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JAN RAMBERG

THE LAW OF TRANSPORT OPERATORS

In International Trade

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Abbreviations

A.C.	Appeal cases, English Law Reports
ADSp	Allgemeine Deutsche Spediteurbedingungen
AfS	Arkiv for Sjørett
Am. J. Comp. L.	American Journal of Comparative Law
AMC	American maritime cases
BGH	Bundesgerichthof
BGHZ	Entscheidungen des Bundesgerichthofes in Zivilsachen
BIFA	British International Freight Association
BIMCO	Baltic and International Maritime Conference
BT	Bulletin des Transport
CA	Court of Appeal
CAD	Cash Against Documents
CFR	Cost and Freight
CIF	Cost Insurance Freight
CIFFA	Canadian International Freight Forwarders Association
CIP	Carriage and Insurance Paid to
Cir.	Circuit
CISG	The 1980 United Nations Convention on Contracts for the International Sale of Goods
CMI	Comité Maritime International
CMR	Convention relative au contrat de transport international de marchandises par route
COD	Cash On Delivery
COGSA	Carriage of Goods by Sea Act
COTIF/CIM	Convention internationale concernant le transport de marchandises par chemin de fer
CPT	Carriage Paid To

D.H.	Danmarks Højesteret
DAF	Delivered At Frontier
DDP	Delivered Duty Paid
DDU	Delivered Duty Unpaid
DEQ	Delivered Ex Quay
DES	Delivered Ex Ship
Dir.Mar.	Il diritto marittimo
DMF	Droit Maritime Français
E.C.E.	United Nations Economic Commission for Europe
E.E.C.	European Economic Community
ed.	editor
EDI	Electronic Data Interchange
eds	editors
ETL	European Transport Law
European Principles	Principles of European Contract Law I–III
EXW	Ex works
F.	Federal Reporter
F. 2d	» , Second series
F. 3d	» , Third series
F. Supp	» , Supplement
F.H.	Finlands Högsta Domstol
F.I.O.	Free in and Out
FBL	FIATA Multimodal Transport Bill of Lading
FCA	Free Carrier (named point)
FCR	FIATA Certificate of Receipt
FCT	FIATA Certificate of Transport
FHD	Finnish Supreme Court cases
FIATA	Fédération Internationale des Associations de Transitaires et Assimilés
FOB	Free On Board
FWB	FIATA Waybill
Hague Rules	Brussels Convention 1924 for the unification of certain rules of law relating to bills of lading
Hague Visby Rules	Protocol 1968 to amend the 1924 International Convention for the unification of certain rules of law relating to bills of lading

Hamburg Rules	1978 United Nations Convention on carriage of goods by sea
HGB	Handelsgesetzbuch (Germany)
HL	House of Lords
ICC	International Chamber of Commerce
IDIT	Institut du Droit International des Transports (Rouen)
J.T.	Juridisk Tidskrift vid Stockholms universitet
JBL	Journal of Business Law
JMLC	Journal of Maritime Law and Commerce
KB	King's Bench Division
L.T.	Law Times Reports
L/C	Letter of Credit
LCL	Less than full Container Loads
Ll.L.	Lloyd's List Law Reports (1919-50)
Lloyd's Rep	Lloyd's List Law Reports (from 1951)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LOTT	Ley de ordenación de los Transportes Terrestres of 1987
MT Convention	1980 United Nations Convention on International Multimodal Transport of Goods
MT	Multimodal Transport
MTO	Multimodal Transport Operator
N.D. Cal.	Northern District of California
N.D.	Nordiske Domme i Sjøfartsanliggender
N.J.	Netherlands Supreme Court cases
NCFF	National Commission of Freight Forwarders (United Arabic Emirates)
NH	Norwegian Supreme Court
NJA	Nytt Juridiskt Arkiv, Swedish Supreme Court cases
NSAB	Nordiskt Speditörförbunds Allmänna Bestämmelser
NVOCC	Non-vessel operating common carrier
NVO-MTO	Non Vessel Operating Multimodal Transport Operator
OTT Convention	The 1991 International Convention on Liability of Transport Terminals in International Trade

publ.	publication
QB	Queen's Bench Division
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rt.	Norsk Retstidende
S.D. Fla.	Southern District Florida
Scand. Stud. L.	Scandinavian Studies in Law
SDR	Special Drawing Right
SH	Swedish Supreme Court
Simply	Yearbook publ. by the Scandinavian Institute of Maritime Law
SMC	Swedish Maritime Code
SøHa	Sjø og Handelsretten (Denmark)
SpV	Speditionsversicherung
Sup. Ct.	Supreme Court
TCM	Transport Combiné de Marchandises
THC	Terminal Handling Charges
TO	Transport Operator
TranspR	Transport- und Speditionsrecht
U.S.	United States Supreme Court cases
UCP 500	ICC Uniform Customs and Practice for Documentary Credits (1993 version)
ULR	Uniform Law Review
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL/ CMI Draft	Draft text of convention on carriage of goods by sea (early 2004)
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	Institut international pour l´unification de droit privé
VersR	Versicherungsrecht
VO-MTO	Vessel Operating Multimodal Transport Operator
WLR	The Weekly Law Reports
3 PL	Third party logistics
3 PLS	Third party logistics service provider

4 PL	Fourth party logistics
4 PLS	Fourth party logistics service provider

Foreword

This book aims to give an overall account of the law of carriage of goods and ancillary services from the perspective of sellers and buyers. It will appear that the present transport law is inappropriate due to the separate regulation of each mode (unimodalism) and the lack of appropriate rules for transport integration and added logistics services. In particular, the mixture of mandatory and non-mandatory law – where the former is attached to the means of transport and the latter to ancillary services – leads to unnecessary complexities and inconsistencies. A new methodology is required for the law of transport to function properly as a necessary link for the implementation of contracts for international sale of goods.

I am indebted to Professor Kurt Grönfors for his pioneer legal research with goods and contract rather than the vehicle of transportation in focus. Additionally, with practical sense and foresight he has addressed the difficult questions of successive carriage, multimodal transport, liability for servants, agents and subcontractors, the carrier's liability for delay and, last but not least, modern documentary practice replacing bills of lading with sea waybills and electronic transmission. Thus, he has for me been a continuous source of inspiration.

If this book contributes to improving matters by creating awareness of the problems and the need for a new methodology, then it fulfills its purpose.

Although it may be a hopeless task seeking to explain the intricacies of transport law, I have nevertheless dared to do so at the risk of being at times too simplistic when treating transport law as interrelated to the contract of international sale of goods. Regrettably, efforts of sellers and buyers to optimize the services of carriers, freight forwarders, and transport logistics service providers are not always assisted by a rational and well-functioning transport law and related commercial practice.

Without the able assistance of Kristina Lövenheim I would not have been able to achieve my manuscript. Christopher Goddard of Riga Graduate School of Law has saved me from the danger of linguistic errors. Stif-

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Stockholm January 2005

Jan Ramberg

1 Introduction

1.1 The term transport operator

The term *multimodal* is applied to *transport operator* to signify a carrier using two or more modes of transport to perform carriage. In this text, the term *multimodal transport operator* is abbreviated to the acronym *MTO*. In the absence of an international convention, or domestic legislation, regulating multimodal transport[1] – the MTO would not be subject to a mandatory carrier regime in the same way as carriers by specific modes (*unimodal transport*). Transport operator (*TO*), as the term is used in the present study, signifies a carrier that does not undertake to perform the contract by any specific mode, or combination of specific modes, but merely undertakes to carry the goods from point to point (*unspecified transport*). This refers both to an undertaking *actually* to perform the transport in a physical sense and also to *procure* performance by using another party or parties as subcontractors.

1.2 Risk distribution under charterparties

In maritime law, the law and practice relating to carriage of goods traditionally only concerned shipments of commodities in ships engaged for a particular voyage or for a period. Contracts between the shipowner and the charterer were evidenced by voyage and time charterparties. The main obligation of the shipowner was to exercise due diligence in providing a seaworthy ship, while the risks following from commercial use of the ship were allotted to the charterer. The particular risk distribution under charterparties expresses the notion of the marine adventure. This meant, in principle, that the charterer assumed the risks for cargo damage or loss once the ship had left port. In contemporary charterparties, the shipowner often dis-

1 Such as the stipulations of CMR and COTIF/CIM

claims liability for the master and the crew, limiting liability to his *personal*[2] want of due diligence. This means that an act or omission giving rise to liability of the shipowner as a legal entity has to be imputed to someone on the managerial level, so that acts or omissions by master and crew will not be sufficient.

1.3 Liner trade

In liner trade, risk distribution under charterparties is mirrored in the carrier's defense of error in navigation and management of the vessel[3]. The distinction between charterparty trade and liner shipping was not reflected in any international convention until the 1920s. The transport document (*the bill of lading*) used in liner shipping became the main instrument for making the distinction. Most contracts of carriage made with shipping lines maintaining regular traffic between ports indicated in their announcements and tariffs are evidenced by bills of lading. With the Hague Rules, or corresponding domestic legislation, contracts covered by bills of lading became subject to a mandatory carrier regime.[4]

1.4 Carriage of goods by rail, road, and air

Development of the law of carriage over land and by air differs from the development of maritime law. The starting point here is rather a service offered to customers at large and without discrimination. The carriers act as

2 Baltime charter party (1974) clause 13: »The Owners only to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss of or damage to the goods, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Managers in making the vessel seaworthy and fit for the voyage or any other *personal* (my italics) act or omission or default of the Owners or their Manager.«

3 This is maintained in the mandatory 1924 Hague Rules Art. 4.2(a) but removed in the 1978 Hamburg Rules.

4 Thus, charterparty trade is still governed by the principle of freedom of contract. See J. Ramberg, Freedom of contract in maritime law, LMCLQ 1993 pp. 178-191 and *id.* The proper delimitation of mandatory rules in the law of carriage of goods by sea [*Liber amicorum* J. Putzeys, Brussels 1996 pp. 339-352].

common carriers under strict liability.[5] International legislation started in the late 1800s with railway carriage and co-operation between railways, often government-operated[6]. Carriage of goods by air became regulated with the 1929 *Warsaw Convention*, where initially the maritime defense of error in navigation appeared in the form of the defense of error in conducting and managing the aircraft[7]. However, this disappeared in the 1955 Protocol to the Warsaw Convention, so that the liability of the air carrier became similar to the liability of the railway carrier.

The difficulty in air law in reaching international consensus relates to carriage of passengers, which is regulated in the same convention. Compensation for death claims and for personal injuries differs considerably, with views differing accordingly as to the appropriate monetary limits for such claims. Hopefully, the debate will come to rest with the 1999 *Montreal Convention*, replacing the Warsaw Convention. International carriage of goods by road was not regulated until 1956 with the international convention on carriage of goods by road (*CMR*). This to a large extent rested on the principles expressed in the international convention on carriage of goods by rail (*COTIF/CIM*) but with a lower monetary limit.

1.5 Containerisation and carriage by several modes of transport

Although the problems of properly regulating combinations of different modes of transport were already addressed in international conventions for carriage by rail and road as well as by UNIDROIT,[8] it was not until the advent of containerisation that a real commercial need arose to deal with the matter. As a container could easily move to and from the ship and be lifted off and on arriving or on-carrying trucks or railway wagons by mod-

5 See L. Gorton, The concept of the common carrier in Anglo-American Law [Gothenburg Maritime Law Association publ. 1971:43], A. Emperanza Sobejano, El concepto de porteador en el transporte de mercancías, Granada 2003 pp. 126-132 and for the factors determining the status of common carrier P. Bugden p. 275 referring to cases *Electricity Supply Stores* v. *Gaywood* (1909) 100 L.T. 855 and *Great Northern Railway Co.* v. *L.E.P. Transport & Depository Ltd.* (1922) 11 Ll.L. Rep 133.

6 Now COTIF/CIM 1999, expected to come into force 2005.

7 Art. 20.2.

8 In COTIF/CIM and CMR (Art. 63 and Art. 2 respectively) and by UNIDROIT 1963 in its Draft Convention on combined transport.

ern cargo handling techniques, the container traffic expanded inland and goods could be carried without re-loading of those stowed in the container. Hence, goods in the container could move not only port-to-port but from inland point to inland point – from *door to door*. As a result, the different modes became mixed in one and the same contract of carriage so that the transport became intermodal – expressed in legal terminology as *multimodal*.[9]

1.6 Expansion of carrier services and freight forwarders as contracting carriers

Containerization changed the roles of carriers and freight forwarders in the transport market. Carriers' expansion of their services even appears in the name of one of the most important pioneer shipping lines – Sealand. Others were to follow, and manufactured goods are now normally carried in container ships. Value-added services, previously only offered by freight forwarders, could now also be included in container line services – for example, *Maersk Logistics*.

Freight forwarders, on the other hand, encroached upon the market previously controlled by the shipping lines. They did so by adopting the role of contracting carriers, using the container lines as subcontracted performing carriers.[10] This became particularly common as to shipments from several shippers consolidated in the same container (*LCL* cargo, LCL for *Less than full Container Loads*). Freight forwarders had long practiced the art of cargo consolidation in their rail and road traffic. Using a term from regulation of carriers in the United States, the freight forwarder became a *non-vessel operating common carrier* (*NVOCC*).[11]

9 The term originates from the 1980 MT-Convention. See, for an account of the background, D. Richter-Hannes, Die UN-Konvention über die Internationale Multimodale Güterbeförderung, Vienna 1982 pp. 15–34 and for an overview D. Faber (ed.), Multimodal Transport – avoiding legal problems, LLP Ltd, London-Hong Kong 1997 pp. 1–5.

10 See, for an account of the freight forwarders' traditional rôle as cargo consolidators and the advent of the FIATA Combined Transport Bill of Lading (FBL), J. Ramberg, The Law of Freight Forwarding [publ. by FIATA, Zürich 2002] pp. 16–26.

11 As such he would have to assume liability as carrier while otherwise as an ocean freight forwarder he is only considered an agent. See *U.S.* v. *American Union Transport et. al.* 327 U.S. 437 and *J C Penney Co. Inc.* v. *The American Express Co. Inc.* 20 F2nd 846.

1.7 Unspecified transport and subcontracting

Freight forwarders, in their general conditions, retain the right to perform transport as they think fit. At the same time, the customer often does not bother to request performance by a specific mode or combination of specific modes of transport.[12] However, the shipping line may find it inappropriate to conceal its main function of carrying goods by sea. Notwithstanding, it may of course use subcontractors for part or all of their performance of the contract – in the same way as a freight forwarder. Hence, both shipping lines and freight forwarders will in practice appear as TOs, although it is more likely that freight forwarders take on this function.[13]

1.8 Transport documents as links to contracts of sale

The Hague Rules provide a link to the contract of sale in stipulating that the rules apply to govern the relationship between the carrier and the holder of the bill of lading.[14] The seller is entitled to this document upon demand.[15] This, then, enables him to get the document needed under contracts of sale requiring the seller to conclude the contract of carriage with the buyer as beneficiary (*CFR* and *CIF* contracts), to satisfy the buyer that he has fulfilled his duty to:

- *contract* for carriage,
- *ship* the goods as described in the bill of lading, and
- *provide* the buyer with a document enabling him to transfer title to the goods to somebody else and ensure delivery to the holder of the bill of lading at destination.

12 This development was observed in connection with the Free Carrier Clause of Incoterms 1990 (FCA), where reference is made to »unnamed transport» in A4 (vi). See J. Ramberg, Multimodal Transport – a new dimension of the Law of Carriage of Goods? [Études offertes à René Rodière, Paris 1981] p. 481 at p. 492 where it is deplored that the MT-Convention does not address unspecified transport.

13 See M.A. Clarke, International Carriage of Goods by Road: CMR, London 2003 p. 19, where he points out that »both forwarders and carriers take on a wider range of responsibilities than those associated with their respective roles in the past».

14 Art. 1(b).

15 Art. 3.3.

By contrast, contracts not requiring bills of lading but only the »usual« transport document would make other trade terms appropriate (*CPT* and *CIP*) for goods carried from point to point without intending to sell them in transit. This is because the usual transport document would suffice, as long as the buyer's right to receive the goods from the carrier is ensured.[16]

16 See, in general, Debattista, Sale of Goods, London 1998 *passim*.

2 Legal classification of Transport Operators

The TO belongs to the category of *carriers* but, as we have seen, is not subject to any mandatory carrier regime of the same kind as appears in the unimodal international conventions relating to carriage by sea, rail, road, or air. The particular convention regulating multimodal transport (the *1980 MT Convention*) has not entered into force. But even if it had, the TO would not be subject to it, as he has not undertaken to carry the goods by any combination of modes of transport. Therefore, his contract of carriage must be regarded as *sui generis*,[1] as compared with contracts relating to a specified mode, or a combination of several modes. This may be considered unsatisfactory in so far as it seems to erode the purpose of mandatory law of carriage of goods. Hence, room exists for argument that the TO *should* be subjected to a mandatory regime. True, when the contract is made we do not yet know which regime will become applicable. That can only be ascertained later, when the TO starts to perform his undertaking. In that case, the applicable regime would be triggered not by contract but by performance – to the extent that he performs the carriage himself. The TO would be liable in the same way as subcontracted performing carriers might be liable for loss of or damage to goods that they have taken in charge. Indeed, this solution sits well with commercial practice as, in many cases, TOs would not perform the transport themselves but would entrust performing carriers to do it. If, in such cases, we permit an escape from the doctrine of privity of contract and allow direct action against non-contract-

1 The *sui generis* question is raised by J. Ramberg, Harmonization p. 245, suggesting that the project ongoing at that time – the so-called TCM Draft – had »run into a blind alley». J. Basedow ed., Münchener Kommentar zum Handelsgesetzbuch, Munich 1997 p. 361 considers multimodal transport as „gemischter Vertrag» rather than *sui generis*. *Contra* R. Herber, TranspR 1990 p. 4 and 7 and F. Fremuth [in Kommentar zur CMR, ed. K-H. Thume, Heidelberg 1994 p. 888], rejecting the idea that the mandatory law applicable to each separate segment should apply, the reason being that the parties have agreed on multimodal transport and not a »Bündel unimodaler Beförderungsverträge».

ing performing carriers, then this would suggest that the TO should also be held liable in the capacity of performing carrier – in the same way as other performing carriers. When the TO does not perform the contract himself, he would only be liable according to the contract. This, admittedly, could be sub-standard compared with the law applicable to the segment of the transport where loss or damage occurred. But, again, if the principle of direct action against the performing carrier is allowed, then the protection intended by mandatory law comes into play, albeit by performance, as opposed to contract.

3 Legal classification of Freight Forwarders

3.1 Contract for work

- The classical Roman *mandatum* contract type is broad enough to encompass all freight forwarder functions. However, the different variants of this type of contract require further classification. As to the transport itself, one would have to distinguish between the freight forwarder's function in acting:
  - merely as agent for the customer or performing carrier,
  - as contracting carrier, assuming carrier liability but without physically performing the carriage and, finally,
  - as performing carrier.

3.2 The freight forwarder's transition from agent to principal

The problem of distinguishing between agent and principal is well known in commercial law. While the distinction is comparatively straight in Anglo-American law,[1] complications arise in continental European and Scandinavian law. Here, an *intermediate stage* exists between the agent and the principal, namely the function of *the commission agent*, acting in his own name but for the account of the principal. In this case, by acting in his own name he would become a party to the contract thus concluded. However, in the agent-principal relationship he would have to give an account of the contract that he, as agent, entered into for the benefit of his principal.

1 See, in general, D.J. Hill, Freight Forwarders, London 1972, *passim* and P. Bugden p. 48 *et seq.*

Thus appears the important distinction that the commission agent becomes the formal contracting party, while his principal becomes the party directly interested in the contract but without being the formal contracting party. The commission agent may not avoid the status of a contracting party by later disclosing his principal. It follows that an important difference exists between a commission agent under continental and Scandinavian law and the status of an agent acting for an undisclosed principal in Anglo-American law.[2]

3.3 International regulation of freight forwarder contracts

In the absence of mandatory law applicable to freight forwarders, the legal relationship between freight forwarder and customer would usually appear from general conditions applicable to freight forwarding services. In most countries, such general conditions are offered through freight forwarders' associations. In the Scandinavian countries, it is even a requirement for membership in freight forwarder associations that members apply the general conditions of the Nordic Association of Freight Forwarders in their business (these conditions are referred to as *NSAB 2000*). While freight forwarders and their associations usually elaborate general conditions unilaterally without consulting customer organizations, NSAB 2000 and the German *ADSp 2002* resulted from co-operation between organizations representing both sides in the contractual relationship. Thus, NSAB 2000 and ADSp 2002 represent *agreed documents*. This, in turn, has made courts of law and arbitration tribunals prone to accept the conditions in some cases, even though they have not been expressly referred to in connection with contracting.[3]

Owing to widely different approaches to the law of freight forwarding, the Rome Institute for the Unification of Private law (*UNIDROIT*) elaborated a draft international Convention (*the 1967 UNIDROIT draft*). The draft seeks to bridge the different approaches of – in particular – German and French law. The distinction between the freight forwarder as agent and as carrier is achieved by subjecting the freight forwarder to carrier liability in three instances, namely when he:

2 See F. Reynolds, Disclosed and undisclosed agency [Intermediaries in Shipping, Gothenburg Maritime Law Association publ. 69, 1991 pp. 149–160].

3 See, in particular, the Norwegian Supreme Court case Rt 1973 s. 967.

- has issued a document evidencing carrier liability (French: *titre de commission*);
- acts as cargo consolidator, or
- has offered a fixed price for the transport.

Thus, it appears that the French notion of *commissionaire de transport* is reflected in the particular document referred to, the *titre de commission*, while the principles of German Law are reflected by the reference to cargo consolidation and fixed price. In view of the efforts to elaborate an international Convention applicable to international multimodal transport, the 1967 UNIDROIT draft was shelved pending further developments. Thus, no international regime presently governs the law of freight forwarding.

3.4 The freight forwarder as carrier

Generally, the law of international carriage of goods is subject to mandatory rules. In a sense, the development of the law is rooted in the old concept of the »common carrier», who was subject to strict liability with few exceptions (*force majeure*, Acts of God, war, civil disturbances, government directions, and similar events). Originally, attention focused on the status of common carrier, while possibilities to avoid liability were limited. With the expansion of the principle of freedom of contract, carriers used the option to reduce their liability by disclaimers and low monetary limits of liability. However, as to rail carriage, which in most cases was managed by state railways, strict common carrier liability survived, as is reflected by the international convention governing such carriage.[4]

A reaction towards what was considered an abuse of freedom of contract first appeared for maritime carriage in the United States with the *1893 Harter Act*,[5] whose basic principles were subsequently extended to the rest of the world by the 1924 Bill of Lading Convention, known as *the Hague Rules*. The expansion of international carriage of goods by road led to the 1956 Convention (*CMR*), which was mainly built on the principles of the earlier railway law in *CIM* but with a somewhat lower monetary limit.[6] In

4 COTIF/CIM.

5 See for an account of the origin of the 1893 Harter Act, A.W. Knauth, The American law of ocean bills of lading, Baltimore 1953 pp. 115–131 and G. Gilmore & C.L. Black, The Law of Admiralty, Brooklyn 1957 pp. 122–124.

6 See R. Löwe, Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), ETL 1976 pp. 311 *et seq.*

addition, air carriage became subject to an international convention. This was clearly based on the old notion of strict common carrier liability but with higher monetary limits than those that applied to other modes of transport.[7] The law of carriage of goods by sea – although mandatory – would offer the carrier a better position than carriers by other modes of transport. This is particularly so as to the defenses available in cases of error in the navigation or management of the vessel and of fire. Moreover, the monetary limits of liability applicable to carriage of goods by sea would in most cases be lower than the limits applicable to other modes of transport.

Even though a company might consider itself as basically freight forwarder or carrier, a freight forwarding company remains free to adopt the function of a carrier, as indeed is a transport company to offer freight forwarding services. But, as we have seen, it is not easy to decide when a freight forwarder should be subject to carrier liability. However, if under the circumstances the freight forwarder is taken to be exercising a carrier function – whether only contracting for carriage or actually performing it – then the freight forwarder is subject to the same mandatory regime as carriers. This is now clearly evidenced by the 1998 amendments to the German *Handelsgesetzbuch* (*HGB*).[8]

In many cases, it would be easier to pinpoint the distinction between the freight forwarder as agent and as carrier. This is because of the particular documentation and routines that apply to particular modes of transport. Thus, bills of lading, CIM, CMR or air consignment notes might clearly indicate who should bear carrier responsibility.[9] But, unfortunately, documents are not always issued with such precision, e.g., when signed by an agent »for the carrier« or »for the master« but without identifying the carrier. Moreover, in international road carriage the documentary procedures are not always clear and consistent.[10] For this reason, it is not always certain how to regard a company that offers transport by road/ferry from, say, England to the European continent. A freight forwarder offering such trans-

7 The 1929 Warsaw Convention as amended by the 1955 Protocol.

8 Sections 458–460 compared with Section 449.

9 But new documentary practice may make it more difficult. See J. Ramberg, The vanishing bill of lading & the »Hamburg Rules Carrier«, Am. J. Comp. L 1979 pp. 391–406.

10 See P. Bugden p. 73 with reference to *Elektronska Industrija OOUR TVA et al.* v. *Transped OOUR Kintinentalna Spedicna et al.* [1986] 1 Lloyd's Rep. 49 QB. See also *Aqualon (UK) Ltd et al.* v. *Vallana Shipping Corporation et al.* [1994] 1 Lloyd's Rep. 669 QB and *Texas Instruments Ltd* v. *Nason (Europe) Ltd* [1991] 1 Lloyd's Rep. 146. See also A. Pozdnakova, Unification of International Multimodal Transport, Law and Justice 2004 pp. 24–30 at p. 28.

port, but without expressly declaring that he does it in his capacity as agent, would therefore risk being subject to the mandatory rules of any applicable convention relating to carriage of goods by road, such as the CMR.[11]

3.5 The freight forwarder as multimodal and transport logistics operator

As for the distinction between the freight forwarder as agent and as carrier, the problems are basically the same irrespective of whether the transport is performed by a single mode of transport (*unimodal* transport) or by a combination of different modes in the same contract (*multimodal* transport). However, as we have seen, the rules applicable to the different modes of transport differ as to basis as well as limitation of liability. Thus, if separate contracts apply to each segment of transport from place of dispatch to the final destination (*segmented* transport), then different rules would apply to each segment, depending upon the mode of transport. If, on the other hand, one contract is made for transport involving at least two different modes, then it is necessary to resolve whether the liability of such a carrier (*the MTO*) should be:

- segmented, so that liability would depend upon localizing the loss or damage to the particular mode of transport where the loss or damage occurred (*the network liability system*), or
- one and the same (*the uniform liability system*).

The network liability system has been preferred in the current rules and conditions applicable to multimodal transport. Possibly, however, the development of transport logistics services may call for a different solution.[12]

11 See as examples *J. Evans & Sons (Portsmouth) Ltd.* v. *Andrea Merzario* [1975] 1 Lloyd's Rep. 162 QB and *Ulster-Swift Ltd and Pigs Marketing Board (Northern Ireland)* v. *Taunton Meat Haulage Ltd and Fransen Transport N.V.* [1977] 1 Lloyd's Rep. 346 QB. K.F. Haak, The Liability of the carrier under the CMR, The Hague 1986 pp. 58–60 considers that the classification of the freight forwarder as intermediary or as carrier constitutes an »insoluble confusion» as one faces »the complex of facts that originates in essence in a factual interpretation problem» but that the international freight forwarder has frequently parted from his own terrain and just as frequently entered upon the domain of the carrier.

12 See *infra* Chapter 11.

4 Attempts to unify Multimodal Transport

4.1 CMI Tokyo Rules and the FIATA FBL

The problem of multimodal transport was dealt with in the 1960s by UNIDROIT and the *Comité Maritime International* (CMI). This resulted in the *1969 CMI Tokyo Rules*. These constituted the basis for *FIATA*[1]'s (negotiable) combined transport bill of lading (*FBL*), which first appeared in 1970, and the corresponding *COMBICONBILL*[2] sponsored by the Baltic and International Maritime Conference (*BIMCO*) in Copenhagen. FBL was later somewhat revised to conform to the *1975 ICC Rules* for a combined transport document.[3] Additionally, to conform to the ICC Rules, BIMCO later presented a document called *COMBIDOC*.

4.2 TCM Draft

The practical importance of multimodal transport is, of course, enhanced by the advent of containerization, since containers can move from one mode of transport to another. In view of this, and because of the CMI initiative to present a draft international Convention by the 1969 Tokyo Rules, UNIDROIT decided to arrange Round Table Conferences, to join efforts with CMI and to explore the commercial view of interested organizations. As a result, UNIDROIT suggested a draft Convention referred to as *TCM 1971* (for *Transport Combiné de Marchandises*) In addition, the TCM draft was based, as were the 1969 CMI Tokyo Rules, on the network liability system. Further work towards an international convention on multimodal transport took place within *UNCTAD* and resulted in the *1980*

1 The freight forwarders' world organization.

2 See for an account of the development of COMBICONBILL K. Grönfors, Container transport and the Hague Rules, JBL 1967 pp. 298–306.

