

# THE HARMONIZATION OF LIABILITY REGIMES CONCERNING LOSS OF GOODS DURING MULTIMODAL TRANSPORT

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## ABSTRACT

The terms “multimodal transport”, “combined transport”, “intermodal transport” are all used in the context of cargo movement from origin to destination. These terms have similar (although not the same) meaning, i.e. carriage of goods by more than one mode of transport through single freight contract.

Containers enable transport of utilised cargo from its origin to its final destination, with a high level of efficiency and at least possible risk.

Unfortunately, technical developments of multimodal carriage of goods are not supported by adequate legal framework. Despite various attempts that have been made in the past, there is no mandatory international convention governing multimodal carriage. The 1980 Multimodal Convention drawn by the UN has not come into force and is not likely to do so. All applicable international conventions are unimodal, i.e. applicable (in principle) only to specific mode of transport (sea, road, rail, air, inland waterways). Provisions contained in each of these unimodal conventions may be applicable to the relating leg of multimodal transport. One should note that provisions of existing unimodal conventions governing the important issues related to the liability of the multimodal transport operator (MTO) differ significantly. Such important issues are: bases of MTO’s liability, limits of liability, loss of right to limit liability, liability of MTO for his agents and servants etc. Therefore, MTO can not be certain which regime applies to his liability for the loss of goods. This problem is especially noticeable in the cases involving “non-localized loss”, i.e. cases in which the place where the loss of or damage to the goods was caused can not be determined.

Therefore, there is up to parties to create their own contractual solutions for multimodal transport of goods, taking into account mandatory provisions of unimodal conventions and applicable national laws. Some helpful contractual standard rules have been created in commercial practice (Uniform Rules for a Combined transport document and UNCTAD/ICC Rules for Multimodal transport documents). In spite of that, a large majority of industrial representatives and Governments consider the present legal framework unsatisfactory.

Existing unimodal conventions applicable to the separate legs of multimodal carriage shall be analysed and compared in this paper. The most frequently used contractual standard rules shall also be examined. The objective of this paper is to explore possibilities for harmonization of liability regimes governing multimodal carriage of goods and to make suggestions in order to achieve this goal.

**Keywords:** multimodal transport, carriage of goods, liability of the multimodal transport operator, international transport conventions, 1980 Multimodal Convention

## 1 INTRODUCTION

The modern international trade demands for the same goods to be transported from the seller to the buyer as soon as possible, without unnecessary delay. Therefore, the effective transport must be “just in time” and “tailor made” (“door to door”). In practice it means that

the goods very often must be carried by two or more modes of transport (sea, air, road, inland navigation, and rail). Such type of transport is called multimodal transport<sup>1</sup>.

During the last few decades, an integrated multimodal carriage of goods has increased rapidly due to the well spread use of containers. All other technical developments make the practical performance of such transport much easier.

However, despite various attempts at the international level that have been made in the past, there is no global and unified legal regime in force regulating multimodal transport of goods. At the same time, there are numerous so called unimodal conventions, *i.e.* conventions dealing with only one and specific mode of transport. In certain circumstances, some provisions of these conventions may be applicable also to related leg (part) of multimodal carriage of goods. One could say that the international multimodal carriage of goods is regulated by the “selected provisions” of different unimodal transport conventions. Unfortunately, “the legal multimodal life” is not so simple. Some issues related to multimodal transport are not regulated by any of unimodal conventions while in relation to some other important issues there is a high degree of legal overlap between mandatory provisions of different unimodal conventions. Moreover, there are some issues which have to be regulated by the mandatory provisions of applicable national laws.

The above described situation creates legal uncertainty in respect of various important topics related to multimodal transport. The most important topic is the liability of the multimodal carrier (also called multimodal transport operator – MTO) for the loss of, or damage to, goods.

In order to solve this problem, parties to the multimodal transport contract create their own contractual solutions. It is not easy job to do because they have to take into account mandatory provisions of unimodal conventions and applicable national laws. Some helpful contractual standard rules have been created in commercial practice.

