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Summary

This research is a critical analysis of a delay regime for multimodal transport, or door-to-door transport. At this day, there are no mandatory rules governing multimodal transport, but a process of creating a set of rules are pending both within UNCITRAL as well as the European Union. Due to the increased use of containers in shipping, multimodal transport has become more common. For this purpose, shipping companies are commonly signing contracts in which they agree on being responsible for loss or damage throughout the whole journey, until the goods are discharged at final destination. However, problems will most likely arise in case of a dispute. Since a multimodal regime does not exist, the rules applicable to such contractual relationship are not one, but various transport conventions. The present system creates unpredictability for the contracting parties as to what rules are applicable on their contractual relationship, which leads to significant amounts spent on legal counselling. Thus, there is a need for a set of mandatory rules within the field of multimodal transport.

The increased multimodal transport, in combination with an increased just-in-time management has increased the importance of a timely delivery and a functioning transport chain. The research will focus on the issues arising out of delay in delivery under the future multimodal regime. Since the UNCITRAL draft is not yet in force, the conclusion will have a *de lege ferenda* perspective. In order to reach a conclusion, delay regimes in the various unimodal laws existing will be reviewed, as well as obsolete and non-mandatory multimodal rules existing.

Liability for carrier delay in delivery is imposed in one way or another in every field of transport. Liability could be imposed either only by agreement between the parties or also an imposed delay by statute for what could be expected from a “reasonable carrier”. In my conclusion, I will analyze how a delay provision ought to be stipulated in a multimodal regime in order to gain a feasible set of rules. A feasible set of rules is one that has enough signing states to unify the existing laws existing today and makes contractual relationships more predictable with regards to possible effects of breach of contract.

Preface

The idea of writing a master thesis on multimodal carriage was born in the spring of 2007 in Toronto during an interview for a summer clerkship at Fernandez Hearn LLP. I am truly grateful for the inspiring idea of a thesis topic suggested by *Gordon Hearn* during this interview.

In the process of completing my thesis I am indebted to the following persons. *Lars Boman*, for the initial tips on scope of my research as well as the heavy criticism of the UNCITRAL work, which subsequently gave rise to my determination of a final topic and conclusions. *Ellen Eftestøhl-Wilhelmsson*, for the seminar “Multimodal Carriage- a European solution” held on Scandinavian Institute of Maritime Law in Oslo, which gave me the idea of adding another chapter to my thesis. I am also deeply thankful for her proof reading and valuable comments once I was finished. *Svante Johansson*, for providing me with an arbitral award not yet published in order for me to better be aware of the delay regime in Scandinavia. The appreciation is especially important due to the lack of jurisprudence on the area. *Johan Schelin*, who explained the present work process within UNCITRAL by answering my questions sent to him. *The library staff* on Scandinavian Institute of Maritime Law, who all have been very kind and helpful in providing help in my search for information, even though I was not a master student at the faculty. My supervisor *Lars-Göran Malmberg* who put up with my stressful schedule and his thorough review of my work.

Last, but not least, I would like to express my deepest gratitude to my parents *Marika* and *Peter Lindström* who always have supported me throughout my whole education with advise and help with whatever problems I’ve had. Also, thanks to *all my friends* in Lund and Montréal who have made the university years a joyride.

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Abbreviations

A.C	Law reports, Appeal Cases
A.M.C	American Maritime Cases
BIMCO	The Baltic and International Maritime Council
C.A	Court of Appeal
Cir.	Circuit (district in which the United States Court of Appeal is located)
CIM-COTIF	Uniform Rules Concerning the Contract of International Carriage of goods by Rail
CMI	Comité Maritime International
D.C	District Court
E.D	Eastern District
Ex. C. R	Exchequer Court Reports (Decisions of Canadian Admiralty Court from 1875 to 1970)
F. Supp.	Federal Supplement
FIATA	International Federation of Freight Forwarders Associations
H.L	House of Lords
Lloyd's Rep.	Lloyd's Reports
ICC	International Chamber of Commerce
MTO	Multimodal Transport Operator
N.B	Nota Bene
NGO	Non-Governmental Organization
NOU	Norges Offentlige Utredninger (reports from commission appointed by the government)
Ry. Co.	Railway Company
SDR	Special Drawing Right
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USCOGSA	United States Carriage of Goods by Sea Act

1 Introduction

1.1 Presentation

The nature of transporting goods is changing. Enterprises world wide are entering the just-in-time generation, which means shipments are smaller, but more frequent. As an effect, the corporation is less dependent on large storage warehouses. Instead, production is initiated by demand among the customers. This way has shown to decrease costs in an organization by less over-produced items going to waste and less cost for storage. This so called “production on demand” increases the importance of a functioning chain of transport. Hence, an occurred delay in delivery is having worse consequences, since the production is dependent upon a timely delivery.¹

The nature of transport is changing also in other perspectives. The door-to-door transport is today a common concept by the increased use of containerized transport.² The handling of containers is simplifying the transport concept as a whole and has lead to an increased multimodal transport, i.e. where two or more modes of transport are used for the purpose of forwarding goods. Within multimodal shipping, the transport industry is commonly using shipping contracts in which a multimodal transport operator (MTO) accepts liability towards the other contracting party throughout the whole journey until the cargo is discharged at the business place of the consignee. Such contract is an attractive choice to the cargo owner, as he gets only one counterpart in case of a possible dispute.

There is no international binding instrument at this day that governs international multimodal transport. The problem with absence of such regime is that various mandatory unimodal laws (i.e. one mode of carriage) are applicable on each and every part of the voyage during the transport. In other words, even though the MTO has accepted liability towards the cargo owner, different rules are applicable on their contractual relationship dependent on where the loss or damage arose. If the occurred loss or delay was caused at sea, maritime law is applicable and if the occurred loss or delay was caused on the road part of the transport, applicable road carriage law is governing. Even though multimodal contracts make door-to-door transport easier, there are a number of issues arising through the absence of an international instrument on multimodal carriage.

¹ M. Ganado, H. Kindred, *The law of delay in the carriage of general cargoes by sea* (London, Lloyd's of London Press Ltd. 1990, 1st ed) at 3.

² The container throughput has grown from 0 in 1965 to 225.3 million moves in 2000. It is forecasted that in 2010, there will be 500 million moves. The rate of manufactured goods transported by sea was estimated to 75 % in 2000 and a majority of these transports are containerized. See UNCTAD, “Multimodal transport: the feasibility of an international legal instrument”, 13 January 2003, online: <http://www.unctad.org/en/docs/sdtetlb20031_en.pdf> at 4.

CMI has initiated a work to draft a convention for multimodal transport. An UNCTAD-report³ summarizes questionnaires sent to interests worldwide in the industry. The report states that there is a vast majority of the involved parties in transport, i.e. governments, carriers, shipping companies and NGO's that is of the opinion that the market is in need of a new legal instrument to cover door-to-door transport. The work has resulted in a draft of an international multimodal convention. The most recent draft is published by UNCITRAL in April 2007 (hereinafter: the UNCITRAL draft).⁴ An attempt to create a legal instrument has been made before, by drafting the Multimodal Transport Convention from 1980.⁵ The attempt was not successful as it did not reach enough ratifications to enter into force.

The main objective with the UNCITRAL draft is to clarify and unify the law of transport in the world. In order to fulfil the main objective, the draft needs a clear support by the major shipping nations in the world. USA is of the standpoint that delay is a matter of commerce and shall be dealt with by the contracting parties themselves in the contract of carriage. The opposite point of view is that smaller businesses need a protection in the law from the increasing importance of a timely delivery. According to the commentators of this view, small businesses have no leverage to change the conditions in contracts of carriage. Hence, the parties within UNCITRAL are far from consensus on the matter.

The delay provision might be the crucial issue with regards to the feasibility of the whole convention. Will not the drafting of a multimodal instrument for transport law without one of the greatest shipping nations have the opposite effect rather than unifying the applicable rules? Is the drafting of the UNCITRAL draft even worth while if there isn't a significant support by the major shipping nations? The result might be to add one more source of law instead of unifying the existing ones.⁶

1.2 Outline

As stated above, the delay provision in the UNCITRAL draft might be one of the crucial provisions that need to be compromised in order to fulfil the main objective of the convention. Therefore, this paper will analyze a proper enactment of a delay provision in the new generation of shipping, i.e. the door-to-door generation. The analysis will contemplate whether delay ought to be part of multimodal transport law at all and if so, to what extent delay liability should be imposed. Either only after agreement between the

³ UNCTAD, "Multimodal transport: the feasibility of an international legal instrument", 13 January 2003, online: <http://www.unctad.org/en/docs/sdtetlb20031_en.pdf>.

⁴ UNCITRAL, Working Group III, Draft convention on the carriage of goods [wholly][or partly] by sea, New York 16-27 April 2007, arts. 17.1 and 21.

⁵ United Nations Convention on International Multimodal Transport of Goods, Geneva 24 May 1980, (The 1980 Multimodal Transport Convention).

⁶ Michael F. Sturley, "Liability for delay under UNCITRAL's Proposed Transport Law Convention", 2006, 4 *Benedict's Maritime Bulletin* 108 at 110.

contracting parties or also imposed liability for late delivery from what could be expected from a reasonable carrier.

The analysis with regards to the delay regulation in the UNCITRAL-draft will be foregone by more general issues. These are questions that are fundamental to review in order to reach a conclusion in my essay. Firstly, I will discuss whether the scope of multimodal regime ought to be all kinds of multimodal transport, or as it is today, only apply when there is a sea leg involved.⁷ Secondly, I will review whether the convention should be mandatory or if the contracting parties should have the discretion to retain the option to choose another set of applicable rules. This is crucial, because some commentators are of the opinion that a multimodal regime is not required in some fields of transport. Moreover, previous multimodal regimes have chosen different liability systems. Either a liability system where the multimodal regime is applicable as a set of fall back rules in case it can't be proven on what stage of the voyage the damage or delay arose. The other alternative is to incorporate a liability system where the set of rules apply at all stages, regardless if the location of the damage or delay is proven. Lastly, I will discuss further issues on delay, such as what limitation that should be applicable.

As there is a lack of an internationally binding instruments, I will use delay provisions in unimodal law as guiding examples towards my conclusion on a delay provision in the UNCITRAL-draft. The delay regime in maritime law will be more thoroughly emphasized. This is mostly due to the draft's application as a "maritime plus" convention. Delay provisions in other fields of transport will also be reviewed as a comparison to maritime law.

Delay enactments in existing multimodal regimes will also be analyzed towards a conclusion as to how the best delay provision in a multimodal convention is drafted. Both commercial alternatives used in the practise of trade and governing mandatory law will be reviewed. The existing multimodal regimes are few and if existing, only covering national or regional transport, not global trade with a large number of signing states. Nevertheless, the rules are interesting to review as they are shown to work in multimodal trade practise. Three national states that have incorporated multimodal rules will be compared in chapter 4.4 below. The states (Germany, China and India) are chosen to compare the possible ways of enacting a delay regime, as they all have enacted different delay provisions.

1.3 Delimitations

The scope of this essay will cover carrier liability only. As a result, a situation where the shipper fails to provide goods as timely agreed is not covered by my research. The problems of establishing the carrier will neither be covered, i.e. whether it is the contracting or the actual carrier who is liable for an occurred delay.

⁷ *Supra* note 4, art. 5.

Delay can be just one of the competing interests in cargo claims and in many cases, it could be difficult to establish to what extent damages result from the delay *vis-à-vis* the other cause of loss, for instance a physical damage. If a delay causes cargo of bananas to rot, the delay is the secondary cause of loss to the primary physical damage. When goods are physically damaged, the applicable convention articles on physical damage will prevail. It is only when the delay itself causes pure economic loss that the specific rules on delay will operate. This paper will cover issues where delay is the primary cause of loss and results in pure economic loss for the cargo claimant.

1.4 Methodology

The method used in the research process of this thesis is comparative, based on international legal material seen in a national context. The legal material is mainly international conventions and national legislation as incorporated. The national case law used in the thesis illustrates and gives support to the interpretation of the international legal instruments.

1.5 Methodological problems

Some case law in this research is older than the conventions themselves. This is not a mistake from my side. The outcomes of the cases are either applied today under new set of rules or are simply used as guiding examples of how the law has developed, even though the case reviewed has lost power as precedent.

The law of delay has not much case law available in recent time. Since the establishment of new “statutorial” obligations of a timely delivery (see chapters 2.4, 3 and 4 below), one can hardly find any case law on the subject. The answer for this problem might lie in that the claims are not large enough to justify legal litigation. Claims for pure economic loss due to delay are probably most often resolved amicably among the parties by settlement or by arbitration. My research on delay in recent time is therefore limited to anticipations and what is written by other authors.