3 ICC Publ. No. 298.

United Nations Convention on International Multimodal Transport of Goods (MT Convention). This, however, basically followed the principle of ***uniform*** liability, although as to localized loss or damage a departure was made from the monetary limitation of the MT Convention whenever the loss or damage could be localized to a particular mode of transport. Here, according to the applicable mandatory law, a *higher* limitation amount would apply.[4]

4.3 Nautical fault and fire defenses as an obstacle to unification

Considerable difficulties confront efforts to establish uniform liability for the multimodal transport operator. This is particularly in view of the defenses available to the carrier according to the rules for carriage of goods by sea (error in navigation and management of the vessel, as well as fire). However, this task would be considerably facilitated if the *1978 United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules)* effectively replaced the traditional liability system within maritime law. This is because the Hamburg Rules remove the particular defenses available to the maritime carrier. In principle, the liability of the carrier according to both the Hamburg Rules[5] and the MT Convention[6] follows the principle of presumed fault. That is, the carrier must disprove negligence on his part or, as expressed in these conventions, assume liability unless he can prove »that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences».

4.4 UNCTAD-ICC Rules for Multimodal Transport Documents

The success of the 1978 Hamburg Rules has been limited,[7] while the MT Convention has not entered into force and probably never will in its present form. This being so, any necessary up-dating of the rules in various docu-

4 Art. 19 of the MT Convention.
5 Art. 5.1.
6 Art. 16.
7 Although they entered into force on 1 November, 1992.

ments used for multimodal transport would still be based on the traditional liability system in maritime law, as reflected by the original Hague Rules and their *1968 Protocol* (*the Hague/Visby Rules*). That is, unless the liability of the maritime carrier significantly changes as a result of ongoing work within UNCITRAL in co-operation with CMI. Meanwhile, UNCTAD and ICC developed the *1991 Rules for Multimodal Transport Documents*[8] based on the traditional Hague-Visby liability system. It is these Rules that are reflected or referred to in current Multimodal Transport Documents such as FBL and *MULTIDOC 1995*.

4.5 The undertaking to perform as criterion for the MTO

All the projects now referred to would define a multimodal transport operator as not only the enterprise actually performing the transport but also anyone *undertaking to procure*[9] performance of multimodal transport. Thus, it would be necessary to distinguish between *vessel-operating MTOs* (*VO-MTOs*) and *non-vessel-operating MTOs* (*NVO-MTOs*). Freight forwarders would fall into the latter category, but it would not affect their liability. This constitutes an additional reason for synchronizing the liability of the MTO with the liability that applies to the maritime carrier as such, since otherwise the NVO-MTO would have to assume a more extended liability than would apply to a maritime carrier. If, for instance, the defense of error in navigation and management of the vessel were available to the maritime carrier in case of collisions and strandings and the NVO-MTO lacked the possibility to invoke that defense against his customer, then liability would ultimately have to be borne by the MTO without possibility of recourse against the party who actually caused the loss or damage. Similarly, the mere conversion of a maritime carrier into an MTO may well seem insufficient to deprive the carrier of the defenses available if he had contracted for an ordinary port-to-port shipment. For this reason, it may be expected that any switch from the traditional network liability system to the uniform liability system would depend upon whether the Hamburg Rules, or some-

8 ICC publ. 481.

9 Regardless of whether he promises to do it himself or by another carrier, as pointed out by J. Putzeys, Le contrat de transport routier de marchandises, Brussels 1981 p. 31 *et seq.*

thing similar to the Hamburg Rules, might successfully replace the traditional maritime liability system under the Hague and Hague/Visby Rules.

Significantly, the transport industry has been considerably re-organized in recent years. Attention is not to the same extent focused on the ownership of the means of transport. Quite often, ships are not owned by their operators at all. They may be used by shipping lines under various charter and leasing arrangements or else by a joint organization that charters ships from partners in the joint venture. From a legal viewpoint, when deciding carrier status and carrier liability, one should therefore rather focus on the question whether or not the enterprise operates the respective means of transport. But what is meant by *operate* for the purpose of distinguishing between a performing and a contracting carrier if the controlling circumstance is no longer ownership as such?

Although it may well be easy to distinguish between a person responsible for the *technical operation* of the means of transport and somebody merely offering transportation services, the borderline would undoubtedly be somewhat blurred when the traditional ship-owning function is no longer decisive. Quite apart from this, what is decisive for responsibility in contract is not whether you own the asset that you promise to sell or provide but, instead, whether you have *undertaken* to provide it. Thus, all the above rules and documents are based on the theory that they apply not only to an MTO physically performing the transport (e.g., a shipping line undertaking MTO services) but also to someone who has merely undertaken to procure performance of the multimodal transport (e.g., a freight forwarder).[10]

This development is also recognized as to the document evidencing the transport. True, bills of lading issued by freight forwarders were traditionally looked upon with suspicion in documentary credit transactions. Indeed, such documents should be rejected, according to earlier versions of the ICC Uniform Customs and Practice for Documentary Credits (UCP). However, UCP 1983 expressly acknowledged freight forwarder documents, provided the freight forwarder has assumed liability as carrier. Indeed, the FBL referred to above evidences the freight forwarder as a multimodal transport operator. This was expressly mentioned as an acceptable document in UCP 1983.[11] However, this reference was considered unnecessary in the 1993 version (*UCP 500*). Thus, the modern development of

10 Or, as expressed by de Wit p. 21, a »paper carrier».

11 Art. 25.

freight forwarding services and the advent of transport logistics operators has also resulted in a change of attitude within the field of banking law.[12]

12 The view that negotiable instruments in addition to those already recognized can only be created by contract with statutory support (the »*numerus clausus* approach») seems to be somewhat arbitrary, since the ocean bill of lading is undoubtedly a product of the *lex mercatoria*. See, for a debate on this issue, J. Ramberg and K. Grönfors, [in International carriage of goods. Some legal problems and possible solutions C.M. Schmitthoff and R.M. Goode, (eds) London 1988 *passim*]. See also A. Recalde Castells, El conocimiento de embarque y otros documentos del transporte, Madrid 1992 pp. 373–374.

5 Carrier liability under international conventions

5.1 Inconsistencies in transport law[1]

The development of the law of carriage of goods has differed according to respective modes of transport. The reason for this is that the particularities of maritime law have not been absorbed by the other modes, but retained in maritime law. By far the largest volume of international carriage of goods is performed by maritime transport. Moreover, it is not to be expected that the rules and practice of carriage of goods by sea will basically change within the foreseeable future. However, as a result of containerisation, maritime transport has confronted carriage by other modes, so that presumably some adaptation to the other modes will occur, either by particular regimes for multimodal transport or by a development of unimodal sea transport to comprise land transport as well. In the emerging area of unspecified transport, maritime transport will necessarily remain an important element in the service of TOs.

5.2 Particularities of maritime law

5.2.1 *Risk sharing*

Risk sharing is the hallmark of maritime law, where the marine adventure traditionally required a joint venture between the interested participants. The shipowner had to provide a suitable and seaworthy ship and, in principle, the cargo owner shared with the shipowner the risk of perils of the

1 These have triggered J.G. Helm, Haftung für Schäden an Frachtgütern, Karlsruhe 1966, to state in Vorwort: „Die Zersplitterung der Rechtsgrundlagen und der Mangel an systematischer Literatur haben das Frachtrecht zu einer Materie werden lassen, in die der Student fast gar nicht, der Wissenschaftler nur schwer, der Praktiker meistens nur im Detail eindringen kann.»

sea. Since, in the carriage of goods by sailing ships, navigation and management of the ship was often difficult and hazardous, the cargo owner had to assume risks following from errors in these respects. The concept of general average was based on such sharing of risks and constituted a particular protection for the cargo owner, who got at least some compensation in the unfortunate event that his cargo was thrown overboard to lighten the stranded ship for refloating.[2] If so, the sacrifice had to be borne by the saved values in proportion. That principle, which had appeared even before Roman law in Lex Rhodia de jactu, became incorporated in the Roman Digest. This particular sharing of maritime risks now appears in the 1994 York Antwerp Rules on General Average, drafted under the auspices of the Comité Maritime International (CMI). As the rules have not generally taken the form of statutory law, they are incorporated in maritime contracts by reference in bill of lading and charterparty clauses.

One would, perhaps, have expected that shipowners would extend their obligation to provide a seaworthy ship, with an additional obligation to undertake appropriate measures to safeguard the cargo on board. However, shipowners generally preferred to limit that obligation as much as possible by extensive exemption clauses. In addition, the obligation to provide a seaworthy ship was regularly reduced to an obligation to exercise due diligence as to the seaworthiness of the vessel. This was considered all the more important as the concept of seaworthiness comprised not only the ship itself but also the idea that the ship and its master and crew should be capable of bringing the cargo to the agreed destination. This required that the cargo should be properly stowed, trimmed, and secured. Hence, seaworthiness includes cargo-worthiness.[3] In order to combat extensive exemption clauses, courts of law – particularly in Anglo-American jurisdictions – engaged in an interpretative exercise where the utmost specificity was required to reach the shipowner's objective to avoid liability as to the care and custody of the cargo.[4] As an illustration, an exemption only sufficed to cover the

2 See as to the origins of General Average, R. Lowndes and G.R. Rudolf, The Law of General Average and the York-Antwerp Rules [D.J. Wilson and J.H.S. Cooke eds] London 1990 pp. 1–5. For a critical assessment of general average see K. Selmer, The Survival of General Average. A Necessity or an Anachronism?, AfS Vol. 4, Oslo 1957, *passim*.

3 Hague Rules Art. 3.1 a, b, c.

4 See R. Lawson, Exclusion Clauses and Unfair Contract Terms, London 2003, B. Coote, Exception clauses, London 1964, H. Klœstad, Ansvarsfraskrivelse i befragtningsforhold, Kristiania 1924, J.G. Petersen, Ansvarsfraskrivelse, Copenhagen 1957 at pp. 131–150 and A.N. Yiannopoulos, Negligence Clauses in Ocean Bills of Lading, Baton Rouge 1962.

shipowner when negligence on the part of himself or his servants or agents could be established if non-liability for negligence had been specifically expressed.

5.2.2 *The Hague Rules compromise*[5]

Shipowners' extensive exemptions of liability triggered counter-measures in other form than merely an adverse interpretation method. The first reaction occurred in the United States with the 1893 Harter Act. Some years thereafter the CMI was established[6] with the objective »to contribute by all appropriate means and activities to the unification of maritime law in all its aspects». Regional legislation, such as the Harter Act, contributed to disunity. This led the CMI to initiate efforts to reach global international consensus as to cargo carried under bills of lading. These efforts resulted in the 1924 bill of lading convention known as the Hague Rules.[7] With these rules, the shipowner became subject to mandatory liability. However, in principle the rules accepted traditional risk sharing, in particular by retaining the defenses of error in the navigation and management of the vessel[8] and of fire.[9] [10] In addition, the obligation as to seaworthiness of the vessel was expressed as an obligation to exercise due diligence.

The Hague Rules' catalogue of exemptions[11] reflects the customary exemptions. In other than the enumerated events, the bill of lading holder may obtain compensation if the carrier cannot prove that »neither the ac-

5 See, for an account of the historical background from the perspective of U.S. law, M.F. Sturley, The History of COGSA and the Hague Rules, LMCLQ 1991 pp. 1–57.

6 1897.

7 See D. Markianos, Die Uebernahme der Haager Regeln, Hamburg 1960 *passim.*

8 Art. 4.2.a.

9 Art. 4.2.b.

10 The defense is re-inforced by so-called Both-to-Blame clauses to the effect that, when claimants, in case of a collision, claim compensation from the owner of the non-carrying vessel, which thereupon includes compensation paid in its claim for collision damages against the other vessel, the party in contract with the ship-owner would have to reimburse him (circular indemnity). Thus, claimants are discouraged from claiming compensation in tort against the owner of the non-carrying vessel. See for criticism of the view of the Supreme Court of the United States in *United States* v. *Atlantic Mutual Ins. Co.* (»*The Esso Belgium*» – »*The Nathaniel Bacon*») 343 U.S. 236 that such clauses are unreasonable when included in bills of lading and therefore invalid, Carver, Carriage by Sea [ed. R. Colinvaux], London 1982 at 2095 (pp. 1447–8). However, Both-to-Blame clauses in U.S. law are upheld in charterparties *American Union Transport Inc.*v. *United States* 1976 AMC 1480 N.D.Cal.

11 Art. 4.2.c–p.

tual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage».[12] As a practical matter, enumeration in the catalogue helps the carrier to avoid liability if he succeeds in bringing himself within the exceptions mentioned. Nevertheless, a carrier invoking, e.g., »perils, dangers and accidents of the sea or other navigable waters»[13] will always be met with the usually sustainable argument that the vessel ought to have been able to withstand these events: modern vessels are built to cope with the not unusual difficulties of that kind.

The defenses of error in the navigation and management of the vessel as well as of fire are different. That is, they apply even if caused by the negligence »of the master, mariner, pilot, or the servants of the carrier» and, as to fire, unless caused by »the actual fault or privity of the carrier». Except for these two defenses, the liability of the carrier under the Hague Rules is basically liability for presumed fault and neglect with a lifting of the presumption as to the enumerated events[14]. The carrier may establish a prima facie case of non-liability if he succeeds in bringing himself within one or several of the enumerated exceptions. However, if so, that may often be rebutted if it follows from the evidence that loss or damage would not have occurred if appropriate measures had been taken.[15]

The Hague Rules are mandatory and would thus defeat contractual clauses departing from Art. 4. As a *quid pro quo*, the carrier benefits from retaining the traditional *due diligence obligation* as to seaworthiness of the vessel as well as the defenses of error in the navigation and the management of the vessel and of fire. Further, the carrier is relieved of the risk that his contract clauses will be defeated by adverse interpretation, as the defenses have been given statutory support. Indeed, risk distribution under the Hague Rules is often incorporated in bills of lading and charterparties outside the scope of application of the convention by Paramount Clauses.[16]

The scope of application of the Hague Rules is limited to contracts covered by bills of lading or similar documents of title. If the bill of lading has

12 Art. 4.2.q.

13 Art. 4.2.c.

14 Art. 4.2.c–p.

15 See K. Grönfors ed., Six lectures on the Hague Rules [Gothenburg Maritime Law Association publ. 31, 1967] *passim*.

16 See M. Wilford, Paramount clauses in charterparties [in International Conference on Current issues in Maritime Transportation, Dir. Mar. 1992 pp. 1134–1145] and de Wit. pp. 77–78.

been issued under a charterparty, then the Hague Rules only apply from the moment at which the bill of lading regulates the relationship between a carrier and the holder of the bill of lading.[17] This means that the terms of the charterparty apply as between the shipowner and the charterer, even if a bill of lading has been issued to the charterer for subsequent transfer to a third party. Upon such transfer, the Hague Rules would take effect to govern the relationship between transferee and carrier. Thus, it is clear that the mandatory rules are primarily intended to protect third parties, such as buyers under CFR and CIF terms, where the seller has to conclude the contract of carriage for the benefit of the buyer. The seller's obligation consists in providing a contract of carriage »on usual terms«[18] and to provide a document that enables the buyer both to claim the goods from the carrier at the port of destination and also, unless otherwise agreed, to sell the goods in transit by transferring the document to a subsequent buyer.[19] As only the bill of lading contains such a transferability function, the seller's tender of a *negotiable bill of lading* prevails when sale of goods in transit is contemplated and to some extent also otherwise.

To enable sellers to fulfil their CFR and CIF obligations, the carrier has to issue a bill of lading to the shipper upon demand.[20] Normally, the FOB buyer who charters a ship to receive the goods on board would be protected in the same way as a CFR or CIF buyer. This is because the carrier would often issue the bill of lading to *shipper's order* for further transfer by the shipper-seller to the consignee-buyer,[21] even although the contract of carriage has been made with the FOB buyer.

In cases where no sale in transit is contemplated, a transferable bill of lading may not be required. Here would suffice a document naming the ultimate consignee, such as a sea waybill or a straight bill of lading. But, until recently, it was difficult to ensure that such documents would give the buyer a right independently of the seller to claim the goods at destination or sue the carrier in the event of damage to or loss of goods. This is now remedied by the 1992 English Carriage of Goods by Sea Act, which stipulates that the party entitled to delivery from the carrier under sea waybills and straight bills of lading enjoys the same protection as applies to the benefit of bill of

17 See Debattista, Sale of Goods pp. 109–156.

18 CFR and CIF Incoterms 2000 clause A 3.

19 CFR and CIF Incoterms 2000 clause A 8.

20 Hague Rules Art. 3.3.

21 See FOB Incoterms 2000 A 8 referring to the seller's assistance to the buyer in obtaining a negotiable bill of lading.

lading holders under the Hague Rules. In the English case of *The Rafaela*,[22] the straight bill of lading is considered such a *similar document of title*,[23] as it is normally intended to be transferred once, namely to the buyer-consignee. In other words, further transferability was not required. It was thought that any transferee should enjoy the protection of the Hague Rules.[24] The aim to protect the third party transferee is further developed in the 1968 Protocol to the Hague Rules, referred to as the Hague-Visby Rules. Here, the carrier is estopped from disproving the information as to receipt of the goods as described in the bill of lading when it has been transferred to a third party acting in good faith.[25]

5.2.3 *The nautical fault debate and the Hamburg Rules*

In a UNCTAD conference in the late 1960s, developing countries expressed concern about what they considered to be inequitable risk distribution under the Hague Rules. As a result, work was initiated under the auspices of UNCITRAL to remedy any shortcomings. This resulted in the 1978 Hamburg Rules, which entered into force in 1992. The Rules as such have not had a significant impact on international trade but have triggered domestic legislation incorporating some of its provisions. For example, the Scandinavian States have used this option in their 1994 Maritime Codes,[26] while maintaining their ratification of the Hague-Visby Rules.

22 [2003] 2 Lloyd's Rep. 113 (CA).

23 As referred to in Art.1 b of the Hague Rules.

24 The case has (2004) been referred to the House of Lords.

25 Art. 3.4.

26 See J. Ramberg, New Scandinavian Maritime Codes, Dir. Mar. 1994 pp. 1222–1224. The contents of the 1994 Maritime Codes of Denmark, Finland, Norway and Sweden are substantially the same but unfortunately the numbering of the sections is not identical. See for comments T. Falkanger, H.J. Bull, L. Brantaset, Introduction to Maritime Law – the Scandinavian Perspective, Oslo 1998 and H. Honka ed., New carriage of goods by sea. The Nordic Approach including comparisons with some other jurisdictions, Åbo 1997 pp. 15–216.

The deliberations leading to the Hamburg Rules involved intense debate regarding justification of the *nautical fault defense.*[27] While considering this defense understandable in a historical perspective in view of difficulties for ships in mastering the perils of the sea, the majority held it to be anachronistic, in that contemporary maritime transport requires skill in naval architecture and navigation enhanced by modern equipment such as radar and GPS, using satellites for determining the exact position of the ship. In fact, the value for the carrier of the defense is considerably diminished in practice as it is difficult to commit an error in navigation if the ship has an able master and crew and the required sea charts and navigational instruments are in good condition. Moreover, if that is not the case, then the defense would be unavailable due to the carrier's failure to exercise due diligence in providing a seaworthy ship.[28]

Paradoxically, resistance to change was vigorously voiced by cargo insurers apparently more anxious to safeguard the justification of cargo insurance than to expand recourse possibilities against the carrier and his liability insurers. Time and again the necessity to maintain the correct equilibrium between cargo and liability insurance was stressed as well as the danger of accumulating excessive risks for loss of or damage to cargo concentrated in the ship *on one keel* without the benefit of spreading the risk in the same way as was possible with cargo insurance. Further, it was observed that deleting the defense of nautical fault would reduce the importance of risk distribution in general average, since the shipowner would ultimately have to bear the costs in situations where the incident causing a general average distri-

27 See, e.g., R.E. Japikse, Nautical fault exemptions [in The Hamburg Rules: A choice for the E.E.C.?, Antwerp, Brussels, Baden-Baden, Zürich 1994] pp. 184–191 at p. 186 stressing that »a carrier has no means to supervise the transportation and handling of the vessel once she has put to sea» and that the defence »forms part and parcel of a negotiated compromise between ship and cargo interests brought about by commercial circles directly involved in the international shipping business». See for contrary views K. Grönfors, The Hamburg Rules – failure or success? JBL 1978 pp. 334–338 and *id.* Die Harmonisierung des Transportrechts und die Hamburger Regeln, RabelsZ 42 (1978)] pp. 696–705, S.R. Katz, Uniformity of International Trade Law and economic interests: The case of the Hamburg Rules, Diritto del commercio internazionale, Milano 1989 pp. 103–118, R. Herber, Harmonization of transport law – where do we stand? [Festskrift J. Ramberg, Stockholm 1996 pp. 225–234], J. Honnold, Ocean carriers and cargo; clarity and fairness – Hague or Hamburg?, JMLC Vol. 24 (1993) pp. 75–109 and H. Honka, The Hamburg Rules – Once More, J.T. 1992–93 pp. 807–813.

28 See, e.g., R. Rodière, Traité Général de Droit Maritime, Vol. II p. 263 and E. du Pontavice, Faute Nautique, Notion et Effet en Droit Français, Dir.Mar. 1971 pp. 411–417 with comments on the case The Ronda, DMF 1970 p. 667.

bution had resulted from nautical fault (e.g. strandings and collisions). Hence, the need for cover under minimum terms[29] would be significantly reduced. Considering the importance of cargo insurance, it is not surprising that the cargo insurers' criticism of deleting the defense of nautical fault under the Hamburg Rules contributed to the reluctance of States to ratify. Whether this will change as to a new convention, possibly resulting from the ongoing efforts in the project known as the *UNCITRAL/CMI draft*, remains to be seen.[30]

The Hamburg Rules, as well as the UNCITRAL/CMI draft, broaden the scope of application as compared with the Hague Rules. The ongoing deliberations within UNCITRAL even contemplate expanding the period of responsibility to include preceding and subsequent carriage by other modes of transport to the extent that mandatory international conventions or national law relating to other modes of transport are not allowed to prevail. However, the carrier is intended to have a general choice to convert himself by express agreement into an agent as to carriage by another carrier or carriers. If so, a mixed contract of carriage and freight forwarding arises. But, as we have seen (above 3.4), such »conversion» is far from easy under a *mandatory* regime if the maritime carrier has charged freight also covering carriage additional to carriage by sea.

A contract of carriage by sea broadly defines under the Hamburg Rules as »any contract whereby the carrier undertakes against payment of freight to carry the goods by sea from one port to another». By comparison, the UNCITRAL/CMI project expands the scope with the words »wholly or partly by sea». As already indicated, charterparties may to a great extent be considered contracts of carriage in spite of the confusing terminology (*hire* instead of *freight*).[31] The Hamburg Rules therefore explicitly exclude charterparties from the mandatory regime,[32] as is also contemplated in the UNCITRAL/CMI draft, but preserve the protection of bill of lading holders

29 Institute Clause C required under CIF Incoterms 2000.

30 See for comments on the project F. Berlingieri, A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door- to-Door?, ULR 2003 pp. 265–280 and H. Honka, The Legislative Future of Carriage of Goods by Sea: Could it be the UNCITRAL Draft? Scand. Stud. L. Vol. 46 (2004) pp. 93–120. Much will depend upon the willingness of other States to basically accept the proposed U.S. Carriage of Goods by Sea Act, which constitutes the basis for on-going discussions. See R. Asariotis & M.N. Tsimplis, The proposed US Carriage of Goods by Sea Act, LMCLQ 1999 pp. 126–140.

31 See for a survey of different types of charterparties and their legal classification J. Ramberg, Cancellation pp. 57–59.

32 Art. 2.3.

when the bills of lading have been issued under or pursuant to charterparties. The drafting style of the Hamburg Rules differs from that of the Hague Rules, which mirror the traditional drafting technique used in bill of lading clauses. This might have discouraged States used to such drafting style from ratifying the Hamburg Rules, although the abstract formula of its Art. 5.1 does express the principle of presumed fault or neglect, which in essence also follows from the Hague Rules catalogue (with the exception of the nautical fault and fire defenses).

5.3 Non-maritime transport

The liability of the carrier in non-maritime carriage has developed in another environment than maritime carriage. Indeed, as non-maritime carriage is normally performed by carriers as a public service made available to customers at large, liability rather rests on the status of the carrier than on contract. Consequently, possibilities to vary liability by contract clauses were restricted. Moreover, the contemporary law of carriage of goods by rail does not permit any departure from the regime established in COTIF/CIM, the more so as the convention also regulates co-operation between the railways, most of which are governmentally owned or controlled. Similarly, for carriage of goods by road, CMR does not permit any departure regardless of whether this would be to the detriment or the benefit of the customer.[33] [34]

The basis of liability in COTIF/CIM and CMR conforms to the strict liability traditionally imposed upon common carriers,[35] with exemptions limited to acts or omissions of the customer – which might include, e.g., missing or inadequate packing, faulty instructions, incorrect description and marking of the goods – as well as inherent vice of the goods causing their decay or wastage in transit. The rail and road carrier benefits from a presumption of non-liability in cases of special risks, such as carriage in open wagons or vehicles, inadequate packing or loading or unloading by the consignor or the consignee, and the nature of certain goods exposing them

33 Art. 41.

34 See A. Pesce, The Contract and Carriage under the CMR (Arts. 1, 41) [in International Carriage of Goods by Road ed. J. Theunis, London 1987 pp. 1–18].

35 See de Wit, pp. 30–31.

to the danger of loss or damage in transit.[36] [37] Further, the carrier may invoke the force majeure defense expressed as follows: »caused by ... circumstances which the carrier could not avoid and the consequences of which he was unable to prevent». This exemption is akin to the notion of »impediment beyond control» expressed in Art. 79 CISG but different in so far as it has not been mentioned that the circumstances must »not reasonably be expected to have (been) taken into account at the time of the conclusion of the contract».

Interpreting such expressions involves determining whether the exemption is available:

- in every case where the circumstances were beyond control of the carrier *in the individual case*, or
- only in cases where they were *of such type* as would fall outside the area of risk to be borne by the carrier.

If the first alternative is chosen, then liability is reduced to that for presumed fault or neglect. However, if the second alternative is chosen, then the exemption becomes akin to the *force majeure* defense. Possibly, it could be argued that Art. 17.3 CMR, expressing absolute liability for the defective condition of the vehicle, represents a conclusive definition of the area of risk. It would then follow that, in other cases, the abstract formula should be read literally, permitting the carrier to escape liability when, in the individual case, he had no possibility to avoid or prevent the occurrence.[38] But, even so, the liability becomes more stringent than under the formula used in Art. 5.1 of the Hamburg Rules due to insertion of the word

36 COTIF/CIM 1999 Arts. 23.3 compared with 25.2 and CMR Art. 17.4 compared with 18.2-5.

37 No corresponding provisions exist for maritime carriage but, instead, particular provisions on deck cargo, exempting carriage of such cargo from the mandatory regime (Hague and Hague-Visby Rules Art. 1 c) but protecting the consignee against unlawful or undisclosed agreements between the consignor and the carrier to allow carriage of cargo on deck. See Debattista, Sale of Goods pp. 147–150.

38 See J. Libouton, Liability of the CMR Carrier in Belgian Case Law (Arts. 17, 18, 19, 20) [in International Carriage of Goods by Road (CMR), ed. J. Theunis, London 1987 pp. 79–96], J. Ramberg, Harmonization p. 225, J. Putzeys *op.cit.* note 4.9 p. 246 *et seq.*, pointing out that the event excusing liability need not necessarily be extraneous but has to be regarded as impossible to avoid even exercising »la plus grande diligence». Cf. D.J. Hill and A.D. Messent, CMR: Contracts for the International Carriage of Goods by Road, London 1984 p. 67 *et seq.*, where it is suggested that the carrier is subject to an »obligation de résultat», which would lead to somewhat stringent liability.

reasonably in the formula: »took all measures that could reasonably be required to avoid the occurrence and its consequences». Thus, the liability of the rail and road carrier would offer a more limited exemption than would be available to the carrier of goods by sea under the Hamburg Rules, irrespective of the interpretative alternative chosen.

