

Carrier's Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU

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1. Introduction

The world of transport has changed considerably over the last few decades. International transportation of goods is increasingly carried out on a door-to-door basis, involving more than one mode of transportation. This has been possible due to the growth of containerized transportation.¹ The increasing use of containers,² together with technological developments improving the system for transferring cargo between different modes, has considerably facilitated the development of multimodal transport. Much of international trade is now carried out on a door-to-door basis involving different modes of transport under one contract.

Multimodal transport is the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract.³ In addition to multimodal or combined transport, there are several other phrases such as intermodal, house-to-house, and door-to-door transport to describe such transport.⁴ Comparing to the unimodal, through or other types of contract for the carriage of goods, the basic features of a multimodal transport are: (1) two or more modes of transport are used for the carriage of goods; (2) the entire carriage is under one single contract which does not exclude the existence of any subcontracts; (3) one party, usually called multimodal transport operator, is responsible for the entire carriage.

The attempts to establishing a uniform legal regime to ensure development of international multimodal transport at international level started by the International Institute for the Unification of Private Law (UNIDROIT) in the 1930s. This area of law was considered more and more important with the introduction and development of containerization of cargoes.⁵ To correspond to this commercial reality, efforts to establish a legal regime for multimodal transport were further made by the Comité Maritime International (CMI) and a "Convention on Combined Transport – Tokyo Rules" was drafted in 1969. Although the rules in the previous drafted conventions were reflected in standard bills of lading such as the "Uniform Rules for the Combined Transport Document" of the International Chamber of Commerce (ICC) and despite other efforts on an international level, it was not until 1980 that the United Nations Convention on International Multimodal Transport of Goods was adopted (hereinafter referred to as the MT Convention). However, the MT Convention has not succeeded in attracting sufficient ratification to enter into force.⁶ When it became obvious

¹ UNCTAD, "Multimodal Transport: The Feasibility of an International Legal Instrument" *UNCTAD/SDTE/TLB/2003/1*, 13 January 2003, p.4.

² Ralph De Wit, *Multimodal Transport* (1995), p.4: "The so-called container revolution has altered the transport of goods enormously."

³ The definition from the UN Convention on International Multimodal Transport of Goods, *UN Doc.TD/MT/CONF/16*, reprinted in 19 *ILM* 938 (1980), done at Geneva on 24 May 1980 (the Multimodal Convention), which offers the definition of "international multimodal transport".

⁴ William Tetley, *Marine Cargo Claims*, 4th ed., Vol.2. 2008, p. 2257; John F. Wilson, *Carriage of Goods by Sea*, 6th ed., 2008, p.246; Thomas J. Schoenbaum, *Admiralty and Maritime Law*, Vol.1, 4th ed., 2007 p.589.

⁵ United Nations Conference on Trade and Development, *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, p.22.

⁶ For a general introduction of historical review see the UN Document: *IMCTRAD/SDTE/TLB/2*, "Implementation of Multimodal Transport", report prepared by the UNCTAD secretariat, p.9. United Nations Conference on Trade and

that MT Convention was not likely to ever come into force, the United Nations Conference on Trade and Development (UNCTAD) secretariat established a joint working with the ICC to elaborate model provisions for multimodal transport documents.⁷ The Joint Working Group completed the preparation of the UNCTAD/ICC Rules for Multimodal Transport Documents in 1991, and the Rules were entered into force in 1992.⁸ The UNCTAD/ICC Rules have similar features that the MT Convention has such as basis of liability while distinguishing themselves by providing for a network system in terms of liability and, like in the Hague Rules, permitting nautical fault and fire exemptions for loss occurring in a sea-leg. The UNCTAD/ICC Rules have widely been accepted by the industry. Standard forms of contract such as the FIATA Bill of Lading 1992 and MULTIDOC- 95 incorporated them. However as the UNCTAD/ICC Rules are contractual in nature, their role is limited.⁹

In order to solve multimodal transport problems, two different models for liability are used: the uniform liability and the network liability system. Under the uniform system, a single liability regime applies regardless of the leg in which the loss or damage occurred.¹⁰ Under the network system, on the other hand, different rules depending on the leg when the loss or damage occurred apply.¹¹ Each system has its own advantages and disadvantages. The advantage of the uniform system is that it is simple and transparent for all parties involved in the transport.¹² However, the disadvantage of this system for the contracting carrier is that his right of recourse to his subcontractor will vary depending on applicable unimodal regime.¹³ On the other hand, the advantage of a network liability system for the multimodal transport operator is that his liability to the shipper will not exceed the liability of the performing carrier. However, this system is detrimental to the shipper since, in the container trade, loss is often concealed as the container is sealed upon receipt and is not open until delivery. Therefore, the damage may not be localized. Even if the damage is identified, it may occur gradually or span on two legs. As a result, any network system must be supplemented by default rules; otherwise, there may be a gap in terms of liability between the applications of the unimodal conventions.¹⁴

The past decades have witnessed the fast development of international trade and modern transport in China. Like in the most other trading countries in the world, the legal problems surrounding multimodal transport continuously emerge. Even if cargoes are transported in a much safer way nowadays, they are frequently damaged or lost during transport. When cargo is damaged or lost, the owner of the cargo must suffer a loss. This paper aims to explore carrier's liability in multimodal transport contract in China and compare the main issues with the counterparts in the US and EU.

2. Carrier's Liability and Cargo Claims under Multimodal Transport Contracts in China

A. An Overview of the Existing Multimodal Transport Legislations in China

It is very likely that a multimodal transportation contract involves foreign interests. According to article 145 of the Civil Law and article 126 of the Contract Law, the parties to a contract involving foreign interests may

Development, *The Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and The Multimodal Transport Convention*, p.27: "... At the end of the 1980s it became obvious that the MT Convention would not enter into force in the immediate future. The main reason cited for this was that as long as the Hamburg Rules were not in force, there was no point in bringing the MT Convention into force since this would create too big a gap between the liability of the MT operator and that of the subcontracting ocean carrier who would still be liable only under "the Hague Rules or the Hague –Visby Rules."

⁷ Mahin Faghfour, "International Regulation of Liability for Multimodal Transport," 5 *WMU* 95, p.99.

⁸ UNCTAD/ICC, *Rules for Multimodal Transport Documents*, Publication No:481, 1992.

⁹ Christopher Hancock, "Multimodal Transport and The New UN Convention on The Carriage of Goods," 14 *JIML* 484, p 486.

¹⁰ Hancock, p 488; Vibe Ulfbeck, "Multimodal Transports in the United States and Europe - Global or Regional Liability Rules?" 34 *Tul. Mar. L. J.* 37, p. 46.

¹¹ *Id.* ; *Id.*

¹² Hancock ,p. 489.

¹³ *Id.*; Ulfbeck, p. 47.

¹⁴ *Id.*

select the applicable law for resolution of a contractual dispute, except as otherwise stipulated by law. The applicable law includes domestic laws and international conventions. At this juncture, it is worthy to mention there are a number of unimodal transportation conventions and China has ratified some of them which include “The Agreement on International Railroad through Transport of Goods, 1951”, “The Warsaw Convention” and its amendment of the “Montreal Convention, 1999”. If the parties in the case have not made any choice, the law of the country to which the contract with the closest connection shall apply.¹⁵ If a multimodal transport contract does not involve foreign interests, or the parties select to apply Chinese law, then the relevant laws and regulations in China will apply. The following will be focused on the exploration of the carrier’s liability under multimodal transport contracts and the related cargo claims, where there is no foreign element is involved or the contracting parties select to apply Chinese law. The legal framework for regulating multimodal transport contracts in China consists of laws and regulations.

3. Maritime Code 1993, Chapter IV, Section 8: Special Provisions Regarding Multimodal Transport Contract

Unlike the US and the most EU countries, China has its own Maritime Code which took almost 40 years and went through more than 20 drafts for its preparation. It came into force in 1993 and its many aspects, when drafting, were largely modeled on the Hague Rules, the Hague/Visby Rules, the Hamburg Rules, and other international conventions. The total of 278 articles is divided into 15 Chapters. Chapter IV, Section 8 is devoted to regulating multimodal transport contract.

Article 102 of Chapter IV provides a specific definition of multimodal transport contract. It is “a contract under which the multimodal transport operator undertakes to transport the goods, against the payment of freight for the entire transport, from the place where the goods were received in his charge to destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage.” It is, thus, clear that the provisions in this Chapter only apply to multimodal transport contract including a sea leg. This definition should be read in conjunction with the definition of the term “multimodal transport operator” provided in the same article which describes the multimodal transport operator as “...the person who has entered into a multimodal transport contract with the shipper either by himself or by another person acting on his behalf.” Consequently, China takes the contractual approach like in Europe by regulating multimodal contracts.

Section 8 comprises of five articles. Besides the definitions given in Article 102, it lays down the provisions of “period of responsibility”, “liability of the multimodal transport operator” and other important matters.

4. Contract Law 1999

In 1993, the Standing Committee of the National People’s Congress (“NPC”) started to draft the contract law. As a result, five drafts were submitted separately to the Legislative Affairs Commission of the Standing Committee of the NPC in the following years. Finally the Contract Law was promulgated in 1999.

The Contract Law consists of 23 Chapters and 428 Articles. It is divided into three parts: namely, General Provisions, Specific Provisions and Supplementary Provisions. Among them, the Specific Provisions deal with 15 types of contracts which include contracts for transportation. According to Article 288, a contract of transportation is “...a contract whereby the carrier carries passengers or goods from the starting place of carriage to the agreed destination, and the passenger or the shipper or the consignee pays for the ticket-fare or freight.” Obviously, this definition includes contract of carriage of goods and contract of carriage of passengers. For contract of carriage of goods, there is a special section - Section 4 – dedicated to contracts for multimodal transportation. It, however, does not provide an express definition of multimodal transportation.

In general, the carrier carrying goods shall: (1) accept the normal and reasonable carriage request of a shipper; (2) carry the goods safely to the agreed destination within the agreed time period or within a reasonable time

¹⁵ The Contract Law, Art.126.

period; (3) carry the goods to the agreed destination via the agreed or customary carriage route. Those obligations are equally applicable to a multimodal transportation business operator.

5. Regulations Governing International Multimodal Transport of Goods by Containers, 1997 (hereinafter referred to as the Regulations)

The Regulations, issued by Ministries of Communication and of Railways, came into effect on 1 October 1997. The Rules contained in the Regulations apply mandatorily to the international multimodal transport of goods by containers by waterway, highway and rail from a place in one country at which the international containers are taken in charge by the international multimodal transport operator to a designated place of delivery located in a different country. But they do not cover the international multimodal transport of goods by containers by air.¹⁶

The Regulations include 8 chapters and 43 articles. It regulates international multimodal transport of goods by containers from different aspects which include the administration of the multimodal transport, documents, the liabilities of multimodal transport operator, claims etc.

6. The Interactions between the Laws and Regulations

Most of multimodal transport involves a sea carriage stage, but it also happens that some multimodal transport contracts for carriage of goods do not include a sea leg. According to Article 123 of Chapter 8 of the Contract Law, if there are provisions as otherwise provided for a multimodal transport contracts in other laws, such provisions shall be obeyed.¹⁷ Thus, the multimodal transport of goods involving a sea leg will be governed by the Maritime Code. Since there is no law specifically dealing with multimodal transportation which merely takes place among the modes of rail, road or civil aviation, the multimodal transport without a sea leg will be subject to the provisions of the Section 4, Chapter 17 of the Contract Law. The Regulations are merely rules and regulations implementing laws promulgated by legislative bodies with a view to strengthening and controlling the international multimodal transport of goods by containers, therefore they do not fall within the ambit of “other laws” referred to in article 123 of the Contract Law. As a consequence, any provisions therein contrary to those of the Maritime Code or the Contract Law will be considered null and void.

B. Cargo Claims

1. Whom to Sue?

Under a multimodal transport contract, the cargoes must be placed in the containers and carried by different means of transport such as ships, railway wagons or aircrafts from place of departure to place of final destination, without being unpacked for sorting or verification when being transferred from one mode of transportation to another. If any loss of, or damage to the goods happened, cargo interests would be better off if they can pursue one single operator who would be responsible for the entire transport, rather than against several carriers involved.

According to Article 103 of the Maritime Code, the period of liability of the multimodal transport operator covers “the period from the time he takes the goods in his charge to the time of their delivery.” Clearly, the period of operator’s responsibility covers the entire carriage. The Maritime Code also allows the multimodal transport operator to enter into separate contracts with unimodal carriers with regard to different sections of the transport under the multimodal transportation contract. However, in the later case, the responsibility for the multimodal transportation carrier with respect to the entire transport will remain unaffected.¹⁸

The Contract Law adopts the similar rule to regulate the liability of multimodal transportation business operator. It is possible for the multimodal transportation business operator to enter into agreements with the

¹⁶ The Regulations, Arts.2 & 4.

¹⁷ The Contract Law, Art.123.

¹⁸ The Maritime Code, Art. 104.

unimodal carriers participating with multimodal transportation on their respective responsibilities for different sections under the multimodal transportation contract.¹⁹ But it is clear from Article 317 that the responsibility of the multimodal transport business operator with respect to entire transport will remain unaffected.

It is very likely that the multimodal transport operator will make contracts with other parties in respect of various parts of the transport; while the cargo claimants are not party to those sub-contract. It is, however, clear that the multimodal transport operator undertakes to transport the goods for the entire carriage. Therefore, cargo interests may only claim against the multimodal transport operator when any loss, damage or delay is incurred to the goods.

The question may arise as to the possibility for the cargo interests to claim against the sub-contractor(s). If the multimodal transport operator himself may not be worth suing, can the cargo interest sue the sub-contractor(s)? It depends on the fact whether multimodal transport operator signs the contract with the sub-contractor for the cargo interests as an agent or principal. In the former case, a direct contractual relationship between cargo interests and sub-contractor may exist and cargo interests can sue the sub-contractor according to the terms in the carriage contract. The claimant may, however, have the alternative to claim against the sub-carrier in tort.

2. Law and Jurisdiction

Cargo interests must ensure the proper applicable law of the contract. Like in the US and the EU, the Maritime Code, the Contract Law and the Regulations also adopt a system of “network” liability. Under the “network” system, the liability of the multimodal transport operator, i.e. damage or loss known to have occurred during a particular section of transport, is determined by reference to the international convention or national law applicable to that particular section of transport.²⁰ It follows that, for example, if there is loss or damage occurring during the carriage by sea, the operator’s liability must thus be subject to the relevant international or domestic law on the sea carriage.²¹ It is possible that more than two conventions or domestic laws may apply to different parts of a multimodal transport.²² If, however, the loss or damage cannot be localized, the Maritime Code will apply to determine particular issues on liability or limitation of liability.

Section 4 of chapter 17 of the Contract Law will apply if the multimodal transportation carriage does not involve a sea leg. Like in the Maritime Code, it adopts a network system of liability.²³ Accordingly, if it can be established at which stage of transport the loss or damage took place, then the rules and regulations applicable to that specific mode of transport will be applied in determining the liability of the multimodal transportation business operator. In case of non-localized damage, i.e. where it is not known at which leg of carriage the loss or damage occurred, the provisions of Contract Law will govern the liability of the multimodal transportation business operator.

The Regulations apply mandatorily only if any provisions therein are not contrary to those of the Maritime Code or the Contract Law. The Regulations do not cover the international multimodal transport of goods by containers by air.

Cargo interests must also ensure the legal proceedings are commenced in the correct jurisdiction. An international convention, if applicable, may normally outline the relevant provisions on the subject. However, cargo interests may have to choose among different jurisdictions, or they may be faced with the possibility to sue against the defendant in a jurisdiction which is not favourable to them. In any case, it is important for the

¹⁹ The Contract Law, Arts 317& 318.

²⁰ The Maritime Code, Art. 105.

²¹ Mo, John Shijian, *Shipping Law in China* (1999), p.130.

²² Ibid.

²³ The Contract Law, Art. 321: “ Where the damage to, destruction or loss of goods occurs in a specific section of the multimodal transportation, the liability of the multimodal transportation business operator for damages and the limit thereof shall be governed by the relevant laws in the specific model of transportation used in the specific section. Where the section of transportation in which the damage or destruction or loss occurred cannot be identified, the liability for damages shall be governed by the provisions of this chapter.”

cargo interests to bring the claim in the right jurisdiction which is most advantageous to them. If the claim is brought in China, the Civil Procedure Law²⁴ and Special Maritime Procedure Law²⁵ contains rules on jurisdiction over cases on multimodal transport contract.

3. Proving the Loss

To effectively bring his claim, the cargo interests must prove his loss. This essentially means that the claimant must establish that the multimodal transport operator has failed to deliver what he had contracted to transport. For any type of claim, it is important for the cargo interests to give notice of loss or damage within the stipulated time period. Where the multimodal transport includes a sea leg, according to article 81 of the Maritime Code, notice of loss or damage must, failing joint inspection when the cargo interest receives the goods and where the loss of or damage to the goods is not apparent, be given in writing to the carrier. The notice of loss or damage must be given in writing within seven consecutive days from the next day of the delivery of the goods, or, in the case of containerized goods, within 15 days from the next day of the delivery of the goods. If the cargo interest fails to give such a notice, “such delivery shall be deemed to be prima facie evidence of the delivery of the goods by the carrier as described in the transport documents and of the apparent good order and condition of such goods.”²⁶ Where the Contract Law applies, the carrier is *prima facie* deemed to have delivered the goods in conformity with the statement indicated in the carriage contract and if the consignee fails to make any claim within the agreed time limit or within a reasonable time limit.²⁷ There is no further explanation as to the meaning of “claim” in the article, but it may be construed as “notice of loss or damage” in the appropriate context.

A multimodal transportation business operator issues multimodal transportation documents upon receiving the goods from the shipper. In the document, the operator states the quantity and apparent conditions of the goods received. In case of loss, the claimant is required to prove that the goods discharged were not the goods stated to have been received for transportation, comparing the difference between the discharge and the loading point.

4. Proving the Carrier's Breach

In almost all cases, it is not sufficient if the claimant can only prove a *prima facie* case as stated in the above section. For the claimant to succeed in the end, he needs to prove that its loss was the direct result of a breach by the carrier of the obligations as agreed in the contract or by law.

Chapter IV of the Maritime Code applies to determine the basis and the extent of liability of the multimodal transport operator in case of non-localized damage when a sea leg is involved in a multimodal transport. The basis of the liability of the carrier for loss or damage to goods is in effect similar to that of The Hague and Hague/Visby Rules. The carrier is required before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship. He is bound to “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.”

According to the principle established in Article 321 of the Contract Law, the liability of the multimodal transportation business operator shall be dealt with under Chapter 17. Article 311 of the Contract Law provides that: “A carrier shall be liable for damages to or destruction of goods during the period of carriage unless the carrier proves that the damage to or destruction of goods is caused by force majeure, by inherent

²⁴ The Civil Procedure Law, Art. 28: “A lawsuit brought for a dispute over transportation contract via...combined transportation shall be under the jurisdiction of the people’s court located in the place of the departure or the destination, or where the defendant has its domicile.”

²⁵ The Maritime Procedural Law, Art. 6(2): “A lawsuit brought on maritime transportation contract may be, in addition to the provisions of Art. 28 of the Civil Procedure Law of the People’s Republic of China, under jurisdiction of the maritime court of the place of its port of transshipment.”

²⁶ The Maritime Code, Art. 81.

²⁷ The Contract Law, Art. 310.

natural character of the goods, by reasonable loss, or by the fault on the part of the shipper or consignee.” For concealed damage, the Contract Law provides for the strict liability.

If the Regulations are applicable, Article 27(1) states the principle that the multimodal transport operator “shall be liable for loss of or damage to or delay in delivery of the goods that happened while the goods were in his charge.” Article 32 of the Regulations ensures that contractual agreements do not override the provisions of the law concerning the liability of the multimodal transport operator. Here, the “law” mainly refers to the Maritime Law and the Contract Law in China.

Delay in delivery occurs not infrequently in multimodal transport. The operator is held liable for delay in delivery of the goods under the Maritime Code, Contract Law and the Regulations.²⁸ The operator is liable for economic loss arising from delay in delivery even without actual loss of, or damage to goods, unless such economic losses occurred from causes for which the carrier was not liable. Provisions are also made for conversion of delay into total loss, for instance, the person entitled to make a claim for the loss of goods may treat the goods as lost if they are not delivered within 60 days from the date agreed for delivery.²⁹

5. Excluding and Limiting the Carrier's Liability

The carrier will seek to deny a breach of any duty owed towards the claimant, and the carrier could then try to extinguish the claim either by arguing that the claim has been time-barred or by pleading one of the exceptions to liability allowed by the applicable law. But since the multimodal transportation operator may enter into separate contracts with unimodal carriers with regard to different sections of the transport and a network system of liability is adopted to apply to multimodal transport contract in China, the provisions of the relevant laws and regulations govern the liability exceptions and limitation of the multimodal transportation operator.

Under the Maritime Law, for example, a multimodal transport operator will be entitled to rely on the exceptions which include nautical fault and fire provided in article 51, which is mainly based on the Hague Rules exceptions to relieve himself from liability for loss or damage to goods. With respect to the limitation of liability, if loss of or damage to the goods has occurred in a certain section of the transport, the provisions of the relevant laws and regulations governing the specific section of the multimodal transport shall be applicable.³⁰ For non-localized loss or damage, the rules contained in Maritime Code will apply. Accordingly, carrier is entitled to limit his liability for loss of, or damage to the goods to an amount equivalent to 666,67SDR per package or other shipping unit, or 2 SDR per kilogram of the gross weight of the goods lost or damaged, whichever is higher, unless the nature and value of the goods have been declared by the shipper and inserted in the bill of lading, or a higher limit has been agreed upon between the carrier and the shipper.³¹ The carrier, however, will lose the right to limit his liability if it is proved that the loss, damage in delivery resulted from his act or omission done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss or damage would probably result.³²

Where the Contract Law applies, the amount of damages for the damage to or destruction of the goods is ascertained according to different rules. If there is such an agreement, the amount of damages shall be the amount as agreed on the contract by the parties. Where there is no agreement or the agreement is unclear, the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied. Concerning the amount of damages, the Contract Law also provides a possibility that “where, after the contract becomes effective, there is no agreement in the contract between the parties on the terms regarding quality, price or remuneration and place of performance, etc. or such agreement is unclear, the parties may agree upon supplementary terms through consultation. In case of a failure in doing so, the terms shall be determined from the context of relevant clauses of the contract or by transaction

²⁸ For example, the Maritime Code, Art. 50, the Regulations, Art. 27.

²⁹ The Maritime Code, Art. 50, the Regulations, Art. 27(2).

³⁰ The Maritime Code, Art. 105.

³¹ The Maritime Code, Art. 59.

³² The Maritime Code, Art. 59.

practices.”³³ In addition, where the laws or administrative regulations stipulate otherwise on the method of calculation of damages and on the ceiling of the amount of damages, those provisions shall be followed.

The Regulations also provide applicable rules for limitation of liability. The multimodal transport operator is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from his act and omission done with the intent to cause such loss, damage or delay, or recklessly and with the knowledge that such loss, damage or delay would probably result.³⁴

The carrier’s liability for the economic loss resulting from delay in delivery of the goods is also limited. It is normally limited to an amount equivalent to the freight payable for the goods so delayed.³⁵ The carrier, however, is not entitled to limit his liability if it is proved that the delay in delivery resulted from his act or omission done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.³⁶

The shipper is held liable under certain circumstances. For example, according to Article 320 of the Contract Law, the shipper is liable for any loss suffered by multimodal transportation business operator as a result of his fault, even if he has transferred the transportation document to other parties.

It is possible that the claim is time barred. For example, according to Article 34(1) of the Regulations, where the multimodal transport includes a sea leg, any action against the multimodal transport operator shall be time-barred if proceedings have not been instituted within a period of one year. This period is extended to two years where there is no sea carriage involved and an action is brought against the multimodal transport operator under the General Rules of Civil Law. The limitation period commences from the day following which the goods were delivered or should have been delivered by the multimodal transport operator.³⁷

7. Carrier’s Liability under Multimodal Transport Contracts in the United States

In the United States, different statutory regimes apply to different modes of transport. The Hague Rules were incorporated into domestic law with the enactment of the Carriage of Goods by Sea Act (COGSA) in 1936.³⁸ The COGSA governs ocean common carriage to and from the United States. COGSA applies tackle-to-tackle, i.e. from the time the cargo is being loaded to the time when it is discharged from the vessel. The intent of the drafters of the Hague Rules was that claims arising outside tackle-to-tackle period should be governed by national law or by contractual agreement between the parties.³⁹ Accordingly, COGSA allows the parties to extend the application of COGSA. If the parties do not extend the application by agreement, the Harter Act applies to the period before loading and after discharge. The Harter Act governs contracts of carriage between ports of the United States and inland water carriage.⁴⁰ Rail transport, on the other hand, is governed by the Carmack Amendment. In order to find who is liable under the multimodal contract, several issues must be resolved.

A. Issuance of Through Bill of Lading

Where a multimodal transport is at issue, ocean carrier may issue an international through bill of lading. Such a bill of lading may effectively serve as a receipt, evidence of the contract, and as a document of title.⁴¹ A bill of lading may be subjected to the Hague-Visby Rules or COGSA for the entire period while

³³ The Contract Law, Art. 61.

³⁴ The Regulations, Art. 31.

³⁵ The Maritime Code, Art. 57.

³⁶ The Maritime Code, Art. 59.

³⁷ The Regulations, Art. 34(2).

³⁸ 46 U.S.C. App. § 1312.

³⁹ Michael E. Crowley, “Admiralty Law Institute Symposium: The Uniqueness of Admiralty and Maritime Law: The Limited Scope of the Cargo Liability Regime Covering Carriage by Sea: The Multimodal Problem,” 79 *Tul. L. Rev.* 1461, p.1471.

⁴⁰ 46 U.S.C. App. § 190 etc.

⁴¹ Schoenbaum, p. 595.

the goods are in the custody of the carrier, including inland transport, by inserting a clause paramount. In this case the intent of the parties must be properly and clearly expressed in the through bill of lading.⁴²

B. Applicable Law

In principle, the facts of the case decide what law to apply. However, there are some other principles applicable to multimodal cases. As mentioned above, the COGSA compulsorily applies during the period from the time the goods are loaded on the ship and until the time when they are discharged from the ship; whereas the Harter Act compulsorily applies outside this period while the goods are in the custody of the carrier.⁴³ However, the application of Harter Act does not include inland transport stage.⁴⁴ Besides, the compulsory application of COGSA or Harter Act, COGSA and Hague Rules specifically allow parties of a carriage contract to extend COGSA, the Harter Act, or any other limitation of liability regime to shoreside contractors such as stevedores, terminal operators, warehousemen, and inland carriers.⁴⁵ In other words, this is done either by the Clause Paramount which extends application of COGSA beyond the time goods are on the vessel or by the Himalaya Clause which extends the benefits of the carrier's defenses and liability limits to shore side third parties.⁴⁶

On the other hand, the Congress enacted the Carmack Amendment as part of the former Interstate Commerce Act in 1906.⁴⁷ Originally, the Carmack Amendment applied only to rail carriers and only to domestic interstate carriage.⁴⁸ It was extended to trade with territories and adjacent countries in 1915, and to road carriage in 1935.⁴⁹ The Carmack Amendment applies to carrier that is subject to jurisdiction of the Surface Transport Board. Accordingly, 49 U.S.C § 10501 (a) provides that:

- (1) *Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—*
 - (A) *only by railroad; or*
 - (B) *by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.*
- 2) *Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—*
 - (A) *a State and a place in the same or another State as part of the interstate rail network;*
 - (B) *a State and a place in a territory or possession of the United States;*
 - (C) *a territory or possession of the United States and a place in another such territory or possession;*
 - (D) *a territory or possession of the United States and another place in the same territory or possession;*
 - (E) *the United States and another place in the United States through a foreign country; or*
 - (F) *the United States and a place in a foreign country.*

⁴² Schoenbaum, p.596.

⁴³ Schoenbaum, p.597, 649 ff. Before Congress enacted COGSA in 1936, Harter Act governed ocean carrier's liability for port-to-port carriage within the United States. 46 U.S.C. §30702 (2000).

⁴⁴ Schoenbaum, p.597; David W. Robertson / Michael F. Sturley, "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits," 32 *Tul. Mar. L. J.* 493, 526

⁴⁵ COGSA § 1307 Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Hague Rules Art.7 " Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea."

⁴⁶ Crowley, p. 1471.

⁴⁷ *Id.* p. 1464.

⁴⁸ Hepburn Act § 7, 34 Stat. 595 (1906); Michael F. Sturley, "Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo," 40 *J. Mar. L. & Com.* 1, 3 and fn. 12 there.

⁴⁹ Sturley, "Maritime Cases About Train Wrecks," p, 3 and fns.13,14.

It is to be stressed that the Carmack Amendment applies to the inland *carrier* rather than *contract of carriage*:⁵⁰ Both 49 U.S.C. § 11706 and § 14706 read that "...[T]hat rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading...." and "That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading...." respectively. It is clear from this wording is that the Carmack Amendment's basis is the carrier.

Consequently, the court may apply either the provisions of bill of lading⁵¹ or the Carmack Amendment if the parties do not elect to apply COGSA, Harter Act or any other liability regime to the leg that is outside the compulsory application of the COGSA or Harter Act.⁵²

Moreover, a through bill of lading may provide that the liability of carriers is based on the network system. In this case, each carrier's liability will be determined in accordance with the leg that it performs.

Application of COGSA to the Inland Leg

In order to determine if maritime law is applicable to the inland leg of multimodal carriage, one must ascertain the nature of the contract first. Generally, the rail or road carriage is non-maritime whereas the ocean carriage is maritime in nature. If inland and ocean legs of the carriage were covered by separate contracts, maritime law will then be inapplicable. Because, as a general rule, admiralty jurisdiction in a contract case arises only when the subject-matter of the contract is *purely* or *wholly* maritime in nature.⁵³ Until recently, "mixed" contracts, which involve obligations for both sea and land carriage, such as a multimodal bill of lading, were considered to fall outside a federal court's admiralty jurisdiction.⁵⁴

However, in 2004, the Supreme Court in *Norfolk Southern Railway Company v. James N. Kirby*⁵⁵ ruled that: "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce--and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage."⁵⁶ Very recently, Supreme Court reiterated this view in *Kawasaki Kisen Kaisha Ltd., et.al v. Regal-Beloit Corp*⁵⁷.

C. Application of the Carmack Amendment to the multimodal transport contracts

Whether the Carmack Amendment is applicable to the inland leg of multimodal transport is in dispute.⁵⁸ Eleventh Circuit establishes a rule that when a shipment of foreign goods is sent to the United States with the intention that it comes to final rest at a specific destination beyond its port of discharge, then the domestic leg of the journey (from the port of discharge to the intended destination) will be subject to the Carmack Amendment as long as the domestic leg is covered by separate bill or bills of lading.⁵⁹

The other courts, however, have applied the Carmack Amendment to inland leg of multimodal transports by relying on the plain language of the statute. In other words, they applied the Carmack Amendment to a single

⁵⁰ Vibe Ulfbeck, "Multimodal Transports in the United States and Europe - Global or Regional Liability Rules?" 34 *Tul. Mar. L. J.* 37, 44.

⁵¹ *Commercial Union Ins. Co. v. M/V Bremen Express* 16 F.Supp. 2nd 403, 1999 *AMC* 2002 (S.D.N.Y 1998).

⁵² Schoenbaum, p.598.

⁵³ *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 555-56, 2001 *AMC* 25 (2d Cir. 2000) at 12; Sturley, p. 6 and fn.27; See generally Schoenbaum, p.130 ff.

⁵⁴ *Id.* at 13; *Id.*, p. 6.

⁵⁵ 543 U.S. 14

⁵⁶ 543 U.S. at 27.

⁵⁷ Syllabus No. 08-1553. [Not reported yet. Order list of states as 561 U.S. ____ (2010)].

⁵⁸ Schoenbaum, p. 598; Crowley, p.1485.

⁵⁹ *Swift Textiles, Inc. V. Watkins Motor Lines, Inc.* 799 F.2d. 697, 701.

bill of lading to the extent that the shipment ran beyond the dominion of COGSA and the Harter Act.⁶⁰ In other words, if the parties to a bill of lading do not extend COGSA or the Harter Act to inland transport, liability under the multimodal transport will be determined according to COGSA, Harter Act and the Carmack Amendment respectively depending on the leg where damage occurred.⁶¹

D. Application of a State Law to Inland Carriage

If the court rejects admiralty jurisdiction, state law may apply. In *SS "Ming Prosperity"*⁶², the cargo was shipped from Hong Kong to Los Angeles on ship and from Los Angeles to New York by rail. The cargo was destroyed in a train derailment and caught fire. The court held that there was no admiralty jurisdiction because the dispute involved a non-maritime obligation that could not be severed from the maritime obligation and the train derailment was not incidental to the maritime contract.⁶³ In the absence of maritime jurisdiction, the claim was governed by New York law, which was the place of delivery, the importer's residence, and location of the business injury.⁶⁴

E. Application of Foreign Law or International Convention

Moreover, in case of loss or damage occurring in a foreign country, an international convention or foreign law may be applied.⁶⁵ In *Hartford Fire Insurance Co. V. Orient Overseas Containers Lines*⁶⁶, a through bill of lading for the shipment of a container of 301 packages of bicycles and bicycle framesets from Oconomowoc, Wisconsin to Spijkenisse, The Netherlands was issued.⁶⁷ The container was picked up in Oconomowoc and transported by truck to Chicago. From Chicago, the container was moved by rail to Montreal, Canada, where it was loaded onto defendants' vessel, the M/V OOCL Bravery.⁶⁸ Defendants transported the container by sea from Montreal to Antwerp, Belgium, and then discharged it to a participating carrier who was supposed to transport it by truck to the consignee's premises in Spijkenisse.⁶⁹ Defendants had selected DeBrock Gebr. Transport, N.V. ("DeBrock") as their trucker between Antwerp and inland destinations in Europe, but DeBrock subcontracted with N.V. Groeninghe ("Groeninghe") to transport said container from Antwerp to Spijkenisse.⁷⁰ A Groeninghe truck picked up the container from defendants' ship at Antwerp.⁷¹ Later on the same evening, thieves stole the truck, together with the container of bicycles, after the truck had been left on a public road without any supervision or guard near the driver's domicile in Deurne, Belgium.⁷² The police was able to track down approximately 30 of 301 stolen packages, but the remainder was never recovered. Plaintiff filed a claim for the value of the missing packages.⁷³

The district court concluded that the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.S. § 1300 et seq., governed the entire intermodal carriage from Wisconsin to The Netherlands and, therefore, that COGSA's provision on limitation of liability applied even though the cargo was lost while being transported by truck in

⁶⁰ *Neptune Orient Lines Ltd. v. Burlington Northern and Santa Fe Railway Company* 213 F.3d 1118; 2000 U.S. App. LEXIS 11452; 2000 AMC 1785; *If the final intended destination at the time the shipment begins is another state, the Carmack Amendment, 49 U.S.C.S. § 14706, applies throughout the shipment, even as to a carrier that is only responsible for an intrastate leg of the shipment. Similarly, if the final intended destination at the time the shipment begins is a foreign nation, the Carmack Amendment applies throughout the entire portion of the shipment taking place within the United States, including intrastate legs of the shipment.* *Project Hope v. M/V Ibn Sina* 250 F.3d 67; 2001 AMC 1910.

⁶¹ Schoenbaum, p.598

⁶² 920 F. Supp. 416

⁶³ *Id* at 420.

⁶⁴ *Id* at 421.

⁶⁵ Schoenbaum, p.599.

⁶⁶ 230 F.3d 549.

⁶⁷ *Id* at 552.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id* at 553.

⁷³ *Id.*

Europe after having been discharge from the vessel. On appeal, the court first concluded that the bill of lading in this case involved land carriage that was more than “incidental” to sea carriage, thus placing this dispute outside of the court’s admiralty jurisdiction.⁷⁴ Next, the court found that the appropriate law to apply under the bill of lading with respect to the loss of goods in Belgium was the Convention on the Contract for the International Carriage of Goods by Road, 1956, not COGSA.⁷⁵

F. Network System in the United States

There is no statute in the United States implementing the network system. However, this does not mean that network system is not applied in the United States. As mentioned before many bill of ladings embody the network principle. The network system in the United States is understood in several different ways.

One way of explaining the system is that whereby the applicable law (i.e. COGSA or Carmack Amendment) travels with the cargo, each carriers’ liability is limited to the transport segment that it performs.⁷⁶ Accordingly, it is said that each carrier is potentially liable only for the part of the journey for which it was responsible.⁷⁷ This understanding of network system seems different than the way it is understood in Europe. Because this wording implies that it also deals with the liability of subcontracting carrier.⁷⁸

Another way the network liability system is understood is that the contracting carrier assumes the liability for entire transport, e.g. the contracting carrier extends its liability regime to cover all stages of the transport and subcontractors cover their own liability regimes.⁷⁹ It is obvious that this understanding of network system is disadvantageous for the contracting carrier as the recourse action against the subcontractor will be different from the one covering the entire transport.⁸⁰ That is to say while recourse action against to subcontractor will be determined in accordance with applicable law to the leg that subcontractor actually performs, contracting carrier’s liability for the whole transport period will be probably subject to totally different rules.

The third way the network system is understood in the United States is similar to European system. Accordingly, the contracting carrier assumes the liability for entire transport and its liability is determined in accordance with applicable rules of the leg where damages occurred.

8. Cargo Claim under Multimodal Transport Contracts in Europe

A. In General

Within Europe, the ocean carriage is regulated by Hague-Visby Rules or adapted version of these Rules; whereas in the United States international ocean carriage is governed by COGSA which is based on the Hague Rules. However, one can say that in general ocean carriage laws both in the U.S. and Europe are similar. On the other hand, the road carriage in Europe is governed by the Convention on the Contract for the International Carriage of Goods by Road (hereinafter referred to as the CMR)⁸¹; while rail carriage is governed by Convention concerning International Carriage by Rail 1980 CIM/COTIF⁸².

Both CMR and COTIF/CIM govern „contracts for carriage“ rather than „carriers“. This approach is considered to be a contractual approach and is explained being that these Conventions only regulate the relationship between carrier and shipper.⁸³

⁷⁴ *Id.* at 555-556.

⁷⁵ *Id.* at 558-559.

⁷⁶ Schoenbaum, p.599.

⁷⁷ *Id.*

⁷⁸ Ulfbeck, p.52.

⁷⁹ Draft COGSA 1999 includes this princible of network system. It is obvious that this system is adventageous.

⁸⁰ Ulfbeck, p.54.

⁸¹ Signed in Geneva in 1956. 55 States are the party to the Convention currently.

⁸² Signed in Bern 1980 and amended by the Vilnius Protocol of 3 June 1999 (1999 Protocol), which entered into force on 1 July 2006.

⁸³ Ulfbeck, p. 45.

There are two views explaining the multimodal contracts in Europe: „plurality of contracts“ and „*sui generis*“ contract.⁸⁴ According to *plurality of contracts*, multimodal transport contract contains several contracts for different modes of transport; thus subjecting the contracting carrier to different liability rules depending on the leg of the transport.⁸⁵ Following the *sui generis* contract view, on the other hand, multimodal transport contract is not regulated by the existing conventions; therefore some European states, such as Germany and the Netherlands, has enacted legislation on the multimodal transports.⁸⁶

B. Extending maritime law to the inland transport

European maritime law regime, based on the Hague Rules, covers the liability of the carrier on “tackle-to-tackle” basis. It is questionable if the maritime law regime can be extended to inland part. European Maritime law regime has no rule preventing the parties of the contract to extend the maritime law to the inland leg. Do CMR and COTIF/CIM have any such rule preventing the parties to extend maritime law to road or rail transport fall under their scope? First, under the CMR and COTIF/CIM, the liability of the carrier is stricter. Secondly, under these conventions, the extent of the limitation of liability is rather restricted. Thirdly, the CMR and COTIF/CIM are applicable to a specific type of unimodal transport while including provisions dealing with multimodal transport. Thus, if the multimodal contract falls under these provisions the parties cannot extend maritime liability regime to the inland leg.⁸⁷

The other question is how to qualify the multimodal contract between the carrier and shipper? The views on this issue are varying in Europe. In *Quantum Corp. Inc. v. Plane Trucking Ltd.*⁸⁸, an English case, goods were carried from Singapore to Paris by air and from Paris to Dublin by truck under a multimodal contract. The District court found that the CMR was not applicable to the liability of multimodal carrier; therefore, the multimodal carrier was not liable for the theft of the goods by the sub-carrier’s driver during the international road leg from Paris to Dublin. The Court of Appeal rejected the argument and held that in accordance with the general conditions of contract, Air France had the option to carry goods by road. When Air France chose to carry goods by road, the transport by road from Paris to Dublin was governed by the CMR. In conclusion, the scope of art.1 of CMR, which reads “...[T]his Convention shall apply to every contract for the carriage of goods by road”, was found broad enough to govern the case. Although this case does not involve an ocean carriage, it is highly significant in the field of multimodal transport. This case also has been highly criticized. The argument against was that a contract for the carriage of goods does not become a contract for the carriage of goods by road just because it allows for performance by road.⁸⁹ By contrast, a French court, a Belgium court, and the Danish Supreme Court have reached opposite results in cases whose facts were similar to facts in *Quantum Corp. Inc. v. Plane Trucking Ltd.* case.⁹⁰

It is to be noted that none of the cases discussed so far addresses the issue of what the qualifications for a multimodal contract are. As mentioned above, there are two views in Europe on this subject. Decision of the Court of Appeal in *Quantum Corp. Inc. v. Plane Trucking Ltd.* reflects “plurality of contracts” view, i.e. liability of the contracting carrier for inland leg of transport is governed by CMR.⁹¹ Thus, under the English law, extension of the maritime law to the inland leg would not be possible as inland leg of multimodal contract fall under the CMR. Accordingly, the answer to the question of whether maritime to be extended to inland leg will be different in Europe.

C. Application of the Inland Transport Conventions to Multimodal Transports

1. Multimodal Transport under CMR

⁸⁴ Ulfbeck, p.73.

⁸⁵ Ulfbeck, p.48.

⁸⁶ Ulfbeck, p.73-74.

⁸⁷ Ulfbeck, p.70.

⁸⁸ [2002] 2 Lloyd’s Rep. 25.

⁸⁹ Ulfbeck, p.73, fn. 163,164 and cases cited there.

⁹⁰ *Id.*

⁹¹ *Id.*

A reflection of contractual approach of CMR Art.1 is based on the contract which is explained in Art.1.1:

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries,..."

Furthermore in Art. 2, CMR sets out its multimodal aspect by providing that⁹²:

"1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the liability of the carrier by road shall be determined by this convention. ..."

According to this article, goods should not be unloaded from the road vehicle used on the previous stage when a new stage of the overall carriage started. In other words, the CMR applies when the entire vehicle loaded with goods or the goods and trailer are sent on by the other mode.⁹³ However, there are cases of transport where goods are loaded from both vehicle and trailer and put on a ship, regardless of contract governed by a separate contract or not.⁹⁴ The Court of Appeal in *Quantum Corp. Inc. v. Plane Trucking Ltd.* applied CMR by means of Art. 1 of CMR.⁹⁵ This is also the dominant approach employed by the Dutch courts.⁹⁶ By contrast, in Germany multimodal contracts do not enter the scope of the Art.1 of CMR; rather CMR applies to multimodal contracts by virtue of Art.2 or the National German Law, i.e. German Transport Law Reform Act sec.452.

2. Multimodal Transport under CIM/COTIF

Like the CMR Convention, CIM/COTIF 1999 has some multimodal aspects, According to Art.1:

*"§1 These Uniform Rules shall apply to every **contract of goods** by rail for reward when the place of taking over the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage. ..."*

§3 When international carrier being the subject of a single contract includes carriage by road or inland waterway in international traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply.

§4 When international carrier being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24§ 1 of the Convention..."

⁹² This provision was introduced at the request of the United Kingdom for multimodal through traffic, particularly for traffic across the English Channel and the North Sea. Malcolm Clarke/ David Yates, *Contracts of Carriage by Land and Air*, 2004, p.5.

⁹³ Clarke/ Yates, p.5-6.

⁹⁴ Clarke/ Yates, p.5-6.

⁹⁵ Marien Hoeks, *Multimodal Transport Law*, 2010, p. 120 ff.

⁹⁶ Karijijn Haak, *Carriage Preceding or Subsequent to Sea Carriage under The Rotterdam Rules*, paper presented at the Conference „The Rotterdam Rules Appraised“ on September 24-25, 2009 at the Erasmus University, Rotterdam, the Netherlands, p. 9-10. There is one exception to this rule.

Again paragraph 1 reflects the European contractual approach. Furthermore, by this provision a feeder service to railway station falls under the scope of the CIM as long as the service does not cross the border. Otherwise, there would be conflict with the compulsory scope of CMR. Likewise, application of CIM is extended to services such as ferries run by railways.⁹⁷

D. Network System in Europe

The multimodal transport within Europe has been based on network system or limited network system.⁹⁸ Network system is also embodied in German⁹⁹ and Dutch¹⁰⁰ national legislation on multimodal transport. On the other hand, the network liability system is preferred system in contracts.¹⁰¹ Therefore, it is the contractual carrier who is the focus under the network system.¹⁰² As a result, liability of contractual carrier's is variable as it is dependent upon at which stage the loss or damage to the goods occurs.¹⁰³

As mentioned in this article, often existing unimodal transport conventions in Europe focus on the type of the contract rather than the transport activity itself.¹⁰⁴ Contracting carrier's liability is determined in accordance to the leg where the damage occurs. Moreover, under these transport conventions, the contracting carrier is subject to network system.¹⁰⁵

The direct liability of subcontracting carrier is not regulated under these conventions; rather, it is regulated by national law, mostly in tort settings.

If the subcontracting carrier is sued directly by the shipper based upon tort, the subcontractor may benefit from maritime law according to Himalaya clause in the carriage contract between the shipper and contracting carrier. On the other hand, if the subcontracting carrier is sued by the contracting carrier in recourse action, mandatory rules of either CMR or CIM/COTIF will apply according to mode of the transportation.

Furthermore, because the direct liability of the subcontractor does not fall under network liability system, the concept of "hypothetical contract" is developed. In accordance with this concept, reference is to be made to the rules that would have governed the liability of the subcontracting carrier, if the shipper had directly contracted with the subcontractor.¹⁰⁶ It is said that in spite of its shortcomings, the network liability model

⁹⁷ „§ 1 The maritime and inland waterway services referred to in Art. 1 of the CIV Uniform Rules and of the CIM Uniform Rules, on which carriage is performed in addition to carriage by rail subject to a single contract of carriage, shall be included in two lists :

- a) the CIV list of maritime and inland waterway services,
- b) the CIM list of maritime and inland waterway services..."

For the list of the services see <http://www.otif.org/en/publications/lists-of-lines-or-services-cim/cim-list-of-maritime-and-inland-waterway-services.html> (visited August 3, 2010).

⁹⁸ Ulfbeck, p. 48.

⁹⁹ By the entry in force of the Transport Law Reform Act in 1998, transport law has undergone substantial changes. The new Act which is based on the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR), applies in a uniform manner to carriage of goods "over land, on inland waterways or by aircraft" with the exception of maritime transport. Furthermore, the Act also applies to multimodal transport of goods including a sea leg. Sec. 452 of the Act provides network system where damage is localized in general. See Sec. 452 ff. "Implementation of Multimodal Rules," Report prepared by UNCTAD Secretariat, *UNCTAD/SDTE/TLB/2*, 25 June 2001, p. 44 ff.

¹⁰⁰ Multimodal transport is governed by the Dutch Civil Code. Arts. 40-43 include core provisions on multimodal transport. The Civil Code in art. 41 adopts the network principle for localized damages. If the damage is non-localized, then the liability of the combined transport operator will be determined by the rules and regulations governing the mode of transport, which impose the highest level of liability on the operator in accordance with art.43 of the Civil Code. "Implementation of Multimodal Rules," Report prepared by UNCTAD Secretariat, p.51 ff.

¹⁰¹ Such as ACL, NEDLLOYD, HAPAG LLOYD. Ulfbeck p.49 fn.45 referring Rolf Herber, *The European Legal Experience with Multimodalism*, 64 *Tul. L. Rev.* 611, 618.

¹⁰² For instance Dutch Civil Code art. 42-43, German Transport Law Reform Act sec.452.

¹⁰³ Ulfbeck, p. 50.

¹⁰⁴ Ulfbeck p.48. CMR Art.1.1.; CIM/COTIF Art. 1 §3 and §4;

¹⁰⁵ Ulfbeck p.48.

¹⁰⁶ This is the language used in art. 2.1; German Transport Law Reform Act sec.452.

achieves an important task under European Law.¹⁰⁷ It harmonizes the liabilities in the contract chain. Accordingly, even if the subcontractors' liability towards shipper is not regulated by the international conventions, the liability of the subcontracting carrier towards the contracting carrier is often regulated.

9. Multimodal Aspect of Rotterdam Rules

On 11 December 2008 the UN General Assembly adopted the „United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea“, and authorized a signing ceremony for the Convention to be held in Rotterdam, recommending the new Convention to be known as the “Rotterdam Rules”. The new Convention was signed by the 16 States on the September 23, 2009; and other 4 States later on, making totally 20 signatory States currently.¹⁰⁸

The Rotterdam Rules extends and modernizes the existing international rules relating to the contract of maritime carriage of goods. The Rotterdam Rules aim to replace the Hague Rules, the Hague-Visby Rules and the Hamburg Rules; accordingly, it will achieve uniformity of law in the field of maritime carriage and provide for modern industry needs in terms of door-to-door carriage.

As mentioned above, there are two systems applicable to door-to-door transport: uniform system and network system. After long discussions, consensus was reached on the „limited network“ system for the Rotterdam Rules. Like the existing European transport Conventions, the Rotterdam Rules takes the contractual approach by providing in art. 1(a) that contract of carriage is “...a contract in which a carrier, against 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.”

This concept is known as “maritime plus” and requires, by art. 6, that both the whole carriage of goods as well as the sea carriage must be international. It is explained that the Rotterdam Rules have not been envisaged generally as a multimodal convention rather prepared with the intention to regulate contracts of carriage by sea in which carrier extends its services to other modes of transport.¹⁰⁹

According to „limited network system“ used in the Rotterdam Rules, special provisions apply to inland parts of the carriage that are different than those applicable to the maritime transport. The related provision is art. 26 titled, „Carriage preceding and subsequent to sea carriage“, which provides 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.”

Although this provision seems to be complicated, it can be summarized as follows: (1) where there is a relevant inland transport convention, liability rules of that convention¹¹⁰ applies under the „hypothetical

¹⁰⁷ Ulfbeck, p.50.

¹⁰⁸ For updated status of the Convention see, „Status 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the “Rotterdam Rules”“
http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (August 3,2010).

¹⁰⁹ Francesco Berlingieri, *Multimodal Aspect of The Rotterdam Rules*, paper presented at the Colloquium of the Rotterdam Rules 2009 held on September 21,2009, p.2

Papers- colloquim, <http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009> (visited August, 32010).

<http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf> (August 3, 2010); Gertjan van der Ziel, Multimodal Aspect of the Rotterdam Rules, *Uni. L. Rev.* 981, p.982.

¹¹⁰e.g. CMR, CIM/COTIF, CMNI, or 1999 Montreal Convention.

contract of carriage“ if loss or damage occurs in this leg of transport;¹¹¹ And (2) if the provisions of Rotterdam Rules conflict with the provisions of the other conventions -that may be applicable to the contract according to their own provisions- other conventions listed in Art. 82 of the Rotterdam Rules will be given priority.¹¹² As above mentioned both CMR and COTIF/CIM 1999 conventions contain provisions that have multimodal effects. Therefore, there will be probably many cases of –particularly- sea and road and/or rail transport combinations of transport, where there will be conflicts of said conventions.

10. Concluding Remarks

For any type of cargo claim, the objectives of the parties are in essence simple: the cargo-claimant has suffered the loss and he seeks to cover damages against the carrier; the carrier, except in the situation where he is liable without question, on the other hand, seeks to deny, exclude or limit liability for that loss.¹¹³ However, the claim itself and its handling may present more complexities than the objective of a claim in a practical context. Cargo claim in a multimodal transport contract can be even more complex as it involves different stages and modes of transportation throughout the world. For a multimodal transport, it is common that a network system of liability is applied in practice. Things would become intricate if more than two domestic laws or international conventions apply to the different parts of a multimodal transportation. The parties to multimodal carriage contract normally use the choice of law provisions or Himalaya Clause to a multimodal transport contract, however, it has turned out that there has been low predictability and high litigation costs.¹¹⁴

As explored in the analysis in the paper, the levels of regulations for multimodal transport contract in each of China, the US and the EU countries share similarities; but differences also remain. Each has its own unique regulatory characteristics and principles. The Chinese Maritime Law is an example where the international conventions on the carriage of goods by sea do not apply.¹¹⁵ As far as the multimodal transport contracts are concerned, despite the recognition of the Rotterdam Rules in various jurisdictions, it will probably fail to achieve the aim of uniformity as intended; particularly it is merely a “maritime-plus” convention. With the continuous development of container trade, there is an imperative need to have a multimodal convention which is broad enough in scope to govern the rights and liabilities of all parties involved in multimodal carriage, including inland carriers and their contractors.¹¹⁶

¹¹¹ van der Ziel, p.983. For more information on the subject van der Ziel, 981 ff; Berlingieri, *Multimodal Aspect of The Rotterdam Rules*, p.3 ; Christopher Hancock, *Multimodal Transport and The New UN Convention on the Carriage of Goods*, 14 JIML 484,490 ; Krijin Haak, *Carriage Preceding or Subsequent to Sea Carriage under The Rotterdam Rules*, p.3, paper presented at the Conference „The Rotterdam Rules Appraised“ on September 24-25, 2009 at the Erasmus University, Rotterdam, the Netherlands (Not published yet).

¹¹² See Erik Rosaeg, *Conflicts of Conventions in the Rotterdam Rules*, paper presented at the Conference „The Rotterdam Rules Appraised“ on September 24-25, 2009 at the Erasmus University ; Rotterdam, the Netherlands (Not published yet). Art. 82 of the Rotterdam Rules reads that “Nothing in this Convention affects the application of any of the following 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;

(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.”

¹¹³ Charles Debattista, “Cargo Claims and Bills of Lading,” in *Southampton on Shipping Law*, chapter 3.

¹¹⁴ Michael E. Crowley, “The limited scope of the cargo liability regime covering carriage of goods by sea: The multimodal problem,” 79 *Tul. L. Rev.* 1461, p.1504.

¹¹⁵ John Mo, p.130: “The Chinese Maritime Law (Code) is an example where the international conventions on the carriage of goods by sea do not apply.”

¹¹⁶ Michael E. Crowley, The limited scope of the cargo liability regime covering carriage of goods by sea: the multimodal problem, 79 *Tul. L. Rev.* 1461, p.1504.