1.6 Definitions

Most of the words used for the purpose of this research are explained in detail in the text or as footnotes. However, there are a few notions that are commonly used in the text that are crucial to have defined. I use the term *cargo owner* for the person who is the contracting party, which is a bit misleading. It is not necessarily the cargo owner that contracts with the carrier. Synonym to cargo owner I will use the notion *consignor*, who is the actual contracting party to the shipping contract, whether he is the owner of the goods or not.

The notions used for performing party of the carriage are *carrier* and *freight forwarder*. In *multimodal shipping*, i.e. carriage with two or more modes of transport, *Multimodal Transport Operator* will be used synonym to carrier. Carrier will, however, also be used in *unimodal shipping* as well, i.e. only one mode of carriage.

The party receiving the shipped goods is the *consignee*.

2 Delay in Maritime law

2.1 Historical background

An obligation by the carrier to take proper care of the goods and carrying the goods safely has been a priority in the field of shipping for a long time. However, it was in obsolete English law established that an obligation of carrying goods with a duty of timely performance did not exist. In the Parana⁸ from 1877, the court held that losses resulting from fall in market value could not be recovered in an ordinary way. At the time, sea carriage was considered to be unpredictable and courts could not find it justifiable to demand a duty of dispatch on the carrier.

2.1.1 The new era

With time, standard of ships got better, not least by the introduction of engine power, but also by improved navigational systems and more advanced cargo handling systems. The technological developments lead cargo claimants to start demanding responsibility also with regards to timely delivery by the carriers.⁹

The verdict in the Saxon star¹⁰ from the USA was one of the cases that first recognized the duty of timely performance in maritime law. The contracting parties to a charterparty¹¹ had agreed upon a timely delivery of oil. The carrier's engine broke down due to an insufficiently competent engine crew and had to be repaired which subsequently lead to delay of discharging the oil. The court held that the applicable rules (the USCOGSA) which allowed recovery for "loss or damage" not could be limited to physical damages only. The Saxon star recognized recovery for pure economic loss due to delay in shipping.

The principle was confirmed also in English law, in the Heron II.¹² The claimant in the case was awarded damages for loss arising from lost markets and a drop of price due to delay in delivery of a load of sugar. The carrier had deviated from the agreed voyage and arrived 9 days later than the agreed date in the contract. During this time, the price of sugar had dropped

⁸ The Parana (1877) 2 P.D. (C.A).

⁹ Ganado, *supra* note 1 at 2.

¹⁰ Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [1957] 1 Lloyd's. Rep. 271 (re art. "loss or damage under art. 4(1) and (2)).

¹¹ "Contract to lease a ship". The Hague rules (as incorporated in the USCOGSA 1936) were found to be applicable on the case due to a Paramount clause (a recognized clause within maritime law referring to a choice of applicable law to the contract). Normally charterparties are not subject to any mandatory transport law. See W. Tetley, *Glossary of Maritime Law Terms* (Montréal, International Shipping Publications, 2004, 2nd ed) at 24.

¹² C. Czarnikov Ltd. v. Koufos (The Heron II) (1969) 1 A.C. 350, (1967) Lloyd's Rep. 457.

significantly. The court held the carrier liable for the occurred loss, since it ought to have been clear that any delay in delivery of the cargo would lead to the drop of market price. The cargo claimant had made this fact clear to the carrier when negotiating the terms of the contract.

2.1.2 The foreseeability test

The rule of recovery for occurred losses due to breach of contract is well established in the Canadian case Hadley v. Baxendale¹³. The ratio is today applicable on all fields of carriage. Hadley, the plaintiff in the case, operated a mill on which the crankshaft broke. The defendant, Baxendale was contracted to deliver the crankshaft to engineers for repair by a certain date. Baxendale failed to do so, which caused Hadley to lose business and suing Baxendale for damages. The court did not allow Hadley damages because the occurred damages could not be foreseeable to Baxendale. Baxendale could only be held liable if the loss was generally foreseeable or if Hadley specifically had mentioned the special circumstances under which he agreed to the contract.

The court created a test to determine whether losses are possible to recover from. The test is applicable to the modern law on recovery from pure economic loss. In the judgement the court stipulated the following. *“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”*.

Damages from breach of contract are those that arise naturally from the breach of contract. In other words, the test is based on what was foreseeable to the contracting parties. Thus, if the carrier knew or reasonably could be expected to know about the anticipated damages of the counterpart, he is liable for the occurred loss. The damages need to be in reasonable contemplation by the parties at the formation of the contract, but not necessarily explicit. However, if damages are claimed due to a special circumstance, notice needs to be given explicitly during the formation of the contract, i.e. if you for some reason need the goods delivered by Christmas, you must give notice to the other party of that circumstance at the formation of the contract. How to determine whether damages arose naturally out of the contract or if it ought to be claimed as special damages is a matter of opinion and is left to be determined by courts in the light of the facts of each case. No clear distinction is made beforehand.¹⁴

¹³ Hadley v. Baxendale, (1854) 9 Ex. C.R. 341; E.R. 145.

¹⁴ Ganado, *supra* note 1 at 116.

2.2 The overriding obligation of seaworthiness

The possible defences available to the carrier in the applicable conventions¹⁵ to justify a delay are dependent upon an obligation by the carrier having been duly diligent in keeping the vessel seaworthy before and at the commencement of the voyage. This obligation has been defined as “a genuine, competent and reasonable effort”.¹⁶ The obligation will not be dealt with in detail in this research, but it is important to understand that any defence that the carrier may invoke to avoid liability for delay is dependent upon the overriding obligation of seaworthiness. Delay is often justified by some other cause, for instance the carrier needing to make repairs in a port of refuge. However, in order to even consider a delay being justified, one must first determine whether the carrier exercised his obligation of due diligence in keeping the vessel seaworthy before and at the commencement of the voyage. Once this is established, one can consider whether the delay itself was justified. If it is established that the vessel wasn’t seaworthy before or at the commencement of the voyage, no defences can be invoked and the carrier will be liable towards the claimant. Thus, if the carrier was delayed due to repairs of a vessel that was unseaworthy at the commencement of the voyage, the carrier is unable to justify the delay as being reasonable.¹⁷

2.3 The Hague and Hague-Visby rules

The Hague¹⁸ and Hague-Visby¹⁹ rules are the most commonly ratified conventions in the field of carriage of goods by sea. There is no express provision in the rules making the carrier liable for delay in delivery. The only reference to liability is to “loss or damage” of goods. Thus, in order to establish whether losses due to delay can be recovered under the rules, one has to interpret the wording of “loss or damage”. Depending on how broadly interpreted the wording of the paragraph is, one can either assume that the loss or damage is with regards to the goods itself, but also a loss or damage to the cargo interest. A broad interpretation of the wording could support the latter option, which means a loss arising from a delay in delivery would be

¹⁵ Hague, Hague-Visby art. 4 (1) and Hamburg art. 5 (1). See note 18-19 and 52 below.

¹⁶ Hague, Hague-Visby art. 3(1) and Hamburg art 5 (1). N.B, in the Hamburg rules, the due diligence obligation of seaworthiness is not only limited to before and at the commencement of the voyage, but also during the voyage. See W. Tetley, *Marine Cargo Claims* (Montréal, BLAIS International Shipping Publications, 1988, 3rd ed) at 369 and 396.

¹⁷ Not only at the commencement of the voyage if the Hamburg rules are applicable on the bill of lading, see note 17.

¹⁸ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 25 August 1924, “The Hague rules”.

¹⁹ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 23 February 1968, “The Visby Protocol” or “the Hague-Visby rules”.

possible to recover from in the Hague and Hague-Visby rules.²⁰ It is, however certain, that in order to interpret delay as being part of the rules, it has to be with reference to the contract of carriage, either expressly agreed upon or implied by the intention of the parties.²¹ The effect of interpreting delay as part of the rules is that limitations and other defences will be available to the carrier.

2.3.1 Reasonable delay

The obligation by a carrier to deliver goods within a reasonable time follows explicitly or implicitly from the contract of carriage. If the parties to a contract of carriage agree on a specific time of delivery, time is of the essence of the contract. By having an express stipulation in the contract for timely delivery of the goods, the consequences arising from breach of the time stipulation must be foreseeable to the carrier in accordance with the test created in Hadley v. Baxendale (see chapter 2.1.2 above).

More complicated is the situation where the parties failed to agree on such time limit. In lack of a clear agreement, one has to consider what follows from law, custom or usage at the port of arrival. Naturally, this differs depending on what jurisdiction the court or interpreter is located. In absence of such rules, goods ought to be delivered within the time a diligent carrier would use, all the circumstances in the case considered.²² As a conclusion, where time is not of the essence of the contract, the carrier has a duty to carry goods with reasonable dispatch. Yet it is to determine what a reasonable delay is.

Being reasonable means that the carrier does not need to take any measure to fulfil his obligation, but, as the wording expresses, reasonable measures only. In English law, the notion has been discussed in Hick v. Raymond & Reid²³. The rationale of the case can be summarized by the following quote by Lord Watson: “*When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is a general application and is not confined to the contracts of carriage of goods by sea /.../ notwithstanding the protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably*”. The conclusion to be drawn from this case is that English law provides a duty of reasonable dispatch even though it is not implied (or expressed) in the contract of carriage. The

²⁰ N.B The question on whether, or not, delay is considered as part of the rules is in the end a national matter. The answer differs between jurisdictions, i.e. there is no universal answer to this question.

²¹ Hague and Hague-Visby art. 4 (1) and (2).

²² H. Karan, *The carrier's liability under international maritime conventions, the Hague, Hague-Visby and Hamburg rules* (Lampeter, The Edwin Mellen Press Ltd. 2004, 1st ed) at. 215.

²³ Hick v. Raymond & Reid (1893) A.C 22 (H.L).

notion of “reasonableness” seems to be equivalent to not being negligent in forwarding the goods.

The test is objective. If a diligent carrier is found to need ten days to complete a voyage and the carrier under judgement had done it in 21 days, the delay is likely to be found unreasonable. However, as Max Ganado points out in the book “The law of delay in the carriage of general cargoes by sea”, depending on the circumstances in each case, what is reasonable delay in one case might as well be unreasonable in another. Factors that courts have to consider are not only the delaying events during the voyage, but also the condition of the ship, the technical equipment used for cargo handling and other circumstances regarding the cargo that is known to the contracting parties. This means circumstances in one case might give support to measures taken by the carrier to be justifiable, for instance weather conditions or perils, whereas the same peril could be considered not to be justifiable for another carrier.²⁴

2.3.2 Case law

In the case Parnass International v. Sea-Land service²⁵, the carrier was allegedly 18 days late delivering bulk goods to the counterpart. The issue was whether the delay was reasonable under USCOGSA section 1304 (4)²⁶ and whether it constituted a deviation²⁷ as defined by the law. The consignee claimed damages for decline in market value and that the delay was a breach of the alleged 30 day transit time agreed upon in the contract. According to the plaintiff, Parnass, the delay in delivering the goods had caused subsequent buyers to cancel their orders. Furthermore, the market value had dropped 20 percent during the 18 days. The delay was mostly due to a port congestion at one of the ports of call in which a strike was at hand. Moreover, the defendants used a relay system in which cargo was forwarded and shifted between different ships during the voyage. The plaintiffs argued that such system was unreasonable and increasing the risk of delay in delivery. The court held the delay being reasonable on the following grounds. Firstly, Parnass must have known about the relay system, since they had done business with Sea-Land for many years, i.e. Sea-Land was acting in accordance with custom between the contracting parties. Moreover, the court held that even if the relay system would not be in accordance with trade customs, the delay would not be unreasonable with regards to the many risks that are involved in trans-oceanic shipping. The risk of port congestions makes it difficult to make promises on exact time for delivery. It could not be proven that the defendants made a promise as alleged by the plaintiffs, as it also would be unlikely for a carrier to give such promise under the prevailing circumstances.²⁸

²⁴ Ganado, *supra* note 1 at 37.

²⁵ Parnass International Trade & Oil Corp. v. Sea-Land Service Inc. (1985) A.M.C 485.

²⁶ Hague rules art. 4 (4).

²⁷ “A departure by the carrier from the agreed or customary geographic route done without the consent of the cargo interests”. See Tetley *supra* note 11, at 41.

²⁸ Parnass International Trade & Oil Corp. v. Sea-Land Service Inc.