The ambition to mirror the liability of the rail carrier in CMR also appears in Arts. 34–36 on successive carriers. Here, however, the provisions become more or less redundant as co-operation between road carriers is not of the same kind as that between railways. Road carriers do not, upon accepting goods from a previous carrier, date and sign a receipt in the form required for the application of Arts. 34–36. Instead, there is a fairly consistent practice that one road carrier assumes liability for the entire carriage using other road carriers as subcontractors.[39]

The *1929 Warsaw* and the *1999 Montreal Convention* impose stringent liability on the air carrier. Some classic force majeure events have been stipulated as exemptions,[40] so that the carrier is not liable in case of »an act of war or an armed conflict» or »an act of public authority carried out in connection with the entry, exit or transit of the cargo». Few force majeure events occur during the carriage of goods by air, except for those mentioned. However, terrorist acts would only qualify as exemptions if they amount to »war or armed conflict». Under the Warsaw Convention[41], the carrier can avoid liability if he can prove that he and his agents have »taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures». However, this defense has been removed in the Montreal Convention as to loss of or damage to cargo, as distinguished from liability for delay. The defenses relating to inherent defect, quality or vice of the cargo[42] and defective packing of the cargo[43] are also available to air carriers but without the rail and road carriers' benefit of a reversal of the burden of proof as to these special risks.

39 See A. Messent, Successive Carriage [in International Carriage of Goods by Road (CMR), ed. J. Theunis, London 1987 pp. 166–182].

40 In Art. 18.2 c and d of both conventions.

41 Art. 20.1.

42 Art. 18.2 a.

43 Art. 18.2 b.

5.4 Multimodal transport

5.4.1 *Multimodal transport under unimodal regimes*

The variety of rules, differing according to modes of transport, creates considerable difficulty in establishing a particular regime for multimodal transport. This difficulty was met in COTIF/CIM and CMR by injecting the rules for different modes as exceptions from the otherwise applicable regime.[44] [45] In that way, a pattern was set known as the network system. This signified that, when loss or damage could be attributed solely to carriage of goods by the other mode of transport, then the rules of mandatory international conventions regulating that mode would be applied as if a separate contract for carriage by that mode had been made (the concept of the *hypothetical contract*). The principle of the network system has been maintained in the various projects aiming to resolve the problem of multimodal transport.[46]

5.4.2 *The 1980 UN Convention on International Multimodal Transport of Goods*

As mentioned, the 1971 TCM draft formed the basis for subsequent efforts leading to the 1980 United Nations Convention on International Multimodal Transport of Goods.[47] At that time, it was expected that the Hamburg Rules would replace the Hague and the Hague-Visby Rules, thus significantly reducing the difference as to basis of liability for the different

44 COTIF/CIM Art. 63 and CMR Art. 2.

45 Actually, the difficulties still remain as regimes other than CMR might well apply, irrespective of the network principle of Art. 2, when bills of lading are demanded and/or issued for road/sea traffic, e.g. as suggested by de Wit, p. 104 in cross-channel trade and the trade between Scandinavia and other European countries. See also, H. Honka *op.cit.* note 5.27 p. 116 and *Quantum Corp.* v. *Plane Trucking Ltd et al.* [2002] 2 Lloyd's Rep. 25 CA on the conflict between the CMR and the Warsaw Convention. See for the difficulties in applying Art. 2 D.J. Hill and A.D. Messent *op. cit.* note 5.38 p. 24 pointing out that the expression »conditions prescribed by law» cannot refer to the Hague Rules as the carrier is entitled to increase his liability. See also A. Pozdnakova, Unification of International Transport Law, Law and Justice 2004, p. 24 at p. 29 and *Thermo Engineers Ltd et al.* v. *Ferrymasters Ltd* [1981] Lloyd's Rep. 200 QB.

46 See for critical remarks. I. Koller, VersR 1989 p. 769 and p. 773 and R. Herber, TranspR 1990 p. 4 and p. 10 *et seq.*

47 The MT Convention, not yet in force.

modes of transport. The MT Convention reproduced[48] the same exemption of liability as appears the Hamburg Rules[49] and reserved the network principle to monetary limits only. Where loss or damage occurred that could be localized to a particular stage of the multimodal transport regulated by an international convention or mandatory national law and providing a *higher* monetary limit than the limit under the MT Convention – then that limit would apply.[50] Hence, the consignor or the consignee would never risk a reduction of the monetary limits under the MT Convention but would benefit from the higher limit that would have applied if they had contracted for the carriage by the mode to which loss or damage could be localized.[51]

Although the Hamburg Rules have entered into force, the Hague and Hague-Visby Rules are still predominant in international trade. As a consequence, States hesitated to ratify the MT Convention, the reason being that the MT Convention does not work as smoothly together with the Hague and Hague-Visby Rules as with the Hamburg Rules. In particular, the MTO would experience a gap between his liability under the MT Convention and his possibility to get reimbursement from a maritime carrier as subcontractor. The standstill of the MT Convention caused UNCTAD to approach ICC and the freight forwarders' world organization, FIATA, with a view to reaching a solution. The ICC, having already[52] established Rules for Combined Transport Documents, saw fit to co-operate with UNCTAD and FIATA in updating those rules. Meanwhile, FIATA, which had already[53] launched its Combined Transport Bill of Lading (FBL) based upon the CMI 1969 Tokyo Rules, agreed to present its views to UNCTAD and ICC as to any revision. In the early 1990s, the FBL had been extensively used to cover individual shipments consolidated in containers, so that freight forwarders using FBL thus appeared as well established contracting carriers in the transport market.

48 In Art. 16.1.

49 In Art. 5.1.

50 Art. 19.

51 See J. Ramberg, Multimodal transport – a new dimension of the law of carriage of goods? pp. 481–492.

52 1975.

53 1971.

The working group set up by the ICC was instructed to base the revised rules on the Hague-Visby Rules. The result appears in the *UNCTAD/ICC Rules.*[54] The principle of presumed fault or neglect is set forth,[55] while the particular defences of error in the navigation or management of the vessel as well as of fire available for maritime carriage appear.[56] The Hague Rules' catalogue of defenses has not been reproduced in the UNCTAD/ICC Rules. However, the effect of the omission, if any, is limited. The network principle, as in the MT Convention, is only used as to the monetary limits, since the different bases of liability are of limited importance when the particular defenses have been made available.[57] As distinguished from the MT Convention, the UNCTAD/ICC Rules apply monetary limits for localized loss or damage not only to the benefit of the consignor and the consignee but also to the benefit of the MTO by referring not to the *higher* limit but to *another* limit.[58] [59]

5.5 Monetary limits

5.5.1 *Assessing the average value of goods carried*

As a general principle of the law of carriage of goods, the carrier's liability is limited to a certain amount. This is nowadays generally expressed in *Special Drawing Rights* (*SDR*) as defined by the International Monetary Fund. SDR was introduced as a unit for the monetary limitation by Protocols to the respective conventions.[60] In this way, the carrier would be able to assess exposure to the benefit of himself and the insurers of his liability. The monetary limits should be set so as to reflect the average value of the goods. This differs according to the type of carriage. Clearly, the average value of goods carried by sea is much less than the average value of goods carried by other modes.

54 Art. 5.

55 Art. 5.1.

56 In Art. 5.4.

57 By the stipulations of Art. 5.4.

58 Art. 6.4.

59 See J. Ramberg, The UNCTAD/ICC Rules for Multimodal Transport Documents – Genesis and Contents [Festskrift H. Tiberg, Stockholm 1996 pp. 513–523].

60 See as to the Hague Rules, Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (»SDR Protocol»), in force 1984.

5.5.2 *Declarations of value*

The assumed average value is determined rather arbitrarily but the cargo-owner may generally opt to make a declaration of value against payment of additional (*ad valorem*) freight. Indeed, in some jurisdictions a reminder of this option must be recorded in the carrier's terms and conditions in order to preserve his rights and immunities. However, the option is seldom used, as the cargo-owner would not get a discount on his cargo insurance premium following a declaration of value.[61]

5.5.3 *Unit and per kilo limitation*

Traditionally, the monetary limit for carriage of goods by sea has related to a *package or unit* of the goods. This remains the principle under the Hague Rules (667.67 SDR),[62] while the Hague-Visby Rules add a limitation per kilo of the goods lost or damaged (2 SDR) with the application of the higher of these limits.[63]

5.5.4 *The container formula*

As to carriage of goods in containers, does the package or unit limitation apply:

- with one amount for the container with the goods stowed in it, or
- to each unit in the container?

The latter alternative applies according to the *container formula* of the Hague-Visby Rules,[64] provided »the number of packages or units (have been) enumerated in the bill of lading as packed in such article of transport».[65] The Hamburg Rules add that when »the article itself has been lost or damaged» it should be considered as »one separate shipping unit» [66]. In

61 See, e.g., H. Glöckner, Limits to liability and liability insurance of carriers under Articles 3 and 23 to 29 of the CMR [in International Carriage of Goods by Road (CMR), ed. J. Theunis, London 1987 pp. 97–112] at p. 104.

62 See E. Selvig, Unit limitation of carrier's liability. The Hague Rules Art. IV (5). AfS Vol. 5, Oslo 1960 pp. 197–235.

63 Art. 4.5 a.

64 Art. 4.5 c.

65 See L. Sisula, Containerklausulen i Haag-Visby-reglerna, Gothenburg Maritime Law Association publ. 39, (1970), *passim*.

the deliberations on the Hague-Visby Rules, some States expressed preference for a pure per kilo limitation. However, the majority favoured retaining the per package or unit limitation to protect high value/low weight cargo, such as electronics and similar manufactured goods.

5.5.5 *Per kilo limitation for non-maritime carriage*

As to non-maritime carriage, the package/unit limitation is missing and a sole per kilo limitation applies. This means that the protection of high value/low weight goods is lost. The per kilo limitation for rail and air carriage is the same (17 SDR per kilo) while, surprisingly, under CMR for road transport the limit is only 8.33 SDR. Surely, one would not expect the average value of goods carried by road to be lower than goods carried by rail? If so, then the explanation is probably that road carriers were not thought to have the same financial capacity to meet claims as rail and air carriers. Presumably, the bargaining strength of the international organization representing road carriers[67] succeeded in pressing for a lower limit which, as any limit, could be defended by considering the cargo-owner's right to make a declaration of value against payment of ad valorem freight. The limit applicable to road carriage under CMR has also been used for non-maritime multimodal carriage.[68] Clearly, the average value of goods carried by air is much higher than goods carried by sea and over land and, therefore, the limit of 17 SDR per kilo has been retained in the 1999 Montreal Convention.[69]

5.5.6 *Increase of limits due to world inflation*

Considering world inflation, the monetary limits under the various conventions erode as time goes by. The limits have therefore been increased in the Hamburg Rules (835 SDR per package or unit and 2.5 SDR per kilo[70]) and in the MT Convention (920 SDR per unit and package and 2.75 SDR per kilo[71]) compared with the limits of the Hague-Visby Rules (667.67 SDR

66 Art. 6.2 b.

67 The International Road Transport Union, IRU.

68 MT Convention Art. 18.3 and the UNCTAD/ICC Rules for Multimodal Transport Documents Art. 6.3.

69 Art. 22.2 b.

70 According to Art. 6.1 a of the Hamburg Rules.

per unit or package and 2 SDR per kilo[72]). The Hague-Visby limits have been retained in the UNCTAD/ICC Rules.[73] The *container formula* appears in all these conventions as drafted in the Hague-Visby Rules,[74] Hamburg Rules,[75] and MT Convention[76] as well as in the UNCTAD/ICC Rules.[77] This signifies that the unit or package limitation is applied to each unit consolidated in the container, pallet, or similar article of transport provided the units are enumerated in the transport document.

5.6 Liability for delay[78]

5.6.1 *Reluctance of maritime carriers to accept liability for delay*

While time is of the essence irrespective of mode of transport, carriers of goods by sea have nevertheless traditionally disclaimed liability for delay, the reason being that ships would from time to time be exposed to adverse weather conditions. Indeed, they are required to reduce speed in fog, even though they are nowadays aided by radar and satellite navigation devices (GPS). True, such difficulties could be embraced by referring to what »would be reasonable to require of a diligent carrier».[79] However, the traditional risk aversion of maritime carriers is difficult to overcome. The Hague Rules[80] refer to »loss or damage to or in connection with goods».

71 According to Art. 18.1 of the MT Convention.

72 According to Art. 4.5 a.

73 Art. 6.1.

74 Art. 4.5 c.

75 Art. 6.2 a.

76 Art. 18.2 a.

77 Art. 6.2.

78 See, in general, K. Grönfors, The concept of delay in transportation law, ETL 1974 pp. 400–413 and, as to multimodal transport, *id.* – Liability for delay in combined transport, JMLC Vol. 5, (1973–74) pp. 483–490.

79 Hamburg Rules Art. 5.2 and the MT Convention Art. 16.2.

80 Art. 4.5.

The words *in connection with* have been suggested to include delay.[81] However, it is difficult to neglect the context in which delay would have to occur, namely, only in connection with loss of or damage to goods – but not independently thereof. Hence, the view prevails that the Hague and Hague-Visby Rules do not generally include liability for all types of delay.

The air carrier's liability for delay has in practice been rather modest and has been further modified in the 1999 Montreal Convention.[82] [83]

5.6.2 *Declarations of interest in timely delivery*

In the deliberations leading to the UNCTAD/ICC Rules, parties representing shipowners took a firm stance against including liability for delay. This resulted in the stipulation that such liability would only arise if »the Consignor has made a declaration of interest in timely delivery which has been accepted by the MTO».[84] If so, then the definition of delay in delivery[85] applies. As a result, the MTO becomes liable »when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case».

5.6.3 *Converting prolonged delay to constructive loss of goods*

A further problem concerns the question when prolonged delay should be considered constructive loss of the goods. As it might be desirable to avoid

81 See for an extensive interpretation of that expression *Renton (G.H.) & Co.* v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149 and *Adamastos Shipping Co.* v. *Anglo-Saxon Petroleum Co* [1959] A.C. 133. See further, Carver, Carriage by Sea (1982) Section 458 suggesting that »the words, loss or damage, ... include cases where the merchant suffers loss because in breach of contract the ship fails to take on the goods or delays in doing so, or delays delivery, or delivers in the wrong place or to the wrong person». Cf. Scrutton 1996 pp. 440 and 443 stressing that loss or damage must ...arise »in connection with» the goods or, as expressed in the Adamastos case, in relation to the »loading, handling, storage, carriage, custody, care or discharge of such goods». See also J. Cooke, J.D. Kimball, T. Young and D. Martowski eds, Voyage charters, London 2001 p. 939.

82 Art. 19.

83 See, e.g., the American case *El Al Israel Airlines* v. *Tseng* 525 U.S. 155 (1999) for a decision on the Warsaw formula (»all necessary measures»), which in the Montreal Convention has been replaced with »took all measures that could reasonably be required».

84 Art. 5.1.

85 According to Art. 5.2.

arbitrary decisions in this respect, it is necessary to stipulate a fixed period, although this would fail to distinguish between transport requiring a shorter or longer period for performance. CMR[86] differentiates between:

- expiry of an agreed time limit for delivery, in which case the excess time giving the consignee the option to claim for total loss has been set at 30 days and,
- where there is no agreed time, in which case the time is 60 days.

The MT Convention[87] has determined a longer period of 90 days, since the MTO may undertake trans-ocean transport. Here, it would not be reasonable to assume that the goods have been lost, even though delayed for a considerable period of time. The UNCTAD/ICC Rules go even further in protecting the MTO in giving him the possibility to rebut the assumption that the goods have been lost (»in the absence of evidence to the contrary»[88]). This provision is helpful when the goods have been short-shipped and left behind and have to await the next available transport to maybe a distant destination.

5.6.4 *Limits of liability for delay*

The loss incurred by the consignee as a result of delay is difficult to assess. Further, recovery would be limited to such loss as could be foreseen by the carrier as a possible consequence at the time of concluding the contract (cf. Art. 74 CISG).

To avoid difficulties in assessing compensation, different methods appear.

COTIF/CIM use agreements on transit periods.[89] If these are exceeded, then compensation is payable[90] in an amount:

- not exceeding four times the transit charge, but
- not more than would have been payable in case of total loss of the goods.[91]

86 Art. 20.
87 Art. 16.3.
88 Art. 5.3.
89 Art. 16.
90 According to Art. 32.1.
91 Art. 32.5.

CMR sets the limit at a sum not exceeding carriage charges,[92] with additional compensation only payable if a special interest in delivery has been declared.[93]

The Hamburg Rules and the MT Convention stipulate two and half times the freight for goods delayed but not exceeding the total freight payable under the contract and, further, not exceeding what would have been payable for the goods in case of total loss.[94]

The UNCTAD/ICC Rules[95] limit compensation to the equivalent of the freight under the MT contract.

The Hague Rules do not stipulate any particular limit for compensation due to delay – presumably, as they were not intended to cover liability for delay.

The Warsaw Convention and the Montreal Convention[96] stipulate liability for delay but there is no particular limit so the general limit of 17 SDR per kilo would also have to be used in the case of delay.

5.7 Loss of right to limit liability

5.7.1 *Reasonableness or practicability?*

Some courts tend to set aside monetary limitations, apparently without bearing their purpose in mind.[97] The objective differs fundamentally from the carrier's benefit of *exemptions of liability*, since the monetary limit is only intended to assess the average value of the goods and to facilitate settlement of claims. Further, a higher value is available to the consignor by a declaration of value. The absence of a monetary limit would necessitate applying general principles of law on limitation of recoverable damages, which may differ in various jurisdictions. A settlement of claims based upon such principles would therefore tend to diminish the effect of the convention to unify the law.

92 Art. 23.5.

93 Art. 23.6.

94 Art. 6.1 b–c of the Hamburg Rules and Art. 18.4–5 of the MT Convention.

95 In Art. 6.5.

96 In Art. 19 of both conventions.

97 See as to the purpose of the monetary limit of liability, J. Ramberg, Ansvarsbegränsning – en fråga om skälighet eller praktikabilitet [Festskrift U. Nordenson, Stockholm 1999] criticizing the Swedish Supreme Court case NJA 1998 s. 390.

It is to be expected that courts, and perhaps arbitrators as well, would prefer to apply the law governing the contract rather than, e.g., the 2004 UNIDROIT Principles of International Commercial Contracts. These[98] limit compensation to what the party liable »foresaw or could reasonably have foreseen *at the time of conclusion of the contract* as being likely to result from its non-performance».[99] Arguably, applying this formula may well re-introduce the monetary limit if defeated by the blameworthy behaviour of the carrier! However, such a result would be avoided if the corresponding provision of the European Principles of Contract Law were to be applied, since here the words »unless the non-performance was intentional or grossly negligent»[100] have been added. However, in view of the worldwide success of CISG, it seems more appropriate to apply its Art. 74 where the *unless* addition of the European Principles is missing. Be that as it may, loss of the right to limit liability should not be taken lightly, as the very purpose of monetary limits – in creating certainty and facilitating settlement of claims – might then be defeated.[101]

98 In Art. 7.4.4 on foreseeability of harm.

99 Author's italics.

100 Art. 9:503.

101 Regrettably, courts often fail to recognize this important purpose of monetary limits. See the justified criticism of the decision by BGH (VersR 1985 p. 1060) by H. Glöckner *op.cit.* note 5.61 p. 108 but apparently to no avail. The risk of losing the benefit of monetary limitation is rather aggravated by placing the burden on the carrier to clarify the circumstances giving rise to the loss or damage (Germ. »Figur der sekundären Darlegungslast»), which, in practice, frequently results in the loss of the right to limit liability. See the decision of BGH TranspR 2003 p. 467 and cf. the decision of the Supreme Court of Sweden NJA 1998 s. 390. A more practical view is upheld in English case law. See R. Asariotis, Haftungsbegrenzungen und deren Durchbrechung im Seehandelsrecht: die englische Auffassung, TranspR 4-2004 p. 147. R. Herber, Haftungsbegrenzungen und deren Durchbrechung in deutschen und internationalen Transportrecht, TranspR 3-2004 p. 93 *et seq.* supports the cases by BGH, stressing that the »Beweislast» is a procedural matter where regard must be had to the claimant's »Informationsdefizit ». F. Fremuth, TranspR 3-2004 p. 99 et seq. at p. 103 criticizes the »Beweislastumkehr» by BGH in BGHZ 145 p. 170, TranspR 2001, 29 at p. 33. Similarly, K-H Thume, TranspR 2002-1 p. 6 *et seq.* From other jurisdictions may be mentioned K.F. Haak, TranspR 3-2004 p. 104 reporting that the Hoge Raad in the Netherlands in later years has departed from the earlier downgrading of the subjective criterion of »knowledge that the damage would probably result» and required that all criteria – subjective and objective – must be present (N.J. 2001:391, N.J. 2002:388 and N.J. 2002:598). J. Schelin, TranspR 3-2004 p. 107 reports that Scandinavian case-law demonstrates a certain tendency not to take the subjective criterion (»wilful») seriously

Cont'd

5.7.2 *Imputing misconduct to the carrier*

The misconduct needed to break the right to limit has been expressed differently in the various conventions. But, even more importantly, the question of *whose* misconduct should be imputed to the carrier is answered differently. The mere fact that the carrier's performance includes servants and agents acting in the course of their employment does not necessarily mean that their acts or omissions should be imputed to the carrier when his right to limit liability is considered. True, when the carrier is a legal entity, which is normally the case, it would be necessary to decide which acts or omissions should be attributed to the legal entity rather than to its servants or agents. However, the distinction is well known in general contract and corporate law and, moreover, particularly in maritime law as to the shipowner's defense of error in the navigation and management of the vessel. Indeed, both the Hague and Hague-Visby Rules[102] refer to »actual fault or privity of the carrier», signifying that acts or omissions have to be attributed to persons on the managerial level of the legal entity.

CMR clearly includes misconduct by »the agents or servants of the carrier» as well as »by any other persons of whose services he makes use for the performance of the contract».[103] COTIF/CIM,[104] The Hague and Hague Visby Rules,[105] the Hamburg Rules[106] and the MT Convention[107] have no

(ND 1983.62 FH, ND 1993.87 DH, ND 1991.123 DH, ND 1988.78 SøHa, ND 1997.355 Borgarting lagmannsrett, ND 1999 s. 94 SøHa, NJA 1992 s. 130). He points out that the real problem stems from the »vicarious liability» for »wilful misconduct» which should be removed as in maritime law. See for case-law in England, R. Asariotis, TranspR 4-2004 p. 147 referring to *Browner International Ltd.* v. *Monarch Shipping Co. Ltd (The »European Enterprise»)* [1989] 2 Lloyd's Rep. 185 QB which as to maritime law seems to conform with the situation under German maritime law, see D. Rabe TranspR 4-2004 p. 142. But cf. from New Zealand, *Pine Industries Ltd* v. *Seatrans New Zealand Ltd (The »Pembroke»)* [1995] 2 Lloyd's Rep. 290. For air law the principle of vicarious liability for wilful misconduct of servants remains but becomes redundant under the principle of unbreakability in the 1999 Montreal Convention, see E. Ruhwedel, TranspR 4-2002 p. 137.

102 In Art. 4.2.(b).
103 Art. 29.2.
104 Art 37 and Art. 39.
105 Art. 4.5.
106 Art. 8.1.
107 Art. 21.1.

corresponding provision but merely refer to »the railway», »the carrier, and »the multimodal transport operator» respectively. The Hamburg Rules add,[108] as does the MT Convention,[109] that persons other than the carrier and the MTO lose the right to limit *their* liability in cases of relevant misconduct. During deliberations on the Hamburg Rules, the CMI observer suggested inserting the word *personal* to avoid doubt whether the carrier would retain the right to limit if misconduct could only be attributed to his servants or agents or other persons used for performance (cf. Art. 4 of the 1976 Convention on the Limitation of Liability for maritime claims). After a rather intense debate on the matter, where the majority seemed to favour retaining the carrier's right to limit when misconduct could not be attributed to himself, it was decided not to insert the word *personal*. Nevertheless, it seemed to be the opinion of the majority that the same result would also follow without the word *personal*. The structure of the convention supports that opinion, as the provision on liability[110] includes »servants or agents», whereas these are missing in the provision on loss of the right to limit.[111]

The Warsaw convention[112] includes »any agent of the carrier acting within the scope of his employment» among those whose misconduct is sufficient to defeat the carrier's right to limit. The Montreal Convention[113] adopts the same principle.

5.7.3 *Definition of behaviour required to defeat the right to limit*

Abstract formulae differ in describing the behaviour needed to defeat the carrier's right to limit liability. The words »with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result» or »wilful misconduct» are used. The Warsaw Convention[114] and CMR[115] refer to *wilful misconduct* adding such »default ... as, in accordance with the law of the court or tribunal seized of the case, is considered equivalent to wilful misconduct». The addition highlights the difficul-

108 Art. 8.2.
109 Art. 21.2.
110 Art. 5.1.
111 Art. 8.1.
112 Art. 25.2.
113 Art. 22.
114 Art. 25.1.
115 Art. 29.1.

ty in interpreting what is meant by *wilful misconduct*, although the word wilful cannot be interpreted to mean something other then intent or dolus.

Semantically, *wilful* relates to *misconduct* and, therefore, would only exclude unintentional misconduct. In other words, *wilful misconduct* requires that the person knows that he is misbehaving. Nevertheless, it is also necessary to decide the relationship between that knowledge and the damage.[116] With the exception of theft, it is not likely that damage is inflicted intentionally. However, intent may well arise through disregarding the likelihood of damage by indifference or, even worse, in order to achieve economic benefit from speedy but careless handling of the cargo. Such intent may not be covered by the words *with knowledge that such damage would probably result*, since the word *probably* invites the conclusion that damage would be more likely than not, in which case the intent approaches *dolus indirectus*. With the word *possibly*, intent would have been reduced to *dolus eventualis*.

The reference in *CMR*[117] to the law of the forum tends to create confusion in correctly interpreting wilful misconduct. This, at times, has been interpreted rather arbitrarily to mean gross negligence in cases where there is no wilfulness at all in the sense referred to in the present analysis. Presumably, in these cases, one has lost sight of the very purpose of monetary limits. These, unless in principle unbreakable, have lost their purpose. Wilful misconduct, with respect to passenger claims, has been replaced in the 1999 Montreal Convention by a new formula referring to an act or omission committed intentionally or recklessly with knowledge that damage would probably result. The Montreal Protocol 4 to the Warsaw Convention assimilated wilful misconduct with the latter formula[118] but, in any event, wilful misconduct is no longer referred to in the 1999 Montreal Convention.[119]

116 This appears from the test used in *Horabin* v. *British Overseas Airways Corporation* [1952] 2 Lloyd's Rep. 450 QB: The »person who did the act knew ... that he was doing something wrong not caring whether he was doing the right thing or the wrong thing» and then is added »... quite regardless of the safety of things... for which ... he was responsible». See A.E. Donald, The CMR, London 1981 p. 27 and D.J. Hill and A.D. Messent *op. cit.* note 5.38 p. 152 *et seq.*

117 Art. 29.1.

118 See *In re Crash Near Cali, Columbia* 985 F. Supp 1106 (S.D. Fla. 1997) confirming the standard of *Butler* v. *Aeromexico* 714 F. 2d 429 (11th Cir. 1985) reversed in relevant part by the C.A. of the 11th Circuit *sub.nom. Cortes* v. *Am. Airlines* 177 F. 3d 1272 (1999).

119 See P. Mendes de Leon & W. Eyskens, The Montreal Convention: Analysis of some aspects of the attempted modernisation and consolidation of the Warsaw system. Journal of air law and commerce, 2001 pp. 1155–1184; it follows that the liability for cargo under the Montreal Convention is »strict but unbreakable» (at p. 1181).

5.7.4 *Within the scope of their employment*

A further reason not to let the misconduct of *servants, agents or other persons* defeat the carrier's right to limit liability follows from the difficulty in deciding whether they have acted within the scope of their employment. A good illustration would be theft. Clearly, they have not been employed to steal but their employment may well give them better opportunities to steal than outsiders. Again, there is no international uniformity as to the extent to which the carrier is liable for theft by servants, agents, or other persons. So, at least in some cases, theft of cargo may not involve carrier liability.

As a practical matter, it appears to be the better solution that the carrier would be liable to pay with the monetary limit as maximum in every case where the cargo fails to reach the consignee unless able to disprove presumed fault or neglect or otherwise benefit from an exception of liability. In many cases, the costs of investigating whether the cargo has been stolen may become disproportionate to the amount to be compensated. All conventions, except CMR, clearly require that the claimant *must prove* (»if it is proved») the circumstances required to defeat the carrier's right to limit liability and, presumably, Art. 29.1 CMR should be interpreted in the same way.[120] In most cases, the burden of proof and the costs of investigation would discourage the claimant from trying to defeat the carrier's right to limit. This invites the question whether he should be induced to try, by a regulation imposing unlimited liability on the carrier in case of theft.

120 However, as appears from the decision by the German BGH TranspR 2003 p. 467, the burden of clarifying the circumstances causing loss or damage (»Figur der sekundären Darlegungslast») may in practice frequently warrant the presumption that the carrier has been guilty of sufficiently blameworthy behaviour to defeat his right to limit liability. The only method of curing this problem seems to be a modification of CMR, preferably by preserving the right to limit except where the blameworthy behaviour could be attributed to somebody on the managerial level.