This paper examines the provisions of both unimodal and multimodal international conventions as well as of the most frequently used contractual standard rules regulating liability for the goods during the multimodal carriage. The paper also contains possible solutions for achieving international harmonization concerning this important topic.

## **2 INTERNATIONAL LEGAL REGULATION OF LIABILITY FOR THE GOODS LOST DURING MULTIMODAL TRANSPORT**

### **2.1 International conventions dealing with one specific mode of transport (unimodal conventions)**

For each mode of transport there is at least one international convention which *inter alia* contains mandatory provisions regarding liability of the carrier for the loss of, or damage to, the goods. These provisions may be applicable to the liability of the MTO<sup>2</sup>. His principal contractual obligation is to deliver goods to the designated place and to the designated person (receiver, usually buyer). In order to fulfil this obligation, the MTO has to arrange the carriage of goods. In principle, there are two ways for him to do that. He may perform each leg of transport by himself. If that is the case, the MTO is a contracting carrier and a performing carrier at the same time. Other way available to him in order to fulfil his obligation is to

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<sup>1</sup> There are some other terms similar to multimodal transport like intermodal transport (the movement of goods in one and the same loading unit or road vehicle, which uses successively two or more modes of transport without handling the goods themselves in changing modes) or combined transport (intermodal transport where the major part of the European journey is by rail, inland waterways or sea and any initial and/or final legs carried out by road are as short as possible), Economic Commission for Europe (UN/ECE), *Terminology on combined transport*, United Nations, New York and Geneva, 2001.

<sup>2</sup> In practice, MTO is usually the freight forwarder.

consign the whole transport (or only part or parts of it) to other carrier (or carriers). However, the MTO still remains liable for the goods during the whole carriage<sup>3</sup>.

The basis, limits and other important issues related to the MTO's liability may be regulated by the provisions of "applicable unimodal convention" i.e. the convention dealing with the mode of transport during which the damage occurred. This is so called "network liability system". The MTO shall fall within the term "carrier" as defined in these conventions. For example, the liability of the MTO shall not be the same in cases when the goods were damaged during the sea leg of multimodal transport (possible application of maritime conventions) and in cases when the goods were damaged during the road leg of multimodal transport (possible application of the CMR convention).

But the MTO's liability for the goods may also be regulated under the uniform principles regardless of the mode of transport during which the damage occurred. This will be the case when parties to the multimodal transport contract make such agreement and there is no mandatory application of the unimodal convention. This is so called "uniform liability system". This system is additionally useful in cases involving "non-localized loss" i.e. cases in which the place (and consequently the transport mode) where the loss of the goods occurred cannot be determined.

It is necessary to get familiar with the applicable rules of unimodal (network) legal system and multimodal (uniform) legal system in order to "see the whole picture" concerning possible MTO's liability. Rules of unimodal conventions shall be elaborated in this chapter while the rules of multimodal sources of law shall be examined in the following chapter 2.2.

### ***2.1.1 Carriage by sea – Hague Rules, Hague/Visby Rules, Hamburg Rules, Rotterdam Rules***

The Hague Rules<sup>4</sup> and the Hague/Visby Rules<sup>5</sup> are in force between a significant numbers of states. However, they do not regulate the multimodal carriage. In principle, their application is limited to the cases of international sea carriage under the bill of lading. However, they may apply to the period between the moment when the goods are loaded on to the ship and the moment when they are discharged from the ship if the goods are carried under a multimodal bill of lading [1].

On the contrary, the Hamburg Rules<sup>6</sup> deal with the multimodal carriage. They define contract of carriage as any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other mode is deemed to be a contract of carriage by sea for the purposes of the Hamburg Rules only in so far as it relates to the carriage by sea (Art 1 of the Hamburg Rules). Additionally, the Hamburg Rules defines the period of the carrier's responsibility for the goods to be restricted to the period during which the carrier is in charge of the goods starting at the port of loading and ending at the port of discharge (Art 4 of the Hamburg Rules). It should be noted that the application of the Hamburg Rules may be mandatory in a case of a voyage where the state of loading is a contracting party to the Hamburg Rules (Art 2(1)). Consequently, in some cases of multimodal carriage of goods the application of the Hamburg Rules may be mandatory concerning the sea leg of such carriage. Although the Hamburg Rules came into force on 1 November 1992, they have not been adopted by any of the major trading nations.

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<sup>3</sup> In some cases MTO and performing carrier may be jointly and severable liable for the goods.

<sup>4</sup> International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 1924.

<sup>5</sup> The Hague Rules as amended by the Brussels 1968 Protocol.

<sup>6</sup> United Nations Convention on the Carriage of Goods By Sea, 1978

Finally, the Rotterdam Rules<sup>7</sup> are designed to be a “maritime plus” convention. While the Hague and Hague/Visby Rules apply only tackle-to-tackle, and the Hamburg Rules apply port-to-port, the Rotterdam Rules expand their application to include door-to-door transport. Unlike the Hague and Hague/Visby system, the Rotterdam Rules cover both inbound and outbound shipments. They define contract of carriage as a contract whereby the carrier undertakes to carry goods from one place to another against payment of freight. 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 definition means that there may be contracts of carriage that fall under the Rotterdam Rules as well as under another carriage convention, such as the CMR<sup>8</sup>. The Rotterdam Rules contain provisions (Art 26) regulating that in cases where loss of the goods occurred solely before the loading onto the ship or after the discharge from the ship, the provisions of another international instrument dealing with carrier liability prevail over the related provisions of the Rotterdam Rules (if certain conditions are fulfilled)<sup>9</sup>. By doing so, the Rotterdam Rules attempt to provide a network solution to the problems of competing conventions that occur with multimodal carriage [2].

At the moment, the Rotterdam Rules are still not in force.

In principle, all above mentioned maritime conventions maintain the basic point of the carrier’s liability principle – the presumed fault principle. They also maintain the basic rule providing responsibility of the carrier for his agents and servants.<sup>10</sup>

However, the significant difference between these conventions is related to the limits of carrier’s liability. For a better appreciation of the issue, an overview of the relevant amounts is provided in Table 1.

**Table 1: Overview of liability limits for loss of or damage to the goods in existing maritime conventions**

Convention	Limits of liability
Hague Rules	£ 100/package
Hague/Visby Rules	2 SDR/kg or 666,67 SDR/package
Hamburg Rules	2,5 SDR/kg or 835 SDR/package
Rotterdam Rules	3 SDR/kg or 875 SDR/package

This issue may be of crucial importance to the MTO if he falls within the definition of the carrier. It is also very important issue in cases when MTO, after paying damages to the cargo owner for the goods lost during the sea transport, brings recourse action against (maritime) performing carrier liable for the damage occurred. The (maritime) performing carrier also has the right to limit his liability according to the applicable conventions.

<sup>7</sup> Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009.

<sup>8</sup> *Infra*, 2.1.3.

<sup>9</sup> It should be noted that the Rotterdam Rules define a carrier as a person that enters into a contract of carriage with a shipper. The carrier is liable for the acts of the performing party – person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage to the extent that such person acts at the carrier’s request or under the carrier’s supervision or control. But the liability of the performing party shall be covered by the Rotterdam Rules only if he is maritime performing party, which is defined as a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. Therefore, an inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

<sup>10</sup> However, there are numerous specific provisions which make the Hamburg and Rotterdam Rules more „cargo-friendly“ than the Hague and Hague/Visby Rules.

### ***2.1.2 Carriage by air – the Warsaw Convention and the Montreal Convention***

The provisions regarding multimodal carriage in the Warsaw Convention<sup>11</sup> and the Montreal Convention<sup>12</sup> are quite similar. Article 31 of the Warsaw convention provides that in the case of combined carriage performed partly by air and partly by any other mode of carriage, provisions of the Warsaw Convention apply only to the period of the carriage by air. Furthermore, Article 18(3) provides that the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. In other words, the mandatory rules on liability contained in the Warsaw Convention shall apply in cases of “non-localized loss” when occurred under above mentioned circumstances.

Very similar, although not the same provisions are contained in Articles 38 and 18 of the Montreal Convention. The slight difference may be noticed in relation to the Article 18 which states that if a carrier, without the consent of the consignor, substitutes air carriage by another mode of transport, for the whole part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air. One could see that the Montreal Conventions, although within the strict limits, also extend its application to other modes of carriage.

The revised Warsaw Convention and the Montreal convention prescribe the same basis for the carrier’s liability for goods damaged or lost – strict (objective) liability with only few possible exonerations (Article 18 of the Warsaw and the Montreal Convention).

The limit of liability is also the same – 17 SDR (Special Drawing Rights) per kilogramme, unless the consignor has made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.

### ***2.1.3 Carriage by road – the CMR***

Carriage of goods by road is covered by the CMR<sup>13</sup>. The CMR applies to every international contract for the carriage of goods by road in vehicles for reward, regardless of the place of residence and the nationality of the parties (Article 1 of the CMR)<sup>14</sup>.

If the part of the multimodal contract is performed also by sea, rail, inland waterways or air carriage, without goods being unloaded from the road vehicle, the CMR will still apply to the whole of the carriage.

Regarding the liability for the goods, if it is proved that any loss of goods occurred during the carriage by the non-road means of transport and such loss is not caused by the act or omission of the road carrier, the liability for the goods shall be determined not by the CMR but under the provisions of the law applicable for that other mode of transport. In the absence of such provisions, the loss will continue to be subject to the CMR.

If the carrier by road is also the carrier by that other mean of transport, his liability shall also be determined in accordance with above mentioned rule, but as if, in his capacities as

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<sup>11</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929, as amended by the Hague Protocol to the Warsaw Convention of 1955, additional protocols in force and supplemented by the Guadalajara Convention of 1961.

<sup>12</sup> Convention for the Unification of Certain Rules for International Carriage by Air, Montreal 1999.

<sup>13</sup> Convention on the Contract for the International Carriage of Goods by Road, 1956. The CMR is amended by the 1978 SDR Protocol.

<sup>14</sup> International carriage means carriage when the place of taking over of the goods and the place designated for delivery, as specified into he contract, are situated in two different countries, of which at least one is a CMR contracting party.

carrier by road and as carrier by the other mode of transport, he were two separate persons (Article 2 of the CMR).

When the goods are unloaded from the road vehicle for carriage by another mode of transport, the CMR will not apply during that other mode of transport. However, it will still cover the international road legs of the carriage that come before and after the other mode of transport.

Although these mandatory provisions of the CMR are not quite clear, one could conclude that CMR creates a uniform liability system for the so called roll on-roll off international carriage. This solution is still subject to ample discussion.

The carrier (which could be the MTO if the whole carriage is a multimodal one) is strictly liable for the goods, unless he can rely on general (primary) or specific (secondary) defences set out in Article 17 of the CMR.

Under the CMR as amended by the 1978 Protocol, the carrier's liability is limited up to 8,33 SDR per kg of gross weight short. The sender has the option to declare the value of the goods in the consignment note in order to avoid this limitation. Similar effect could be achieved by fixing of a special interest in delivery (Articles 24 and 26 of the CMR).

### ***2.1.4 Carriage by rail – the COTIF***

The COTIF<sup>15</sup> should be the system of uniform law concerning the contract of international carriage of passengers and goods in international through traffic by rail, including complementary carriage by other modes of transport subject to single contract. The carriage of goods is regulated by the COTIF/CIM<sup>16</sup>. According to the Article 1 of the COTIF/CIM, it applies to all contracts of carriage of goods by rail. It also applies on the carriage of goods by other transport modes if this transport occurs regularly and complementary to the rail transport on a line that is included in a certain list<sup>17</sup>. This principle is not restricted to the roll on-roll of transport, as mentioned concerning the CMR. Even if the goods are transferred to another container or vehicle the COTIF/CIM rules still apply. In case a line consists of rail-sea transport, each Member State may indicate that certain grounds for exemption from liability specifically tailored to sea transport will apply in addition to those already provided by the COTIF/CIM. The carrier (which could be the MTO) may avail himself of these grounds for exemption if he proves that the loss occurred in the course of the sea journey between the time when the goods were loaded on board the ship and the time when they were discharged from the ship [3].

The COTIF/CIM prescribes strict liability for the loss of, or damage to, the goods, with some general (primary) and specific (secondary) possible exonerations from liability (Article 23 of COTIF/CIM). Liability for the lost or damaged goods is limited to the 17 SDR/kg of gross weight short.

### ***2.1.5 Carriage by inland waterways – the CMNI***

The CMNI<sup>18</sup> deals with the regulation of inland waterway transport contract. It applies to any contract of carriage according to which the port of loading or the place of taking over of the goods and the port of discharge or the place of delivery of the goods are located in two different states of which at least one is a state party to the CMNI. Contract of carriage is

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<sup>15</sup> Convention concerning International Carriage by Rail (COTIF) of 1980 in the version of the Protocol of Modification of 1999 (the Vilnius Protocol).

<sup>16</sup> Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM – Appendix B to the COTIF Convention).

<sup>17</sup> The list could be found at [www.otif.org](http://www.otif.org).

<sup>18</sup> Budapest Convention on the Contract for the carriage of goods by inland waterway (CMNI).

defined as any contract, of any kind, whereby a carrier undertakes against payment of freight to carry goods by inland waterway (Article 1 of CMNI). There are some opinions that CMNI does not apply to inland waterway carriage which is part of a multimodal contract [4].

However, Article 2 of the CMNI extends the application to contracts of carriage whose purpose is the carriage of goods, without transshipment, both on inland waterways and in waters where maritime regulations apply, unless a maritime bill of lading has been issued in accordance with the maritime law applicable, or the distance to be travelled in “maritime” waters is the greater.

The carrier is liable for loss of the goods between the time when he took them over for carriage and the time of delivery, unless he can show that the loss was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted. The carrier’s liability for loss occurred during the time before the goods are loaded on the vessel or the time after they have been discharged from the vessel is governed by the law of the State applicable to the contract of carriage (Article 16 of the CMNI).

In principle, liability is limited to the amount of 666,67 SDR per package or 2 SDR per kg (whichever is higher). However, if the package or other shipping unit is a container and if there is no mention in the transport document of any package of shipping unit consolidated in the container, mentioned amounts shall be replaced by the amount of 1,500 SDR for the container without the goods it contains and, in addition, the amount of 25,000 SDR for the goods which are in the container (Article 20 of the CMNI).

## **2.2 International regimes dealing with multimodal transport of goods**

### ***2.2.1 UN Multimodal Convention, 1980***

It has been clear for some time that multimodal carriage is marked by greater uncertainty and confusion with regard to the legal regime than unimodal carriage. The UN Multimodal Convention<sup>19</sup> has been created to remove the uncertainty and confusion referred to above, by introducing a uniform and mandatory level of liability which would apply in all cases where goods are carried under an international multimodal transport contract and which, in most cases, would not differ according to the segment of transit in which the loss may have occurred [5].

The UN Multimodal Convention necessarily introduces some new notions and definitions in Article 1. International multimodal transport is defined 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. 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 multimodal transport. Furthermore, multimodal transport operator (MTO) is defined 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 of or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract<sup>20</sup>.

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<sup>19</sup> The United Nations Convention on international multimodal transport of goods, 1980.

<sup>20</sup> Unfortunately, these crucial definitions are somewhat lacking in precision. It is not clear what is meant by a “mode of transport”; it is not clear is it necessary that the contract provides expressly or by implication for the goods to be carried by more than one mode of transport, or is it sufficient that in the event the goods were so carried; it is not clear what is meant by the operations of pick-up and delivery of goods, etc. These problems have played significant role related to the fact that the UN Multimodal Convention has never entered into force.

The UN Multimodal Convention promotes a uniform solution to the problem of defining the basis of liability undertaken by the MTO. Subject to the few exceptions, the liability of the MTO does not depend on the segment of the transport at which the loss occurs. Consequently, as the basis of the MTO's liability concerns, there is no need to distinguish between "localised loss" and "unlocalised loss". In the Preamble to the Convention one could find the principle agreed between the contracting states that liability of the MTO should be based on the principle of presumed fault of neglect. This "common understanding" clarifies the provisions contained in Article 15, under which the MTO shall be liable for loss of the goods if the occurrence which caused the loss took place while the goods were in his charge, unless MTO proves that he, or his agents and servants took all measures that could reasonably be required to avoid the occurrence and its consequences.

The UN Multimodal Convention contains unsatisfactory and complex provisions relating to the limitation of MTO's liability.

If, according to the contract, the transport includes carriage by sea or inland waterways, the liability of the MTO is limited to 920 SDR per package or 2,75 SDR per kg of gross weight of the goods lost, whichever is the higher.

Where, according to the contract, the transport does not include carriage by sea or inland waterways, the liability of the MTO is limited to an amount up to 8,33 SDR per kg of gross weight of the goods lost.

However, when the loss of the goods occurred during one particular stage of the multimodal transport ("localised loss"), in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from the application of the relevant provisions of UN Multimodal Convention, then the limit of the MTO's liability shall be determined by referenced to the provisions of such convention or mandatory national law (Articles 18 and 19 of the UN Multimodal Convention). This formulation creates a number of problems. For example, it is unusual that the UN Multimodal Convention allows the contracting states to prescribe, by their national laws, limits of liability which are higher than those prescribed by the Convention. It seems opposite to the basic purpose of the UN Multimodal Convention – introducing uniform liability rules for international multimodal transport.

Regarding the relationship with other unimodal conventions, two articles of UN Multimodal Convention are of significant importance.

Article 30(4) provides that the carriage of goods in accordance with CMR and CIM shall not for state parties to these conventions governing such carriage be considered as international multimodal transport within the meaning of the UN Multimodal Convention, in so far as such states are bound to apply the provision of such conventions to such carriage of goods.

Furthermore, UN Multimodal Convention provides, by Article 38, that if judicial or arbitral proceedings are brought in a contracting state in a case relating to international multimodal transport subject to that Convention which takes place between two states of which only one is a contracting state to the UN Multimodal Convention, and if both these states are bound by another international convention, the court or arbitral tribunal *may*, in accordance with the obligations under such convention, give effect to the provisions thereof. In fact, Article 38 leaves to the court or arbitrator to resolve the conflict of applicable conventions. It is very interesting that, under the Article 38, the court (arbitrator) in the state party to the UN Multimodal Convention may give effect to the provisions of another convention which bounds other two contracting states concerned even if the state in which action is brought is not bound by this other convention. This may inevitably lead to considerable uncertainty as to the probable outcome of this conflict.



Taking into account all described and some other “weak points” of the UN Multimodal Convention, it is not surprising that it has never collect required number of ratifications (30) in order to enter into force. Consequently, it has failed to achieve its primary purpose – to become the uniform code for international multimodal transport of goods.

### ***2.2.2 UNCTAD/ICC Rules for Multimodal transport documents***

Since the adoption of the UN Multimodal Convention, UNCTAD<sup>21</sup> has monitored its progress and become concerned. Since the Convention had not provided for any model form document, the UNCTAD was set to work on producing one that might encourage commercial adoption of the Convention. The next step was establishing a joint UNCTAD/ICC<sup>22</sup> working group. The result of their work are the UNCTAD/ICC Rules for Multimodal transport documents, 1991 (UNCTAD/ICC Rules). They are not a convention. They do not apply when they are not referred to in the contract of carriage. Therefore, they are so called “soft law instrument”. It is possible to refer to them even for port to port traffic and when unimodal transport is intended. Parties having referred to the UNCTAD/ICC Rules, and thereby incorporated them into their contract, must avoid inserting stipulations which derogate from these Rules and which thus would be contradictory. The parties by referring to the UNCTAD/ICC rules agree that these Rules would supersede anything which has been stated to the contrary.

UNCTAD/ICC Rules contain definition of the MTO (person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier). Multimodal transport contract is a single contract for the carriage of goods by at least two different modes of transport. Carrier is defined as the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the MTO or not. Finally, multimodal transport document means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be issued in a negotiable form or in a non-negotiable form indicating a named consignee. (Article 2 of the UNCTAD/ICC Rules).

Under the UNCTAD/ICC Rules, the MTO shall be liable for loss of the goods, if the occurrence which caused the loss took place while the goods were in his charge, unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person for whose act MTO is liable, has caused or contributed to the loss. However, the MTO shall not be responsible for loss with respect to goods carried by sea or inland waterways when such loss has been caused by the nautical fault of the master, mariner, pilot or the servants of the carrier; or by the fire, unless caused by the actual fault or privity of the carrier. Whenever loss has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage (Article 5 of the UNCTAD/ICC Rules). These exceptions from the general liability principle (presumed fault) are inspired by the similar provisions of the Hague and the Hague/Visby Rules.

Limitation of liability of the MTO is provided in Article 6 of the UNCTAD/ICC Rules. In principle, the MTO shall in no event be liable for any loss of goods in an amount exceeding 666,67 SDR per package or unit or 2 SDR per kg of gross weight of the goods lost, whichever is the higher. In the case of the use of container, the claimant could use the units inside the container for limitation purposes provided they have been mentioned in the transport document. All this solutions are also inspired by the provisions of Hague/Visby Rules.

However, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO shall be limited to an

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<sup>21</sup> United Nation Conference on Trade and Development.

<sup>22</sup> ICC – International Chamber of Commerce.

amount not exceeding 8,33 SDR per kg of gross weight of the goods lost. This solution is inspired by the corresponsive solution of the CMR. Additionally, in the cases of “localised loss” 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 shall be determined by reference to the provisions of such convention or mandatory national law.

In principle, liability limits prescribed by the UNCTAD/ICC Rules are lower than those prescribed by the UN Multimodal Convention.

The UNCTAD/ICC Rules have been incorporated in widely used multimodal transport documents such as the FIATA FBL1992 and the “Multidoc” of the Baltic and International Maritime Council (BIMCO). In practice, they have replaced their “older brother” - ICC Rules for a Combined transport document (URC), drawn up in 1973.

### 3 CONCLUSIONS

The current legal regime governing the international multimodal carriage of goods is characterized by complexity and a lack of uniformity.

There is no international convention in force regulating multimodal transport. The UN Multimodal Convention has never entered into force and is not likely to achieve that goal in the future. At the moment, it is very difficult to predict the destiny of the Rotterdam Rules, which are, in a specific manner, also designed to be a kind of multimodal (maritime plus) convention.

The mandatory provisions dealing with the liability of the MTO contained in various unimodal conventions are applicable to different legs of multimodal transport. It is not easy job to get familiar with all this provisions. There is a possibility that the mandatory provisions of two or more unimodal conventions shall overlap. Despite the clear multimodal transport contract based on well spread UNCTAD/ICC Rules, the “conversion” of the MTO into the carrier (as defined in the applicable unimodal convention) may cause a bit of surprise. And it is well known that international trade does not like surprises.

Even if the MTO is aware of different unimodal regimes that may be applicable, it is sometimes difficult to establish the point on which one specific mode of transport ends while the other begins. It sometimes depends on the area on which the specific operation is performed. In some other cases it depends on the technical characteristics of the specific transport operation.

Indeed, it is very difficult to create harmony between the possible multimodal convention and the existing mandatory unimodal transport conventions. Stakeholders in a number of states are already get used to the “strong points” and “weak points” of these unimodal conventions. Therefore, the possible new international multimodal agreement which contains different solutions must be very clear, logical and simple in order to attract these stakeholders and their states. It is possible only if the new international agreement contains solutions already approved in commercial practice which brings us to unavoidable further conclusion that the future multimodal convention must take into account the existing commercial standards, particularly already mentioned UNCTAD/ICC Rules.

These Rules are, at least in relation to the limits of the MTO’s liability, created under the influence of the Hague/Visby Rules and the CMR. Taking this into account, the first step toward a kind of “intermodal legal regime” may be creating unified intermodal rules (or convention) applicable (only) to the carriage by land. These (conventional) rules should create uniform liability basis and limits of the MTO *land* carrier. Similar solutions already took place in some national legislation. If that mission could be accomplished successfully, in the future we should take account about only three unimodal regimes (sea, land and air) instead of existing five. And that is a significant progress.

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