In the US case American Cyanamid v. Booth²⁹, the carrier deviated from its original geographical route in order to take advantage of spring tides and thus delivering cargo sooner. The plan failed and instead caused a delay in delivery. The court held the delay being reasonable as “*what departure from the contract voyage might be a prudent person controlling the voyage at the same time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all the people concerned, without obligation to consider the interest of any one as conclusive*”. The attempts of saving time were regarded as being a decision taken by a prudent carrier and thus not considered as unreasonable.

In the English case Boukadoura Maritime Corp. v. S.A Marocaine³⁰, the carrier was delayed due to problems that occurred during loading fuel oil as cargo. The shipper had presented false quantities of oil in the bill of lading³¹ and the master of the ship refused to sign the bill of lading with the alleged quantities. The shippers claimed that the master had an obligation to sign the bill of lading without qualification and endorsement and contested the reasonableness of the refusal by the master. The master was right about the false presented quantities and the delay caused by the master was considered to be reasonable to justify the delay in delivery.

If the carrier is required to make necessary repairs, the cargo owner has to accept the delay that follows. For the repairs to be excusable, they may not be an effect of the carrier’s negligence (neither as result of an unseaworthy vessel, as mentioned in chapter 2.2 above). During the repairs, the cargo owner may withdraw his cargo as long as he still provides what is required by him in the contract of carriage (normally paying freight). If the repairs take longer time than expected, the carrier will be liable for the extended delay only to the extent he failed to exercise due diligence finishing the repairs and in taking proper care of the cargo meanwhile. The obligation to take proper care of the cargo may under certain circumstances be to transship the cargo (for instance if the cargo is perishable) but the extra expenses occurring from such measures will likely be borne by the shipper.³²

2.3.3 Reasonable anticipation

Under the Hague and Hague-Visby rules, the carrier has an obligation to reasonably anticipate a delaying event and exercise due diligence in

²⁹ American Cyanamid Company v. Booth S.S Co. (1951) A.M.C 1505.

³⁰ Boukadoura Maritime Corp. v. S.A Marocaine de L’industrie et du Raffinage (1989) Lloyd’s Rep. 393.

³¹ “Not necessarily the complete contract of carriage, but the best evidence of carriage as well as receipt signed by the master or someone on his behalf indicating what order and condition the goods have been received onboard”. See Tetley *supra* note 11, at 13.

³² Ganado, *supra* note 1 at 40.

preventing it. The carrier is presumed to be aware of causes that may delay the vessel. So, if the carrier is made aware that a port is at strike, he shall not visit that port. The leading case from this perspective is the Mormacsaga³³ from the Supreme Court of Canada. The carrier was delayed in delivering a cargo of oranges after having entered a port at strike with knowledge of this fact. The carrier claimed to have been informed that the strike was not probable to last as long as it did, however, the court did not find this a reasonable cause to breach the obligation to reasonably anticipate the strike as a delaying event and thus avoid entering the port.

The obligation to avoid reasonably anticipated delaying events is especially strict if the cargo is perishable (such as in the Mormacsaga). The effect of a delay is obviously more significant to cargo owners of perishable cargo. Furthermore, the obligation burdens the carrier throughout the whole voyage, where reasonable measures need to be taken against any anticipated delaying event.³⁴

2.3.4 Further obligations

Even though the carrier is delayed for reasons that in chapter 2.3.1 above are seen as reasonable, the carrier might nevertheless be liable towards the cargo interests. The delaying events impose further obligations on the carrier, even though it was not at fault or negligent. The imposed obligations are such as informing the shipper of the delay, to care for the cargo during the delay, to overcome the delay and to resume the voyage as soon as the delaying events cease.³⁵

The court in the Mormacsaga³⁶ reasoned with regards to this obligation. The carrier was carrying a cargo of oranges which is considered perishable. While stuck in the strike bound port, the carrier failed to care for the cargo of oranges. The oranges in the case were bound to be a total loss, nevertheless, the master on the Mormacsaga took no measures to save the oranges while in the port at strike. This was considered to be a clear breach of the obligation to take proper care of the cargo during the delaying event. The carrier has to take measures as to avoid the cargo becoming a total loss. This is a further obligation imposed to the carrier when the delay already is a fact.

2.3.5 Excusable delays

The Hague and Hauge-Visby rules contain strict rules in cargo handling, which means an act from the carrier to avoid delay might constitute a deviation, or even a fundamental breach of contract. In case of port congestion, the custom is to wait for your turn to enter the port and

³³ Crelinsten Fruit v. The Mormacsaga, (1969) 1 Lloyd's Rep. 515 (Ex. Ct. Can).

³⁴ Ganado, *supra* note 1 at 54.

³⁵ Ganado, *supra* note 1 at 51.

³⁶ The Mormacsaga, *supra* note 33.

discharge goods. Even though the carrier is obliged to carry with reasonable dispatch, the carrier might be prohibited according to the contract of carriage to transship or replace the cargo as loaded in the port of loading. A fundamental breach of contract will deprive the carrier from all of his rights in the contract and, in some cases, even the limitations of liability.

2.3.5.1 Statutory defences

An unreasonable delay (see chapter 2.3.1 above) might be excusable if one or more of the requirements in the list of possible defences³⁷ was causing the delay. As mentioned above (see chapter 2.2 above), in order to invoke a defence, the overriding obligation of seaworthiness must be fulfilled and furthermore, the carrier must not be at fault. Thus, the carrier is not able to invoke any of the statutory defences if he is negligent in performing his duties, he must invoke the defences available with “clean hands”.³⁸

2.3.5.2 Contractual defences

In order to avoid a breach of contract, carriers usually make sure to include clauses in the contract of carriage in order to avoid liability for measures taken to avoid delays *en route*. The obligation of carrying cargo with a reasonable dispatch is difficult unless the carrier is able to take certain measures as to avoid delays. Port congestions and strikes are obstacles that can be overcome by transshipment or by deviating from the planned voyage. However, such measures might constitute a breach of contract by deviation unless the carrier is allowed to make these decisions as to overcome the obstacles by reference in the contract.

The references in the contract that could solve the above mentioned problem are liberty clauses and disclaimers. The former permits the carrier to deviate or take measures with respect to cargo handling as to avoid a delay in delivery and the latter exempts the carrier from liability for an already occurred delay. The clauses can not be too broadly drafted since courts tend to protect cargo claimants by a restricted interpretation. Thus, a clause needs likely to specifically address the delaying event in order to exempt the carrier from liability.³⁹

2.3.5.2.1 Liberty clauses

Liberty clauses are drafted either in order to allow the carrier to deviate from the agreed geographical route, overcarry or return at a later date than agreed.

Aside from the allowed deviation in the Hague and Hague-Visby rules,⁴⁰ a carrier may be at liberty to deviate from the geographical route by a liberty

³⁷ Hague, Hague-Visby art. 4 (2) (a)-(q).

³⁸ Ganado, *supra* note 1 at 94. N.B The defence for “error in navigation by the master or crew” in Hague, Hague-Visby art. 4 (2) (a) can be invoked regardless of the nature of negligence on which the defence actually is based.

³⁹ Ganado, *supra* note 1 at 104. See also Carver, T. G., *Carriage by Sea*, (London, Stevens & Sons, 1982, 13th ed.) at 541.

⁴⁰ To save life or property, Hague, Hague-Visby art. 4 (2) (l).

clause in the contract of carriage. However, to serve its purpose, the clause can not be too broadly drafted. The court might overlook the liberty clause if the liberty is considered to be unreasonable. Thus, only reasonable deviations can exempt the carrier from liability in a liberty clause. The House of Lords stated in Foscolo Mango⁴¹ that a departure from the contract (i.e. deviation) has to be what a prudent person would do in the same situation. The carrier has to bear in mind all relevant circumstances in the case, such as the terms of the contract and interests of all parties concerned, but without any duty to see any of the parties' interest as conclusive. With this said, the contract clause is not conclusive when judging whether a delay was reasonable. Also other facts need to be taken into consideration when justifying the delay. The bill of lading in Foscolo Mango contained the following clause: "...with liberty to sail without pilots, to call at any ports in any order, for bunkering or other purposes or to make trial trips after notice. . .". The vessel had deviated from the agreed route to drop off an engineer. The basis of the case was therefore to interpret the wording of the liberty clause and whether dropping off the engineer was comparable to "bunkering or other purposes". The taken measure was interpreted not to be covered by the clause and the carrier was held liable for the deviation. Thus, courts construe such clauses narrowly. Any deviation falling outside the exact wording in the liberty clause is considered null and void according to the Hague and Hague-Visby rules.⁴²

In spite of the clear case law, a number of bills of lading contain such liberty clauses. Case law considering liberty clauses null and void often base the nullity on a too broadly drafted clause. Thus, narrowly drafted liberty clauses could be held valid. Max Ganado is of the opinion that there is no point in including a liberty clause for deviation in the contract, since such clause is void anyways. Other authors (such as Thomas Carver) find that the clause allowing the carrier to deviate actually defines the geographical route. Thus, such clause is not subject to the nullity ground of the rules, since the obligation of the carrier is not lessened. In other words, as the geographical route is not defined in the contract, the liberty to deviate constitutes the agreed route. Ganado's view is supported by the American case General Electric v. SS Nancy Lykes⁴³. The court held that "...the carrier may not define the voyage in such broad language as to render it impossible for any deviation to be found no matter how far the vessel wanders from the specified route". The case Leduc & Co. v. Ward⁴⁴ broke down a clause giving the carrier liberty to enter "any port at any order" only to be valid for ports substantially on the course of the voyage. The conclusion on this matter is that courts tend to construe liberty clauses restrictively.

⁴¹ Stag Line Ltd. v. Foscolo, Mango and Co. Ltd. (1932) A.C 328 (H.L).

⁴² Hague, Hague-Visby art 3 (8).

⁴³ General Electric Co. v. SS Nancy Lykes, (1982) 536 F. Supp. 687 (D.C S.D.N.Y).

⁴⁴ Leduc & Co. v. Ward (1888) 20 Q.B.D. 475 (C.A).

In cases where liberty clauses have been approved by courts, the clauses have been subject to a specific situation. Furthermore, they have to be drafted in good faith and not exclude liability for negligence by the carrier. In an American case, Dietrich v. US Shipping Board Emergency Fleet⁴⁵, the contract stipulated that the carrier was free to re-arrange loaded cargo due to a renewal of the carrier's fleet (what normally would be considered as a deviation and breach of contract). Since the re-arrangements caused a delay in delivery, the carrier was sued by the cargo owner. The court found the delay being reasonable in light of the drafted liberty clause. It was not drafted in bad faith and it was drafted to specifically cover situations where the cargo needed to be re-arranged. Thus, the carrier was not held liable for the delay and the clause valid.

As a conclusion, if the carrier exercised his liberty to deviate and did it reasonably, he will not be liable under the contract of carriage. Thus, when having a liberty clause under consideration, the court is making a reasonability test whether to allow the occurred delay or not. With this rationale, it is not clear what purpose a liberty clause has. A reasonable deviation is lawful in the Hague and Hague-Visby rules even without a liberty clause.⁴⁶ However, according to Max Ganado, the scope of the rules is likely to be limited to mere geographic deviations and not cover cases of overcarrying or transshipment as a mean to overcome a delay.⁴⁷

2.3.5.2.2 Disclaimers

Unlike liberty clauses, which give the carrier right to take measures in order to overcome delay, disclaimers explicitly exclude liability for an occurred delay. Courts tend to construe these clauses restrictively as well. Excluding liability is only allowed when the occurred delay is found to have been reasonable, a disclaimer can not exempt the carrier from liability for negligence.⁴⁸ However, an American case opens for the possibility of disclaimers' validity, but it is not without controversy. The ratio of the case is not clear. The court held that there is nothing in the Hague rules prohibiting a carrier to exclude liability for delay, provided that the exclusion is a reasonable one.⁴⁹ It is likely that the ratio of the case has no value, since it is well established, at least in some jurisdictions, that the wording "loss or damage" in the Hague and Hague-Visby rules is not limited to physical damage (see chapter 2.3.1 above). If the court meant the carrier is able to exclude liability for reasonable delay only, the case is not of any use with respect to disclaimers, since reasonable delays are not prohibited in the rules.⁵⁰

⁴⁵ Dietrich v. U.S Shipping Board Emergency Fleet Corp (1925) 7 F. 2d 889 (D.C N.D. Cal.).

⁴⁶ Hague, Hague-Visby art. 4 (4).

⁴⁷ Ganado, *supra* note 1 at 111.

⁴⁸ Which means CONLINEBILL, clause 13, which excludes liability for the carrier unless he acted in gross negligence ought to be void. "The carrier shall not be responsible for any loss sustained by the merchant through delay of the goods unless caused by the carrier's personal gross negligence" *Ibid*.