6 The mixture of mandatory and non-mandatory law

6.1 Scope of mandatory carrier regimes

6.1.1 *Period of responsibility*

Traditionally, maritime carriers were keen to limit their responsibility strictly to the period from the moment the goods were hooked on to the ship's tackle until they were unhooked from the ship's tackle at destination (*the tackle-to-tackle principle*).[1] In charterparty trade, the responsibility may be further restricted by leaving the entire loading and unloading obligation to the charterer (*Free In and Out, F.I.O.*). Modern cargo handling techniques and containerisation make such a limitation of the maritime carrier's period of responsibility inappropriate. Parcel cargo is either received by the carrier for stuffing into containers or assembling on pallets or similar articles of transport or received by the carrier stowed in or on such articles of transport. Except where the article of transport contains homogeneous cargo, the container with cargo stowed in it is usually received from freight forwarders who have undertaken to consolidate the parcels for a number of shippers (*LCL, for Less than full Container Loads*). The shippers would then get the freight forwarder's bill of lading as receipt and evidence of the contract made with the freight forwarder (often the FBL), while the carrier would tender his bill of lading as a receipt and evidence of the contract between him and the freight forwarder. In these cases, the freight forwarder becomes the contracting carrier, with the maritime carrier as the subcontracted performing carrier. Containers are lifted on board cellular ships with cranes usually operated by port authorities or independent terminal operators in the container ports. As it would not be practical in such cases to refer to the ship's tackle, the natural period of responsibility would be from the moment the carrier takes the goods in charge – usually at his cargo terminal before the arrival of the ship – until delivery at destination, again usually from a cargo terminal.

1 See as to the Hague-Visby Rules D.M. Bovio, Extremos del periodo de aplicacion mínimo en la CB-PV, Madrid 1998, *passim*.

The appropriate period of responsibility appears in the Hamburg Rules (»in charge of the goods at the port of loading, during the carriage and at the port of discharge»[2]) and in the MT Convention, here without reference to any particular place for receipt or delivery of the goods.[3] Non-maritime carriers have not felt any need to restrict the period of responsibility to between the loading or unloading of the vehicle of transportation, instead referring to the period during which the goods are in charge of the carrier.[4] The Warsaw Convention limits *in charge* to the airport or, in the unfortunate event of »landing outside an aerodrome, in any place whatsoever»;[5] while the Montreal Convention[6] excludes »any carriage by land, by sea or by inland waterway performed outside an airport».

6.1.2 *Type of loss covered*

All conventions limit their scope in only specifically regulating liability for *loss of or damage to the goods* and, except the Hague and Hague-Visby Rules[7] also for *delay in delivery*. The reason is that liability concerns incidents happening during the period of responsibility and not unrelated non-performance of the carrier's contractual obligations. Hence, a breach of contract by the carrier in failing to receive the goods for transport falls outside the mandatory regime, as it only covers delay *in delivery* and not also delay in *receipt for shipment*. Liability in the latter case would be determined by the applicable law on breach of contractual obligations under the contract of carriage. Such liability would not be controlled by mandatory law and would often be reduced by contract clauses relieving the carrier from liability for indirect and consequential loss.

In practice, sellers as beneficiaries under letters of credit are more interested in getting compensation in cases of the carrier's failure or delay in receiving the goods for carriage than in receiving compensation for delay in delivery. However, they get no assistance from mandatory carrier regimes

2 Art. 4.1.

3 Art. 4.1.

4 COTIF/CIM Art. 23, Warsaw Convention Art. 18 and Montreal Convention Art. 18-D.

5 Art. 18.2.

6 Art. 18.D.4.

7 But *after* the goods have been received by the carrier he might be subject to the mandatory regime if a broad interpretation of the words »or in connection with goods» is preferred. See *supra* note 5.81.

to ensure compensation for loss due to inability to present the required transport document to the bank for payment under the letter of credit. They may, in case of delay in shipment, sometimes get assistance by the carrier back-dating the transport document. This, however, would constitute a fraud on the buyer.

The Hamburg Rules and the MT Convention[8] address the problem by invalidating fraudulent letters of indemnity purporting to protect the carrier by the shipper's promise to reimburse him if the buyer recovers damages for having received a clean document, when it ought to have been claused by mentioning any discrepancies between the stated and observed condition of the goods, but the more serious case of back-dating the transport document is not addressed. The Hamburg Rules and the MT Convention[9] also stipulate liability to pay compensation for false information with intent to defraud a third party. Possibly, at least in more serious cases, the carrier's disclaimers of liability for indirect or consequential loss could also be defeated by applying general principles of law, using the same notions that appear in the UNIDROIT Principles of International Commercial Contracts,[10] stipulating that exemption clauses »may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract». Moreover, the overriding duty to »act in accordance with good faith and fair dealing»[11] may prevent a carrier from escaping liability in the event of serious non-performance of obligations falling outside the scope of the mandatory regime.

6.1.3 *Misdelivery*

Carrier liability for loss other than loss of or damage to the goods or delay in delivery is without limit. In particular, such liability will arise if the carrier fails to honour his obligation to deliver goods only in return for at least one original of the bill of lading. This obligation follows directly from the *presentation clause* usually appearing in the lower right-hand corner of the front page of the bill of lading. But even without a presentation clause it may follow from the very nature of the bill of lading as a vehicle for transfer of right to subsequent holders that goods may only be delivered in return for at least one original. In this context, the practice of issuing bills of lading in several originals should be mentioned.

8 In Art. 17 and Art. 12 respectively.
9 In Art. 17.4 and Art. 11 respectively.
10 Art. 7.1.6.
11 Art. 1.7.

The main reason for this practice – or rather malpractice – stems from the considerable difficulty arising for the shipowner if the ship arrives but no one turns up with an original bill of lading. If this happens, then the ship owner cannot deliver the goods but will have to store them for whom it may concern. Further, if the original bill of lading is lost, then this necessitates applying for a court order entitling the person last in possession of the bill of lading before its loss to possession of the goods as if he had been the rightful holder of the original bill of lading (*mortification procedures*).

The problem with several originals is that they are not necessarily all in the hands of one person. As a result, the risk of fraud appears, since the holder of several originals may choose to sell the goods represented by the bills of lading to several parties. In that case, the party first appearing with an original would get the goods while the others would lose their rights under the bill of lading. There is also a practice that one original is kept by the master of the ship, who might then tender the original to a party having presented satisfactory proof that he is entitled to receive the goods as consignee. In that case, the master could hand over the original to that party and then get it back in return for the goods. Here, however, the bill of lading has ceased to function properly as originally intended. When no original bill of lading is available at destination, the goods are nevertheless delivered to the person believed to be entitled to them. But then the goods are delivered against a bill of lading guarantee, normally issued by a bank. If the rightful holder of the original appears to claim the goods, then the party that misdelivered the goods would become liable, though with the possibility to obtain re-imbursement under the bill of lading guarantee.[12] Needless to say, such a system is inappropriate as it constitutes a serious departure from the function of the bill of lading as a document of title. Delivery of goods without presentation of bills of lading would not be covered by the terms of the shipowner's ordinary (protection & indemnity) insurance. But, exceptionally, cover could nevertheless be made available at the discretion of the insurer.[13]

12 See W. Tetley, Letters of Indemnity at Shipment and Letters of Guarantee at Discharge, ETL 2004 p. 287.

13 Some carriers seek to avoid liability for misdelivery by retaining the right to deliver the goods to somebody believed to be the party entitled to the goods but this would negate the very purpose of the bill of lading as a negotiable document of title. True, it may be difficult for the issuer of the bill of lading when delivering the goods in good faith to somebody presenting a forged bill of lading. But, as appears from *Motis Exports Ltd* v. *Dampskibsselskapet af 1912 Aktieselskab et al.* [2000] 1 Lloyd's Rep. 211 CA, the system requires that the risk of such a misfortune is borne by the issuer.

Where the ultimate consignee is known from the outset and no transfer is contemplated while the goods are in transit, no paper document is required for delivery of the goods. However, in US law the *straight bill of lading* is used in such cases.[14] Nevertheless, straight bills of lading usually contain a presentation clause of the same kind as in negotiable bills of lading stipulating that the bill of lading must be presented and surrendered in exchange for the goods. As mentioned, applicability of the Hague and Hague-Visby Rules depends upon issue of a bill of lading as a *document of title*, signifying that rights to the goods evidenced by the bill of lading may be transferred while the goods are in transit. Without this transferability function, a seller of goods CFR or CIF Incoterms 2000 would be unable to fulfil the obligation to tender the required document. Qualifying the straight bill of lading in this respect was discussed in the English case of *The Rafaela*.[15] Here, the court held that the straight bill of lading did qualify for such purpose, adding (*obiter*) that surrender of the straight bill of lading was required as a condition for delivery of the goods even in the absence of a presentation clause. It was considered sufficient that the bill of lading could be transferred once – namely from the shipper to the consignee – and that further transferability was not required to qualify the straight bill of lading as a *document of title*.

Other documents of transport differ from bills of lading, since rights to goods under waybills cannot be transferred from one party to the other. Instead, delivery of goods at destination is to be made to a named consignee. The shipper, in the capacity of carrier's contracting party, would be entitled to give instructions as to delivery of the goods until they have reached their destination and thus change the name of the original consignee.

To ensure the right of a named consignee to the goods at destination, waybills used for carriage of goods by rail, road, and air under the applicable international conventions are issued in several originals, one for the shipper, one for the carrier, and one for the named consignee. As long as the shipper keeps his original, he is in a position to give further instructions to the carrier as to delivery. But this right ceases when the goods have reached their destination, in which case they will be delivered to the named consignee without any requirement that his original of the waybill should be presented in exchange for the goods. If the shipper surrenders his original to the consignee, then he loses the right to give further instructions to the

14 Under the Pomerene Act US Code Title 49 §§ 81–124.

15 [2003] 2 Lloyd's Rep. 113 CA.

carrier and the right of the consignee to the goods will be ensured. This *estoppel* function of the shipper's original of the waybill would make it a document »controlling the disposition of the goods» in the sense of Art. 58 CISG.

As manufactured goods are normally not sold in transit, bills of lading are not required for this purpose. Hence, bills of lading are often replaced with *sea waybills*, particularly by container shipping lines. As yet, sea waybills are not recognized in any international convention relating to carriage of goods by sea. However, sea waybills have been recognized in national legislation, such as the English Carriage of Goods by Sea Act 1992. Although they cannot be regarded as *documents of title*, the consignee protection intended by the Hague and Hague-Visby Rules has been accorded to parties entitled to delivery under sea waybills. However, no legislation protects the named consignee against the risk of the shipper misdirecting goods to somebody else by changing instructions to the carrier. Such protection would therefore have to be arranged by contractual stipulations between the parties concerned. With that in mind, the CMI presented its Uniform Rules for Sea Waybills in 1990. Under these rules, the shipper may agree that his original instructions to the carrier as to delivery of the goods are irrevocable so that he may not direct delivery to somebody else than the named consignee (*No Disp-clause*). Only in such cases would the sea waybill qualify as a document »controlling the disposition of the goods» in the sense of Art. 58 CISG.[16]

As we have seen, under the waybill system delivery should be made to a person identifying himself as entitled to delivery. Absent any specific stipulation as to carrier liability in case the goods are delivered to the wrong person, it is reasonable to assume that the carrier may only avoid liability if he can prove that he has exercised due diligence in identifying the party entitled to delivery.

To some extent, electronic data interchange (*EDI*) replaces paper documents. As far as waybills are concerned, no major difficulties would arise, because information to the carrier could easily be transmitted electronically. In this way, the carrier would know to whom the goods should be delivered

16 See regarding the waybill system K. Grönfors, Towards Sea Waybills and Electronic Documents, [Gothenburg Maritime Law Association 70, (1991)] *passim* and concerning the CMI Uniform Rules for Sea Waybills, R. Herber, Die einheitlichen Regeln des CMI über Seefrachtbriefe [Schriften des Deutschen Vereins für Internationales Seerecht – 80, Hamburg 1991] and A. Recalde Castells, El conocimiento de embarque y otros documentos del transporte, Madrid 1992 *passim*.

at destination and also whether the instructions given electronically are irrevocable or not.

It is different with bills of lading, as long as no legislation is in force giving statutory support to a *document of title* replaced by EDI. Yet, Incoterms even in their 1990 version indicated the possibility to get the required support by contractual stipulations. Here, the A8 clauses of i.a. the CFR and CIF terms stipulate: »Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message». This invites the question as to the meaning of the word *equivalent.*

In the event, the CMI launched its Rules for Electronic Bills of Lading[17] simultaneously with the adoption of Incoterms 1990. Under these rules, the right of control of the goods is attached to a Private Key, which is unique to each successive Holder. The *Private Key* means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission. The holder of the Private Key is the only party who may, as against the carrier, claim delivery of the goods, nominate the consignee, or substitute a nominated consignee for any other party, and transfer the right of control and transfer to any other party. Further, he is entitled to instruct the carrier as to the goods as if he were the holder of a paper bill of lading. In addition, it is stipulated that the contract of carriage is subject to any international convention or national law that would have been compulsorily applicable if a paper bill of lading had been issued. Transfer of the right of control occurs by the current holder notifying the carrier of its intention to transfer its right of control to a proposed new holder. And, upon accepting the transfer, the carrier should cancel the current Private Key and issue a new one to the new holder. As the system has no statutory support but rests solely upon voluntary adoption of the rules by the parties, it would, as foreseen in Incoterms 1990, not operate in the absence of an electronic agreement.[18]

17 See on the CMI Rules for Electronic Bills of Lading, J. Ramberg, Sea waybills and electronic transmission [in The Hamburg Rules: a choice for the E.E.C. ?, Antwerp 1994] pp. 101–115.

18 See L. Railas, The Rise of the Lex electronica and the international sale of goods, Helsinki 2004, p. 262 *et seq.* He also addresses the so-called Bolero system resting on a central registry and contractual support in the form of a Rule Book, *id.* pp. 401–421.

6.1.4 *Mixed carrier and agency function*

As mentioned, the Hague and Hague-Visby Rules restrict the carrier's period of responsibility to the time while the goods are on the ship (*the tackle-to-tackle principle*) and carriers have traditionally been reluctant to extend the period of responsibility to include storage and carriage before loading and after discharge. Nevertheless, while carriers have largely arranged such activities, in the absence of any mandatory legal regime, they have used their freedom of contract to reduce their liability by declaring that they are only acting as agents as to any arrangements prior to loading or after discharge.

Where the carrier procures on-carriage of the goods to or from ports or places inland, the carriage may be covered by the carrier's *through bill of lading* but with a disclaimer of carrier liability when carriage has not been performed by the carrier's own ships. Hence, there may well be continuous documentary cover of the kind required under a documentary credit – but *not* continuous liability. Through carriage is addressed in the Hamburg Rules[19] recognizing this practice but, in order to protect shippers and consignees, it is required that the part to be performed by another person than the carrier should be specified and that the performing party should be named (*the actual carrier*). If these requirements are not met, then both carriers would be responsible jointly and severally[20]. Further, it is required that the actual carrier could be held responsible under the Hamburg Rules in the same way as the main carrier.

As regulation under the Hamburg Rules does not conform to contemporary practice, the UNCITRAL/CMI draft takes a more cautious approach. It recognizes that the parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods, the carrier, acting as agent, will arrange carriage by another carrier or carriers. In that event, carrier liability is reduced to the exercise of due diligence in selecting and contracting with such other carrier(s), i.e., a liability for *culpa in eligendo*.

It would thus appear that a through bill of lading in contemporary practice differs from a multimodal transport document in so far as it only provides *documentary cover* for carriage performed by parties other than the issuer of the document. By contrast, the multimodal transport document

19 Art. 11.

20 According to Art. 10.4.

provides not only documentary cover but also *liability cover* for the whole transit.

6.1.5 *Shipper's liability*

A common principle of transport law exists that the shipper guarantees that his information regarding the cargo is correct. If it is not, he would become liable if the carrier suffers any damage or injury as a result of incorrect information. This includes compensation for damage to the carrier's property or for fines incurred for passing on any incorrect information to the authorities. In particular, the shipper's liability may be serious if he has failed to observe regulations regarding dangerous goods. The carrier also inserts information regarding the goods in the transport document. Further, by issuing the document the carrier may incur liability to consignees that received the document relying on the information in it. In maritime carriage, the carrier usually disclaims liability for information by expressions such as »said to be» or »according to the declaration of the shipper» but may nevertheless become liable for non-disclosure when any discrepancies ought to have been noted.

As to damage or injury caused by the goods,[21] the rules differ regarding shipper's liability. In maritime carriage, the charterer and the shipper are taken to have guaranteed that the cargo is fit to carry without any risk of property damage or personal injury. In some cases, the nature of the goods may also require particular instructions. Moreover if, in the absence of such instructions, the goods cause injury or damage, then the charterer or shipper will become liable. However, the Hague and Hague-Visby Rules[22] state that the shipper is not responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants. Only as to dangerous cargo shipped without the carrier's knowledge and consent is the shipper's liability strict and the carrier may at any time before discharge land the goods at any place and make them innocuous without compensating the shipper or the consignee.[23]

21 See, in general, K. Grönfors ed. Damage from goods, [Gothenburg Maritime Law Association publ. 70 (1978)] *passim.*

22 In Art. 4.3.

23 Art. 4.6.

The Hamburg Rules and the MT Convention make the same distinction between dangerous cargo and other cargo.[24] In charterparty trade, the charterer or the shipper may become liable when the ship is directed or proceeds to unsafe ports or berths or, under time charterparties, also when the ship is used outside the agreed trading limits or for some purpose other than agreed. The customary clause in charterparties – »as near thereto as she may safely get and lie always afloat» – has not been interpreted literally in the Anglo-American jurisdictions as a limitation of the right to direct the ship but also as an implied or express warranty that the ship does not suffer any damage in reaching, remaining at, or leaving the port or berth.[25]

In non-maritime transport, express regulation of the shipper's liability concerns incorrect or inadequate information about the goods. In addition, CMR[26] and COTIF/CIM[27] impose strict liability on the consignor in case of absence of, or defects in, the packing of the goods unless this was apparent or known to the carrier upon receipt. The CMR[28] has particular rules on dangerous cargo similar to the Hague, Hague-Visby, and Hamburg Rules, and the MT Convention. COTIF/CIM[29] regulates the carrier's right to unload and destroy dangerous goods at any time. The UNCITRAL/CMI draft[30] defines the shipper's liability corresponding to the principle of presumed fault or neglect (»unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent»). In all cases when the charterer, shipper, or consignor is liable, liability is unlimited.

6.1.6 *Payment and adjustment of freight*

In charterparty trade, freight is negotiated and agreed, usually by independent shipbrokers engaged by the parties. In voyage charterparties, prepaid freight is »earned upon shipment and non-returnable, vessel or cargo lost or not lost», according to consistent practice, while freight payable at des-

24 Arts. 12–13 and Arts. 22–23 respectively.

25 See J. Ramberg, Unsafe ports and berths, [AfS Vol. 8 (1967)] pp. 551–670 and M. Wilford, T. Coghlin, J. Kimball, Time Charters, London 1995, pp. 177–209.

26 In Art. 10.

27 In Art. 14.

28 In Art. 22.

29 In Art. 9.

30 In Art. 7.6.

tination is usually earned upon delivery. In some jurisdictions, freight may be payable *quantum meruit* and *pro rata* for the part of the voyage performed (*pro rata itineris*)[31] when further carriage is hindered or prevented. In time charterparties, payment of hire may become suspended according to regulation in *off-hire clauses*[32] when the working of the vessel becomes hindered or prevented.

In the liner trade, carriers publish their tariffs, which are made available upon request and incorporated in bills of lading according to the rate at the date of shipment. It is customary that the freight, prepaid or not, is considered earned upon shipment and non-returnable in any event. Further, the freight may also be subject to adjustments if the currency in which the freight has been charged becomes devalued. The relevant currency adjustment factor (*CAF*) is usually available in the carrier's tariffs. If not, then the bill of lading would usually explain how the adjustment should be made. If the consignor fails to deliver the cargo for carriage as agreed, then he may become liable to pay *dead freight*. The amount payable may vary between full freight or a portion of it, depending upon the carrier's opportunity to obtain substitute cargo.

Matters relating to freight are usually not subject to mandatory regulation. However, protecting consignees necessitates ensuring that they do not have to pay for hidden charges resulting from agreement between carrier and consignor. The Hamburg Rules[33] provide that, if the bill of lading does not set forth payable freight or demurrage, then this constitutes *prima facie* evidence that no freight or demurrage is payable by the consignee. And, if the bill of lading has been transferred to a party in good faith, proof to the contrary is not admitted.

6.1.7 *Deviation, hindrances, and non-performance*

As mentioned, freedom of contract has – at least traditionally – been controlled by requiring a clear and complete contractual stipulation for any reduction of liability as it would have been in the absence of the contractual stipulation concerned. Far-reaching exemption and limitation of liability

31 Under English law *pro rata* freight is only payable if expressly or impliedly agreed *St. Enoch Shipping Co. Ltd* v. *Phosphate Mining Co.*[1916] 2 KB 624. *Contra* SMC Chapter 14, Section 21. See E. Selvig, The Freight Risk, AfS Vol. 7 pp. 1–490.

32 See M. Wilford *et al.*, *op.cit.* note 6.25 pp. 363–391.

33 In Art. 16.

clauses would require the utmost specificity in order to be upheld as intended by the drafters. Deviations from the agreed transport would be particularly serious for the carrier, as in English law it has been held as a general requirement for the validity of clauses reducing carrier liability that the voyage would be performed strictly as agreed. Otherwise, as a matter of interpretation of exculpatory clauses, their effect would be limited to the agreed voyage, so that any deviation would make them ineffective.

This would explain the customary clauses in charterparties and bills of lading, where the scope of voyage is defined or where the carrier retains more or less complete freedom as to methods and routes of transportation. Thus, the Gencon charterparty (1994 version) deviation clause stipulates that the vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property. And customary multimodal transport bills of lading indicate under the heading »Methods and Routes of Transportation» :

> »The carrier is entitled to perform the transport and all services related thereto in any reasonable manner and by any reasonable means, methods and routes»

and, further:

> »In accordance herewith, for instance, in the event of carriage by sea, vessels may sail with or without pilots, undergo repairs, adjust equipment, dry dock and tow vessels in all situations».

The corresponding stipulation in the FIATA Multimodal Transport Bill of Lading, in its 1992 version, reads as follows:

> »Without notice to the Merchant the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods».

With definitions of the *scope of voyage* or the methods and routes of transportation as above, the intention is to avoid an adverse interpretation of the exculpatory clauses only to apply if the voyage is performed strictly as agreed. Nevertheless, according to the literal wording of clauses, the carrier remains free to perform the contract as he thinks fit. As a result, it is necessary to decide whether such clauses should be upheld without any restric-

tions, or whether they should only give the carrier a reasonable possibility to exercise his liberty when this is due to circumstances that he did not foresee or ought to have foreseen at the time of concluding the contract. As we have seen, reference to reasonableness sometimes appears from the wording of the clause itself.[34]

The carrier's liability in case of deviation from the agreed method and route of transportation is addressed in the Hague and Hague-Visby Rules and the Hamburg Rules as to carriage of goods by sea. However, these stipulations only relate to the carrier's non-liability in cases of any deviation in saving or attempting to save life or property at sea. The Hague and Hague-Visby Rules[35] also include »any reasonable deviation» in addition to deviation for the purpose of saving life or property. Such deviation is not regarded as an infringement or breach of the convention or the contract of carriage. The Hamburg Rules[36] restrict carrier non-liability to cases where loss, damage, or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea. Hence, measures to save life result in unconditional non-liability, while saving property is qualified by the word *reasonable*. It is also added that liability may arise in general average.

Presumably, the intention is that the stipulations of the Hague and the Hague-Visby Rules and the Hamburg Rules should be interpreted *e contrario* so that any deviation not covered by the stipulations will be considered unlawful, resulting in liability. However, the carrier would, at least to some extent, be assisted by the above liberty clauses, by which he reserves some freedom to perform the carriage as he thinks fit. As suggested, the liberty accorded to the carrier under such clauses should be subject to the test of reasonableness.

If it is considered that the carrier should be liable for unlawful deviation, then this necessitates deciding the nature and extent of his liability. As mentioned, under English law an unlawful deviation may be considered such a departure from the contract of carriage that the contractual basis for the exculpatory clauses of the contract disappears so that the carrier be-

34 E.g., Combiconbill in its 1995 version clause 6.
35 In Art. 4.4.
36 In Art. 5.6.

comes strictly liable without the benefit of any limitation of liability.[37] But even so, the causation between deviation and the loss inflicted on the shipper or consignee would have to be resolved as well as restricting compensation to such loss as could or ought to have been foreseen at the time of the conclusion of the contract as a possible consequence of the deviation (cf. the formula of Art. 74 CISG or similar principles relating to remoteness of damage). Under the circumstances, a deviation may under the Hamburg Rules[38] result in the carrier's loss of the right to limit responsibility. There is no reason to assume that the test should be different in case of deviation than in other cases of acts or omissions of the carrier. This is clarified in the UNCITRAL/CMI draft,[39] stipulating that unlawful deviation only has effect consistently with the provisions of the draft.

As to method of transportation, carriage of goods on deck constitutes a particular problem. First, such carriage may expose the cargo to excessive risks of loss or damage. Second, cargo which by the contract of carriage is stated as being carried on deck, and is so carried, would not fall under the definition of *goods* in the Hague Rules[40] and would thus be exempted from the mandatory rules. It is customary, particularly when the goods are stowed in containers, that carriers reserve the right to *optional stowage* so that the goods may be carried on or under deck without notice. This stipulation is required because of the structure of container vessels. These are usually cellular vessels also offering safe carriage of the containers well above whatever is considered to be equivalent to the weather deck of a traditional vessel. Further, it is difficult to know at the time of concluding the contract of carriage exactly where the container with the goods will be placed on board the vessel. Put differently, in modern carriage of goods by container vessels the former sharp dividing line between deck cargo and

37 See on liability for deviation Carver's Carriage by Sea, London 1982, Sections 1161–1208. As to the right of limitation, recent cases stress the words »in any event« of Art. IV (5) of the Hague Rules and reject the principle that the right of limitation is defeated by deviation. See *Parsons Co. et al.* v. *C.V. Scheepvaartonderneming (The »Happy Ranger«)* [2002] 2 Lloyd's Rep. 357 CA and *Dæwoo Heavy Industries Ltd. And Another v. Klipriver Shipping Ltd And Another (The Kapitan Petko Voivoda)* [2003] 2 Lloyd's Rep. 1 CA. However, doubts are expressed whether these cases represent »the last word« in the matter. See R. Asariotis, Haftungsbegrenzungen und deren Durchbrechung im Seehandelsrecht: die englische Auffassung, TranspR 4-2004 p. 147 at p. 151, where she mentions, as an example, that unlawful loading of the goods on deck constitutes an intentional breach.

38 Art. 8.

39 In Art. 6.5 (b).

40 Art. 1 (c).

cargo in the holds of the vessel has more or less disappeared. This is reflected in the UNCITRAL/CMI draft, which specifically refers to cases where goods in containers are to be carried in vessels specially fitted to carry them.[41] To protect the consignee, any agreement between the shipper and the carrier as to carriage of goods on deck should appear from the bill of lading not only by a general liberty clause on optional stowage but also as a statement on the front page of the bill of lading.[42]

Most contracts and standard forms contain clauses covering cases when performance is hindered or excessively onerous due to circumstances that need not have been taken into account at the time of concluding the contract. These clauses usually appear under the heading »Relief« or »Force majeure». Charterparties would usually specifically address the best-known circumstances affecting or preventing performance. These include, e.g., strikes, war and warlike operations, and ice.[43] Bills of lading would usually assemble these and other contingencies in a single clause.[44] [45] Clauses containing more abstract formulae appear in documents used for multimodal transport with the heading Hindrances etc. Affecting Performance.[46] Under such clauses, the carrier retains the right not to perform the contract as agreed but to deliver the goods at a substitute safe and convenient port, alternatively to treat performance of the contract as terminated. The shipper may then have to pay the full freight as well as compensation for any extra cost resulting from the circumstances referred to in the clause.[47]

6.1.8 *General Average*

As mentioned, the rules relating to general average have been preserved through the centuries and now appear as the 1994 York-Antwerp Rules. Charterparties and bills of lading invariably refer to these rules.[48] As to

41 Art. 6.6.1 (ii).

42 This is required for the protection of the buyer-consignee. See Debattista, Sale of Goods p. 148.

43 See, e.g., Gencon in the 1994 version, clause 16 General Strike Clause, clause 17 War Risks (»Voywar 1993«) and clause 18 General Ice Clause.

44 e.g., Conlinebill, in its 1978 version, clause 16 Government Directions, War, Epidemics, Ice, Strikes, etc.

45 See, in general, J. Ramberg, Cancellation *passim*.

46 See, e.g., Combiconbill, in its 1995 version, clause 8.

47 See Conlinebill clause 16 and MULTIDOC 95 clause 9.

48 See, e.g., Gencon, in its 1994 version, clause 12, Combiconbill, in its 1995 version, clause 22 and MULTIDOC 95 clause 23.

general average which is to be adjusted in accordance with the law and practice of the United States, a particular clause is required, the *new Jason clause*, which may be incorporated explicitly,[49] or by reference.[50] [51] It is a firm principle of general average that the settlement is not affected by faults of one of the parties to the adventure but that the settlement does not prejudice any remedies or defenses that may be available in an action separate from the settlement.[52]

The Hague and Hague-Visby Rules contain no stipulations relating to general average. However, the Hamburg Rules[53] deviate from the principles of the 1994 York-Antwerp Rules as to independent settlement of the general average by referring to the provisions of the convention relating to liability of the carrier. This may entitle the consignee not only to reclaim any contribution already paid but also to refuse contribution in general average. Similarly, the UNCITRAL/CMI draft[54] stipulates that liability of the carrier may influence settlement as well as liability to reimburse any contribution made.

Notably, general average is strongly related to the carrier's defenses of errors in the navigation and management of the vessel, as many incidences of general average result from such errors. In fact, a general average settlement would be a waste of time and money if the ultimate responsibility rested upon the carrier in any event. The MT Convention[55] contains a stipulation to the same effect as Art. 24.2 of the Hamburg Rules. However, in multimodal transport operations subcontracting may usually be required. If the MTO does not perform the maritime carriage himself, he may have to pay contribution in general average to the subcontracted maritime carrier, in which case he would usually retain the right to reimbursement from his contracting party for any compensation paid. In such cases, the stipulation

49 As in the Gencon Charter Party in its 1994 version.

50 As in MULTIDOC 95 clause 23.

51 The clause was named by reference to *The Jason* 225 U.S. 32 and is intended to preserve the carrier's right to recover contributions from cargo interests even though the necessity for the general average sacrifice or expenditure was brought about by the carrier's fault, provided it was fault for which the carrier would be protected from liability by contract, statute, or rule of law. In the case of *The Jason* this clause, which was inserted to avoid the effect of a previous case prohibiting such recovery (*The Irrawaddy* 171 U.S. 187), was recognized as valid. See N.J. Healy & D.J. Sharpe, Admiralty, St. Paul, Minn. 1999, pp. 779–782.

52 Rule D of the 1994 York-Antwerp Rules.

53 In Art. 24.2.

54 In Art. 15.2.

55 In Art. 29.2.

on general average would appear as a duty to indemnify the multimodal transport operator for claims incurred by him as a result of a general average.[56]

6.1.9 *Added Services*

Added service in maritime carriage usually concerns additional handling and storage of the goods after the period of responsibility under the applicable convention (i.e. beyond the *tackle-to-tackle period*). Consequently, maritime carriers may use their freedom of contract to reduce their liability for loss of or damage to the goods. However, a total disclaimer of liability may be defeated as unreasonable. In fact, handling and storage of the goods prior to loading and subsequent to discharge constitute – either expressly or impliedly – separate contracts to the extent that they are not within the scope of the contract of carriage as such. In most countries, there is no legislation in force imposing mandatory liability on the provider of services. An extension of the carrier's period of responsibility to cover the stages before loading and after discharge, as appears from the Hamburg Rules[57] and suggested in the UNCITRAL/CMI draft,[58] is beneficial not only to the shipper and consignee but also to the carrier, who otherwise may risk losing his right to limit liability. Consequently, in bills of lading used in container traffic or for multimodal transport, the period of responsibility is often extended to cover the whole period from the time the carrier has taken the goods into his charge until the time of delivery.[59]

With carriage of goods by road, it often happens that the carrier is instructed only to deliver the goods when the consignee has paid the invoice for the goods under the contract of sale. Under CMR,[60] the carrier's failure to execute such instructions will result in liability to cover any pecuniary loss suffered by the shipper up to the amount that he requested the carrier to collect. As no departure from the rules of the convention is permitted,[61] the carrier cannot escape the above liability on account of his failure to observe the cash on delivery (COD)instructions. CMR[62] does not impose a duty on

56 See, e.g., clause 15 of FBL.
57 Art. 4.1.
58 Art. 4.1.1.
59 See, e.g., MULTIDOC 95 clause 10 (a) and FBL clause 6.1.
60 Art. 21.
61 According to Art. 41 of CMR.
62 Art. 21.

the carrier immediately to reimburse the amount he has failed to collect, as the shipper must first prove that he has suffered pecuniary loss. This would normally mean that the shipper has been unable to collect the amount directly from the consignee due to his insolvency. Although adequate protection of the interests of the consignee may well require that the carrier immediately reimburse him, against assignment to the carrier of his right to collect the amount from the consignee, it follows from the wording of CMR[63] that the consignee must prove actual loss because of the carrier's breach of contract.[64]

Although services in addition to carriage of the goods are usually provided by freight forwarders and not by the performing carriers, it is to be expected that logistics services will be offered in cases where the performing carriers are engaged in transporting goods from door-to-door. The matter will be further discussed in 6.7 below.

6.2 Scope of non-mandatory freight forwarder regimes

6.2.1 *The freight forwarder as service provider*

At least one common denominator of the freight forwarder is universally recognized: he could be described as a *service provider*. The difficulty starts when the need arises to distinguish between different types of services. One such service would be assisting the customer with export and import of goods.[65] The freight forwarder would offer his services to fulfil whatever obligations are imposed on the exporter to declare and clear the goods for export as he could assist the importer in clearing goods for import and paying duty and other official charges. In some countries, the latter function might require a license to act as a *customs broker*. Traditionally, clearing the goods for import might require taking the goods in charge from the transportation vehicle for transport through Customs or into Customs warehouses. As a result, the freight forwarder would also be engaged in physical handling of the goods.

63 Art. 21.

64 See *infra* 8.7.2.

65 This is still in many areas the dominant function of freight forwarders. See, e.g. M.V. Ofobrukwera, Shipping & Forwarding Practice – Imports, Lagos 2001, *passim*.

Additional services might involve loading the goods on transportation vehicles or discharging them from arriving transportation vehicles. If the goods are intended to be carried further inland, then the freight forwarder might undertake to arrange for their reloading on the on-carrying vehicle. Or, where goods are to be stored pending delivery to the consignee, then the freight forwarder might arrange for storage or store the goods in his own storage facility. The services now described are performed domestically and the liability of the freight forwarder for such services will usually fall within the category of obligations to exercise due diligence or best efforts, with liability for failure to do so. In French law, most of these services would be performed by transitaires (cf. *commissionaires expéditeurs* in Belgium) as distinguished from the functions of a *commissionaire de transport.*

In recent years, services offered by freight forwarders have been considerably extended. As an illustration, Art. 2 of the Nordic Freight Forwarder Conditions (*NSAB 2000*) provides:

> The freight forwarder contract may include the performance of:
> - Carriage of goods
> - Storage of goods
> - Other services in connection with the transport or storage of goods, such as
>
> 1) clearance of the goods,
> 2) cooperation in the performance of the customer's obligations under public law,
> 3) handling and marking of goods,
> 4) signing of insurance,
> 5) assistance with documents for export and import,
> 6) collection of 'cash on delivery' charges and other assistance concerning the payment for the goods,
> 7) advice in matters of transport and distribution.
>
> The freight forwarder may carry out these services either on his own account or as intermediary.
>
> A. The freight forwarder has a liability as carrier under §§ 15–23:
> a) when he performs the carriage of goods with his own means of transport (performing carrier), or
> b) when he has expressly or impliedly accepted liability as carrier (contracting carrier).
>
> The freight forwarder shall be considered as contracting carrier:
> 1) when he has issued a transport document in his own name,

2) when in connection with marketing or in his offer he formulated his undertaking in such a way, e.g. quoting his own price for the transport, that it can be reasonably assumed that he has undertaken a liability as carrier,
3) when he undertakes carriage of goods by road.

B. Under §§ 24–26 the freight forwarder has a liability as intermediary, without liability as carrier, with regard to carriage of goods not covered by A.

C. The freight forwarder's liability includes liability for those he has engaged to perform the contract (agents and independent contractors):
a) when he has a liability as carrier in accordance with A.,
b) when the services have been performed by himself with the help of his own equipment or employees, or
c) when he has accepted responsibility for the services on his own account.

These conditions apply equally to the persons of whose services the freight forwarder makes use for the performance of the contract as to the freight forwarder himself, irrespective of the grounds for the customer's claims against the freight forwarder and such other persons. The aggregate liability of the freight forwarder and such other persons is limited to what applies to the freight forwarder's liability under these conditions.

When the freight forwarder has undertaken to perform the contract on his own account, in addition to what has been expressly agreed, general practice and generally accepted terms are applicable in so far as they do not deviate from these conditions.

In other cases than those mentioned under a)–c) the freight forwarder is responsible as intermediary *without liability* for other parties than his own employees.

D. With regard to *warehousing*, the conditions of § 27 apply.»[66]

As we shall see in 6.7. below, freight forwarders prefer the title of *logistics service providers*, owing to the expansion of their services to perform complete distribution according to the principles of logistics. As the term »logistics» is used to describe any rational system for management and distribution of goods, the outsourcing of such functions to freight forwarders would appear under the name of third party logistics (*3PL*).

66 See J. Ramberg, NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders. Commentary, publ. by Nordiskt Speditörförbund, Stockholm 2001.

6.2.2 *Agency and disclaimer of status as carrier*[67]

Traditionally, freight forwarders offer their services in connection with international transport by contracting with carriers as agents for the customer. Or, as described in the case of *Jones* v. *European & General Express Co, Ltd.*,[68] forwarding agents are:

> willing to forward goods for you ... to the uttermost ends of the earth. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.

Freight forwarders could also be retained by carriers in soliciting cargo for their benefit and as their agents. In ports served by liner shipping companies, freight forwarders are often appointed as liner agents. Consequently, they would have a dual function representing both parties in the contractual relationship that they have arranged as agents, between carrier and shipper. This should not be confused with the freight forwarders' activity in connection with air transport, where they act as IATA agents serving the IATA airlines generally and not solely one particular airline.

The activity of freight forwarders in connection with rail and road transport is different. Here, freight forwarders would usually have their own arrangements with the railways, reserving space on railway wagons to be used for consolidating individual shipments from a number of shippers destined for a number of consignees. In these cases, the freight forwarder would offer the customers carriage of the goods according to his own tariffs and issue his own document to each customer, with himself retaining the consignment note for the whole wagon. International carriage of goods by road would usually be performed either by the freight forwarder with his own vehicles, alternatively arranging longer periods with owners of such vehicles, reserving the needed capacity for the freight forwarder. In these cases, the freight forwarder would not qualify as an agent as he has his own interest in the freight charged by him. As an agent, he would have had to give an account for the freight actually paid to railways or road hauliers and agree with the customer on an appropriate commission. Nevertheless, as we shall see, freight forwarders, at least traditionally, prefer to disclaim status as carrier in these cases.

67 The traditional reluctance of freight forwarders to accept liability as carriers is well explained by J.G. Helm, Speditionsrecht, Berlin & New York 1973 p. 77: »Die Anwendung des Frachtrechts auf die Spedition zu festen Kosten erweist sich angesichts seiner starken Zersplitterung als nicht sehr praktikabel».

68 [1920] 4 Ll.L. Rep. 127.

German law has considerably influenced law and practice in the Scandinavian countries and to some extent also in Italy. The freight forwarder is defined as a person who *in his own name* undertakes to arrange a contract of carriage for the account of his customer. Or, as was expressed in the German *Handelsgesetzbuch*[69] prior to the 1998 amendments:

> Spediteur ist, wer es gewerbsmässig übernimmt, Güterversendungen durch Frachtführer oder durch Verfrachter von Seeschiffen für Rechnung eines anderes (des Versenders) in eigenem Namen zu besorgen.

This principle is reflected as the main principle in the 1998 amendments[70], while the freight forwarding contract[71] implies that the freight forwarder is obliged to arrange for dispatch of the goods.[72] A similar definition as in earlier German law appears in the Italian *Codice Civile*[73] describing the Italian *spedizionere.*[74] Concluding the contract with the carrier in his own name would make him a contracting party with the carrier, according to the principles relating to commission agents. He may not escape his liability to the carrier under the contract made with him by later disclosing the name of his customer – unlike the case in English law, under the principles of the undisclosed principal. Nevertheless, his customer remains the interested party in the contract of carriage, so that the freight forwarder would have to account to him for whatever follows from the contract of carriage. Hence, the freight forwarder would have a right to reimbursement for freight and other payments arising under the contract of carriage, in addition to the remuneration agreed in the contract of commission with his customer.

French law differs from the German, Italian, and Belgian law as to the status of the *commissionaire de transport.* The *Code de Commerce* definition of commission agent[75] is the same as in the other jurisdictions. However, although the *commissionaire de transport* falls within the category of intermediaries, he has a particular liability that in effect equals the liability of a carrier. According to the *Code de Commerce,*[76] he warrants the arrival of the

69 § 407 (1).

70 In Section 454 (3).

71 In Section 453.

72 See I. Koller, CMR und Speditionsrecht, VersR 1988 pp. 556–563.

73 Art 1737.

74 See A. Dani, L'intermédiare (»commissionaire») de transport en droit italien [in Les auxiliaires de transport dans les pays du marché commun. IDIT, Rouen 1977 pp. 203–214].

75 Art. 94.

76 Art. 97.

goods at the agreed destination with the exception of *force majeure*. Further,[77] he warrants that the goods will not suffer any loss or damage in transit, again with force majeure the only exception. In addition, he is responsible for acts or omissions by persons engaged for the performance of the contract. Art. 99 is regarded as a rule imposing upon the *commissionaire de transport* a *del credere* liability for subcontractors (*une règle légale ducroire*). However, the liability incumbent upon the *commissionaire de transport* according to the *Code de Commerce* may be avoided by contrary stipulations in his contract. So far, the liability of the *commissionaire de transport* differs from the liability imposed upon carriers, who often fall within mandatory regimes. Following the principles of del credere liability, when the *commissionaire de transport* incurs liability for acts or omissions by persons engaged for the performance of the contract, he will be subject to the same liability as would be imposed on the persons engaged (*le système caméléon*). Thus, the *commissionaire de transport* will have to respond to his customer but would have a full right of recourse against the persons engaged provided, of course, that he succeeds in proving that loss or damage could be attributed to them. The liability of the *commissionaire de transport* rests upon a pure network liability system, as not only liability at law for the persons engaged but also their contractual regulation would apply.[78]

Belgian and Italian law is different in so far that the particular liability of the French *commissionaire de transport* has not been adopted. Instead, the Belgian *commissionaire de transport* is regarded as a carrier as distinguished from the *commissionaire-expéditeur*, whose duty is limited to dispatching the goods, while the *commissionaire de transport* has undertaken the duty to procure the transport from point to point. It does not matter whether he performs his duty by his own means of transport or by means belonging to persons engaged.[79] [80] Italian law is basically to the same effect in distinguishing between a *spedizioniere* and a *spedizioniere-vettore*. According to the Italian *Codice Civile*,[81] the *spedizioniere* is defined as a person who un-

77 According to Art. 98.

78 See R. Rodière, Traité Général de Droit Maritime Vol. III p. 155 and L. Peyrefitte, Le commissionaire de transport et les autres auxiliaires de transport en droit français [in Les auxiliaires de transport dans les pays du marché commun. IDIT, Rouen 1977] (also in ETL 1978 pp. 3–23).

79 Arts 91–108 of the Belgian Code de Commerce.

80 See J. Libouton, L'intermédiaire (»commissionaire«) de transport en droit belge [in Les auxiliaires de transport dans les pays du marché commun. IDIT, Rouen 1977 pp. 87–192].

81 Art. 1737.

dertakes the duty to conclude a contract in his own name for the account of his customer and to perform accessory operations, while the *spedizioniere-vettore* undertakes to procure transport from point to point which, under the *Codice Civile,*[82] imposes liability upon him as carrier.[83]

In Spanish law, the *comisionista de transporte* traditionally[84] had the same characteristics as the French *commissionaire de transport.* Nevertheless, according to the present *Código de Comercio,*[85] if the undertaking is not limited only to *arranging* contracts of carriage but amounts to *procuring* the carriage (*la realización del transporte*), it is suggested that the Spanish *comisionista* becomes equivalent to the Italian *spedizionere-vettore.* The particular regulation of road carriers[86] is restricted to *performing* road carriers but this does not affect interpretation of the notion of *comisionista.* Although, in principle, the liability of the *comisionista* is non-mandatory, he may be caught by mandatory carrier regimes to safeguard the interests of his customer.[87]

Although the distinctions mentioned in French, Belgian, Italian, and Spanish law seem to clarify the position of the freight forwarder, depending upon the duties undertaken, it is not easy to make the distinction in practice. Basically, however, what matters would be the duty to procure transport (*faire transporter*) from point to point (*de bout en bout*) and it is irrelevant whether transport procurement is implemented by the freight forwarder's own means of transport or by using transport subcontracted from somebody else. In determining whether the freight forwarder has limited his duty to *conclude* the contract or contracts needed to take the goods from point to point or whether he has undertaken a duty to *procure* the transport, the fact that he has charged his own price[88] for the whole transit without a duty to give account for what he has paid to his subcontractors would become decisive as would, of course, any express undertaking evidenced by the document issued. Normally, analysis of the document would suggest

82 Art. 1741.

83 See A. Dani, L'intermédiaire (»commissionaire») de transport en droit italien [in Les auxiliaires de transport dans les pays du marché commun. IDIT, Rouen 1977 pp. 203–214].

84 In Art. 232 of the Código de Comercio 1829.

85 Art. 379.

86 Ley de ordenación de los Transportes Terrestres of 1987 (LOTT).

87 See A. Emperanza Sobejano, El concepto de porteador en el transporte de mercancías, Granada 2003, pp. 160–161 and 175–177 and L.M. Piloneta Alonso, Las agencias de transporte de mercancías, Barcelona 1997 pp. 57, 77, 114 and 132.

88 See, e.g., the French cases DMF 1952.497 and BT 1972.321.

whether it represents a transport document or merely a receipt for the goods.

When German, Belgian, Italian, and Spanish freight forwarders are considered pure intermediaries without carrier or equivalent liability, they may limit such liability in their general conditions. However, this appears not to be possible if they fall under a mandatory carrier liability regime. This is now clarified with the 1998 amendments to the German *Handelsgesetzbuch*.[89] [90] Hence, the most important distinction between the French *commissionaire de transport* and commission agents under Belgian, German, Italian, and Spanish law seems to be as follows:

- The French *commissionaire de transport* may avoid carrier liability by contractual stipulations.
- This does not seem to be generally possible for the Belgian *commissionaire de transport*, the Italian *spedizionere-vettore*, or the Spanish *comisionista del transporte*.
- In any event, is not possible for the German *Spediteur* in the situations specified in HGB.[91] [92]

The Scandinavian countries have no statutory law regulating liability of freight forwarders. Instead, the Nordic Association of Freight Forwarders has since 1919 agreed on General Conditions applicable in Denmark, Finland, Norway, and Sweden – and now also in Estonia and Latvia. As of 1959, the General Conditions were drafted in co-operation with organizations representing customers. As they could be regarded as an *agreed document*, they would, in practice, fulfil the same function as statutory law, although they would normally require incorporation into individual contracts in the same way as other standard form contracts. Until the 1974 ver-

89 Sections 438–460 compared with Sections 466 and 449.

90 See R. Herber, The New German Transport Legislation, ETL 1998 pp. 591–606. The position under Swiss law seems to be different, as carrier liability for freight forwarders seems to be limited to multimodal transport. See G. Montanaro, Die Haftung des Spediteurs für Schäden an Gütern, Zürich 2001 pp. 6–7.

91 Sections 458–460.

92 See I. Koller, Transportrecht. Kommentar zu Spedition und Gütertransport, Munich 2004 p. 732 regarding § 459 (»Fixkostenspediteur«) and § 460 (»Sammelladungspediteur«) where the freight forwarder is subjected to carrier liability. Similarly, K-H. Thume [in F. Fremuth and K-H. Thume eds, Kommentar zum Transportrecht, Heidelberg 2000] p. 482 and p. 485, adding that the mandatory law of carriage of goods only applies to the carriage as such but not to additional services.

sion of the Nordic Conditions (*NSAB*), the freight forwarder disclaimed liability as carrier unless he had physically performed the carriage. However, as from the 1974 version the Nordic Conditions recognize the freight forwarder's liability as carrier, in particular where he has quoted his own price for transport without a duty to account for charges paid to subcontractors. Thus, the Nordic Conditions – now NSAB 2000 – contain a separate regulation for liability of the freight forwarder as an intermediary and a separate carrier liability, which is akin to the liability imposed upon the carrier by road under the CMR supplemented by a network liability where a particular mode of transport has been agreed or where loss of or damage to the goods could be localized to a particular mode of transport. Thus, the carrier liability of the freight forwarder under NSAB would, in practice, be more or less equivalent to the liability of a French *commissionaire de transport* according to the provisions of the French *Code de Commerce.*

6.2.3 *Adoption of liability as contracting carrier*

As we have seen, freight forwarders may themselves clarify the legal position either by avoiding the status of carrier whenever this is possible under the applicable law, alternatively adopting liability as contracting carriers. Provisions on carrier liability may be found in general conditions used in Canada, France, Hong Kong, Indonesia, Kenya, the Netherlands, Poland, Singapore, South Africa, Sri Lanka, Switzerland, the United Kingdom and Vietnam and in the countries where NSAB 2000 are used.[93] Hence, most freight forwarders undoubtedly prefer to clarify the position, rather than to leave it uncertain and subject to the vagaries of courts of law.

Voluntary adoption of carrier liability has been enhanced by the competition between contracting and performing carriers. In particular, the advent of containerisation in the 1960s forced freight forwarders to properly evidence their contracts of carriage when receiving goods from their customers for containerisation. It would not be a commercially viable option to receive goods from individual shippers, to stuff the goods into containers in the country of shipment, and to arrange break bulk of the containers at destination, while at the same time insisting that the contract of carriage as such was arranged by the freight forwarder for the sole purpose of achieving a contractual relationship between their customer and the performing carrier(s).

93 Denmark, Estonia, Finland, Latvia, Norway and Sweden.

This would explain the creation in 1971 of the FIATA Combined Transport Bill of Lading (FBL), as it was then called. This was met with some scepticism by traditionalists who preferred a disclaimer of carrier liability. However, commercial realities made the use of FBL a global success. As FBL is used in relation to each individual shipper, while in the contractual relationship between the freight forwarder and the performing container lines bills of lading covering the whole container would be used, FBLs by far outnumber liner bills of lading in international trade. The FBL, as an international document of transport, is used independently of the freight forwarder's general conditions but the carrier liability under FBL is often used to reflect carrier liability under general conditions as well.[94] Freight forwarders wishing to tender a document to customers evidencing receipt and an obligation to deliver the goods at destination to the consignee, but without incurring liability as carrier, could do so by the FIATA Certificate of Transport (FCT) where carrier liability is expressly denounced.

6.3 The 1967 UNIDROIT Draft Convention on Contract of Agency for Forwarding Agents relating to International Carriage of Goods

The law of freight forwarding is not subject to any international convention, because the efforts of UNIDROIT to achieve such a convention have not materialized. The work of achieving an international convention started in the mid-1950s and progressed simultaneously with work to elaborate a convention on contracts for combined international carriage of goods. In 1963, the Governing Council of UNIDROIT approved the Draft Convention on the Contract of Agency for Forwarding Agents as well as the Draft Convention on the Contract for the Combined International Carriage of Goods. The aim of both these proposed international instruments was to promote international trade. Although general conditions sponsored by the forwarding agents' organizations would have established a certain uniformity, the conditions were considered a poor substitute for uniform legislation. First, as they were issued by private organizations, their validity might

94 See regarding freight forwarder carrier documents FBL and FWB, J. Ramberg, The law of freight forwarding, [publ. by FIATA, Zürich 2002] pp. 42–88.

be contested. Second, the general conditions varied from one country to another.

It was not an easy task to bridge the different concepts in statutory law relating to freight forwarders. In particular, the French notion of *commissionaire de transport* created difficulties. With that in mind, one approach to avoiding any difficulty involved replacing reference to *commissionaire de transport* by the words *contrat de commission en matière de transport international de marchandises.*

Regulating the freight forwarder's liability for incidental services carried out by himself included:

> all operations incumbent upon him before the first stage of carriage, between two stages of carriage or after the last stage, and, in particular, the taking over of the goods at the designated place; their custody, storage, transhipment and moving; that the documents necessary for their export or import are obtained; that the customs and other formalities are complied with; that the duties, dues and other expenses incumbent upon the principal are paid in advance or that security is furnished therefor; that the condition of the goods and of its packing is checked; that the carrier is furnished with data necessary for the making out of the carriage documents; and that assistance is made available for loading and unloading.[95]

In carrying out these functions, the forwarding agent would be liable for acts and omissions of his agents, servants and representatives when they acted within the scope of their employment.[96] But the freight forwarder would not be liable for the due performance of contracts that he has concluded to ensure the carrying out of the international carriage.[97] His liability in this respect was reduced to a liability for proper choice of subcontractors and for the instructions given to them (liability for *culpa in eligendo vel instruendo*). The principle that the forwarding agent avoided liability for due performance of contracts that he had concluded would follow naturally from his function only to act as agent. A monetary limitation of the forwarding agent's liability was contemplated but the amount was left open for later decision. Interestingly, loss of the right to limit liability did not follow the CMR concept of *wilful misconduct* that had been accepted only a few years earlier. Indeed, by the mid-1960s the meaning and scope of the concept of *wilful misconduct* had already been the subject of notable controversy

95 Art. 1.3.
96 Art. 12.
97 Art. 13.

both in doctrine and case law. Instead, conduct defeating the right to limit liability was expressed as »either a deliberate disregard of the prejudicial consequences that might result from such conduct, or inexcusable lack of awareness of such consequences».[98]

The particular French concept of a *del credere* liability for the *commissionaire de transport* was taken care of in a particular chapter on »Forwarding Agency Contract with Special Liability».[99] Here,[100] it is noted that the parties may agree that the forwarding agent is responsible, from the time he takes over the goods until he delivers them to the consignee, for the due performance of all contracts made to ensure the carrying out of international carriage. In case of non-performance of such contracts, the forwarding agent would be responsible according to the rules governing the contract concluded with the respective subcontractor, i.e. the network liability system, which would naturally follow from the *del credere* principle. This would not reduce the liability of the forwarding agent for failure to observe the duties incumbent upon him as an intermediary. Additionally, the forwarding agent would not benefit from any special clauses in his contract with the subcontractor and which would not regularly be used in such contracts.[101] In so far as »special liability» would follow from an express contract, it would not be difficult to accept the system of *del credere* liability for subcontractors. However, in other cases one would have to resolve much-debated issues. As to situations where the forwarding agent has agreed on a flat rate for the contract of carriage, he would have to accept liability in the same way as would follow from an express agreement.[102] Further, in case of grouping the goods under *one single carriage document* it should be presumed that the forwarding agent has accepted liability.[103]

The draft convention also contains[104] provisions relating to a international forwarding note (Fr. *titre de commission de transport international*). That document might be issued upon request. It would contain the information usually to be found in bills of lading, so that the forwarding agent would have more or less the same duty as a carrier. That is, to check the accuracy of the statements in the international forwarding note as to the de-

98 Art. 21.1.
99 Chapter III.
100 In Art. 22.
101 Art. 22.4.
102 According to Art. 22.
103 In accordance with the provisions of Art. 22.
104 In Chapter IV.

scription of the goods and their apparent condition including their packaging, and, if found incorrect, enter appropriate reservations. If no reservations were made, it should be presumed that the goods were in good order and condition when taken over unless the contrary is proved. However, it will not be possible for the forwarding agent to disprove the contents of the document against a consignee who has acquired the international forwarding note in good faith. In the same way as under CMR,[105] any stipulation directly or indirectly derogating from the provisions of the convention would be null and void.[106]

As we have seen, the *special liability* of the forwarding agent is not exactly the same as liability of the carrier. However, in practice the result would be more or less the same as if the forwarding agent had accepted liability as contracting carrier. This, under ordinary principles of law, would include vicarious liability for any persons used in the performance of the contract of carriage. That invites the question whether it would serve any purpose to introduce a *middle category* between the ordinary liability of the forwarding agent and the ordinary liability of a carrier.[107] However, of course the *special liability* may be explained as acceptance of the particular liability of the French *commissionaire de transport*, which under the draft convention would be recognized in some circumscribed situations.

When the draft convention was approaching the stage of a diplomatic conference, FIATA had already started to consider the possibility of a particular combined transport bill of lading to be used by freight forwarders in consolidating cargo for container transport. Such a document, it was believed, would be much more appropriate than the international forwarding note contemplated by the draft convention. Additionally, it was considered premature to deal with any special liability for the freight forwarder until his position under the contemplated draft for the combined international carriage of goods had been ascertained. Although, as we have seen, such an international convention is now available for ratification in the form of the 1980 UN Convention on International Multimodal Transport of Goods, it has not yet entered into force and would have to await further development in this field. So, in spite of the shortcomings of rules available for voluntary adoption, such as the 1991 UNCTAD/ICC Rules for Multimodal Trans-

105 Art. 41.
106 Art. 42.
107 See L.M. Piloneta Alonso, *op.cit.* note 6.87 p.132.

port Documents, there is as yet no other alternative to achieve international uniformity.

6.4 Regulation of freight forwarder contracts in general conditions

General conditions for the service of freight forwarders undoubtedly contribute to consistency and transparency. But this does not extend beyond the countries or regions in which such general conditions are used. Thus, international trade would have to suffer from the different approaches and levels of liability following from general conditions. Countries and regions, where organizations representing customers have participated in the deliberations with freight forwarders in the drafting of general conditions, have succeeded in achieving a better balance between the interests of the parties concerned. Nevertheless, any comparative analysis of general conditions used would demonstrate a considerable and harmful variety.

In countries where freight-forwarding services have been regulated by statutory law, the conditions follow that law or at least use the law as a point of departure. Where, as in Germany, the law relating to the freight forwarder as contracting carrier is mandatory, to that extent no option is available for him to regulate his liability differently in his general conditions.[108] Instead, the mandatory liability may be absorbed by a more or less sophisticated insurance system.[109] The Austrian General Conditions also replace liability with insurance but in a different way, since no mandatory law exists as in Germany. Among the countries where liability closely follows statutory law we find, i.a., Germany, France, Spain, Portugal, Slovakia, and Uzbekistan. However, overall limits of liability differ. For example, French conditions (50.000 EUR) contrast with Spain, which has no overall limit as to loss of or damage to goods but a limit to an amount not exceeding the remuneration for the service as to delay in delivery or any indirect loss or damage. In some countries, such as the Czech Republic and Poland, limitations of liability are allowed only if following from national law or inter-

108 See J. Trappe, The reform of German transport law, [2001] LMCLQ pp. 392–405.

109 See regarding the system under the German ADSp/SpV 2002 the observations by J. Ramberg, The Law of Freight forwarding [2002] pp. 30–31. The system triggered excessive premiums and was already discontinued in 2003.

national conventions. Again, in Russia reference is made to the monetary limits of international conventions.

At the other end of the scale we find countries still accepting almost a total freedom of contract which is used by some associations in their disclaimers of liability (e.g., in Australia, Greece, India, New Zealand, and Singapore). The traditional disclaimer of liability as carrier appears in Belgium, Bulgaria, the Czech Republic, Egypt, Poland, the Netherlands, and Italy. The distinction between the freight forwarder as agent and principal is particularly apparent in the common law jurisdictions, where the lead of the British conditions (*BIFA*) have been followed in Bulgaria, Hong Kong, Ireland, Kenya, South Africa, U.A.E. (*NCFF*), and Vietnam.

In some countries, distinctions are made between the different functions of the freight forwarder, with carrier liability sometimes accepted by reference to FBL, e.g., the Scandinavian and Baltic States using NSAB 2000, France, Switzerland, Greece, Canada (*CIFFA*), Russia, Korea, Indonesia, and Ukraine. In the United States, the notions of *indirect carrier* and *non-vessel operating common carrier* (*NVOCC*) have been launched in the regulatory statutory provisions[110]. However, the private law aspects of the freight forwarder's liability have so far attracted less attention, except in efforts to extend maritime liability to cover multimodal transport by amendments to the Carriage of Goods by Sea Act. These are presently under re-consideration by UNCITRAL in co-operation with CMI. To what extent such amendments will affect the freight forwarder's liability remains to be seen.

This short survey of the freight forwarder's liability on the world map demonstrates a chaotic picture. Regrettably, the 1996 FIATA Model Rules have so far only had a marginal impact. This may lead to a general decline of the traditional method of the freight forwarding industry to determine liability by self-regulation in general conditions.

110 See W.J. Augello, Transportation, Logistics and the Law, Huntington N.Y. 2004 *passim* and J. Guandolo, Transportation Law, Washington 1971 *passim*.

6.5 The 1996 FIATA Model Rules for Freight Forwarding Services

In 1981, FIATA submitted to its member organizations a »FIATA Model for Standard National Freight Forwarding Trading Conditions». That Model contained only a few articles that did not deal with liability fully and also left the monetary limits of liability open. The Model contained some articles as to the freight forwarder's right of lien, time limits for claims (6 months), and jurisdiction. As far as known, no freight forwarding organization has to any significant extent used that Model.

The different approaches to legal classification of freight forwarders are disturbing, in at least two important areas. First, the notion of the freight forwarder as commission agent is unknown in the common law systems. Instead, one would have to resolve from case to case whether or not the freight forwarder has acted as agent or as a principal. Second, in French law a freight forwarder who undertakes to procure carriage from point to point (*de bout en bout*) is[111] responsible for the acts or omissions of third parties as a »commissionaire de transport» (a kind of *del credere* liability). This concept is unknown to both the common law systems and the civil law systems other than French law. However, the French concept has similarities in a number of other jurisdictions but with some important differences. In addition, a distinction exists under French law between the freight forwarder as *commissionaire de transport* and as *transitaire*, since the latter is a person who will only undertake matters ancillary to the actual transport (*opérations juridiques*). Under Belgian law, the concept of *commissionaire de transport* is also known but *del credere* liability has not been used since the Belgian *commissionaire de transport* is under liability as carrier. The situation is the same according to the Italian *Codice Civile,*[112] stipulating that the spedizionere-vettore is subject to liability as carrier (vettore) as is presumably the *comisionista del transporte* according to the Spanish *Código de comercio.*[113]

In order at least to modify the differences in the law of freight forwarding, in 1995 FIATA submitted to a Working Group the task of performing a survey of the existing general conditions used by freight forwarders in the member countries of FIATA and, on the basis of that survey, elaborating Model Rules for Freight Forwarding Services. In June 1996, the Working

111 According to Arts 96–99 of Code de Commerce.

112 Art. 1737 compared with Art. 1741.

113 Art. 379.

Group presented a final draft, which later in October was accepted by the Board of Officers of FIATA in connection with the Caracas World Conference.

The Model Rules distinguish between the freight forwarder as principal and agent. When liable as principal for carriage and other services, his liability follows the same rules that would have applied if the customer had entered into a separate contract for such service or carriage and with the application of the mandatory and other rules and conditions relating thereto.[114] In other words, the *network system technique* has been used. This also means – provided, of course, that the loss or damage could be localized – that the freight forwarder would enjoy a *back-to-back position*, since he could seek indemnity from those he might have engaged for the service or carriage upon the same conditions as apply in the relationship with his own customer. Whenever the freight forwarder performed the service or carriage by his own facilities or means of transport it would, of course, be possible for him to make the contract subject to his own specific conditions for the service of carriage insofar as such conditions did not depart from any compulsorily applicable regime.

As to freight forwarding services, the FIATA Model Rules stipulate that the freight forwarder would have an obligation to exercise due diligence and take reasonable measures in performing the services.[115] The monetary limit has been set at 2 SDR per kilo as to loss of or damage to the goods,[116] but for other types of loss the liability limit for each incident has been left open for a decision by the respective national freight forwarding associations. There are particular exceptions from liability for valuables as well as for delay and consequential loss other than *direct loss*.[117] The time bar for actions against the freight forwarder is nine months from handing over the goods.[118] Where liability concerns something other than loss of or damage to the goods – such as liability for errors or omissions – notice of the claim must be given within 14 days from the day when the customer knew or ought to have known the circumstances giving rise to the claim. Failing such notice the claim is barred unless it can be shown that it was impossible to comply with this time limit.[119]

114 Art. 7.3.
115 Art. 6.1.11.
116 Art. 8.3.1.
117 Art. 8.1.
118 Art. 10; cf. the same rule in FBL and the UNCTAD/ICC Rules.
119 Art. 9.2.

The Model Rules also secure the freight forwarders' right to exercise a general lien on the goods in his possession in order to satisfy his claims, both as to such goods and also for claims arising from earlier contracts with the customer.[120] Additional stipulations provide for the customer to hold the freight forwarder harmless for unexpected costs arising in the performance of the services according to the customer's instructions or when, owing to incorrect or incomplete instructions, extra costs result for the freight forwarder.[121] In particular, the customer is responsible for economic loss incurred by the freight forwarder as a result of dangerous characteristics of the goods unknown to the freight forwarder.[122]

If the freight forwarder refers to the Model Rules, then this would constitute an agreement with the customer that his liability could not be reduced by the simultaneous application of additional rules stipulating a lower liability.[123] However, the Model Rules would, of course, not prevent the freight forwarder from doing the opposite and giving the customer additional protection.

Since the application of the Model Rules is voluntary, it remains to be seen to what extent they will be used in national freight forwarding conditions or otherwise.

In NSAB 2000 the preamble signals that in every respect they offer the customer *at least* the protection that would follow from applying the FIATA Model Rules.[124]

6.6 Warehousing by freight forwarders and the 1991 OTT convention

6.6.1 *Freedom of contract prevails*

The liability of stevedores and terminal operators is subject to national law, which usually accepts considerable scope for freedom of contract. Conse-

120 Art. 15.
121 Art. 17.
122 Art. 18.
123 Art. 1.2.
124 See for comments to the Model Rules, J. Ramberg, International Commercial Transactions pp. 191–192 and *id.* The FIATA Model Rules for Freight Forwarding Services, Dir. Mar. 1997 pp. 284–291 and Unification of the Law of Freight Forwarding, ULR 1998-1 pp. 5–14.

quently, stevedores and terminal operators have used their freedom of contract to limit their liability accordingly by various methods. These include, for example, stipulating liability only for »wilful misconduct on the managerial level of the company» and with a very low monetary limit. In addition, liability may be excluded altogether to the extent the customer has or should have covered himself by cargo insurance.

6.6.2 *Lack of effective protection and the need to insure the goods*

Regrettably, the purpose of mandatory law as to international transport is not sufficiently clear. We have seen that the Hague and Hague-Visby Rules primarily aim to protect the *consignee* by mandatory rules. The reason is that under CFR and CIF contracts the consignee is exposed to the risk of substandard contract terms. That is, he exerts no influence at the time of concluding the contract of carriage that is made for his benefit by the CFR and CIF seller. Additionally, rules should exist to protect his rights under the documents, entitling him to:

- claim the goods from the carrier at destination, and to
- sue the carrier in case of loss of or damage to the goods.

It cannot be said, however, that the aim of the mandatory regimes under the Hague and Hague-Visby rules generally aim to protect the weaker party in the contractual relationship.

A further purpose of mandatory law would be to reach uniformity. However, here global international consensus is of course required – but not easily achieved. The willingness of States to commit themselves to an international regime depends upon the benefits that could be derived from it. In essence, it is believed that contracting parties are capable of agreeing in an appropriate way, at least in situations where they have an opportunity to ascertain their legal position under the contract as drafted. Owing to the great variety of contracts needed to take goods from one point to another in transnational trading, the aim of achieving full and consistent cover with appropriate liability for the persons engaged is a hopeless task. Protection by mandatory rules would necessarily be haphazard unless one and the same enterprise undertakes through liability – from point to point.

Even so, no international regime as yet exists providing protection by mandatory law for such an undertaking. Moreover, as we shall see, it may only be possible ever to achieve international consensus on such a type of

through liability if some flexibility is offered. The shortcomings of the present rules and the difficulty of achieving full protection from point to point by mandatory law explain the continuing focus on the traditional mandatory liability of carriers. This goes hand in hand with abstaining from similar protection for the customer during the particularly dangerous stages before or after the carriage. Hence, few customers would dare to abstain from an appropriate insurance covering the whole transport including the stages before and after the actual carriage. This becomes all the more important as carriers that have undertaken to receive the goods from and to deliver them to inland points would only seldom voluntarily accept liability for stages of the transport during which they have not themselves performed the transport. Even if mandatory law covered the period of responsibility from the carrier's taking the goods in charge until delivery, successive carriers may be involved. As a result, the goods might then be exposed to loss or damage during the critical transhipment stages.

Carriers undertaking liability during the pre-shipment and after the discharge stages may look for reimbursement of compensation that they had to pay to their customers. However, they would then often find that the liability of stevedores and warehousemen in different countries is simply non-existent or substandard. They would, of course, benefit from any international regime protecting their rights of recourse. Nevertheless, it is to be expected that the interest of States to assist them is rather weak. This may stem from the general view that carriers have a sufficiently strong bargaining position with their customers and subcontractors to look after their own interests.

6.6.3 *The 1991 OTT Convention*

Efforts to create a uniform regime comprising the stages before and after carriage were initiated by UNIDROIT. Later, under the auspices of UNCITRAL, this led to the 1991 International Convention on Liability of Operators of Transport Terminals in International Trade (the *OTT Convention*).[125] The mandatory scope of that convention in connection with

125 See for comments on the OTT-Convention, J. Ramberg & E. Vincenzini, La convenzione sulla responsabilità degli operatori di transport terminals nel commerzio internationale, Diritto dei trasporti 1990:2 and J. Sekolec, Comments on the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991, Dir. Mar. 1992 1051–1062. See also P. Falvey, Liability of Terminal Operators and Insurance Cover, Dir. Mar. 1992 pp. 1063–1068.

carriage relates to operators who handle or receive goods »involved in international carriage».[126] The liability rules and the monetary limitation correspond to the rules of the 1980 Multimodal Transport Convention. However, particular difficulties arise in deciding the very basis for applying the OTT Convention, namely that the goods should be *involved in international carriage.*

The independent terminal operator as such is not involved with international carriage. Moreover, the fact that the *goods* are involved in such carriage may – as far as he is concerned – be considered a rather weak connecting factor to *international carriage.* In some cases it might even be difficult to ascertain whether or not goods delivered to a terminal operator are intended for carriage internationally. Further, if the goods remain in the terminal after entering it, difficulty may arise in establishing whether they arrived there after international carriage.

Further difficulties arise in determining the applicable monetary limit, since according to the OTT Convention regard should be had to the intended transport. If a subsequent non-maritime transport is contemplated, then the monetary limit of 8.33 SDR per kilo would apply. But how will it be possible for both parties to the contracts of storage and handling of the goods in terminals to know which goods – or which part of the goods – are intended to be carried abroad with a particular mode of transport? Additionally, since a distinction is made between goods *involved in international carriage* and other goods, then administrative difficulties would result for the terminal operator unless he chose to apply the OTT Convention – also outside the scope of its mandatory application – for *all goods* handled in the terminal.

The OTT Convention has so far had little success (one State has ratified, whereas five ratifications and accessions are necessary to bring the Convention into force). Perhaps, the fate of the OTT Convention evidences what has been suggested, namely that efforts to achieve a workable and appropriate protection to the benefit of owners of goods in transit will fail to reach sufficient international consensus. Instead, it might be necessary to focus on the more modest objective of providing an appropriate legal infrastructure with *non-mandatory* rules, thus leaving to the contracting parties the possibility either to opt in or opt out.

126 See, concerning the problem of deciding whether goods in a terminal are »involved in international carriage» and, if so, by what means of transport, J. Ramberg, International Commercial Transactions, pp. 187–188.

6.7 Distribution and value-added logistics services

As we have seen, the services offered by freight forwarders are fairly comprehensive. But, traditionally, they are all more or less closely connected to the transport as such. They relate to services in preparing for the transport by receiving the goods, storing and clearing them for export as well as preparing the appropriate documentation and procuring the contract of carriage. Further, after-transport services comprise clearing the goods for import, helping with paper-work, receiving the goods from the carrier, carrying out CAD or COD instructions, and storing the goods pending delivery to the party entitled to receive them. Additionally, the pick-up and delivery service may include collecting the goods from the carrier or the customer for delivery at inland destination points or to carriers for on-carriage.

In recent years, services offered by freight forwarders have been considerably expanded and may comprise everything necessary from the moment the goods are produced or manufactured until they reach the ultimate receiver and sometimes even following such receipt through assistance required for adaptation and use of the goods. Hence, expanded value added services may include receiving orders and also implementing orders by:

- collecting the goods from storage facilities,
- packing and marking the goods,
- assembling parts to conform with the order,
- supervising goods in storage by inventories, and
- receiving any goods returned as non-conforming with orders.

In such context, customers may require sophisticated distribution services, in turn requiring a profound knowledge of the products and the relevant market.

Added services are not limited to the physical movement of goods from point to point but would include information by EDI and the transfer of money under various arrangements not limited to cash on delivery or cash against documents but extended to payment under factoring and leasing arrangements. In many cases, the ability of service providers to satisfy the requirements of customers at low cost would entail considerable saving of costs which otherwise would have been incurred. Hence, it would be economically sound to engage other parties, such as freight forwarders, by outsourcing functions previously maintained by the entities concerned. How-

ever, this would require efficiency and reliability of parties contracting to undertake such important functions for their customers.

The holistic approach required to achieve optimal economic efficiency deserves an appropriate term. This has been provided by the term *logistics* inherited from strategy used in warfare. Clearly, it would be imprudent to send armies into enemy country without first ensuring an appropriate and timely supply of ammunition, stores, and provisions for the fighting forces. The logistic approach may of course be used internally by an enterprise or in co-operation with a particular customer. However, if a third party, such as a freight forwarder, is engaged, then the terminology needs qualifying by the term *third party logistics* (*3PL*).

The term *4PL* is also used primarily to indicate that the service is more comprehensive and sophisticated than offered by other 3PLS particularly as to the management of information flows by EDI.[127]

The term *logistics service provider* as compared with the notion of freight forwarder does not signify any difference in principle, except that a logistics service provider is expected to offer more comprehensive, sophisticated services. The French General Terms of Sale of the *Fédération des Entreprises de Transport et Logistique* (2001) refer to operations performed by transport or logistics operators but do not significantly depart from traditional regulation in general conditions on freight forwarding services.[128]

Undoubtedly, rights and obligations as well as liability in case of non-performance may be taken care of by general conditions. However, a new approach is required compared with existing general conditions regulating freight forwarding services.[129] The traditional focus on obligations relating to transport as such – including ancillary services – is inadequate. Instead, a purely contractual approach is needed. In essence, contracts with 3PLS or 4PLS are contracts for non-tangible services and should be performed accordingly. In order to be competitive, 3PLS and 4PLS would have to ac-

127 See L. Railas, The Rise of the Lex electronica and the International Sale of Goods, Helsinki 2004 p. 53 referring to M. Bedeman & J.F. Gattorna, Third- and Fourth-party logistic service providers [in Gover, Handbook of Supply Chain Management, Aldershot 2003] pp. 482–484.

128 See for other examples P. Bugden, pp. 617–642, A. Gran, Vertragsgestaltung im Logistikbereich, TranspR 1-2004 p. 1, deploring the absence of precise contractual regulation, and I. Koller, Transportrecht. Kommentar zu Spedition und Gütertransport, Munich 2004 p. 935 referring to VBGL 2002 for »Güterkraftverkehrs- und Logistikunternehmer».

129 See the observations by K. Grönfors, Spedition och multimodala transporter [Rettsteori og rettsliv, Festskrift C. Smith, Oslo 2002 pp. 345–361].

cept fairly extensive liability. Disclaimers, or reduction of liability referring to an estimated average value of the goods may become unacceptable to customers. Instead, one would have to rely on a general monetary limitation of liability based on an assessment of loss that could be reasonably foreseeable at the time of the conclusion of the contract (cf. Art. 74 CISG).

7 Subcontractors and piercing the privity of contract barrier

7.1 Use of subcontractors

7.1.1 *Through transport*

As we have seen, the mere fact that a document covers a period from taking goods in charge until delivery does not necessarily imply continuous liability for the issuer of the document. In particular, the maritime carrier customarily limits liability to the segment of carriage that he physically performs. At the same time, he acts as agent – in the same way as a forwarding agent – when concluding additional contracts needed to bring the cargo to the delivery point mentioned in the transport document. Under such a contractual arrangement, the party entitled to delivery will have two or more contracting parties, each responsible for their part of the total transport. This situation may also arise in non-maritime carriage, although here the non-maritime carrier would usually remain responsible for the whole transport from the moment of taking the goods in charge until their delivery.

However, particularly in carriage of goods by road, transport may be arranged in stages, where each participating carrier becomes responsible only for the part that he performs. In carriage of goods by rail and road, particular rules apply to such cases imposing a collective responsibility on the carriers. Thus, according to COTIF/CIM,[1] the railway that accepts goods for carriage with a consignment note will be responsible for the carriage during the entire route up to delivery. Moreover,[2] each succeeding railway by taking over the goods with the original consignment note will participate in performing the contract in accordance with the terms of that document. Actions for loss of or damage to the cargo may be raised against the forwarding railway, the railway of destination, or the railway on which the cause of action arose.[3] This system has been copied in the CMR provisions

1 Art. 26.1.
2 According to Art. 26.2.
3 Art. 43.3.

relating to carriage performed by successive carriers.[4] However, liability arising by reason of a successive carrier's acceptance of the goods *and the consignment note* does not correspond to contemporary practice. Rather, in international carriage of goods by road, one carrier usually remains responsible for the whole transit, using other carriers as subcontractors.[5]

As mentioned, air carriers are liable under the applicable conventions solely for air carriage as such, finishing with delivery from the airport. Consignees will not always receive goods from the air carrier at the airport but the airline may offer a pick-up and delivery service. However, whatever they do in that context would not be covered by the conventions. Nevertheless, by contract air carriers often assume liability equivalent to liability under the applicable convention, so as to avoid difficulty in attributing incidents involving the goods to the air carriage segment as distinguished from those before and after it. Often, freight forwarders assemble goods for air carriage and issue their own documents in the same way as in maritime carriage, where they use FBL. However, in these cases, freight forwarders customarily use their own air waybills (*house air waybills*) using the airline waybill as the *master air waybill*. The latter might comprise a number of individual consignments assembled in the particular container used for air carriage (*the igloo*). Again, determining whether the freight forwarder has assumed liability as carrier would involve analysing the house air waybill issued.

7.1.2 *Multimodal transport*

Multimodal transport operations require distinguishing between a performing MTO and a MTO merely contracting for carriage and using subcontractors to perform the carriage. However, in practice it may well hap-

4 Arts 34–40.

5 See, in general, K. Grönfors, Successiva transporter, Stockholm 1968 *passim* and as to the difficulties in applying CMR Arts. 34–40 to successive carriage by road A. Messent, Successive carriage [in J. Theunis ed., International Carriage of Goods by Road (CMR), London 1987 pp. 166–182] and M.A. Clarke, International Carriage of Goods by Road: CMR, London 2003 pp. 153–154 pointing out that collective liability presupposes that the subsequent carrier not only takes over the goods but also the *original* consignment note thereby accepting being bound by its terms. A new consignment note will not do. In some jurisdictions this requirement has been relaxed. This trend might be explained by the fact that »the transport industry is not punctilious about formalities» – a rather poor excuse, it seems, for deviating from the requirements set forth in the CMR.

pen that a MTO that performs the major part of the transit – e.g. a container line extending the transport inland to a *hub* to and from which the cargo is tendered and delivered – leaves additional transport to other carriers. Conversely, a MTO primarily acting as contracting carrier and using a subcontracted carrier for the main part may well physically perform additional carriage. Also, any services additional to the transport as such may either be performed by the MTO himself or by engaging other parties. Independent terminal operators are often used as subcontractors, particularly as to storage in stages between two parts of the carriage or storage pending delivery to the consignee.

7.1.3 *Logistics service providers*

As we have seen, the service offered by logistics service providers extends to include activities falling under different types of contracts. Several of these would not so much concern physical handling of the goods as intangible services required to achieve optimal flow of money and information, as well as goods. The range of subcontractors needed in performing such contracts necessarily expands when compared to requirements to perform simple transport of goods.

7.2 Liability of subcontractors and the carrier's vicarious liability

7.2.1 *Different approaches*[6]

While it is a fairly universal principle that, absent agreement to the contrary, a contracting party remains liable even though all or part of his performance is entrusted to subcontractors, nevertheless the liability of subcontractors to parties under contract with the main contractor is much-debated. In the absence of a contractual relationship with the claimant, the subcontractor would be exposed to the risk of actions on a non-contractual basis. This, in most jurisdictions, would be possible based on a general duty of care to the world at large not to inflict physical loss of or damage to the goods (*the tort of negligence*). However, as to actions unrelated to such a duty

6 See for an account of the available options de Wit, p. 45 *et seq.*

of care it would usually be impossible or at least difficult to obtain compensation for pure pecuniary loss, e.g. following from inadequate information.

Another option would be to exclude the possibility of concurrent action against both the main contractor and his subcontractor under the theory that the parties have impliedly agreed to bar a concurrent action against the main contractor's servants and agents. However, such protection of servants and agents would normally not be available under the applicable law.[7]

As an alternative to non-contractual actions against subcontractors based upon the tort of negligence, contract terms might be used in spite of the fact that there is no contract between the claimant and the subcontractor. If so, it remains to be determined what contract terms should be used. One option would be to incorporate the terms that would have applied if a contractual relationship had been established between the claimant and the subcontractor under the theory of an implied contract to that effect. Alternatively, the terms of the main contract could be incorporated based on the theory of implied authority of the main contractor to agree with his subcontractors on the same terms as in his own contract on behalf of his contracting party. This alternative may expose the subcontractor to worse contract terms than those of his own contract with the main contractor. But in that case he could protect himself by a right of recourse against the main contractor. This would arise if the subcontractor has to pay more to the claimant than would have been the case if the main contractor had sued for reimbursement of what the main contractor might have had to pay to the claimant (*a circular indemnity clause*). Conversely, the subcontractor could benefit from the better terms of the contract concluded between the main carrier and the customer.

Normally, one would expect each contracting party to agree in his best interests and guard against any additional risks following from actions from persons under contract with his own contracting party. Clearly, however, it would be asking for too much to require employees, and perhaps also some other less sophisticated parties, to do so. Perhaps, the clearest example of a misfortune of a person exposed to an action in tort appears in the famous case of *Adler v. Dickson* (*The Himalaya*)[8] where the master and boatswain were sued by a passenger who wished to avoid the defenses available to the shipowner. As a result, legislative action was required to obtain protection for, in particular, servants and agents and to support contractual clauses

7 See, however, as to French and Belgian law, de Wit, p. 56 *et seq.*

8 [[1955] 1 QB 158.

(*Himalaya clauses*) extending the benefits of the main contract not only to servants and agents but also to anyone engaged for the performance of that contract.

7.2.2 *Solutions under international conventions*

In maritime carriage, the problem of non-contractual claims was first addressed in the Hague-Visby Rules.[9] Here, the possibility for the claimant to get an upside by a tort action was defeated first by Art. 4 bis 1 to the effect that it did not matter whether the action was founded in contract or in tort. In both cases, the defenses and limits of liability provided for in the Hague-Visby Rules would apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage. Additionally, if such action had been brought against a servant or agent of the carrier, such servant or agent would be entitled to avail himself of the same defenses and limits of liability which the carrier was entitled to invoke under the convention. Further, the aggregate of what could be recovered from the carrier and servants and agents should not exceed the limit provided for in the convention. Nevertheless, the Hague-Visby Rules strictly limited the protection to *servants and agents* and added within brackets the following words »such servant or agent not being an independent contractor». At the time of the CMI Stockholm Conference 1963 preparing this addition to the Hague Rules, it was the majority view that protection should be expanded to cover independent contractors. However, at the time of the diplomatic conference views had changed presumably under the assumption that parties other than *servants and agents* were capable of protecting themselves by appropriate clauses.[10] The Hamburg Rules[11] are based on the same principles as the Hague-Visby Rules[12] but the MT Convention[13] extends protection to »any other person of whose services he makes use for the performance of the multimodal contract».

9 Art. 4 bis.

10 This view has been challenged by K. Grönfors, Why not independent contractors?, JBL 1964 pp. 25–27.

11 In Art. 7.

12 Art. 4 bis.

13 Art. 20.2.

7.2.3 *Identifying the carrier*

In maritime carriage, several carriers are often involved and it might therefore be difficult to decide which of these carriers is responsible to shippers and consignees. Bills of lading often contain identity of carrier clauses whereby liability is channelled to the owner of the ship. Hence, although the contract of carriage may seem to have been entered into between a party other than the shipowner and the consignor, the clause aims to identify the performing carrier as the contracting carrier. The validity of such clauses is much-debated but channelling liability to the shipowner, rather than, e.g., a time charterer, is also supported by the practice of issuing bills of lading *for the master*, who would not have authority to conclude contracts on behalf of anyone else than his employer, the shipowner. In practice, however, bills of lading are issued by liner agents and it might be argued that they act upon the authority of the liner shipping company rather than the shipowner, even if they put their signature under the pre-printed text *for the master*.[14]

If channelling liability to the shipowner under the applicable law were unsuccessful, he would be exposed to actions from the cargo owners on a non-contractual basis. This may deprive him of any exemption or limitation of liability available under the applicable international convention. Normally, he would not ultimately be prejudiced by this, as most charterparty forms would give him a right of recourse for any liability following from the orders given by the time charterer (under the employment clause of time charterparties). Instead, the detriment would hit the contracting carrier by his duty to indemnify the shipowner, so that the end result would be loss of his rights under the applicable international convention. True, cargo claimants could be discouraged from performing such a by-pass operation by a circular indemnity clause in bills of lading to the effect that any amount paid in excess of the liability under the international convention must be reimbursed to the contracting carrier. However, such measures are seldom used – presumably due to reliance on *identity of carrier* clauses.

14 See for a discussion on the problem K. Grönfors *et al.*, The Stockholm Colloquium on maritime law 1965: Report on the carrier identity problem (also in Dir. Mar. 1966 pp. 163–213). See also J. Ramberg, The time-charterer's liability against bill of lading-holders, ETL 1966 pp. 874–897 commenting, in particular, on the Swedish Supreme Court case NJA 1960 s. 742 *The Lulu* and further K. Schmidt, Verfrachterkonossement, ReederKonossement und Identity-of-Carrier Klausel, Hamburg 1980 *passim*.

7.2.4 *Joint liability of contracting and performing carriers*

The Hamburg Rules[15] first define the *carrier* as »any person by whom or in whose name a contract of carriage of goods by sea has been concluded with the shipper». In addition,[16] the non-contracting carrier is referred to as the *actual carrier*. This carrier is defined as »any person to whom the performance of the carriage of the goods, or a part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted». This wide definition of *actual carrier* would not only include the performing carrier but also non-performing carriers if they had been *entrusted* by the carrier to perform. So, if such a non-performing carrier subcontracted performance to another carrier, he would still remain responsible in his capacity of *actual carrier*.[17] The UNCITRAL/CMI draft restricts the definition to *performing parties* which refers to »a person other than the carrier that physically performs any of his responsibilities under the contract of carriage» and further provided that he acts »at the carrier's request and under the carrier's supervision or control». The Hamburg Rules[18] make all the provisions of the convention applicable to the responsibility of the actual carrier but limited to »the carriage performed by him». And, further, the liability of the contracting carrier and the actual carrier is joint and several.[19] It is not quite clear what is meant by the words *for the carriage performed by him*.[20] According to a literal interpretation, this would seem to mean that a party entrusted with performance but choosing to delegate it to somebody else might escape liability. However, this would mean that the broad definition of actual carrier[21] has not been followed up in the implementation provision.[22] Presumably, such a literal interpretation[23] ought to be avoided under the the-

15 In Art. 1.1.

16 In Art. 1.2.

17 These principles are also reflected in SMC Chapter 13, Sections 35-37. The particular notion of »entrusting» carriage to another entity is extensively discussed in the Finnish case *The Linda*, FHD 2003:98, where a sub-carrier unsuccessfully argued that he was neither contracting, nor performing carrier.

18 In Art. 10.2.

19 Art. 10.4.

20 Art. 10.2.

21 In Art. 1.2.

22 In Art. 10.2.

23 Of Art. 10.2.

ory that the *undertaking to perform* would be enough to qualify the carrier as the performing carrier.[24] [25]

In non-maritime carriage, the same dichotomy of contracting and performing carriers appears in a particular convention added to the Warsaw Convention, the 1961 *Guadalajara Convention*. Here,[26] basically the same distinction between contracting carrier and actual carrier as in the Hamburg Rules appears. It follows from the Warsaw Convention[27] that successive carriers will also become liable. All these carriers are subject to the rules of the Warsaw Convention but – as to successive and actual carriers – only for the part of the transport performed. As to successive carriers, an exception to this principle is made when the first carrier has assumed liability for the whole journey.[28] In rail and road transport, the principle of collective responsibility of carriers is recognized under the theory that each successive carrier becomes responsible together with the other carriers upon receiving the goods and accepting the consignment note.[29] COTIF/CIM and CMR stipulate that non-contractual claims against the carrier or someone for whom the carrier is responsible would be subject to the provisions of the respective conventions which exclude or limit liability.[30] As mentioned, subcontracting in carriage of goods by road often occurs when one carrier assumes liability for the whole carriage from point to point while engaging others wholly or partly to perform the carriage. In particular, when freight forwarders undertake liability as carriers they would do so by issuing a CMR waybill for the whole transit although they might have engaged other road carriers wholly or partly to perform the carriage.

7.3 Clauses for protecting subcontractors

7.3.1 *Himalaya clauses*

Particularly in English law, the doctrine of privity of contract has made it difficult to secure recognition of clauses aiming to protect servants, agents,

24 In the sense referred to in Art. 10.2.

25 Cf. in this respect the *ratio decidendi* of the Finnish Supreme Court in *The Linda* supra note 17.

26 In Art. 1 b–c.

27 Art. 30.

28 According to Art. 30.2.

29 COTIF/CIM Art 26 and CMR Arts 34–40.

30 COTIF/CIM Art. 40 and CMR Art. 28.

and subcontractors. In the absence of a contractual link between a party to the contract of carriage and the persons engaged in performing the contract without being contracting parties themselves, the doctrine of privity of contract would in theory make it impossible to extend any rights or obligations under the contract of carriage to somebody else.[31] This is different under civil law as no difficulty exists in making a stipulation in a contract to the benefit of somebody else. Nevertheless, a particular drafting of the clause may make it acceptable even under English law, provided the stipulation has been made by a contracting party acting as agent or trustee as to the stipulation intended to provide protection for other than the contracting parties themselves. By this method, the required contractual link is created and the outsiders become beneficiaries of the contractual stipulation intended to protect them. Although, in the 1992 English Carriage of Goods by Sea Act, there is now statutory support to the benefit of the carrier's servants and agents, the particular drafting of *Himalaya* clauses traditionally required under English and US law is still retained. It should also be mentioned that this particular drafting will still be required if the protection is also intended to comprise independent contractors not covered by statutory support, such as independent contractors when the Hague-Visby Rules apply.

Even if *Himalaya* clauses as such are recognized, it remains to decide how far they go in order to protect subcontractors. An illustration is the American case of *Kirby* v. *Norfolk Southern Railway Company.*[32] Here, Kirby had made a contract with a freight forwarder (ICC) in Australia for carriage of goods to a US port for oncarriage by the railway. Thus, a contractual relationship was established between Kirby and ICC. ICC, in its turn, had subcontracted a shipping line (Hamburg Sud) for carriage of the goods from Sydney Australia to Savannah Georgia, from where the goods were to be carried by rail onto the destination, Huntsville Alabama. The damage occurred while the train was on route from Savannah to Huntsville, with extensive damage to the goods (machinery). This well exceeded any limit of liability under the stipulations of the document issued by ICC (the

31 See for a comparative account of Anglo-American law in this respect J. Moore, Liability of Stevedores for cargo damage under United States and British Law, Gothenburg Maritime Law Association publ. 18 (1961) and *Midland Silicones Ltd.* v. *Scruttons* [1962] A.C. 446 and *Robert C. Herd* v. *Krawill Machinery Corp.* 359 U.S. 297 (1958) both denying stevedores the benefit of the protection available to the carrier under the Hague Rules.

32 300 F. 3d 1300 C.A. 11th Cir. (2002) reversed by the US Supreme Court November 9, 2004.

FIATA Multimodal Transport Bill of Lading, FBL) and also under the bill of lading issued by the shipping line. As the freight forwarder according to FBL undertakes liability as carrier, the shipping line acted as its subcontractor, as reflected in its bill of lading, which thus governed the relationship between the freight forwarder and the shipping line. Both the FBL and the bill of lading issued by the shipping line contained Himalaya clauses. The shipping line's bill of lading extended protection to »all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever». The FBL, in customary less specific language, extended protection to »any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract». The question to decide was whether, under any of these Himalaya clauses, protection could be extended to the railway as independent subcontractor. The US Supreme Court held that the freight forwarder had implied authority to make the Himalaya protection of the shipping line's bill of lading available to the railway, although it was not his subcontractor but a sub-subcontractor engaged by the subcontracted shipping line as its subcontractor.

7.3.2 *Circular indemnity clauses*

It is to be expected that logistics service providers would often find themselves in the same situation as the freight forwarder in the case of *Kirby* v. *Norfolk Southern Railway Company*. In such cases, one might well take the view that it would be too complicated to extend *Himalaya* protection to the world at large and that protection ought to be limited to persons engaged in performing their own contract – and not be extended to protect persons under somebody else's contract as well. On the other hand, the claimant undoubtedly gets an unexpected upside from the mere fact that the oncarrier happens to be under contract with somebody else than the claimant's own contracting party. Indeed, if *Himalaya* clauses were defeated because of lack of specificity or failure to meet the requirements needed to pierce the privity of contract barrier, one might well experience counter-measures by way of circular indemnity clauses. These could protect everyone in the contractual chain by imposing a duty on the cargo claimant to reimburse whatever has been received from non-contractual claims against somebody

involved in the performance of the contract irrespective of his position as contracting party, servant or agent, independent contractor, or sub-subcontractor.[33] Presumably, the decision by the US Supreme Court in the Kirby case may be explained by a general desire to let the terms of the subcontract prevail even in the absence of a direct contractual link between the claimant and the subcontractor and sub-subcontractor.

7.3.3 *Who is the claimant under the contract of carriage?*

It would be wrong solely to focus on the contract of carriage, ignoring its interrelation with other contracts involved in international trade transactions and, particularly, the contract of sale. Whenever the terms of the contract of sale require the buyer to conclude a contract of carriage – such as under a FOB contract – the link between the buyer and the carrier is immediately established, which would seem to solve all problems. It will be for the buyer to agree with the carrier on appropriate terms. Nevertheless, even under FOB terms, sellers often undertake the practical arrangements by booking the cargo for transport with the shipping line (*FOB additional services*) for the benefit of the buyer. In addition, the seller even without being a party to the contract of carriage would have to hand over the goods for carriage and would in that capacity require a receipt from the carrier. In some cases, the receipt may not be identical with the transport document – the bill of lading – but may take the form of mate's receipt. According to customary practice, bills of lading are often tendered to the seller even when the contract of carriage is between the carrier and the buyer. We may then get a situation where the buyer – although a contracting party in the contract of carriage – has no right to receive the goods from the carrier in the absence of the bill of lading, which has to be presented and surrendered to the carrier in exchange for the goods at destination. Additionally, the buyer would wish to rely on the information contained in the bill of lading, which is made out in his absence and with a description of the goods under the control of the seller and the carrier.

Under CFR and CIF contracts the position of the absent buyer is even more aggravated, since now he is not a party to the contract of carriage, which

33 See on the structure and effect of circular clauses, de Wit, pp. 495–501 and P. Todd, Modern Bills of Lading Oxford, 1990, pp. 224–228. The circular clause was considered valid in *Nippon Yusen Kaisha* v. *International Import & Export Co. Ltd (The »Elbe Maru«)* [1978] 1 Lloyd's Rep. 206 QB. As pointed out by de Wit, p. 499, the circular clause is a remedy to recover what has been paid but it does not prevent liability as appears in *P.S. Chellaram & Co. Ltd* v. *China Ocean Shipping Co.* [1989] 1 Lloyd's Rep. 413 Australia Sup. Ct. New South Wales.

is concluded by the seller. The buyer only becomes a beneficiary to the contract of carriage through the medium of the bill of lading representing the goods. The bill of lading will be issued to the seller upon his demand and subsequently transferred to the buyer by the seller's endorsement.

In non-maritime transport, the situation is basically the same but simpler as sale of goods in transit is seldom contemplated. Consequently, the transport document need not have the transferability function of a bill of lading. It is enough that the buyer is named as consignee and that he may receive the goods from the carrier in that capacity.

The buyer might wish to take delivery at the seller's premises under the trade term EX Works (*EXW*) and, if so, the whole transit would be within his immediate control under the contract or contracts of carriage made for the purpose of bringing the goods to the ultimate destination. The situation is basically the same when the seller's obligation is limited to handing over the goods for transport to the carrier but, again, as appears from FCA Incoterms 2000 clause A3 a »the seller may contract for carriage on usual terms at the buyer's risk and expense». Where under the terms CPT and CIP – corresponding to CFR and CIF – the goods are not handed over on board the ship but to the carrier usually at inland points, the seller would make the contract upon usual terms as a contracting party in the contract of carriage but with the buyer as beneficiary. Only with contracts of sale made upon delivered terms (destination contracts: DAF, DES, DEQ, DDU and DDP Incoterms 2000), the seller would be not only contracting party but also beneficiary under the contract of carriage. Nevertheless, buyers may require documents necessary for oncarriage of the goods or for receiving them from the carrier at destination.[34]

It follows from what has been said that the claimant under the contract of carriage is not necessarily the party who has suffered the harm but the party who because of the contracting either remains or becomes the contracting party in the contract of carriage or, subsequent to assignment, becomes the party entitled to claim the goods from the carrier and to exercise any rights against the carrier in the event the goods are not correctly delivered.[35]

34 The A8-clauses of the delivered terms as interpreted in Incoterms 2000.

35 It is important to distinguish between the passing of property rights in the goods and passing of risk. See, in general, Debattista, Sale of Goods pp. 72–105. Also, the mere fact that a buyer in relation to the seller is the owner of the goods does not suffice to give him the possibility to claim the goods or compensation from the carrier. See Debattista pp. 26–38 commenting on the English 1992 COGSA Section 2.

8 Linking contract of sale and contract of carriage

8.1 The bill of lading

The bill of lading holds a unique position in international trade law. It is usually described as having at least three important functions, namely:

- To evidence that the goods, as described in the bill of lading, have been handed over for carriage or, in other words, that the seller has fulfilled his obligation under F- and C-terms (the *receipt* function).
- To evidence the terms of the contract of carriage either by printed conditions in the bill of lading itself or by reference to the carrier's general conditions on concluding the contract (the *evidence of contract* terms function).
- To give the holder of the document the right of control and transfer, so that the holder of the bill of lading is the only one entitled to give instructions to the carrier while the goods are in transit and to receive the goods at destination (the *document of title* – or *transferability*-function).

The last of the three functions in particular distinguishes the bill of lading from other documents of transport – such as waybills for carriage of goods over land or by air – which simply name the person entitled to receive the goods at destination (cf. the same method for *straight bills of lading* used in the United States).

The specific need for a bill of lading in carriage of goods *by sea* is explained by the fact that it is only during such carriage that the goods are sometimes sold in transit. This in turn necessitates a document that both entitles the original buyer to receive the goods and also enables him to transfer his right to subsequent buyers. Without a document of title, such as the bill of lading, this would not have been possible. In a sense, when goods are sold in transit, such sale usually takes the form of an assignment of the first buyer's rights under contracts of carriage and insurance as the

case may be. This also explains the rather strange phenomenon that the risk of loss of or damage to the goods may pass to the buyer at the very moment when they are handed over to the carrier. Of course, in the case of sale of goods in transit this will occur before the contract of sale is made. In essence, it is not then a sale of the goods themselves but rather of documents representing the goods.[1] [2]

In practice, several original bills of lading are usually issued. This practice, or rather malpractice, is necessarily risky, since the right of control and transfer may be vested in different persons at the same time. This risk is modified to the benefit of the issuer by the customary wording in the lower right hand corner of the front page of the bill of lading reading:

> »One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.
>
> IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of each being accomplished the other to stand void».

The cited text means that the issuer need not bother if there are originals of the bills of lading held by other parties once he has rightfully delivered the cargo to a person presenting one original. The system of several originals is explained by the fact that the unpaid seller would hesitate to surrender the right of control to the buyer. For this purpose, however, it would have been sufficient with two originals. It is more difficult to explain why more than two originals are usually issued in practice. It has been suggested that this stems from older trading patterns, whereby originals could be sent to trading houses in different ports whereupon the vessel could proceed to one of these as soon as it had been ascertained that there was a buyer for the goods in the port. With several originals of the bill of lading one could ensure that one be available for the buyer before, or at the same time as, the ship arrived, Nowadays, however, such a system seems wholly anachronistic.[3]

1 See Art. 68 CISG.

2 See Debattista, Sale of Goods pp. 74–75. Art. 68 CISG stipulates as to sale of goods in transit that the risk passes at the time of conclusion of the contract but that »if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage». This means that CFR and CIF contracts would fall under the last-mentioned exception, which thus, in practice, becomes the main rule. See Schlechtriem, pp. 510–511 and J. Ramberg, Guide to Incoterms 2000. ICC publ. 620, Paris 2000 p. 110 and p. 120.

Banks are usually aware of the risks connected with issuing several original bills of lading. They would invariably insist on being given a full set, which is also required under UCP 500 setting forth the rules relating to documentary credits[4]. So, in banking practice the system of several originals has in a sense defeated itself. The position of the unwary buyer is less fortunate, as he may tend to forget that, unless otherwise agreed, he has no obligation whatsoever to pay the price until either the goods or documents controlling their disposition are at his disposal (cf. CISG Art. 58.1). Clearly, one original bill of lading, when several have been issued, would not be enough for the buyer to control disposition of the goods, since he would risk having as many competitors as there are originals in circulation.

The buyer should take care not to place too much reliance on the evidence function of the bill of lading when it states that the goods have been received (*received for shipment* bill of lading) or shipped (*shipped on board* bill of lading) *in apparent good order and condition.* Bills of lading also stipulate that everything mentioned therein has been furnished by the merchant and that the *condition, weight, measure, marks, numbers, quality, contents and value* of the goods are unknown to the issuer of the bill of lading. True, according to particular provisions and principles in most jurisdictions, the carrier would owe a duty to the holder of the bill of lading to check the condition of the goods and insert reservations in the bill of lading if something appears to be wrong. However, it should be carefully noted that reference in the bill of lading is made to *apparent* good order and condition, which is something quite different from the *actual* condition. Particularly in container trade, practical possibilities for the issuer of the bill of lading to check the goods would be non-existent, unless he himself has been charged with the task of stowing them in the container. Therefore, the normal evidence function of the bill of lading as to the goods has more or less disappeared in container trade.

A further difficulty arises because of the arrangement of maritime transportation services. Usually, the bill of lading clauses aim to channel liability to the owner of the carrying ship. The shipowner may or may not be identical with the person with whom the contract of carriage has been made. The contracting carrier may have engaged the vessel under a time- or voyage charterparty. As a result, it is often difficult to see whether an action arising from loss of or damage to the goods should be directed towards the

3 See the criticism by J. Ramberg, International Commercial Transactions p. 67.

4 Art. 23 iv.

contracting carrier, the charterer, or the owner of the ship. The practice of issuing bills of lading *for the master* or *as agent* without disclosing the principal of the agent, whose signature in some cases may be illegible, is not very helpful.[5]

Bills of lading are not only used in commodity trade – where they are needed to enable the first buyer to assign his rights under the bill of lading to a subsequent buyer while the goods are in transit – but also in liner trade, where there is no intention at all to perform such sales. Particularly in liner trade, problems often occur when the vessel arrives before the original bill of lading needed to claim the goods. Liner vessels nowadays often travel faster than mail (*snail mail* as compared with *e-mail*). Moreover, quite apart from this the transmission of bills of lading may become delayed when they are processed by ship's agents, forwarders, and banks. This has given rise to yet another malpractice, namely to issue bill of lading guarantees to protect the carrier from claims when he intentionally departs from his obligation to deliver the cargo only in return for an original bill of lading. Here again, a distinction could be made between fraudulent and rather innocent situations. In most cases, the carrier would know that the non-availability of the bill of lading is simply due to the sad fact that the trading partners have been fettered by old traditions and simply used the wrong document. It may be more or less evident that the carrier should in fact not expect anyone else as entitled to receive the goods than the party named under *notify address* in a copy of the bill of lading. But in order to avoid any risk whatsoever a bill of lading guarantee could still be useful.

Nevertheless, issuers of such bill of lading guarantees should be aware of the risk that the carrier has committed a serious breach of his main obligation and that he would be exposed to unlimited liability. This, at worst, could extend to include compensation for even remote and unforeseeable losses, such as factory standstills when important components do not arrive in time.[6] In some jurisdictions, limitation of liability to pay for such unforeseeable losses is unavailable when they have been caused intentionally or by gross negligence.[7] Whenever the carrier has any reason to suspect such risks, he should take care to get a bill of lading guarantee without any mon-

5 See *supra* note 7.14 on the problem of identity of the carrier.

6 Some carriers seek to modify the risk either by reserving the right to deliver the goods to somebody in good faith believed to be the person entitled to receive the goods or, alternatively, disclaiming or limiting their liability for misdelivery. This has triggered a lively debate as to whether, in such cases, the bank under UCP500 should reject the bill of lading.

7 As is also reflected in the 1996 European Principles Art 9:503.

etary limit. Whether the banks would be prepared to issue such unlimited bill of lading guarantees is another matter. Normally, they have every reason not to do so, or for that matter to issue any bill of lading guarantee at all, as this would only support a practice that has ceased to function properly. At any rate, if in a particular trade goods are in fact often delivered to persons claiming to be consignees but unable to present an original bill of lading, then the whole system has collapsed. The consequences are serious since – in the event of the seller's bankruptcy – it could be disputed that possessing an original bill of lading is sufficient for the right of control and transfer of the goods needed for property rights to pass from seller to buyer or to give the buyer a secured right to the goods with priority over the seller's other creditors.

One would have thought that the presentation clause usually inserted in straight bills of lading would be unnecessary when the ultimate consignee is known and consequently named in the document. Nevertheless, straight bills of lading customarily contain presentation clauses. Indeed, in the English case of *The Rafaela*[8] it is suggested in an *obiter dictum* that, even in the absence of a presentation clause, every bill of lading would require surrender of the paper document in exchange for the goods. The English 1992 Carriage of Goods by Sea Act contains no specific regulation of the straight bill of lading which, therefore, presumably would simply be regarded as a sea waybill (see *infra*). Nevertheless, it may be of some benefit to have the options to use either:

- an ordinary negotiable bill of lading, where the bill of lading could be transferred repeatedly while the goods are in transit,
- a straight bill of lading, which could only be transferred once from the original shipper to the named consignee, or
- sea waybills, where no paper document is required in order to claim the goods at destination and where it would be sufficient that the named consignee identifies himself as such.

8.2 Sea waybills

As we have seen, the bill of lading system entails a number of difficult problems. In addition, the management of the system is quite costly. In the 1970s, shipping lines therefore made efforts to rationalise the documentary procedures by switching from bills of lading to sea waybills.

8 [2003] 2 Lloyd's Rep. 113.

These are distinctly different from bills of lading by not offering the holder of the document any entitlement to transfer the rights under the document to somebody else. Instead, the goods are delivered to the person named as consignee in the sea waybill. In other words, the goods are intended to travel directly from the shipper to an identified consignee in the same way as would be the case under the straight bill of lading known for many years in the United States. These modern documents for carriage of goods by sea bear many names, such as *sea waybill, data freight receipt* and *liner waybill,*[9] but they are all based on the above principle for delivery of goods at destination.

In international conventions relating to carriage of goods over land and by air, a particular system has been designed to protect the consignee – usually identical with the buyer – against the sender's disposal of the goods in transit by re-destining them to somebody else than the named consignee. This is achieved through duplicating the document so that the unpaid sender could retain his original (the duplicate waybill for carriage of goods by road and rail and the sender's original for carriage of goods by air) until paid. However, when the original intended for the sender has been surrendered to somebody else, the sender would lose his right to give instructions to the carrier to re-destine the goods. Thus, the sender's original of the waybill would be a document controlling the disposition of the goods in the sense of CISG Art. 58.1.[10] Accordingly, the buyer when holding such an original takes no risk that the goods will be delivered to somebody else, unless the carrier fails to fulfil his delivery obligation under the contract of carriage, in which case he would be liable to fully compensate the buyer.

The traditional system used by maritime carriers differs from the practice now described for non-maritime carriage. Thus, a sea waybill cannot be regarded as a document controlling disposition of the goods in the sense of CISG Art. 58.1, and the buyer is not obliged to pay for the goods in return for such a document. In order to create a sea waybill with an estoppel function, the CMI, in 1990, presented the Uniform Rules for Sea Waybills.[11]

9 See K. Grönfors, Simplification of documentation and document replacement, ETL 1975 pp. 638–647 (also in LMCLQ 1976 pp. 250–254) and on the use of transport documents in international trade the Report by the UNCTAD Secretariat 26 November, 2003, UNCTAD/SDTE/TLB.

10 See Schlechtriem, p. 473 at note 34.

11 See R. Herber, Die einheitlichen Regeln des CMI über Seefrachtbriefe [Schriften des Deutschen Vereins für internationales Seerecht (Vol. 80) Hamburg 1991].

These rules do not deal with the contract of carriage as such. It is merely stated that the contract shall be subject to any international convention or national law which, if the contract had been covered by a bill of lading or similar document of title, would have been compulsorily applicable thereto. The purpose of this particular rule would be to solve the problem arising from the limited scope of application of the Hague Rules requiring for its application that a bill of lading or a similar document of title be issued.

The key provision of the Rules relates to the Right of Control. First, it is stipulated that the Right of Control remains with the shipper unless he has exercised his option, not later than the receipt of the goods by the carrier, to transfer the Right of Control to the consignee. Thus, the shipper would, unless the option is exercised, have the right to change the name of the consignee at any time up to when the consignee claims delivery of the goods after their arrival at destination. If, however, the shipper exercises his option to transfer the Right of Control to the consignee, then this must be noted on the sea waybill and, if so, the right of the shipper to give the carrier new instructions for delivery would be transferred to the consignee.

The system signifies that the shipper could from the outset give the carrier *irrevocable instructions* to deliver the goods to the named consignee and to nobody else. If this particular stipulation of the CMI Uniform Rules for Sea Waybills is followed, the sea waybill would fulfil the requirements under CISG Art. 58.1, since the buyer would have a secured right to call upon the carrier to deliver the goods to him at destination. At the time when the CMI Uniform Rules were elaborated, a particular problem arose, since under English law, owing to the doctrine of privity, it is in principle impossible for two parties to confer rights on somebody not being a party to the contract. For this reason, the Rules contain a provision relating to *Agency* to the effect that the shipper on entering into the contract of carriage would do so not only on his own behalf but also as agent for and on behalf of the consignee. This is now, at least under English law, unnecessary in view of the particular provisions relating to sea waybills in the 1992 English Carriage of Goods by Sea Act.[12] So far, only a few shipping lines have adopted the system according to the CMI Rules. However, unless they trust their sellers, buyers should avoid paying for goods before having checked that the sea waybill contains irrevocable instructions to the carrier .

A sea waybill system designed according to the CMI Uniform Rules would make bills of lading unnecessary, except where the buyer intends to

12 See Section 2 and the comments by Debattista, Sale of Goods pp. 33–38.

sell the goods in transit. In order to facilitate a switch from the bill of lading system to the sea waybill system, Incoterms 2000[13] stipulate that *unless otherwise agreed* the transport document should enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer. Here, reference is made to the negotiable bill of lading. By the words *unless otherwise agreed* the parties are reminded of the possibility to use a sea waybill when the buyer has no intention to sell the goods in transit. But if a buyer enters into such an agreement with the seller, he should insist on a sea waybill with *irrevocable instructions* to deliver the goods to him unless he considers the seller wholly trustworthy.[14]

8.3 Electronic bills of lading

As mentioned, the 1990 revision of Incoterms was mainly triggered by the computer revolution. International trading already to some extent uses electronic data interchange (EDI). Indeed, a model law for such trading[15] has been submitted to governments for their consideration as a basis for national legislation. Incoterms 1990 as to all trade terms, except EXW where no proof of delivery is required, contain the following text in A8:

> »Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message».

A general problem connected with electronic messages concerns their evidentiary effect. First, one would have to ensure that the message is sent by somebody authorised to do so (the problem of authentication). Second, the system must ensure that an unauthorised person cannot change the message by gaining access to the computer. Third, it is necessary, before somebody other than the receiver relies on it, that the EDI message retains its original content. Thus, it is important that parties agreeing to communicate electronically check whether proper security measures are built into the computer system.

13 In CFR and CIF A8.

14 See J. Ramberg, Guide to Incoterms 2000. ICC publ. 620, Paris 2000 p. 112 and *id.* International Commercial Transactions p. 72.

15 The 1996 UNCITRAL Model Law on Electronic Commerce.

While non-negotiable transport documents, such as waybills for carriage of goods over land and air and sea waybills, could be transformed into EDI messages without much difficulty, problems arise in transforming a negotiable document such as the bill of lading embodying a legal symbol of transferability. True, the problem of transferring rights from the shipper as the first holder of the *right of control and transfer* to an identified buyer is equivalent to the same problem arising under sea waybills, where the technique of irrevocable instructions from the sender to the carrier to deliver the goods to the buyer could be used. But particular difficulties arise, as subsequent transferees are unknown at the time of issue of instructions.

At the same time as the CMI adopted its 1990 Uniform Rules for Sea Waybills, it also adopted Rules for Electronic Bills of Lading.[16] Under these Rules, holding a *Private Key* is considered to equal holding a paper bill of lading. It is defined as any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission. The Private Key is unique to each successive holder and is not transferable by him to somebody else. Instead, according to the CMI Rules the transfer of the holder's Right of Control and Transfer through possessing the Private Key is performed in five successive steps, namely:

- the current Holder notifies the carrier of its intention to transfer its Right of Control and Transfer to a proposed new holder;
- the carrier confirms the notification message;
- the carrier's transmission to the proposed new Holder of information – except the Private Key – as to the goods is electronically recorded;
- the proposed new Holder notifies acceptance of the Right of Control and Transfer;
- the current Private Key is cancelled and new Private Key issued to the new Holder.

Since it is impossible to know in advance whether subsequent transferees are willing and able to communicate electronically, the Rules provide for the option to receive a paper document. Thus, it is possible to opt out of the system prior to delivery of the goods at destination by demanding a paper

16 See K. Grönfors, Towards sea waybills and electronic documents [Gothenburg Maritime Law Association publ. (Vol. 70) 1991, *passim*], J. Ramberg, Sea waybills and electronic transmission [in the Hamburg Rules: a choice for the E.E.C?, Antwerp 1994] pp. 101–115 and L. Railas, The Rise of the Lex electronica and the International Sale of Goods, Helsinki 2004 p. 283–286.

bill of lading from the carrier, that is, a printout of what has been electronically recorded. However, the paper bill of lading replacing the electronic one must contain a statement that it has been issued upon terminating the procedures for EDI under the CMI Rules. Moreover, opting out means that the Private Key must be cancelled, although any rights, obligations, or liabilities already accrued before issue of the paper bill of lading are preserved.

The 1996 UNCITRAL Model Law on Electronic Commerce contains a particular stipulation as to transport documents, reading as follows:

> »**Article 17. Transport documents**
> (1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.
>
> (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.
>
> (3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.
>
> (4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.
>
> (5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.
>
> (6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.«

Stipulations as to electronic communication are not contained in any international convention relating to carriage of goods as yet. However, the UNCITRAL/CMI Draft contains extensive provisions not only relating to electronic communications but also to the possibility of a *controlling party* to give instructions to the carrier while the goods are in transit and to trans-

fer control to another party, as well as to the modalities upon delivery of the goods to the consignee. In principle, it is suggested that anything which is to be in or on a transport document may be recorded or communicated by using electronic communication provided the issue and subsequent use of an electronic record occurs with the express or implied consent of the carrier and the shipper. The use of a negotiable electronic record is suggested to be subject to rules of procedure agreed between the carrier and the shipper or the holder of the rights. Moreover, these rules of procedure should provide for the modalities as to the transfer of the negotiable electronic record to a further holder and how it should be proven that somebody is the holder of the negotiable electronic record.

8.4 Freight forwarder documents

The freight forwarders' world organization, FIATA, has launched a number of documents, all of which play a role for the purpose of linking the contract of carriage or freight forwarding with the contract of sale. The most important document used by freight forwarders worldwide today is the FBL. In view of the importance of ocean bills of lading, FIATA considered it appropriate to create an equivalent document in cases where freight forwarders assumed liability as contracting carriers – primarily for carriage of goods by sea. Traditionally, it has been disputed whether it is open for everyone to issue a bill of lading with the characteristics of the ocean bill of lading capable of transferring rights successively from one party to the other (i.e., with the document's transferability function). Could this, one might ask, be done by contract or is statutory support required?[17]

17 See on this matter de Wit, referring to the orthodox view of some jurisdictions that documents with transferability function are locked into a special category (*numerus clausus*) disallowing other documents merely resting on the intention of the parties p. 257 and pp. 273–286. J. Basedow, Der Transportvertrag, Tübingen 1987 p. 371 states that the »*numerus clausus*» approach constitutes a hindrance in many countries to recognizing documents of title without statutory support. See also J. Ramberg, The Multimodal Transport Document [[C. Schmitthoff & R. Goode eds, International carriage of goods: Some legal problems and possible solutions, London 1988 pp. 1–18] where at p. 5 he criticizes the view that the FBL cannot be an extension of the traditional bill of lading as »it seems somewhat arbitrary to restrict the use of negotiable documents solely to maritime transport if, for some reason or another, negotiable transport documents could serve a useful purpose even for other types of transport». See for an account of the reluctance to accept the creation of rights *in rem* contractually L. Railas, The Rise of the Lex Electronica and the International Sale of Goods, Helsinki 2004 pp. 203–212 and pp. 438–441.

Statutory support exists in some countries. Indeed, it has done so in England ever since 1855 with the Bill of Lading Act, now replaced by the stipulations of the 1992 Carriage of Goods by Sea Act. Moreover, in the United States statutory support is given by the Pomerene Act of 1916[18]. But it must not be forgotten that the ocean bill of lading was recognized as a document of title long before it received statutory support. Further, in any event the promise of the issuer of the bill of lading only to surrender the goods upon presentation and in exchange for the paper bill of lading must be recognized as a promise to anyone – either directly under the contract with the carrier or subsequently upon assignment of the rights under the bill of lading from one party to the other. Thus, for all practical purposes, the rights of the holder of the document would be ensured on the basis of the promise contained in the bill of lading. Yet, there is some hesitation in countries strictly adhering to the doctrine of privity of contract, as the promise made to the first holder of the bill of lading may not necessarily be recognized as a promise effective for the benefit of subsequent holders. However, such an orthodox implementation of the doctrine of privity would run against the interests of international trade. It therefore deserves to be defeated in the same way as it has been defeated in connection with documentary credits where, indeed, an opening bank is permitted to extend a promise to honour its undertaking under the contract with the instructing party to the benefit of the beneficiary.

In any case, with a reservation for the transfer of property issue, there can be no doubt that the FBL contains the same three characteristics as the ocean bill of lading, namely:

- to function as a receipt of the goods;
- to evidence the terms of the contract of carriage, and
- to enable subsequent transfer of the bill of lading by handing it over duly endorsed to a new holder.

As mentioned, freight forwarders traditionally sought to avoid status as common carriers. Nevertheless, a commercial need existed for a document which like a bill of lading would require presentation and surrender in exchange for the goods. Hence, the freight forwarder's certificate of transport (*FCT*) was made available for use. That document stipulates that the goods will be delivered »against surrender of this document properly

18 US Code Title 49 §§ 81–124.

endorsed». However, it also states that »the undersigned do not act as carriers but as forwarders».[19] Additionally, the terms of the FCT follow the general conditions applicable to freight forwarding services in the respective countries where it is used. The freight forwarder would certainly be held to his promise as to the modalities of delivery and the FCT would also presumably have the same transferability function as an ocean bill of lading, although the freight forwarder does not accept carrier liability. The question whether the FCT has the same transferability function as the bill of lading is now more or less redundant after the advent of FBL, which should be used whenever such a transferability function is intended.

The other documents, the freight forwarder's certificate of receipt (*FCR*) and the FIATA Waybill (*FWB*), are similar to waybills used for air and land transport. As with sea waybills, it is necessary to agree on the modalitites of delivery by a contractual stipulation, as there is no statutory support for the estoppel function of the sender's original of the waybill. Instead, under FWB,[20] the consignor may use the option to transfer the right of control to the consignee by a notation in the box of the front page of the FWB. If this is not done, then the consignor, in his capacity as contracting party with the freight forwarder, would retain the right to change his instructions and re-direct the goods to a person other than the buyer. In the same way as the FBL, FWB evidences that the freight forwarder has accepted liability as carrier. If he does not wish to do so, then he would either use his own *house document* where carrier liability is denounced, alternatively the FIATA documents FCT or FCR. The FCR provides that instructions authorizing disposal by a third party can only be cancelled or altered if the original certificate of receipt is surrendered.

8.5 Stoppage of goods in transit

Art. 71 CISG provides that a party may suspend the performance of his obligations if, after concluding the contract, it becomes apparent that the other party will not perform a substantial part of his obligations. As to the seller's right to do so, the rule represents what is known as the seller's right of *stoppage in transitu*. His practical possibilities to exercise this right necessarily becomes impaired after he has dispatched the goods. CISG[21] stipu-

19 Clause 2 on the front page.
20 Clause 4.2.
21 In Art. 71.2.

lates that the seller may prevent the handing over of the goods to the buyer even after dispatch of the goods and even though the buyer holds the document that entitles him to obtain the goods.

However, there is also an important reminder that what has been stated »relates only to the rights in the goods as between the buyer and the seller». As long as the seller under the respective document is entitled to give instructions to the carrier, he would have ample opportunity to do so whenever he is entitled to stop the goods in transit as stipulated in CISG.[22] But what is his position if he has lost that right either by:

- irrevocable instructions under the sea waybill to deliver the goods to the buyer/consignee, or
- surrendering his original of the waybill to the buyer/consignee, or
- transferring the bill of lading duly endorsed to the buyer/consignee?

Such situations involve incompatibility. That is, under the contract of carriage and the transport document the carrier is undoubtedly under a duty to deliver the goods to the buyer/consignee and to nobody else, while the seller is estopped from giving any further instructions to the carrier. But under the contract of sale the situation is different whenever the seller has a right to stop the goods in transit in the relationship between himself and the buyer. Surely, it would be unfair to expose the carrier to any risks involved if he were to depart from his obligation under the contract of carriage.[23]

In principle, there is no reason to resolve the matter differently from the situation where the buyer wishes to estop a bank to which he has given irrevocable instructions to pay for the goods in return for stipulated documents. If the documents are conforming, then, under the doctrine of separability, the bank would have to pay even though under the contract of sale the buyer would have the right to avoid the contract and his obligation to pay for the goods. The same principle should apply when the seller seeks to stop delivery of the goods but has lost the practical possibility to do so by instructions to the carrier. Thus, the carrier would have to honour his ob-

22 Art. 71.

23 See Schlechtriem, p. 530 expressing the view that »the seller must rely on the carrier's voluntary compliance with his instructions» and that »the carrier cannot rely on that obligation (i.e. the buyer's obligation to accept the seller's right under the contract of sale) directly as a defence against the buyer's damages claim». See also, for the same opinion, S.O. Johansson, Stoppningsrätt under godstransport, Stockholm 2001 pp. 373–385 at p. 383.

ligations under the contract of carriage and deliver the goods to the buyer/consignee. In these situations, the only remedy available to the party wishing to stop performance would be to ask a court of law for an injunction restraining the carrier – or the bank, as the case may be – from fulfilling its obligation pending resolution of the rights and obligations under the contract of sale.

8.6 Seller's obligations under Incoterms 2000 Clauses A3 and A8

8.6.1 *Structure of Incoterms 2000*

Clauses A3 and A8 of Incoterms 2000 determine the seller's obligations as to contracts of carriage and insurance (A3) and his obligation to tender documents (A8).

The term *Ex Works* (*EXW*) represents the minimum obligation of the seller, who consequently has no obligation at all as to contracts of carriage and insurance and documents. It is simply for the buyer to take delivery as soon as the goods have been placed at his disposal at the named place of delivery (clauses B4 and A4). It is then for the buyer to decide the destination to which the goods should be carried and conclude contracts of carriage and insurance as appropriate.

The other terms are divided in three categories, with each category indicated by the first letter of the three digits describing the trade term:

- Terms starting with the letter (F) signify shipment contracts where it is for the buyer to contract for carriage (clause B3).
- Terms starting with the letter (C) also signify shipment contracts but where the seller must procure a contract for the carriage of the goods to the named port of destination (clause A3).
- Terms starting with the letter (D) signify destination contracts, where the seller has to contract for carriage in order to fulfil his obligation to deliver the goods at destination.

Although this division of trade terms is clear in principle, commercial practice will also often involve the seller in concluding the contract of carriage under trade terms *FCA* and *FOB*.[24] The trade term FCA is used particularly for the sale of manufactured goods. Here, it is commercial practice for the seller to arrange for the contract of carriage at the buyer's risk and expense and thereupon deliver the goods to the carrier at the named place on the date or within the period agreed for delivery.[25] In accordance with the main principle of the F-terms, the buyer retains the right to conclude the contract of carriage and may inform the seller accordingly. Further, the seller may decline to make the contract and, if he does, he must properly notify the buyer.

8.6.2 *Contracts of carriage and insurance*

The term FOB is used irrespective of the nature of the goods but would undoubtedly be more appropriate for sale of commodities. In such cases, the buyer would normally contract for carriage by nominating an appropriate ship. Indeed, his failure to do so and ensure that the ship arrives on time will result in a premature transfer of the risks.[26] When the ship has been nominated, it is for the seller to deliver the goods on the date or within the agreed period of time at the named port of shipment and in the manner customary at the port on board the vessel nominated by the buyer.[27] The term FAS follows the same principles as apply to FOB but now it is not for the seller to place the goods on board but to place them alongside the nominated vessel at the loading place named by the buyer at the named port of shipment on the date or within the agreed period and in the manner cus-

24 See concerning such practice and the variants of FOB Debattista, Sale of Goods pp. 8–11 distinguishing between »straight», »classic» and »extended» FOB contracts, where the latter variant is different from CIF as the FOB seller is entitled to debit the buyer freight and/or additional charges while, in CIF, such costs are included in the CIF price. Under the »classic» FOB, the buyer would nominate the vessel but the seller would conclude the contract of carriage for account of the buyer. The »straight» FOB may make it difficult for the seller to hold the carrier liable or, conversely, deprive the carrier of the protection available under the contract of carriage as the seller is sitting outside »the charmed circle of privity of contract». But when there is a need to depart from that notion the common law is fortunately flexible enough to permit it as evidenced by *Pyrene Co Ltd* v. *Scindia Navigation Co. Ltd* [1954] 2 QB 402 and *The Athanasia Comninos and Georges Chr. Lemos* [1990] 1 Lloyd's Rep. 277 QB.

25 Clauses A3 and A4.

26 According to clause B5.

27 Clause A4.

tomary at the port.[28] The term FAS would normally require the buyer to charter a ship, since liner shipping companies would receive the goods not alongside the ship but usually in cargo terminals for subsequent loading on board the ship. Although it has not been indicated in FOB A3 Incoterms 2000, the seller may conclude the contract of carriage at the buyer's risk and expense, in the same way as under the trade term FCA when it is commercial practice to do so. This would then constitute a variation of FOB Incoterms 2000 usually referred to as *FOB additional services.*[29] Such a variation of FOB is particularly appropriate for sale of manufactured goods.

Although the C-terms all indicate the port or place of destination, they are nevertheless shipment contracts signifying that the seller fulfils his obligations to the buyer at the port or place of shipment. In essence, contracts under C-terms are the same as contracts under F-terms but with the additional obligation on the seller to conclude a contract of carriage and also, under trade terms CIF and CIP, a contract of insurance. Hence, the point for division of risk between the seller and the buyer (*the FOB-point*) is exactly the same under trade terms FOB, CFR, and CIF. It is important not to be misled by the fact that the destination is mentioned after the C-terms: this does not mean that the seller's obligations are extended until the goods actually arrive at destination. Instead, the buyer would be the beneficiary of contracts made by the seller. Since the seller would have to pay the costs for concluding contracts of carriage and insurance, then the contract could in a commercial sense be similar to a contract concluded on the basis of FOB *plus contracts of carriage and insurance.*[30] However, the important difference would be that under CIF the seller would assume the risk of an increase of the costs added to the FOB price from conclusion of contract of sale until conclusion of the required additional contracts and delivery of the goods on board the ship.[31]

The difference between *CFR* and *CIF* on the one hand, and *CPT* and *CIP* on the other, is in principle the same as the difference between FOB

28 Clause A4.

29 The »classic» or »extended» FOB, see *supra*, note 24.

30 See note 24 on the comparison between »extended» FOB and CIF.

31 As harshly evidenced in the case of *Tsakiroglou & Co. Ltd.* v. *Noble Thorl GmbH* [1962] A.C. 93 where the Sudanese seller did not benefit from the doctrine of frustration to escape his obligation under a CIF contract where his costs increased when he could not get a ship to take goods via the Suez canal which became closed in the war between Israel and Egypt. Instead, he had to contract for a voyage around the Cape of Good Hope. See, for an analysis of the case, J. Ramberg, Cancellation, pp. 177–178.

and FCA. The FOB-point is the relevant point for division of risk of loss of or damage to the goods under FOB, CFR, and CIF. However, under FCA, CPT, and CIP it is for the seller to deliver the goods to the carrier, or, if there are subsequent carriers, to the first carrier for transport to the agreed point at the named place on the date or within the agreed period.[32] As mentioned, under FCA the carrier may be nominated by the buyer or, according to commercial practice, chosen by the seller. It is then for the seller to deliver the goods to the carrier nominated by the buyer or chosen by the seller at the named place on the date or within the period agreed for delivery.[33]

The choice of FCA, CPT, or CIP instead of FOB, CFR, and CIF will depend upon the nature of the goods. The International Chamber of Commerce, in its Model International Sale Contract[34], recommends the choice of FCA, CPT and CIP for contracts of sale of manufactured goods intended for resale. Needless to say, the seller's obligation in connection with concluding the contract of carriage is of paramount importance because, after the seller delivers the goods to the ship or the carrier, the buyer will have to assume the risk until the goods have reached their destination. If something goes wrong, his only remedy lies against the carrier under the terms of the contract of carriage concluded by the seller and, under trade terms CIF or CIP, with a further remedy of claiming compensation under the terms of insurance.

Under C-terms, it is for the seller to contract on usual terms at his own expense for the carriage of the goods to the named port or place of destination by the usual route. Under CFR and CIF it is added that the contract should be for carriage of goods in a seagoing vessel (or inland waterway vessel, as the case may be) of the type normally used for the transport of goods of the contract description. In CPT and CIP the contract should concern carriage of the goods in a customary manner. Thus, CPT and CIP could be used irrespective of the contract of carriage chosen, while contracts of sale on CFR or CIF-terms would invariably oblige the seller to conclude a contract of carriage by sea or inland waterways. The choice of FCA, CPT and CIP is particularly appropriate when the goods are to be carried in containers, since in such cases risk transfer when the goods pass the ship's rail at the named port of shipment[35] is inappropriate. This is because the carrier

32 The A4-clauses of CPT and CIP.
33 The A4-clause of FCA.
34 ICC Publ. 556.
35 As stipulated in clause A5 of FOB, CFR and CIF.

in container traffic would either receive the container on a vehicle arriving at its container terminal or container yard or, alternatively, receive the goods for stowage into containers at the carrier's container freight station.

As to the seller's choice of carriage, reference is made to *usual terms* and *usual route*. In this respect, it should be noted that Art. 32.2 CISG puts more stringent obligations on the seller as »he must make such contracts as are necessary for carriage to the place fixed by the means of transportation appropriate[36] in the circumstances and according to usual terms for such transportation».[37] The reason why the seller's obligation under the C-terms of Incoterms 2000 has been modified is explained by the fact that carriers of goods by sea do not warrant that the vessel is *appropriate in the circumstances*, as their duty is generally reduced to exercising *due diligence* in providing a seaworthy ship. If the buyer wants a particular ship or carrier in order to ensure an appropriate transportation, then he has to agree this with the seller accordingly. A contract subject to CISG would allow the parties to depart from the stipulations of CISG.[38] Thus, a reference to Incoterms 2000 would supersede Art. 32.2.

Although it would be inappropriate to fix a point for transfer of the risk of loss of or damage to the goods to the passing of the ship's rail where the goods are to be carried in containers, it should be observed that the choice of FCA means that the buyer would have to absorb costs in the stage between the seller's handing over of the goods to the carrier until shipment on board. These costs, often referred to as THC (*Terminal Handling Charges*), would have to be considered on concluding the contract of sale so that the price is determined accordingly. In cases where it is difficult to know to what extent THC will be debited, the buyer may wish to require the seller to pay THC.[39]

8.6.3 *Documents*

Clause A8 determines the seller's obligation as to documents. The seller's obligation to procure documents is an important addition to the obligation to deliver goods conforming to the terms of the contract of sale. Thus, the

36 My italics.

37 Schlechtriem, p. 257 restricts the word »appropriate» to »the type of vehicle ... and to the route» and on this understanding Art. 32.2 CISG would comply with Incoterms 2000 as to the seller's obligation to choose the vessel. Cf. Debattista, Sale of Goods p. 139.

38 According to Art. 6.

39 See J. Ramberg [in Incoterms 2000. A forum of experts, ICC publ. 617 pp. 17–18].

seller may be in serious breach of obligation to the buyer under the contract of sale even in cases where conforming goods have been delivered in time for shipment. Therefore, the importance of the seller's obligations under the A8-clauses of Incoterms 2000 cannot be over-emphasized.[40]

As mentioned, it is – at least in principle – the buyer's obligation to contract for carriage under the F-terms. Thus, one would expect that the buyer should obtain the transport document evidencing the contract of carriage directly from the carrier. However, as we have seen, commercial practice often involves the seller in concluding the contract of carriage. In addition, even if the buyer has concluded the contract of carriage, the transport document may be handed over by the carrier to the shipper acknowledging that the carrier has received the goods in apparent good order and condition as described in the document. This will explain why clause A of both FCA and FOB states that the seller must provide the buyer at the seller's expense with the usual proof of delivery of the goods in accordance with A4, which determines how delivery to the carrier is made. Nevertheless, the second paragraph of the A8-clauses indicates that proof of delivery may be the transport document itself. And, if a separate proof of delivery has been obtained from the carrier (such as a mate's receipt) then »the seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage».

In the C-terms it is a different story. Here, as the seller would have to conclude the contract of carriage, he would obtain the transport document, which has to be tendered to the buyer. Under CFR- and CIF-terms the document would traditionally be the *negotiable bill of lading*, the reason be-

40 See, in particular, Debattista, Sale of Goods p. 141 stressing the obligation of the seller to provide continuous documentary cover up to the agreed destination referring to *Hansson* v. *Hamel & Horley* [1922] 2 A.C. 36 and the need to distinguish between a »documentary breach» which may exist quite independently from a breach of non-conforming goods which he refers to as »physical breach» pp. 190–222. As evidenced by *Finlay (James) & Co. Ltd.* v. *NV Kwik Hoo Tong Handel Maatschappij* [1929] 1 KB 400 these breaches give separate rights to rejection which are also independent, see *Kwei Tek Chao* v. *British Traders and Shippers Ltd.* [1954] 2 QB 459. The seller's duty to tender correct documents is, in the same manner as under Art. 13 of UCP 500, subject to the doctrine of strict compliance. See, in particular, *Proctor & Gamble Philippine Manufacturing Corporation* v. *Kurt A. Becher GmbH & Co. K.G.* [1988] 2 Lloyd's Rep. 21 CA. Whether this doctrine of strict compliance is consistent with the principle of fundamental breach under Art. 25 CISG may be subject to some doubt. See, in general, on the interpretation of Art. 25 CISG Schlechtriem, pp. 173–185 and C.M. Bianca & M.J. Bonell, Commentary on the International Sales Law – the 1980 Vienna Sales Convention, Milan 1987 pp. 205–221.

ing that these trade terms are often used for the sale of commodities where it is contemplated that the goods may be sold in transit. If this occurs, then the bill of lading with its transferability function would be used in order to transfer entitlement to the goods, which is implemented by transferring the paper document to subsequent buyers. However, if it is known from the outset that there will be no sale of goods in transit, then other documents may be sufficient. This is indicated in the A8-clauses by the words *unless otherwise agreed*, dispensing with the need for a negotiable bill of lading and the characteristics of that document to »enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer».

If the ultimate consignee is known from the outset, then documents such as *a non-negotiable sea waybill or an inland waterway document* may be sufficient. In all cases, the transport document must cover the contract goods, be dated within the period agreed for shipment, and enable the buyer to claim the goods from the carrier at the port or place of destination. This is specifically set out in the A8-clause of CFR and CIF, while the corresponding provisions of the A8-clause of CPT and CIP have been expressed differently by including further variants of transport documents and without specifically mentioning that they must also cover the contract goods and be dated within the period agreed for shipment. Additional transport documents mentioned include »air waybill, a railway consignment note, a road consignment note, or a multimodal transport document».

All A8-clauses of Incoterms 2000, except clause A8 of EXW – where the seller has no documentary obligation at all – contain the following text relating to the replacement of paper documents by electronic communication: »Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message». This text was inserted already in the 1990 version of Incoterms in the expectation that the replacement of paper documents by electronic messages would increasingly be taking place. However, developments in this respect have been rather slow. CMI presented its rules on electronic bills of lading simultaneously with the 1990 version of Incoterms and, as we have seen, these rules have to some extent been taken into consideration in the UNCITRAL/CMI draft. Preferably, all international conventions dealing with transport of goods should be supplemented with rules relating to electronic communication. This is a matter far too important to be regulated by the traditional segmented approach to transport law, where the need of compatibility between the various rules has been either ignored or down-

graded. The matter of electronic communication would require concerted action, so that in the form of Protocols the same stipulations could be added to all conventions.

CISG[41] stipulates as to the seller's obligation to hand over documents relating to the goods, that he »must hand them over at the time and place and in the form required by the contract». This invites the question – particularly in connection with documentary credits – whether the seller is entitled to a second tender whereby he could adjust the documents if rejected by the buyer or the bank. Art. 34 CISG gives the seller such an opportunity but only if he is able to hand over the documents before the agreed time. In that event, he may, up to that time, cure any lack of conformity in the documents. An exception exists to this right of second tender if it would cause the buyer unreasonable inconvenience or unreasonable expense.[42] Moreover, the buyer retains the right to claim damages as provided in CISG if a second tender would cause him loss. Normally, however, the buyer would not be prejudiced by the seller's correction of documents relating to the goods, such as correction of description of the goods, the price, a certificate of inspection, or exchanging a non-negotiable document for a negotiable one. However, serious difficulties may arise for the buyer if, before correction of the documents, the buyer had concluded or contemplated a resale of the goods to a second buyer.

8.7 Payment modalities

8.7.1 *Payment on open account, contract guarantees, CAD, and COD*

The parties to the contract of sale may have agreed on payment on open account or required demand guarantees or standby letters of credit. If so, no link would exist between the contract of sale and the contract of carriage as to the buyer's payment obligation. However, such a link would appear if the parties agreed that payment should be made in return for documents (*CAD*) or upon delivery (*COD*). In such cases, it would be a breach of contract by the bank or freight forwarder in handing over documents – and by the carrier in handing over the goods – before the buyer's payment of the

41 In Art. 34.

42 See Schlechtriem, p. 273 where the right of second tender appears under the heading »curing lack of conformity».

seller's invoice. Moreover, it is generally held that the carrier commits a breach of contract if he allows the buyer access to the goods for inspection before payment. Conventions dealing with maritime carriage contain no particular stipulations as to these carrier obligations, so that the carrier's liability for breach of contract would fall outside the mandatory regime.

8.7.2 *Liability for failure to carry out instructions*

In non-maritime carriage, both COTIF/CIM and CMR contain particular provisions relating to carrier liability for not observing cash-on-delivery instructions. Thus, COTIF/CIM[43] allows the sender to make the consignment subject to a cash-on-delivery payment not exceeding the value of the goods, while imposing[44] upon the railway a liability »to pay to the sender the amount of any loss sustained by him up to the total amount of the cash-on-delivery payment without prejudice to its right of recovery from the consignee». Similarly, CMR[45] provides that the carrier, if failing to collect the cash-on-delivery charge, »shall be liable to the sender for compensation not exceeding the amount of such charge without prejudice to his right of action against the consignee». In practice, these provisions are not easily implemented if understood as imposing a liability on the carrier to fully compensate the sender for the inconvenience following from the carrier's breach of contract. The sender would have to prove his loss, which normally can only be done where the consignee/buyer is proven to be insolvent and incapable of paying the sender/seller.

Hence, as a practical matter, the sender's position when he has to chase the buyer for the amount which should have been collected by the carrier is not equivalent to the position he would have been in if the instructions had been correctly carried out. Thus, it is sometimes suggested that the carrier ought to pay the amount he has failed to collect in return for an assignment by the sender of his right against the consignee.[46] But, in any event, the carrier should have the possibility to prove that the sender has not incurred any loss corresponding to the amount which should have been collected (e.g.

43 In Art. 19.1.

44 Art. 19.3.

45 Art. 21.

46 See D.J. Hill and A.D. Messent, CMR: Contracts for the International Carriage of Goods by Road, London 1984 p. 119, where it is pointed out that the English and French texts of Art. 21 differ. The French text would give the instructing party better protection but the English text supporting the view that the claimant must prove his loss is preferred.

where the consignee/buyer had the right to reject the goods as non-conforming). