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.⁶

5. Liabilities of a Consignor

The Consignor is any “person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.”⁷

For every multimodal transport contract a company enters into, the consignor has the responsibility to guarantee the accuracy of the goods at the time MTO takes charge of the goods and also furnish same with all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the good.⁸ Where any loss results from inaccurate particulars, the consignor shall

¹ See Rule 4.3. this is when the Multimodal Transport Document has been issued in a negotiable form "to bearer", to the person surrendering one original of the document, or when the Multimodal Transport Document has been issued in a negotiable form "to order", to the person surrendering one original of the document duly endorsed, or when the Multimodal Transport Document has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transferred "to order" or in blank the provisions of Rule 4.1(b) apply, or when the Multimodal Transport Document has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity, or when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.

² Rule 5.1 UNCTAD/ICC RULES. Note that, however, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO. Also the MTO remains responsible under the Rules whether the damage is localized or not, but the basis of liability varies in its detailed application when the loss can be attributed to a particular subcontracted carrier. (Localized Injury has been defined as cargo injury that can be shown to be the result of an event which occurred on a particular segment of the multimodal transportation. By localizing the cargo injury, it becomes possible for a company in various situations to attribute responsibility among the actual segmental carriers and cargo handlers); See foot note 4

³ UNCTAD/ICC RULES 4.2. Thus where a MTO engages a third party for example a TPL as a carrier, it will be liable when any such servant, agent or other third party is acting within the scope of his employment or performance of the contract, as if such acts and omissions were his own.

⁴ This is the case whether such claims are founded in contract or in tort. The aggregate liability of the MTO of such servants, agents or other persons shall not exceed the limits provided in Rule 6 of the Rules. See Generally, Rule 12 of the UNCTAD/ICC Rules

⁵ Rule 5.4 UNCTAD/ICC Rules

⁶ *ibid*

⁷ Article 1(5) MT Convention

⁸ *Ibid.* Rule 8.1 UNCTAD/ICC Rules

indemnify the MTO against such loss and shall remain liable even if it has transferred the MT document.¹

6. Assessment of Compensation

Where the MTO is liable for compensation, assessment shall be made with reference to the value of goods at the place and time of delivery or when they should have been delivered under the multimodal contract and the value of the goods will be determined according to the current commodity exchange price or in the absence of such, current market price with regard to the normal value of goods of similar nature and quality.²

7. Limitation of Liability

In every circumstance, whichever is the higher, the liability of the MTO will not exceed the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight.³ Where the carriage does not involve carriage of goods by sea or inland waterways, the liability will not exceed 8.33 SDR.⁴

8. Legal Actions and Time Limitation

Legal actions can be brought by aggrieved parties against a MTO in tort or in contract, however, such actions must be brought within nine (9) months of the delivery of the goods or when the goods should have been delivered.⁵ It is stated that a time bar of 9 months has to be chosen in order to ensure that the MTO would have adequate possibilities to institute recourse actions against the performing carrier. The MT Convention provides a two years limit.⁶

9. Terms and Conditions

The multimodal transport document should set the standard terms and conditions. It contains particulars about the parties to the contract of carriage, the goods, and the terms and conditions of carriage. The terms and conditions to be used by companies may or may not be the same from document to document, considering that some parties may have specific preferences. Without specific requests by the parties to every contract, it is the carrier's choice of Multimodal Rules and Standard contract terms and conditions which will govern contracts. In every multimodal contract it enters into, the agreed terms and conditions will serve as the accepted standard of service whether the parties read the document or not.

10. Arbitration and Jurisdiction

Unlike the MT Convention, the UNCTAD/ICC Rules is silent in relation to provisions for arbitration or jurisdiction. Concerning jurisdiction, the Convention gives a wide option to the claimant to institute an action for claims relating to international multimodal transport. It clearly provides that the plaintiff may sue in one of the following places:

- (a) The principal place of business or residence of the defendant;
- (b) The place where the MT contract was made;
- (c) The place of taking the goods in charge or the place of delivery; or
- (d) Any other place agreed upon and evidenced in the MT document⁷

Following the growing trend in international commercial disputes, the Convention also recognizes arbitration as an alternative to judicial proceedings. It provides that the parties may agree, in writing, to submit their disputes under the Convention to arbitration. As to the place of arbitration, the options available to the claimant for jurisdiction are also available in case of arbitration.⁸ For contracts, companies involved in multimodal business

¹ Ibid. Rule 8.2-3 UNCTAD/ICC Rules

² Ibid. Rule 5.5 UNCTAD/ICC Rules

³ Ibid. Rule 6.1. This will generally be the case unless the nature and value of the goods were declared by the consignor before the goods were taken in charge by the MTO and inserted in the MT document.

⁴ Ibid Rule 6.3 Further, as stated earlier, the rules will have no effect if it conflicts with international conventions or mandatory national laws, thus, when the loss of or damage to goods occur during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

⁵ Rule 10-11 UNCTAD/ICC RULES

⁶ Article 25(1) MT Convention provides that 'any action relating to international multi modal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiration of this period.'

⁷ Article 26 MT Convention

⁸ See Article 27 MT Convention. By virtue of Article 27(2) The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places: (a) A place in a State within whose territory is situated: (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or (ii) The place where the multimodal transport contract was

can incorporate jurisdiction and arbitration clauses based on unimodal transport rules provisions which would be incorporated in their multimodal transport contracts.

11. Modes of Multimodal Transportation

For companies just beginning the multimodal transport business, it is usually advised that they start with two modes of transporting goods¹ and in future incorporate all modes of transportation. The carriage by sea and by land seems to be the most important with regard to multimodal transport.²

11.1. Carriage of Goods by Sea

Carriage of goods by sea is carried out on the basis of a contract of carriage between the carrier and the consignor. This contract usually follows the contract of sale and serves to enable delivery of the goods between seller and buyer. A contract of carriage is not necessarily concluded in writing, but normally requires evidence. In practice, a contract of carriage is usually evidenced by a transport document issued after the goods have been delivered by the consignor to the carrier.

The laws governing international carriage of goods by sea, are the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules) as amended by the Brussels Protocol of 1968, Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, The Carriage of Goods by Sea Act 1971 (Hague/Visby Rules) and the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). In 1996 UNCITRAL initiated work on a new convention for the international carriage of goods by sea.³

Multimodal transportation of goods by sea can be carried out by common carriage⁴ or charter party. In many instances, a common carriage is more appropriate. A contract for carriage of goods by sea is evidenced by a bill of lading. Under English law, the shipped bill of lading has been recognised as the only document which always has the status of a document of title in sea carriage.⁵ The use of a bill of lading is important because it also serves as a receipt for goods, and a document of title which means that the person who is rightfully in possession of the bill of lading has the right to possess, use and dispose of the goods.⁶ The bill also shows that a contract of carriage exists between carrier and shipper and sets out its terms and conditions. When loss or damage occurs during the transportation of the goods, the holder of the bill can lodge a claim against the carrier under the bill of lading.⁷

The Hague-Visby Rules is applicable (regardless of the nationality of the ship, carrier, shipper, consignee or any other interested party), where the bill is issued in a contracting state; or the carriage is from a port in a contracting state or the contract provides that the Rules be applicable but does not apply to some kinds of cargo e.g. live animals, deck cargo etc.

made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or (iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or (b) Any other place designated for that purpose in the arbitration clause or agreement.

¹ See footnote 1. By virtue of the definition of a Multimodal Transport, a multimodal operator can engage at least two modes of transportation for carriage of goods.

² Op Cit. Schommer, T pg 9

³ M Clarke "The line in Law between Law and Sea" (2003) J.B.L 522-524 pg. 522. The legislation is still in draft and is known as the UNICITRAL Draft Instrument on the Carriage of Goods wholly or partly by sea.

⁴ Where the owner or operator of a vessel is willing to carry goods for more than one person, the vessel is known as a *general ship* or a common carrier

⁵ The phrase "document of title" is a common term used to denote documents issued by a carrier or by a warehouseman acting as a bailee. The document of title is a written description, identification or declaration of goods issued by or addressed to a bailee which evidences that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. The main purpose of documents of title is to facilitate transfer of rights in goods while they are in the custody of a carrier or warehouseman. See Caslav, P. "Documents of title in carriage of goods by sea: present status and possible future directions" (2001) J.B.L 461 - 488 pg. 462

⁶ Caslav Pejovic "Documents of title in carriage of goods by sea: present status and possible future directions" (2001) J.B.L 461 - 488

⁷ The seller as shipper delivers the goods to the carrier and in exchange, as evidence, he receives the bill of lading from the carrier. By the contract of carriage evidenced by the bill, the carrier undertakes to deliver the goods as described in the bill to the consignee, *i.e.* to the buyer, to whom the shipper transfers the bill. After the bill has been transferred to the buyer, it represents the contract between the carrier and the buyer as a third-party holder of the bill. The buyer as a third-party holder of the bill has an independent right against the carrier, under the contract of carriage evidenced by the bill of lading, to demand delivery of the goods as described in the bill. See also Op Cit. Caslav Pejovic. Pg 464-465

11.1.1. Rights, Duties and Liabilities of Parties

(a) The Carrier

The carrier includes the owner or charterer who enters into a contract of carriage with the shipper.¹ A carrier becomes responsible for the goods from the time when goods are loaded until when they are delivered² and at the request of the shipper, must issue a bill of lading, showing the order and coordination of goods, quantity or number of packages and weight; and leading marks necessary for identification of goods. Where a shipper is unable to verify contents of a package, the shipper can make a reservation in writing and thus, will not be liable where the goods are not accurate upon delivery.³

The carrier is also required to exercise due diligence in ensuring that; the ship is seaworthy; the ship is fit and safe for reception, carriage and preservation of goods; properly and carefully load, handle, stow, carry, keep, care for and discharge the goods; and carry and properly man, equip and supply the ship.⁴ Thus, where due diligence is not exercised by the carrier, the carrier shall be liable for loss, damage or delay in delivery of goods.⁵

A carrier will not be liable for loss or damage resulting from unseaworthiness where it has taken all precautions to ensure that the ship is sea worthy and also, where any loss or damage arises from instances such as riots and civil commotions; act of God; perils, dangers and accidents of the sea or other navigable waters; fire, unless caused by the actual fault or privity of the carrier; act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management; and latent defects not discoverable by due diligence.⁶ The Carrier will also not be liable for damages or loss where he deviates from the rules or contract of carriage for the purposes of saving life or property, such deviation must however, be reasonable and justifiable.⁷

If the nature or value of goods is knowingly mis-stated by the shipper in the bill of lading, the carrier will not be liable. A carrier has the right to land at any place, destroy or render innocuous at any time before discharge, where goods are inflammable, explosive or dangerous without any compensation or liability.⁸

(b) Shipper's duties and immunities

The Shipper has a duty to ensure that the particulars of the goods are accurate and shall indemnify the carrier of any loss, damages and expenses where there are inaccuracies in the particulars of the goods.⁹ The shipper is also liable for shipments where the carrier lands at any place, destroys or renders innocuous at any time before discharge, goods which are inflammable, explosive or dangerous.¹⁰

Generally, under the carriage of goods by sea, neither the carrier nor the ship is liable for loss or damage that arises or results from any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.¹¹

11.1.2. Settlement of Disputes and Compensation

The Hague-Visby rules contain provisions in respect of the extent of liability and time limitation and the carrier is not allowed by the rules to lower the liability limits or lessen the time limits.¹² Where a party wishes to make a claim for loss or damages, the action must be instituted within one year after the goods should have been or were delivered, as such, if an action is not brought within the stipulated time, the carrier and the shipper shall be discharged from liability.¹³ As regards compensation, the aggregate of the amounts recoverable from the carrier, his agents or servants, shall not exceed the limit provided under the rules.¹⁴

11.2. Carriage of Goods by Road

¹ Article 1(a) Hague-Visby Rules

² Art. III. 1&2 . Art 3 Hague Rules. Under the Hamburg Rules, a carrier becomes responsible from the time he takes charge of the goods at the port of loading until the port of discharging.

³ Generally, Article III (3) –(8). See also Article 15 of the Hamburg Rules, and Article 3 of the Hague Rules.

⁴ M Clarke "The line in Law between Law and Sea" [2003] J.B.L 522-524

⁵ Article III (1) and (2) Hague – Visby Rules

⁶ Article IV (1) and (2) Hague-Visby Rules

⁷ Article IV (4) Hague-Visby Rules

⁸ Article IV(6)

⁹ Article III (5) Hague-Visby Rules

¹⁰ Op Cit. Caslav, P. Pg 464-465

¹¹ Article IV (2)q Hague-Visby Rules

¹² Carr I. *International Trade Law* (2005, 3rd edn, Cavendish, Britain)pg 259

¹³ Article III (6) Hague-Visby Rules

¹⁴ Article IV (5) (a) and (b) Hague – Visby Rules

The Convention on International Carriage of Goods by Road (CMR)¹ is applicable to the transportation or carriage of goods by vehicles. Vehicles includes motor vehicles, articulated vehicles, trailers and semi-trailers² The CMR may govern the carriage of goods aspect of any multi modal business plan and govern questions as to rights, obligations and liabilities o parties. Where the CMR is applicable, parties cannot contract out of its provisions. Where there is derogation from its provisions in the terms of contract between parties, the contract shall be null and void, thus rendering it unenforceable.

A contract of carriage by land is usually evidenced by a consignment note and under a multimodal contract; it is issued to cover the whole transaction.³ Traditionally, the bill of lading is used in carriage of goods by sea, while the waybill is used in other kinds of transport. However, in modern practice the bill of lading or more precisely carriage documents with characteristics of a bill of lading (negotiable multimodal transport documents) can also be used in carriage of goods by road, rail and air, while the waybill is used in sea carriage.⁴

11.2.1. Rights, Obligations and Liabilities of Parties

(a) The Carrier

Under the CMR, a carrier has an obligation to make the vehicle road worthy for the carriage of goods.⁵ The carrier has the duty to ensure or check if goods are properly packaged⁶ and is accountable for the goods during the time it takes charge of the goods till when the goods are delivered.⁷ Thus the carrier will be liable if there is a delay in the delivery of goods and where there is either total or partial damage or loss of goods. Where goods have not been delivered within the stipulated delivery time, it will be treated as lost within thirty days and within sixty days from the time the carrier takes over where there is no stipulated time.

The carrier takes liability for acts and omission of his agents and servants who act on his behalf.⁸ Where damage or loss was caused by a willful misconduct of the carrier or his servant or agent, it shall not be excluded or limited from liability.⁹ There are however circumstances where the carrier will not be liable for such loss, damage or delay.¹⁰

The carrier's right includes right to freight, charges, expenses incurred as a result of the contract, right to sell, dispose of, or unload goods in specific circumstances.¹¹ Where a carriage governed by a single contract is performed by successive road carriers, each carrier shall be responsible for the whole transaction and will be parties to the terms of the contract.¹²

(b) The Sender

Before the goods are delivered, the sender has the right to stop transit of goods and change the place of delivery or order that the goods be delivered to another consignee.¹³ Where the goods are of dangerous character, the sender has an obligation to inform the carrier of the dangerous nature of the goods and any preventive measure(s) it needs to take.¹⁴ The sender is responsible for packing the goods and will be responsible for any damages arising from defective packing.¹⁵ The sender is also responsible for concluding customs formalities and must attach the customs documents to the consignment note. The sender shall be liable to the carrier for damages caused by

¹ The Convention on International Carriage of Goods by Road 1956(CMR).The CMR was incorporated into UK Law by the Carriage of Goods by Road Act 1965.

² Article 1 (2) CMR

³ Article 4 CMR 1956. The consignment note must contain all the details stipulated under Article 6 (1)and(2) CMR 1956

⁴Op Cit Caslav Pejovic pg. 475

⁵ Article 17(3) CMR 1956

⁶Article 8(1) CMR 1956

⁷ Article 17(1) CMR 1956

⁸ Article 3 CMR 1956

⁹ Article 29 CMR 1959

¹⁰ Article 17 CMR 1956. A carrier will not be liable under certain circumstances such as if the loss, damage or delay was caused by: the wrongful act or neglect of the claimant; the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier; and by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. A carrier shall also be relieved f liability where loss or damage arises from special risks such as insufficiency or inadequacy of marks or numbers on the packages, etc.(Article 17 (4) (a)-(g) CMR 1956)

¹¹ Circumstances such as; where the goods are perishable; where storage expenses would be more than the value of goods; and it has become necessary to sell or dispose the goods under the condition. See Article 16(3) CMR 1959

¹² Article 34 CMR 1959

¹³ Article 12(1) CMR. Based on the provisions of Article 12(2), this right of the sender ceases where the second copy of the consignment note is handed over to the consignee.

¹⁴ Article 22(1) CMR 1956

¹⁵ Article 10 CMR. The Carrier will however be held liable, where he is aware of the defective packing and ignores it.

inaccuracies and irregularities of the documents.¹

(c) The Consignee

The Consignee has a right to demand the delivery of goods and consignment note on arrival of the cargo; where the sender makes provision to that effect, the consignee will have a right of disposal and the consignee can sue the carrier for any damage, loss or delay.² The consignee can sue the carrier in his own name and he is further entitled to 7 days notice in case of claim for loss or damage and 21 days in case of claims for losses due to delay.

11.2.2. Compensation

Where there is partial loss, compensation is calculated by reference to the value of goods at the place and time the goods were accepted for carriage valued at the commodity exchange price or current market rate.³

11.2.3. Settlement of Disputes

The CMR makes provisions for places where disputes arising from contracts of carriage of goods can be brought. In addition to this, parties may by agreement, institute actions in another contracting state,⁴ they may agree to arbitration⁵ and the CMR will be applied.⁶

11.2.4. Legal Actions and Time Limitation

Generally, the period of limitation for instituting an action is one year, however, where there is wilful misconduct an action can be instituted within 3 years⁷. Any dispute arising from contracts of carriage of goods can be brought at:

- a) the defendant's place of residence or principal place of business;
- b) branch or agent through which the contract was made;
- c) the place where the goods were taken over by the carrier; or
- d) the place of delivery⁸.

In addition to this, parties may by agreement, institute actions in another contracting state. As soon as due formalities are concluded, judgment will be enforceable in the contracting state as well as other contracting states.⁹ Parties may also agree to arbitration where dispute arises.¹⁰ Where parties agree to arbitration, such arbitration clauses must be included in the contract. Suggested arbitration clauses are the UNCITRAL Model Law on Conciliation or the International Chamber of Commerce ADR Clauses. However, the tribunal shall apply the rules of CMR.¹¹

12. UNCITRAL Model Law on Electronic Commerce

In contemporary times, international trade is being conducted by electronic means. The ability to enter into and perform contracts online is at the heart of today's international businesses. Information and communication technology play a major role in the provision of transport services in international trade. Transportation and logistics are also necessary for the growth of electronic commerce and the impact of electronic commerce on transportation has led to an increased demand for transportation services suited to web based transactions.¹²

International trade involves a multitude of activities such as placing orders, invoicing, warehousing, insurance, customs clearance, and shipping and the availability and accessibility of information quickly and effectively is

¹ Article 11 CMR 1956. The sender shall not be liable where there has been some wrongful act by the carrier.

² See Article 13 (1) and 12 (3), (4) and (5) respectively.

³ Articles 23 (1) and (2). Such compensation shall not exceed 8.33 units of account per kilogram of gross weight short. Where price is not available, value will be determined from normal value of goods of similar kind and quality. Compensation is limited to 8.33 Special Drawing Rights per kilogram or gross weight short and the limit will not apply where the value of goods or special interest in delivery has been stated on the consignment note. Generally, compensation must be in accordance with the provisions of Article 23-28 CMR 1956

⁴ Article 31 CMR 1956. Judgment will be enforceable in the contracting state as well as other contracting states.

⁵ An arbitration clause must be included in the contract if parties want to be subject to arbitration.

⁶ Article 33 CMR 1956

⁷ See generally Article 32. Please note that limitation period shall be calculated as follows - (a) where there is partial loss, damage or delay in delivery, from the date of delivery; (b) In the case of total loss, from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier; (c) In all other cases, on the expiry of a period of three months after the making of the contract of carriage.

⁸ See Article 31 CMR 1959

⁹ See generally Article 31 CMR 1959

¹⁰ Where parties agree to arbitration, such arbitration clauses must be included in the contract. Suggested arbitration clauses are the United Nations Commission on International Trade (UNCITRAL) Model Law on Conciliation or the International Chamber of Commerce ADR Clauses.

¹¹ Article 33 CMR 1959

¹² The United Nations Conference on Trade and Development Report on Electronic Commerce and International Transport Services, 31st July 2001, pg. 6.

necessary to enhance business in the transport sector.

The UNCITRAL Model law of Electronic Commerce gives effect to the facilitation of carriage of goods contract documents by electronic means¹. The UNCITRAL Model Law on Electronic Commerce² was created to facilitate the growth of e-commerce by removing legal barriers to the use of electronic equivalents of traditional paper based documents. The model law does not have the same legislative force of law as a Convention; however, it does away with many of the delays and bureaucratic measures associated with conventions.³ It also plays a significant role in enhancing the use of paperless communications for International Trade.

The law takes into account certain activities associated with the carriage of goods⁴ and also makes certain provisions in respect of transport documents.⁵ Thus, the model law should be of particular interest to companies and more so because the Model law facilitates electronic commerce by removing the legal uncertainties that may surround data sent through electronic means.⁶ Basically, the problems associated with e-contracting are the requirements of form i.e. writing, signature, and original.

The Model Law applies to commercial activities⁷ and provides for party autonomy.⁸ However there is only limited party autonomy as Article 4(2) provisions cannot be varied by agreement since requirements relating to form such as writing, signature and presentation/retention of originals, and admissibility of evidence are mandatory in most jurisdictions and may reflect decisions of public policy. The Model Law applies to a wide array of commercial issues under carriage of goods which includes but is not limited to furnishing the marks, number, quantity or weight of goods, notifying a person of terms and conditions of the contract, undertaking to deliver goods to a named person or a person authorized to claim delivery, granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods, acquiring or transferring rights and obligations under the contract.⁹

The acceptance of the Model Law will ease the use of electronic documents including electronic signatures. By implication, parties can enter into contracts for carriage of goods using electronic medium and the use of such medium will not render such contracts unenforceable. Article 17(6) of the UNCITRAL Model Law recognises the use of paperless documents for contracts¹⁰ by virtue of Article 17 (6) of the Model Law, "If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document."

Again, where contracts are to be executed through electronic medium, it should contain standard terms and conditions of contract and have provisions on choice of Law, jurisdiction and arbitration clauses. These standard terms should include the right of parties, definition of terms, mode of payments, claims, consideration etc. The inclusion of provisions related to choice of law, jurisdiction and arbitration will greatly prevent legal and jurisdictional complexities. Again, transferability of contract documents can be ensured by the use of digital signatures and trusted third parties¹¹.

¹ These transport documents will include carriage by sea, road, air, rail and multimodal transport

² The United Nations Commission on International Trade Law (UNCITRAL) Model Law 1996

³ Op Cit. Indirra Carr. Pg 109

⁴ Part 2 of the UNCITRAL Model Law on Electronic Commerce 1996 which pays attention to carriage of goods. Article 5 provides formally for the legal recognition of electronic contracts. Article 7 requires that States give legal recognition to electronic signatures and Article 11 provides for the legal recognition of electronic contracts. Article 5, provides that: "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. Article 7 states: "Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement." Article 11 states: "In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose."

⁵ Article 17 of the UNCITRAL Model law on Electronic Commerce.

⁶ Op Cit. Indirra Carr pg. 109

⁷ Article 1 UNCITRAL Model law on Electronic Commerce

⁸ See also Op Cit. Indirra Carr pg 110

⁹ See generally, Article 16 UNCITRAL Model Law

¹⁰ The Article provides that, "if a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

¹¹ See Indira Carr at page 116

13. CONCLUSION

With the increasing adoption of the Internet and electronic communication systems the role of multimodal transport as the intermediary between buyer and seller is changing, and the industry has to change with it.¹ The fact that there is no single International Legislation regulating Multimodal Businesses, and the fact that the online world coupled with its disadvantages has no territorial jurisdiction or geographical boundaries might make multimodal transport business seem complex, however these will not prevent the efficiency of the business. The incorporation of the discussed rules and conventions, in its contracts will enable the efficient and effective organization of a company's multimodal business contracts. Today, parties can also enter into contracts for carriage of goods using electronic medium and the use of such medium will not render such contracts unenforceable. In addition to taking out insurance to insure various aspects of its business, a company should further have a standard contract regulating its transactions which should include the various issues discussed in this paper. A company may also consider taking membership with the International Multimodal Transport Association (IMMTA)² where all individuals, institutions and corporations interested in the promotion of trade, multimodal transport and logistics are eligible and welcome to become Members.

Multimodal transport contracts are complex especially in the areas of liabilities and compensation as examined in the body of this article. Hence a company must be aware of its duties, rights and liabilities under the different unimodal and multimodal laws as well as their applicability with regard to multimodal transport contracts in an electronic commerce era. Achieving efficient borderless transportation of goods and speedy information flows along the international transports logistics chain should become a key objective towards a competitive and resource efficient multimodal system. It is only in embedding electronic commerce in international multimodal transport business that this can be achieved in the contemporary international business environment.³

¹ United Nations Economic Commission for Africa 'Issues on Multimodal Transport Development in Africa' 2003

² See The International MultiModal Transport Association (IMMTA). Available from
<http://www.immta.org/uploads/Eligibility_and_Membership_Application_Form_new.pdf> Accessed 16/12/14

³ European Commission E-Freight Initiatives 05/2013 Available on : http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_move_001_e_freight.pdf Accessed 16/12/14

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