⁴⁹ United Merchants & Manufacturers Inc. v. U.S Lines Co. (1953) 126 N.Y.S 2d 560.

⁵⁰ Ganado, *supra* note 1 at 113.

2.3.6 Limitation of liability

In the chapters above, Hague and Hague-Visby have been treated synonymously, which is rather correct, since it is not much that differs between them. However, with regards to limitation of liability for carrier delay, there is a significant difference between the two protocols. The Hague rules contain no limitation for consequential damages. The Visby protocol, however, contain an express limitation for delay in its art. 4 (5) (b) when stating that the value of the goods shall be calculated at discharge or “should have been so discharged”. The maximum amount the carrier can be liable for is 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.⁵¹

2.4 The Hamburg rules

The Hamburg rules⁵² have not reached any success with regards to implementations in national law. Only about 30 countries have adopted the Hamburg rules, of which only a few are major shipping nations. The Hamburg rules’ art. 5 (1) extends the obligation of the carrier to cover also a duty of carrying goods with a reasonable dispatch by adding “as well as from delay in delivery” to the obligation contained in the Hague and Hague-Visby rules with regards to carrier liability.⁵³

2.4.1 Duty of timely delivery

Delay is defined in 5 (2) of the rules to be what is expressly agreed upon or, in the absence of such agreement, what would be reasonable to require of a diligent carrier having regard to all the circumstances of the case.⁵⁴ Thus, the obligation in art. 5 (1) in the Hamburg rules is two pronged. Firstly, there is a contractual obligation by the carrier of timely delivery and secondly an obligation without such express agreement. In other words, the Hamburg rules enacts the English principle established in Hick v. Raymond & Reid (see chapter 2.3.1 above) and imposes a duty on the carrier to carry goods with a reasonable dispatch, even without an express agreement between the parties. It is not necessary for an agreement to be in writing, courts would also give effect to an express oral statement. The statutory obligation was drafted in order to avoid situations where carriers refuse to give the consignee an estimated time of arrival due to the risk of becoming liable for contractual delay. In other words, the drafters of the Hamburg

⁵¹ “Unit of Account” is a calculated reference based on the largest currencies in the world (Euro, British Pound, Japanese Yen and US Dollar) and is less sensitive to market fluctuations and inflations. Is synonym to the Special Drawing Right (SDR). The daily rate can be found at the International Monetary Fund online:
<http://www.imf.org/external/np/fin/data/rms_sdrv.aspx>.

⁵² United Nations Convention on the Carriage of Goods by Sea, Hamburg 30 March 1978, “The Hamburg rules”.

⁵³ Hamburg rules art. 5 (1).

⁵⁴ Hamburg rules art. 5 (2).

rules found the previous regulation (i.e. the Hague and Hague-Visby) being unsatisfactory and not enough cargo owner friendly.⁵⁵ The regulation is inspired by delay provisions drafted in other fields of transportation (see chapter 3 below).⁵⁶

The obligation without express agreement is based on a reasonability test identical to the one under the Hague and Hague-Visby rules. The object of the reasonability test is to determine what a diligent carrier would have done in the same situation as the carrier under judgement, taking all the relevant circumstances in the case into account. When determining the reasonability of a delay under the Hamburg rules (i.e. determining whether a delay occurred or not), circumstances arisen after the parties entered into the agreement are normally not considered. Only circumstances known to the parties at the time of entering the contract shall be subject to the reasonability test. Note that the reasonability test is only when the parties failed to stipulate a time for delivery, there is nothing in the rules preventing the parties from agreeing upon an unreasonable delivery date. One author suggested carriers to incorporate a date in their bills of lading stipulating a time of delivery so far ahead, that delay would be out of the question. However, there is little doubt that the consignee not would accept such act by the counterpart.⁵⁷

Art. 5 (3) of the rules contains a provision which further protects the cargo claimant from delay in delivery. The provision gives the cargo claimant an opportunity to treat the goods as lost unless the cargo is delivered within 60 days from the date agreed in the contract of carriage. The claimant is not obliged to treat the goods as lost, but is free to await the cargo if he wishes to do so. The stipulation eliminates the issues that could arise under the Hague and Hague-Visby rules with regards to calculation of damages for delay in delivery.⁵⁸

2.4.2 Defences

The carrier is presumed to be at fault if delay in delivery is proven by the cargo claimant. Thus, the burden of proof is on the carrier to exculpate himself from liability for delay. The Hamburg rules do not have a list of possible defences, but a single provision leaving it to the court (or whoever is in the position to judge) to determine what is to be considered a justifiable delay. Art. 5 (1) stipulates that the carrier is not liable if he proves that he took “all measures that could reasonably be required to avoid the occurrence

⁵⁵ J. F. Wilson “Basic carrier liability and the right of limitation” in Samir Mankabady, *The Hamburg rules on the Carriage of Goods by Sea* (London, The Chameleon Press Ltd. 1978, 1st ed.) at 146.

⁵⁶ UNCTAD, “The economic and commercial implications of the entry into force of the Hamburg rules and the Multimodal Transport Convention” (New York, United Nations Publications, 1991) at 110.

⁵⁷ Tony Kegels (ed), *The Hamburg rules: a choice for the E.E.C?* (Antwerp, MAKLU Uitgevers, 1994, 1st ed) at 149.

⁵⁸ *Ibid* at 152.

and its consequences”. The drafting is by many authors identified to be a typical civil law drafting, as opposed to the common law exhaustive drafting of defences that can be found in the Hague and Hague-Visby rules. Aside from the general defence, there is, however, a provision allowing the carrier to deviate (i.e. exempting the carrier from liability for the delay that follows) in order to attempt to save life or property.⁵⁹

Contractual defences are allowed to the extent it does not lessen the liability for the carrier under the Hamburg rules.⁶⁰ Thus, contract clauses that attempts to give the carrier liberty to deviate or disclaimers are prohibited to the same extent as in the Hague and Hague-Visby rules.

2.4.3 Limitation of liability

The Hamburg rules contain an explicit limitation for carrier liability with regards to delay in art. 6 (1) (b). The maximum amount that the carrier can be liable for is two and a half times the freight payable for the goods delayed, but not exceeding the total amount of freight paid.

2.4.4 Nordic law

The Nordic countries have not officially signed the Hamburg convention, but the Nordic Maritime Codes have to a large extent incorporated the provisions contained in the Hamburg rules. Carrier liability for delay was established by law already in the 1970’s. The delay provision is identical to the one stipulated in the Hamburg rules, where the carrier is liable for delay by reference in contract, or in absence of such contract, what is reasonable with regards to the circumstances could reasonably be required by a diligent carrier.⁶¹ In the preparatory works of the Norwegian Maritime Code the legislators justified such an enactment with the following words: “*Modern carriage of general cargo imposes increasingly stringent requirements with respect to regularity and speed in performance of the transport. The Code’s requirement of due despatch must be viewed in this light. Delay will be deemed to have occurred where the voyage exceeds what would be reasonable time in light of the planned carriage and the marketing thereof*”.⁶² In commerce practise in the Nordic countries it was not common with an express stipulation of time for delivery in the contract of carriage, wherefore such stipulation by law was considered to be required in the law in order to protect cargo owners from carrier delay.⁶³

The Nordic Maritime Codes differ from the Hamburg rules with regards to limitations. When the laws were drafted, the legislators decided to keep the limitations as found in the Visby protocol. The standpoint taken is in favour

⁵⁹ Hamburg rules art. 5 (6).

⁶⁰ Hamburg rules art. 23.

⁶¹ See for instance the Swedish Maritime Code, s. 13:28 § (Sjölagen), SFS 1994:1009.

⁶² NOU 1993:36 at 28.

⁶³ Falkanger, T., Bull, H.J., Brautaset, L., *Scandinavian Maritime Law, the Norwegian Perspective* (Oslo, Universitetsforlaget, 2004, 2nd ed.) at 293.

of the cargo claimant, since the Hamburg rules' ceiling is calculated in light of the cargo value as a whole and not considering the value at the port of discharge. The Nordic Maritime Codes are thus keeping the limits where the value of the goods is the port of discharge is the basis for calculating the limitation. The result is most likely a compromise between the interests advocating the incorporation of the Hamburg rules as a whole and their opponents.⁶⁴

⁶⁴ *Ibid* at 97. N.B The Danish Maritime Code differ from the rest of the Nordic countries, since the Danish parliament chose to incorporate the Hamburg rules' limitation.

3 Delay in other fields of transport

3.1 Carriage of goods by road

Contractual relationships in road transportation are commonly governed by CMR.⁶⁵ The Convention has around 50 parties, however, mostly European nations. The nature of transporting goods by road is different from sea transport, as the environment is more predictable and possible obstacles for the carrier are fewer. Furthermore, road transport has less tradition than maritime law (which goes back thousands of years) and contain less principles that are recognized and customary for the contracting parties. Thus, a delay regime within the scope of road transport is not as controversial as in maritime law.

Art. 17 (1)-(5) of the CMR covers carrier liability for delay in delivery. As follows from the wording of the paragraph, “any delay in delivery” falls within the ambit of the provision. The carrier is liable at all times unless he proves that the reason for the occurred delay was beyond his control. The carrier is neither liable for wrongful acts or neglect by the claimant. However, just like the overriding obligation of seaworthiness in maritime law, the carrier is prevented from all defences available if the delay was a result of a defective vehicle. If the carrier proves that the delay was due to circumstances beyond his control, the delay is considered as excusable.⁶⁶

The carrier has to consider certain circumstances in planning the voyage and agreeing upon a timely delivery with the consignor. An icy road is not a defence that typically is allowed as exculpating the carrier from delay, this is something the carrier ought to have considered in the planning of the voyage. The same applies for detentions at public authorities. The carrier ought to count on a long stop at customs in a country where the public authorities are known for taking time in retaining goods for inspection. However, delay caused by an unlawful detention of cargo by public authorities should serve as a typical defence to constitute delay as being lawful. Defences available to the carrier are dependent upon whether he had good reason to anticipate the circumstances occurred. Thus, a road that normally is open and where the traffic normally flows without problems which temporarily is jammed should act as defence, whereas problem with obtaining a visa for the driver is not.⁶⁷

⁶⁵ Convention on the Contract for International Carriage of Goods by Road, Geneva 19 May 1956, “CMR”.

⁶⁶ Clarke, M. A., *International Carriage of Goods by Road: CMR* (London, Lloyd’s of London Press Ltd., 2003 4th ed) at 220.

⁶⁷ *Ibid.*

Damages for delay causing pure economic loss are allowed in the convention. The wording itself in art. 23 (5) could be rather ambiguous stipulating compensation for “damage”. However, it was soon established that pure economic loss is recoverable under the provision.⁶⁸

Liability is imposed on the carrier for delay after agreement as well as for delay after a reasonable time for delivery has elapsed. Art. 19 is covering both of the situations. The reference to an agreed time limit is not limited to cover only agreements in the consignment note. This means, if the carrier has advertised upon a timely delivery or such agreement is made orally, such statement is binding. In an agreed time limit, the parties are free to agree upon any conditions they wish. Any breach (outside the carrier’s control) of such condition is considered a breach of contract and leads to reprisals for the carrier. Agreed time limits are seldom subject to interpretation, if the carriage arrived later than agreed, the carrier is liable.

It can be questioned whether the carrier is liable for delivery made too soon. Naturally the carrier can not be held liable for delay as defined in the CMR, however, the cargo owner have a right to decline delivery until the time has reached a point within the agreed scope in the contract. If the carrier delivers too soon is more a question of breach of other duties in the contract rather than delay.⁶⁹

If the contracting parties fail to agree upon a date of delivery, the carrier is obliged to deliver within a time a reasonable carrier would use for the same voyage, considering the circumstances of the case. What shall be considered as reasonable is determined by the interpreter from time to time and such judgement ought to be fairly arbitrary. However, the guidance that has been given in case law is that in cases of partial loads, one has to consider the time required for making up a complete load in the normal way. Thus, the cargo owner of the partial load has to consider the additional time it takes for the carrier to load and handle other consignors’ cargo (unless the parties agrees on otherwise). Factors that one has to consider when taking relevant circumstances under judgement are nature of the goods (more perishable goods are required a sooner delivery), the type of vehicle used, any instructions given by the consignor, the permitted driving hours, road conditions and other factors that might affect the carriage *en route*. In some countries, the customs could be more time demanding than others, some countries could have political instabilities form time to time etc. The conclusion is that whatever obstacle the carrier is facing, the judgement to be made is whether he acted reasonably in order to overcome the situation.⁷⁰

Art. 23 (5) of the convention stipulates a limitation of liability for the carrier after an occurred delay to the amount of the accumulative charges for the carriage.

⁶⁸ *Ibid* at 177.

⁶⁹ *Ibid* at 175.

⁷⁰ *Ibid* at 176.

3.2 Carriage of goods by air

The paramount reason for a cargo owner choosing carriage by aircraft is most likely for the speed and possibility of delivery within a short period of time. The cargo owner actively chooses the transport form regardless of the higher freight because he is dependent upon a timely delivery of the goods. Therefore, the consequences of delay in delivery are therefore even more crucial in aviation law than in any other field of transport. Time is of the essence of every contract of carriage.

The convention that covers air transport is the Montreal Convention.⁷¹ It amended the former Warsaw Convention and was signed in 1999. The convention applies to all international carriage of cargo (as well as persons and baggage) performed by aircraft for reward.

Art. 19 covers carrier delay and stipulates the following: “*The carrier is liable for damage occasioned by delay...Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures*”. Thus, as for the burden of proof, the same principle applies as in other fields of transport. Once the claimant has proven delay, there is a presumption that the carrier is at fault and it has to exculpate itself from this presumed fault.

Delay is when the cargo did not arrive on the date and at the hour explicitly stipulated or indicated in the carrier’s timetable. However, courts and authors have established that any delay does not constitute delay *per se*, but merely abnormal delays are meant to be covered by the notion of delay in the convention. An abnormal delay is resulted by the carrier’s lack of taking the appropriate measures to ensure departure and arrival of the aircraft at the times explicitly specified or indicated in the timetable. In older law within the common law system, it was established that the reasonability test were to apply on air carriage performed without a contract. However, since contracts always are issued for air carriage, this principle is at this day obsolete.

There is nothing in the rules limiting when the delay must arise in order to impose liability on the carrier. Delay might arise before departure, during the voyage or after the arrival of the aircraft. This follows implicitly by interpreting the period of responsibility in the convention.⁷²

Art. 23 of the Montreal Convention prohibits contract clauses which partly or fully relieve the carrier from liability resulting from delay. Such clauses are null and void. Case law is clear construing this provision and

⁷¹ Convention for the Unification of Certain Rules for International Carriage of Goods by Air, Montreal, 28 May 1999 “The Montreal Convention”.

⁷² Mankiewicz, R. H., *The liability regime of the international air carrier* (London, Kluwer Law International, 1981 1st ed) at 186.

disclaimers are regularly held unlawful. One exception can, however, be mentioned. In the American case Atlantic Fish v. Pan American Airways⁷³ (which was subject to the equivalent rule under the Warsaw Convention) a disclaimer was held valid due to special circumstances. The airline had exempted delay for other airlines' delay and this was allowed from which to exempt according to the court. Since the occurred delay was due to a subcontracting airline, Pan-American Airways was not liable for the delay under the clause.

Courts have applied art. 19 strictly and have held the carrier liable for any kind of abnormal delay unless he could discharge the burden of proof that is required. The requirement of reasonable measures to overcome delay is set high. In Iran Air v. Société générale de Géophysique⁷⁴ (also subject to the equivalent Warsaw Convention rule) the carrier was held liable for partial delay. Goods had been left behind in Paris and did not reach the designated destination in Iran until 17 days later. The carrier failed to prove that he took reasonable measures to ship the goods on another aircraft. The court took into consideration the existence of many direct and indirect connections between Paris and Teheran that the carrier could have used in order to fulfil his obligation to the consignor.

As well as in other fields of transport, perishable cargo increases the obligation of timely delivery by the carrier. In one case, the carrier had breached an agreement where he was prohibited to overnight stopovers. It was carrying a load of perishable fruits and due to the nature of the cargo, the negligent behaviour of making an overnight stopover was considered to be a fundamental breach of contract. Liability was imposed on the carrier for the occurred delay without any limitations.⁷⁵

As for the limits of liability, one can see significantly higher amounts than in other fields of transport. The maximum amount a carrier is liable for with respect to delay in delivery of cargo is 17 SDRs per kilo. This amount might be increased if the consignor has made a special declaration of interest in delivery (which in practise probably only is possible if the consignor pays a supplementary sum).⁷⁶

3.3 Carriage of goods by rail

There are a number of international conventions covering international carriage of goods by rail. The various conventions have with time been annexed in one big convention covering all forms of rail carriage. This

⁷³ Atlantic Fish and Oyster Corp. v. Pan American Airways, 2 November 1948, Illinois Circuit Court, Cook County.

⁷⁴ Iran Air v. Société générale de Géophysique, 14 November 1974, C.A Paris.

⁷⁵ Mankiewicz, R. H., *The liability regime of the international air carrier* (London, Kluwer Law International, 1981 1st ed) at 193.

⁷⁶ Art. 22 (3).

convention is named COTIF.⁷⁷ It has around 40 member states in various nations worldwide. The sub-convention of significance for carriage of general cargo on rail is CIM.⁷⁸

The contracting parties to a contract of carriage by rail are bound to agree upon a transit period. In absence of such agreement, there are detailed time limits provided in CIM which the carrier is obliged to follow.⁷⁹ The transit periods provided are based on how much cargo the consignor have on board the carrier (wagon load or less than wagon load) as well as the distance of the transport. The distance is defined as the agreed route or, in lack of such agreement, the shortest route possible.

The carrier is liable for exceeding the agreed, or the statutory, transit time in art. 23 for whatever railway infrastructure used. The same burden of proof is imposed on the carrier once the claimant has proved delay in delivery. The carrier is relieved from liability if it proves that someone else was at fault (however, not someone under the carrier's vicarious responsibility) or if the delay was due to a defect in the goods forwarded or otherwise caused by circumstances that he was unable to avoid.

The cargo owner may treat the goods as lost 30 days after the expiry of the transit time agreed upon or provided in the convention.⁸⁰ When the person entitled to the goods has used the right to treat the goods as lost, the title holder may at the same time make a request to the carrier to be notified should the goods be recovered within a year. This gives the cargo owner a possibility to repay the refunded freight and have the goods delivered.

The compensation for exceeding transit times shall not be higher than four times the carriage charge.⁸¹ However, if the consignor has made a special interest in delivery, the amount agreed upon shall be the limit of liability between the contracting parties. Thus, liquidated damages are overriding the statutory limits in art. 33 by reference to art. 35 if the parties agree upon it. In order for the carrier's limit of liability to be extended, the consignor explicitly has to declare the special interest in a timely delivery. The carrier can not be liable for more than the limit agreed upon, naturally the agreed limit can not be lower than the amounts provided in CIM.

⁷⁷ Convention concerning International Carriage by Rail, Berne 9 May 1980, "COTIF". Last modified in Protocol of 3 June 1999.

⁷⁸ Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, Appendix B to COTIF, "CIM".

⁷⁹ CIM art 16 (1) and (2).

⁸⁰ CIM art. 29.

⁸¹ CIM art. 33.

4 Existing multimodal regimes

This chapter will review existing regimes on the multimodal transport area. The heading might be somewhat misleading, since the European Community proposal is not an existing one (see chapter 4.5) and the 1980 Multimodal Transport Convention is more or less obsolete (see chapter 4.2).

4.1 Network or uniform liability?

In a chain of transport it can be difficult to prove what caused the alleged loss or damage, or in this research, delay. This is resolved in the variety of multimodal regimes by a liability system in which the Multimodal Transport Operator (MTO) accepts liability towards the cargo owner throughout the journey. However, the responsibility that the MTO accepts is different depending on what liability system that is used. In a network liability system, the MTO accepts liability towards the cargo owner under the multimodal set of rules to the extent that it can not be proven where the delay occurred. This means, if a delay is proven to have occurred during the road part of the transport, the CMR rules are applicable. If it can not be proven where the delay occurred, the fall back provision in the multimodal regime is applicable. In a uniform liability system on the other hand, the MTO is liable under the multimodal rules at all times. Thus, the same liability rules are applicable throughout the whole transport. There is also a third alternative in this respect, which can be named a modified liability system. In this system, the uniform liability rules are applicable throughout the whole journey, whereas some mandatory provisions in unimodal law (such as limitations) are different depending on what stage of the journey the loss occurred.⁸²

Chapter 4.2, 4.3 and 4.4.3 will show examples of a modified liability system and chapter 4.5 of a uniform liability system. Chapter 4.4.1 will review a jurisdiction which has chosen the network liability system.

4.2 The 1980 Multimodal Transport Convention

The need of uniformity on the law of multimodal transport has been at hand for a long time, which is proven by the UN initiative which lead to the draft of the 1980 Multimodal Transport Convention. However, as the convention has not reached the required amount of 30 signing states, it is not at this day in force. Nevertheless, the substantial rules in the convention have inspired subsequent drafts of multimodal instruments.

The convention is applicable on all multimodal carriage if the place where taken in charge or delivery of the goods is located in a contracting state. It is

⁸² UNCTAD, "Multimodal transport: the feasibility of an international legal instrument", 13 January 2003, online: <http://www.unctad.org/en/docs/sdtetlb20031_en.pdf> at 16.

a mandatory regime, but it recognizes the right of a consignor to choose whether he wants the transport to be governed by unimodal transport law.⁸³

The convention presents a modified network liability system. Thus liability is governed by the convention regardless of whether the loss or delay is localized or not, whereas the monetary limits are governed by unimodal rules if the damage is localized to a particular stage of the voyage.⁸⁴

Liability for delay is provided in art. 16 of the convention. The MTO is therein liable for delay expressly agreed upon as well as delivery later than the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. If the delivery is delayed with more than 90 consecutive days, the goods may be treated as lost.

Even though the convention is not in force, a few countries have copied the rules in the convention and enacted them to have force in their jurisdiction. Egypt, for instance, have enacted the 1980 Multimodal Transport Convention as law (even though they're not a signing state of the convention). At the same time, the government has established a licensing system for the operation of an MTO in the country. This measure is taken in order to control the quality of the companies acting as transport operators so that they conform with the international duties toward other nations trading under the rules of internationally binding treaties and conventions Egypt is part of.⁸⁵

Mexico, as a signing state of the convention has also adopted national rules identical to the ones provided in the 1980 Multimodal Transport Convention.⁸⁶

4.3 UNCTAD/ICC Rules for Multimodal Transport Documents

Pending the entry into force of the 1980 Multimodal Transport Convention, ICC and UNCTAD gathered the commercial parties established in transport to develop a set of rules to apply for multimodal carriage. The rules are not applicable *ex proprio vigore* (by their own force) like the Hague and Hague-Visby rules. The set of rules are purely applicable through incorporation by the contracting parties. Incorporation can be made in writing, orally or otherwise incorporated into the contract of carriage (i.e. how it is incorporated is more a question of proving applicability by the party which is alleging it).⁸⁷

⁸³ Art. 3 (1) and (2).

⁸⁴ Art. 16 (1).

⁸⁵ UNCTAD, "Implementation of Multimodal Transport Rules" 25 June 2001, online: <<http://www.unctad.org/en/docs/posdtetlbd2.en.pdf>> at 44.

⁸⁶ Regulation on International Multimodal Transport, published in "Diario Oficial" on 7 July 1989.

⁸⁷ UNCTAD/ICC Rules for Multimodal Transport Documents, online: <<http://r0.unctad.org/en/subsites/multimod/mt3duic1.htm>>.

The UNCTAD/ICC rules use a modified liability system, where the MTO accepts liability at all stages during the voyage. Naturally, stipulations on monetary limitations in the set of rules can not be contrary to the ones provided in the applicable mandatory conventions. The rules are only meant to function as supplement to contractual stipulations between contracting parties and the mandatory transport conventions prevent contracting parties to opt out certain matters (such as limitations).

Article 5 (1) of the rules stipulates liability for the MTO for delay in delivery. The definition of delay is the same as in the Hamburg rules, namely if the goods have not been delivered within the time expressly agreed upon, or in the absence of such agreement, within the time which it would be reasonable to require from a diligent MTO, having regard to all the circumstances of the case. Thus, if the cargo claimant proves delay in delivery, the same presumption of fault applies as in mandatory transport conventions and the MTO has to prove that it was not at fault to be exempted from the occurred delay.

One important difference from the Hamburg rules has to be highlighted. The MTO is not liable for an occurred delay unless the cargo owner has made a declaration of interest in timely delivery, which also has been accepted by the MTO. The declaration can thus be seen as an amendment to the contract of carriage and it is required that it can be proven that this declaration has been made.

Furthermore, art 5 (4) states that the MTO is not liable for any occurred delay by sea or inland waterway if the delay is caused by an error in navigation or management of the ship or fire. Thus, the delay provision by sea is slightly more carrier friendly than if the delay occurred on land.

The cargo owner might treat the goods as lost if the delivery has passed 90 consecutive days following the date delivery should have been made in accordance with art. 5 (1).

4.3.1 Commercial use

The UNCTAD/ICC rules have shown to be successful with regards to use in commercial practise. Well established multimodal contracts of carriage are based on the rules, such as the FIATA Multimodal Transport Bill of Lading and the BIMCO Multidoc 95. The FIATA Bill of Lading contain a box on the front page under the headline “declaration of timely delivery of the consignor”. Thus, the consignor must declare that time is of the essence of before the freight forwarder signs the bill. In practise, this system makes it easy to prove whether time is of the essence.⁸⁸

⁸⁸ *Ibid.*

4.3.2 Implementation in international agreements

Aside from pure contractual implementations, the UNCTAD/ICC rules have also been incorporated through legislation in national law and model for internationally binding treaties. For instance, the delay provision contained in the rules have been enacted in three separate agreements on international multimodal transport in South America.⁸⁹ Thus, the South American countries have found the declaration of interest by the cargo owner to be a functioning way to stipulate liability for delay.

4.4 National multimodal regimes- a brief comparison

There are a number of states that have enacted national laws on multimodal transport. This chapter will briefly review the delay provisions in some of those jurisdictions. Having a national law on multimodal carriage might conflict with other applicable international regimes, but the conflict of laws perspective will not be dealt with in this research. The comparison will merely be an analysis on the delay provisions existing in national law. The specific nations are chosen because the three countries have chosen to enact different delay provisions. China imposes liability only after agreement, Germany both after agreement as well as within a reasonable time and India only after a declaration of interest is made.

4.4.1 Germany

Germany adopted a law in 1998 which object is to govern multimodal transport.⁹⁰ It applies on transports with at least two modes of carriage over land, inland waterways or by aircraft. Thus, the law is not aimed to cover multimodal carriage where the main part is by sea. The regulation is based on a network liability system, which means if the delay is localized to have arisen during a certain stage on the voyage, the rules governing this mode of transport prevails. The burden of proof is on the claimant, or whoever is alleging the occurred loss. However, the parties may agree upon the general multimodal rules to be applicable, even if it is proven where the damage arose. Naturally, the parties may not agree upon conditions that would violate international binding agreements (such as the limitations in the Hague-Visby rules) as they apply *ex proprio vigore*.⁹¹

The basis of liability is mainly taken from the CMR rules on carrier liability. Thus, the carrier is liable for any damage resulting from delay in delivery,

⁸⁹ The Andean Community (Bolivia, Colombia, Ecuador and Peru), decision 331 of 4 March 1993; MERCOSUR (Argentina, Brazil, Uruguay and Paraguay), Partial Agreement for the facilitation of Multimodal Transport of Goods 27 April 1995; ALADI (Argentina, Bolivia, Brazil, Cuba, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela), agreement on International Multimodal Transport 1996.

⁹⁰ German Commercial Code (Handelsgesetzbuch) arts. 452-466, as revised 25 June 1998 (Transport Law Reform Act).

⁹¹ German Commercial Code art. 452 (a) and (d).

both due to specific agreement as well as what is to be reasonably expected from a reasonable carrier. The limit of liability for delay is fixed to three times the freight.⁹²

4.4.2 China

China has several laws that are applicable on multimodal carriage. All together, they cover the full scope of multimodal carriage. For instance, when there is a sea-leg involved in the multimodal carriage, the Maritime Code applies. When the multimodal carriage is performed without any maritime transport, the Contract Law applies.⁹³

Under the Maritime Code, the carrier is held liable in art. 50 for delay if the parties agreed on a timely delivery. Thus, there is no “statutorial” provision making the carrier liable for delay when the contracting parties failed to agree on such time. The carrier can invoke the same defences for an occurred delay as for other damages. The Chinese Maritime Code is unique compared to other laws on multimodal transport, as it explicitly gives the cargo claimant right to pure economic loss by statute. The Code defines pure economic loss as it states that the carrier is liable also “*for economic losses 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*”. Furthermore, the goods might be treated as lost by the cargo owner unless delivery is made within 60 days from the agreed delivery date, thus an inspiration from the Hamburg rules.⁹⁴ Damages resulting from delay are limited to the freight paid for the goods. Thus, a lower limitation for the carrier than most other transport conventions and laws in the world.⁹⁵

As for other forms of multimodal carriage, general contract law applies and there is nothing stipulated on delay. Hence, liability for delay is also in this perspective imposed only after express agreement by the contracting parties.

4.4.3 India

The Indian Multimodal Transport of Goods Act from 1993⁹⁶ applies from any place in India to a place outside India. The Act has the same delay provision as provided in the UNCTAD/ICC rules, thus, the cargo owner needs to provide a declaration of interest to the carrier which the carrier has to accept.⁹⁷

⁹² German Commercial Code art. 431 (3).

⁹³ The Chinese Maritime Code 1993, Chapter IV, Section 8, Special Provisions regarding Multimodal Transport Contracts; The Chinese Contract Law 1999, Chapter 17 section 4: Contracts for multimodal transportation.

⁹⁴ The Chinese Maritime Code art. 50.

⁹⁵ The Chinese Maritime Code art. 57.

⁹⁶ The Indian Multimodal Transportation of Goods Act 1993, (No 28 of 1993).

⁹⁷ Sec. 13 (1).

The provision on delay states that the carrier is liable for any delay and consequential damages arisen from such delay if the loss occurred during the time the MTO was in charge of the goods with reference to the contract of carriage. The system is a modified liability system, where the carrier is liable towards the cargo owner at all times under the Act, but the limitations are subject to unimodal law if the damage or delay is localized to a particular stage of the voyage.

The claimant may treat the goods as lost if the carrier has failed to deliver within 60 consecutive days from the agreed delivery date. Furthermore, the limitation of liability for delay is the freight paid for the carriage.⁹⁸

4.5 The European Community proposal

The need for a set of rules covering multimodal transport is established. However, most commentators are anticipating a long process on a global level before all parties involved can agree on an internationally binding multimodal instrument (see chapter 5 below). Therefore, the European countries have initiated a process of creating a set of rules within the European Union that can function as role model for the further development of a binding convention on a global level. The directorate general of Energy and Transport of the European Union has appointed some of the leading commentators within the member states to prepare a first draft as proposal to the European Commission. The report⁹⁹ (ISIC) was filed in October 2005 and the draft is at this point revised by the Commission. The European initiative is not aiming to create a set of rules in competition with UNCITRAL. The main objective of the rules is to create a regime that can be evaluated and tested on a global level and maybe work as a role model for a subsequent international regime. Two main characteristics can be highlighted on the European draft. Firstly, the name of what most commonly is called “multimodality” is in the European report called “intermodality”. Secondly, the application of the set of rules shall be on a voluntary basis. The rules will apply within the Community without any reference in the contract of carriage, but, the contracting parties shall have the opportunity to opt out the rules in the contract of carriage. Thus, the objective is to cover only contractual relationships that have not actively chosen the rules not to apply.

The set of rules have, as opposed to most other multimodal liability systems, imposed a strict liability on the MTO in a unimodal liability system.¹⁰⁰ Thus, it is a simple regime without any issues with regards to determining where loss or damage arose on the voyage. The defences available for the

⁹⁸ Secs. 13 (2) and 16.

⁹⁹ Clarke, M. A., Herber, R., Lorentzon, F., Ramberg, J. “Integrated Services in the Intermodal Chain”, Southampton, 28 October 2005, online: <http://ec.europa.eu/transport/logistics/consultations/2006_04_26/doc/2006_03_31_logistics_consultation_task_b_en.pdf>.

¹⁰⁰ In the report, the MTO is named “Transport Integrator”, but I will continue using MTO in order to retain conformity in the paper.

MTO are less favourable to the carrier than in most other regimes. The defence for an occurred loss is suggested to be only those that are comparable to *force majeure*.¹⁰¹ As for the limitation of carrier's liability, it is suggested that 17 SDRs per kilo is appropriate. Thus, no package limitation is enacted and the same limit is applicable throughout the voyage regardless during which stage of the voyage the damage arose.¹⁰²

In art. 8 (1) of the report, it is stipulated that liability is imposed for delay in delivery. Delay in delivery is defined in art. 8 (2) as “*when the goods have not been delivered within the time expressly agreed upon by the parties to the contract of transport or, in the absence of such agreement, within a reasonable time, having regard to the circumstances of the case*”. Thus an identical provision as the one contained in the Hamburg rules. The rules further give the cargo owner a right to treat the goods as deemed lost after 90 consecutive days from the date when the goods were agreed to have been delivered or determined to have been delivered by a diligent carrier.

¹⁰¹ “Circumstances beyond his control”. Thus, not necessarily only *force majeure* situations. More precisely what the defence means is to be determined by courts *in casu*. See the report art. 8 (4).

¹⁰² Art. 9 (1).

5 The UNCITRAL draft

5.1 Historical background

The concept of multimodal transport is not new, it was developed already in the mid 20th century along with the development of container transport. As the trade became more global than before, the container transport was found to be a satisfactory way of transporting goods long distances. The container is easy to load and reload and is suitable for a subsequent inland carriage. This means a consignee is less dependent on having his place of business close to a port. This evolution made shipping companies and freight forwarders to offer contracts of carriage in which they accepted responsibility towards the consignee for the whole chain of transport. In the complex world of international shipping with different languages, laws and commercial practises, cargo owners were offered a service where only one party was responsible for the cargo. This was shown to be an effective marketing measure. Nevertheless, the market needs rules to govern these transport operations. Problems arose as to what responsibility the carriers actually had towards the cargo owner. These problems lead to the development of the non-mandatory UNCTAD/ICC rules and the 1980 Multimodal Transport Convention. As said above (chapter 4.3), the non-mandatory contractual regime is rather successful, but there is a lack of mandatory rules on the area of multimodal transport.¹⁰³

Work was initiated by the CMI to develop a multimodal transport document. For years, the work in the organization had been focused on developing the Hague and Hague-Visby rules, but the work stranded because of the global need for a multimodal regime. The final draft was handed over to UNCTAD for further improvements. The preparatory measures by UNCTAD lead to a report, which is a summary of the different opinions in the industry with regards to a mandatory multimodal regime. The work of drafting the convention is now under the UNCITRAL umbrella and pending. Some commentators claim the different opinions with regards to the contents of the convention is making it impossible for a feasible convention to be drafted. As described below (chapter 5.1.2) the delay provision is one of the disputable articles.

5.1.1 The UNCTAD report

Even though multimodal transport contracts are commonly used today, the market is in need of a legal framework to cover issues that may arise. Contracts are subject to mandatory provisions in unimodal transport law and, dependent upon where the delay occurred, different rules are applicable. This is difficult to determine and creates unpredictability for the

¹⁰³ UNCTAD, "Multimodal Transport: short introduction", online: <<http://r0.unctad.org/en/subsites/multimod/mt2brf0.htm>>.

contracting parties. Therefore, the UNCTAD report concludes a need for a multimodal regime that governs these matters. This opinion is supported by a broad consensus within the industry.

The working group also concluded that the standard form contracts used by Multimodal Transport Operators (MTO's) today are often favourable to the carrier. It is only major shippers and consignors that have the bargaining power to negotiate the terms in the standard agreements on the market. Therefore, the underlying principle for a mandatory regime is to protect smaller businesses. Smaller cargo owners will not have a chance to negotiate a timely delivery with the carrier.

Of all the respondents to the questionnaire, 90 % stated that any instrument governing multimodal carriage should govern liability for delay. The basis for this is that all modern unimodal transport regimes contain liability provisions for delay. So is the fact for the 1980 Multimodal Transport Convention, as well as the modern multimodal contracts of carriage.¹⁰⁴ However, how liability for delay ought to be drafted was not proposed in consensus. Some of the delegates held liability for delay only should be imposed after agreement, but some held the increasing concern of a timely delivery should be considered as so important that liability should be imposed even without an agreement.¹⁰⁵

5.1.2 The pros and cons

The provision is controversial in the process of drafting the convention. As a majority of all the nations participating in UNCITRAL is positive to a delay provision, there are also counterarguments to the drafting of a delay provision. The main argument used by the con-side is the same used by the pro-side with regards to including a delay provision. Jurisdictions that have enacted delay provisions have seen that the effect of having a provision is not very remarkable. The case law for delay in delivery is almost non-existent, perhaps even more important, the successful attempts of the existing cases are even fewer. The pro-side is using this as an argument to enact a delay provision, since it doesn't make a difference to draft a provision, as it won't have any further effects than a system without a delay regime. The con-side is using the same fact arguing for the lack of a commercial need for a delay provision.

With regards to a delay provision for liability without an express agreement, the con-side expressed concern that such imposed liability would lead to an increased amount of litigation. The pro-side expressed the anticipation of drafting of a statutory obligation of timely delivery leading to increased litigation being exaggerated.¹⁰⁶

¹⁰⁴ BIMCO Combidoc and FIATA Bill of Lading, which both are based on the UNCTAD/ICC rules. See online: <<http://www.bimco.dk>> and <<http://www.fiata.com>>.

¹⁰⁵ *Ibid.*

¹⁰⁶ UNCITRAL, Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007) at 42.

5.1.3 The USA proposal

The United States is of the view that a delay provision is to be excluded from the convention. Accordingly, delay provisions are not in line with public policy and to impose damages for delay will not work in practise. Furthermore, the American delegation expressed that imposing such liability would change the custom of most shipping nations and create a greater complexity and uncertainty in the law of transport. If damages ought to be possible to recover from, it shall be resolved amicably by the contracting parties, i.e. only by reference to an agreement between the parties. The delegation further expressed that the working group and all other delegations had overstated the meaning of the just-in-time management. That if a company needs protection for delay in delivery, it ought to be capable to include such condition in the contract of carriage.

The American delegation also expressed concern over the further effects a liability regime for delay would have, especially with regards to increased insurance costs. Carriers facing exposure to this new liability will be required to purchase insurance to cover the potential liability. The costs will in the end be borne by the cargo owner by increased freight rates. Accordingly, the increased costs will not only be borne by the cargo owners that are shipping high value goods (that also have a greater need of a timely delivery), but also the ones who are shipping low value goods and are less dependent upon a timely delivery.

As the American delegation concluded that delay liability should not be a part of the convention at all, they also forwarded a possible compromise. In this compromise, liability for delay could be remained in the draft, but only after an express agreement.¹⁰⁷

5.2 The current delay provision

Until the most recent draft, the delay provision in the UNCITRAL draft was identical to the one in the Hamburg rules, where liability was imposed for delay both after an express agreement as well as within what time of delivery that ought to be expected from a diligent carrier. The proposal was found to be controversial, not least after protests by the American delegation. The working group found that there was valid reasons to keep a provision covering carrier delay and not leave it up to domestic law to determine, but to what extent was not clear. Strong views were expressed to keep the part on delay liability also without an express agreement, since it was said to be the core of the whole provision. However, the working group finally deleted the wording on the ground that some delegations expressed

¹⁰⁷ UNCITRAL, "Proposal of the United States of America on Carrier and Shipper delay", 4 April 2007, online: <<http://daccessdds.un.org/doc/UNDOC/LTD/V07/820/90/PDF/V0782090.pdf?OpenElement>>.

their concerns that keeping the obligation without express agreement would lead to increase the risk of litigation.

Thus, the provision on delay in the current UNCITRAL draft is only imposing liability on the carrier where there is an express agreement for a timely delivery.¹⁰⁸

¹⁰⁸ UNCITRAL, Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007) at 44.

6 Conclusions and recommendations

6.1 Scope of a multimodal regime

The main objective with creating a new set of rules for multimodal transport is to unify the existing laws on transport and make it easier and more predictable to apply rules on multimodal carriage. The complexity of today's applicable rules is what initiated the process in UNCITRAL and the result of a draft must be in accordance with the main objective to have the effect that the parties in multimodal shipping are intending. The result must not be another complex legal regime added to the others, which more has the function of "food for lawyers".¹⁰⁹

The UNCITRAL draft is only applied where there is a sea leg involved in the multimodal carriage. Thus, it is not a true multimodal convention, but more of a maritime convention with additional set of rules for prior or subsequent inland carriage. The 1980 Multimodal Transport Convention is a true multimodal convention applied on all modes of carriage. In light of the main objective, one can question why the UNCITRAL draft omits to create rules for all kinds of multimodal carriage. Is the need for multimodal rules bigger where there is a sea leg involved? It might be so. The maritime conventions used by the majority of all the shipping nations are fairly old. The Hague rules are from the 1930's and the Visby protocol is around 40 years old at this day. Conventions for other modes of carriage have evolved with time, whereas maritime laws have stayed the same since they were created. Thus, the need for a set of rules might be bigger when one of the modes of transport is by sea. However, a set of rules failing to apply on all forms of multimodal carriage is not in light with the main objective of the multimodal convention. It does not eliminate unimodal law on transport. Unimodal transport law will still be applied and in one way, the UNCTRAL draft will be "lawyer food" if it can not be applied on all multimodal carriage. However, it is a step in the right direction towards a true multimodal regime. It could serve as a role model for subsequent conventions that are to be applied on all multimodal carriage. Furthermore, if the UNCITRAL draft succeeds with having Hague, Hague-Visby and Hamburg countries to sign, at least it has gained success with unifying the rules existing in maritime law.

The UNCITRAL draft is misleading as to its application though. Johan Schelin states a good example in his article "Carriage of Goods by Sea- the

¹⁰⁹ As expressed by Johan Schelin, see "Carriage of Goods by Sea- The UNCITRAL Convention" 2007, Ax:son Johnson Institute, Stockholm, online: <http://web.mac.com/johan.schelin/iWeb/MaritimeLawInstitute/Research/Research_files/RavennaPaper.pdf>.

UNCITRAL Convention”.¹¹⁰ A rail carriage from Siberia to St. Petersburg and a subsequent sea carriage to Stockholm and a further land transport to Norway would be covered by the UNCITRAL draft. Yet, the sea leg is so short in comparison with the rest of the voyage, next to nominal. Ought the maritime plus convention to be applied on such voyage? This is a good example to use when criticizing the draft on its application. It is no answer as to whether it is a maritime plus or a true multimodal convention that is the best answer at this day. However, it is remarkable that almost the same carriage from Siberia to Norway by road through Finland is not covered by the convention. The question one has to answer is what it is about sea transport that creates the extra need for the UNCITRAL draft? Perhaps the answer lies in that a true multimodal convention would be to take a too large step from the legal tradition applied today. Maybe creating a true multimodal convention would be to take a too big step at once. The fact that the 1980 Multimodal Transport Convention did not reach any success could be one of the factors why the parties in UNCITRAL want to limit the scope of a new convention. I find this approach fairly reasonable, but I find that it is misleading to call it a multimodal convention. The same effect could have been reached by developing the existing maritime conventions to apply on subsequent or prior land transports. The work load would have been significantly lower and the effect would have been the same.

6.1.1 Mandatory or opt out approach?

Not all modes of carriage are in need of a multimodal regime. Bulk carriage and tanker carriage are transport types within maritime law that are usually not transported subsequently on land and which also normally are considered low value goods (considering the value *vis-à-vis* the weight carried). A multimodal regime is mainly for the purpose of container shipping and high value transport. If the need for a set of multimodal rules is not equal in the whole transport industry, why create a set of rules that apply equally on all kinds of cargo? Is the solution to have different stipulations for different cargo? That is doubtful. However, if the contracting parties are able to choose the application of the rules, the problem is solved. The 1980 Multimodal Transport Convention has the answer. It gives the contracting parties an option to choose unimodal transport law to govern their contractual relationship. This solution eliminates unnecessary application on a multimodal convention on transport that is not in need of the rules. Also, it is in conformity with the objective with the convention and does not create unpredictability to the parties. If they actively chose unimodal law to apply on their contract of carriage, they are fully aware of what set of rules that will be applicable on a future dispute. This answer does not eliminate unimodal law, but the solution is without doubt giving the contracting parties a predictable contractual relationship.

¹¹⁰ Schelin, *supra* note 109.

The rules should apply *ex proprio vigore*, unless the parties actively choose another set of rules to apply. To have voluntary rules that only apply after reference in the contract of carriage creates a too big responsibility on the contracting parties. Contracts of carriage need a set of rules of mandatory nature which not need to be incorporated in the contract to apply. Such rules would not be very different from the UNCTAD/ICC rules, perhaps with the only difference that other limits could be used in such convention. The European solution, with an opt out approach, is well considering the parties in low value shipping and transport that does not have the need for a multimodal regime. Those parties can actively agree on applying unimodal law in light of their needs and earlier custom.

The solution is taking into consideration the large part of shipping that is containerized today and the predicted increase over the next couple of years (see footnote 2 above). Thus, letting the few contracting parties that are lacking the need of multimodal rules opt out the set of rules ought to be less problematic than letting the majority of all transporting parties to actively choose multimodal rules in the contract of carriage.

6.1.2 Network or uniform liability?

With regards to choosing a network or uniform principle, guidance has to be sought in the main objective with having a set of rules applying on multimodal carriage. The set of rules shall unify and make application more predictable than today. In this statement I also presume that, aside from predictability, decreasing the number of litigation and the complexity in proving claims under the rules is the object of the convention. With this said, the network principle is not satisfactory for multimodal carriage. In the network system, the rules only serve as fall back provisions if it can't be proven where and how the loss arose. Thus, the costs for investigating facts for the claim and time spent in litigation will not to decrease significantly within this system. The network system does not serve the predictability in accordance with the main objective. Insurance companies and lawyers can not give their clients valuable advice for likely effects under the rules using the network liability system. This is because they are unaware of what set of rules that will apply. If the carrier fails to prove where the loss arose, the multimodal rules with one set of limitation will apply and if he succeeds the limitations in unimodal law will be applicable. This is not what I would define as predictable.

I would not go as far as saying a network liability system is worthless, because it gives the cargo owner a fall back set of rules. Besides, the burden of proving the occurred loss is on the carrier, not the cargo claimant, since the well established presumption of fault still would apply under the UNCITRAL draft. Thus, the set of rules is definitely more cargo owner friendly than a system lacking multimodal liability rules. However, from a utilitarian and economic perspective of the law, a uniform liability system is making the system more predictable and less "food for lawyers".

Furthermore, a network liability system could have the effect on the parties seeking to apply the rules which are the most favourable to them, so called forum shopping. This is certainly not in accordance with the main objective of the convention, as the set of rules are being abused and parties would spend a lot of money for legal counselling. Under a uniform liability system, the parties would not have this opportunity and would save the amount of legal costs that otherwise would be spent for the purpose of forum shopping.

6.1.3 Limitations under uniform liability

The European proposal suggests a uniform liability system and is unique in comparison to the various multimodal regimes existing today. Why is this idea revolutionary and not in use in other regimes to a larger extent? Well, the uniform liability system is probably seen by many as a system which is required, but it gets difficult effects. If the MTO is liable towards the contracting party no matter where the loss occurred, issues will arise in the subsequent stage of the judgement. The uniform liability system decreases the amount of money the parties will have to spend on investigation and litigation as to where the loss occurred, but this means that the MTO's limitation will have to be equal for all modes of carriage. The European proposal sets the MTO limit of liability to 17 SDRs per kilo no matter what form of transport that was used when the damage or delay arose. This is problematical. The uniform liability system is satisfactory *per se*, but will the market accept such a high limit of liability? I doubt that maritime performing parties will agree on an increase of the limit from 2 SDRs per kilo as stated in the Visby protocol to 17 SDRs per kilo. Any other solution is, to my knowledge, not possible to find under a uniform liability system. The effect of decreasing costs for investigation and litigation on where the loss or damage arose will be useless if the same amount of investigation would have to be spent on investigating where the loss or damage arose for the purpose of limiting liability. Thus, if different limitations are stipulated for different modes of carriage, the whole purpose of the uniform liability system is defeated. This is perhaps an even more crucial issue in the UNCITRAL draft than the delay provision itself and also one of the reasons why UNCITRAL chose to draft a maritime plus convention instead of a true multimodal convention.

Is there an amount that can be applied on all modes of carriage? Doubtfully. I reckon that there will be protests by the interested parties in European transport if 17 SDR per kilo is to be applied on all modes of carriage. The parties have an opt out opportunity in which they can avoid these high limits. However, the question is if what's gained on having a uniform liability system is lost when parties instead will to a larger extent negotiate the terms of the contract as to avoid the high limitations? It is naturally difficult to predict, but in order to have a uniform liability system, the only way of serving the purpose is to have the same limitations applicable on all carriage. Even though it will be difficult to enforce, I find that the solution is necessary.

6.2 The delay provision

There are three possible solutions to the delay issue in the UNCITRAL draft. One option is leave out the provision and not impose any liability on delay in the convention. The second option is to impose liability in the convention, but only after agreement by the parties. The third alternative would be to have a statutory obligation on the MTO for a timely delivery even when the parties failed to agree on a timely delivery. The third alternative is two pronged, since the obligation could be conditioned by adding a duty of declaring interest in a timely delivery on the consignor in order for the provision to be enforceable.

6.2.1 Delay provision part of a multimodal regime at all?

There are a number of reasons why delay should be part of a set of rules governing multimodal transport. Transport conventions for road, rail as well as air carriage all contain a delay provision. Furthermore, the multimodal rules as enacted in various national laws contain some sort of delay provision. The UNCTAD/ICC rules, that have gained success in the practical application as governing law for contractual relationships have delay as part of their liability regime. Even where delay is not incorporated in international conventions (read: the Hague and Hague-Visby rules) it is in most part of the world established by case law that delay is part of the rules even though the explicit words do not refer to delay. The UNCTAD report further gives support to the need for having some sort of delay provision contained in the UNCITRAL draft. To my knowledge, it is only the United States that opposes the view on having a delay provision as part of a multimodal regime at all. However, at the same time their opinion should not be exclusive in the draft process, their standpoint can neither be omitted from. In light of the main objective of unifying the applicable rules, failing to have USA as a signing state to the UNCITRAL convention would be a defeat of the whole purpose. It is one of the largest shipping nations in the world and the shipping nation that is making the applicable rules existing in the world so diversified. USA is the only state of significance using the Hague rules today. In other words, if more nations were to sign the Visby protocol, the diversified amount rules and the unpredictability would be less of a problem. Hence, USA is an important factor to include in the contemplation of fulfilling the main objective with the UNCITRAL draft. I would even go as far as claiming that if USA omits to sign the convention, the whole project could fail. It will only increase the amount of applicable rules in transport law and make it less predictable to the contracting parties to foresee what set of rules that might be applicable. The feasibility of the convention is dependent on USA, otherwise the draft might be a repeat of the Hamburg rules or the 1980 Multimodal Transport Convention.

USA has no delay stipulation in their law of carriage of goods by sea. This means delay claims can only be enforced after an express agreement. It is a political standpoint taken by the American government. The possible compromise forwarded by the American government (of having a delay

provision only after express agreement) is an opening for USA as a signing state even if delay is stipulated in the draft. I think that USA is negotiating the UNCITRAL draft in good faith and with the intention to create an internationally binding instrument to govern multimodal transport. Thus, a delay provision as part of a multimodal regime or not ought to be only of editorial complexity rather than a real problem. The real problem is whether the provision should impose liability also without express agreement between the parties.

6.2.2 Delay only after agreement

As I earlier concluded, not all parties to shipping contracts are in need of a multimodal regime. It is not unlikely that the same parties that aren't dependent upon a multimodal regime probably neither are in need of a delay regime. Low value goods are usually transported in large quantities. Furthermore, companies that are shipping large volumes are usually less dependent on the just-in-time delivery. It is the high value goods that form a part of this crucial just-in-time management that are highly affected by a delay. In fact, in many cases, the loss arising from delay can be many times bigger than the value of the shipped goods itself. This statement would be applicable to transport of technical equipment which is supposed to form components to something bigger. Delay in delivery of such components could stop the whole production line until the arrival of the crucial components and constitute outrageous amounts of loss.

The question is if the parties to such transport contracts are able to refer to this importance in the contract of carriage and get the protection desired or if they need further protection by law? It is said that only the really big companies are able to negotiate terms in the contract of carriage. This leaves smaller businesses to an option of either signing the standard form contract or having to turn to another freight forwarder. It is my opinion that, since the terms of contracts are so difficult to negotiate, there is a need for extra provision protecting cargo claimants from delay even if the contracting parties have agreed upon a timely delivery.

With reference to the case law referred to under chapter 2 above, there should be small practical effects by including a provision with a stipulated obligation after agreement. This is because most Hague and Hague-Visby regimes already recognize remuneration for carrier delay in maritime law after agreement between the parties. The practical effect of having a provision on delay would be that the limitation rules contained would be applicable, whereas a lack of a provision could create uncertainty whether the convention limitation rules would apply on agreement upon timely delivery in the contract. Thus, since the practical effects of a provision imposing liability after express agreement are merely of editorial nature, such drafting would not be very controversial. The controversial issue is whether liability could be imposed even without such agreement.

6.2.3 Statutory obligation

The statement from the pro-side of having a statutory liability for delay in delivery would not lead to further disputes does not convince me. Even though countries with the imposed liability have not seen an increased amount of litigation, there is no doubt that claims will increase. This is not by court litigation, since such claims tend not to be large enough to be resolved in court. Such claims are likely to be resolved amicably among the parties or by alternative dispute resolution, but most likely by settlement among the parties at an early stage. A statutory obligation will lead to greater risks by the MTO and less predictability. Having a stipulation on how a “reasonable carrier” should carry goods is not very predictable, since the judgement to be made is too arbitrary. There is no set time in advance acting as threshold for the carrier. It is also doubtful that transit times can be included in the convention as for carriage of goods by rail in the CIM-COTIF. Sea carriage is too unpredictable for this to be possible and the distances of shipping goods by sea are significantly longer than for goods by rail. Thus, the lack of time limits in the “reasonable carrier” obligation is making it difficult in my opinion to impose a statutory obligation on the carrier. However, I am of the opinion that some sort of extended protection is required to protect the cargo owner from delay in delivery.

At the same time small businesses are in need of protection for delay in delivery for some cargo carriage, there are also businesses that are not in need of a timely delivery. This is a fact for the low value carriage. The American delegation expressed concern for stipulating a duty of reasonable dispatch without agreement because the further costs that will be charged by the carriers for this increased duty will be affecting the whole transport industry, even the cargo owners of low value goods. If the carrier has a statutory duty to carry goods with a reasonable dispatch, he will charge his customers for the increased duty. This will not only be for the customers that are in need of a timely delivery, it will be for all kinds of customers. The duty is at hand at all times, no matter if the customer is intending to use his right to compensation due to delay or not. This will lead to higher freight rates in the whole industry. The opposite point of view would be that the practical implications of a statutory obligation would not be as alleged by the American delegation. Even if the duty of a timely performance is imposed on the carrier, it will be aware of the fact that amounts that can be lost by cargo owners of low value goods will be limited. In other words, as the possible amount that a cargo owner of low value goods could claim will not be significant, the freight rate for this type of cargo will not increase significantly. As the claimant has the onus of proving the amount lost due to the delay, any practical effects will not arise from a delay since it would be unlikely for the carrier to have to pay any large amounts for an occurred delay when carrying low value goods.

No matter how a statutory delay will affect the freight rates, I can agree that an imposed duty of timely performance by statute will give rise to

uncertainty to some extent. Since the need for protection is not equal in the whole industry, I find that a statutory delay without any sort of prior agreement is not the right way to draft a delay provision.

It is not as controversial to have a delay provision for short distances as it is for long ocean transports. This is why the provisions in the Nordic Maritime Codes are practically feasible and not very controversial, whereas issues arise in the process of drafting a convention on a global level. The number of perils and obstacles in the Baltic Sea are less than those for long voyages around the globe. This said, I find that an imposed duty without any prior common understanding between the parties is too cargo owner friendly to have a well balanced convention. In order to keep the cargo owner protection and still draft a well balanced convention, it has been suggested to shift the burden of proof to the cargo claimant. The UNCTAD/ICC solution of having a declaration of interest as condition to enforce the delay provision is another solution.

6.2.3.1 Shifting the burden of proof

Nicholas Gaskell has suggested that the issues on delay could be resolved by putting the burden of proof on the cargo claimant.¹¹¹ Gaskell sees big problems in having a statutory delay because it will have serious effects on the practical application of the rule. He believes that a carrier of a delayed container ship will not bother to contest delay claims for the amount of containers he is carrying, because the task of doing so means too much administration. A carrier carrying thousands of containers will have to deal with thousands of claims from all the cargo owners. Instead, Gaskell thinks that the carrier will refund the freight rates automatically to avoid such administration. As one of the solutions to this problem, he suggests that if the burden of proving the delay is shifted to the cargo claimant, this practical problem could be avoided by decreasing the amount of claims.

I disagree with the suggestion provided by Gaskell. Jurisprudence has well established the burden of proof on the carrier for a reason. It is difficult enough to present any form of evidence for a delaying event, for the claimant this would go further, an impossible task. The information that can be presented to support an alleged defence for an occurred delay can only be presented by the carrier itself. The carrier is the only party to the contract of carriage that was present during the delaying event, thus the cargo claimant could not have any chance for a successful claim if the burden of proving the delay was on him. The claimant would only be able to guess what caused the delay, the only fact available to the claimant is that his cargo arrived late.

I fully agree with the issues that Gaskell presents as worrying with imposing a statutory duty of timely delivery. However, it is not best resolved by putting the burden of proving the delay on the claimant. I think the issue is

¹¹¹ Gaskell, N "Damages, Delay and Limitation of Liability under the Hamburg Rules 1978". In: Kegels, T (ed.) *The Hamburg Rules: A Choice for the EEC?* (Antwerp, MAKLU Uitgevers, 1994, 1st ed) at 153.

better resolved by putting an obligation of declaration of interest on the consignor.

6.2.3.2 Declaration of interest

In order to have a successfully drafted instrument, one has to consider the pragmatic effects of the provisions that are under judgement. The best way ought to be to consider rules that actually are used in practise. The UNCTAD/ICC rules are shown to work in practise, which should lessen the controversy in incorporating the same rules in an internationally binding instrument. The declaration of interest has its advantages. At the same time a statutory obligation of timely delivery is stipulated to protect the cargo owner, the carrier is becoming aware and is able to predict the possible effects of a possible delay on his side. Thus, imposing a duty to declare interest in a timely delivery is a compromise between the interests involved. The cargo owner is protected by the statutory duty of a timely delivery and the carrier is given the necessary predictability. The declaration of interest resolves the problems of interpreting the “reasonable carrier” requirement and gives both contracting parties’ specific times which they both can relate to. This should decrease the number of claims and make it easier for contracting parties to settle claims without any significant legal costs.

The declaration of interest is not the same as negotiating terms of a contract, even though the two processes have their similarities. It is above stated that the cargo owner rarely is able to negotiate the terms of the contract, but by this solution, he is given the opportunity to be protected by law and have his goods delivered in time as required by stipulating it on the bill of lading. The same effect as for negotiating the terms of the contract can be reached without a difficult negotiating process. The cargo owner who wishes to stipulate such term in the contract of carriage will most likely have to pay an increased freight rate, but the importance of a timely delivery should be reason enough for this extra expense. Also, the increased freight rate will only be borne by the cargo owners who are really in need of the timely delivery and not by all cargo owners. This, in combination with the predictability for the carriers is supporting the view that the statutory duty of timely delivery with the additional duty to declare interest in order to enforce the rule is the best compromise solution for a delay provision. It is confusing to me why UNCITRAL has not even considered such a solution in the draft.

One problem with the UNCTAD/ICC solution is that the carrier needs to agree on this duty. This means that the carrier can refuse to perform the carriage with a duty of dispatch. However, with time, such behaviour of the carrier could be of its disadvantage with regards to good will and reputation in the transport industry. For the same reason MTOs have taken the voluntary responsibility in multimodal carriage today, the MTO would likely not want to have reputation of refusing customers the services they want the carrier to perform.

6.3 Closing comments

By deleting the imposed liability for what could be expected by a “reasonable carrier” in the UNCITRAL draft the parties have come one step further towards a feasible convention. I find that it is a well considered compromise from all parties and it shows that the parties are intending the convention to have effect and not merely be a toothless set of rules. What many would call a hopeless project when CMI initiated the work and handed it over to UNCITRAL is not that hopeless any longer. The European draft of a multimodal set of rules will most likely put pressure on the international work process to make further compromises in order to fulfil the task of drafting a feasible instrument for the purpose of multimodal transport.

However, the flip side of the coin of a feasible instrument is that the outcome of the compromise made is perhaps not the fairest. It is important to retain the right balances between the carrier and the cargo owner. The delay provision as drafted today is not that well balanced, since it tends to be a bit more carrier friendly. A better balanced delay regime would be to have a statutory duty on the carrier with a duty of declaring interest in a timely delivery on the cargo owner. It has shown to work in practise and protects the cargo owners while imposing no unreasonable and unpredictable duty on the carrier. By having this procedure, the carrier becomes aware of the theoretical amount that he can be liable for towards the claimant and he is aware of his duty of dispatch.

In any event, the current delay provision will not be one of the provisions preventing states from signing the UNCITRAL convention. It is a political compromise and is in line with the feasibility desired, fair or not.

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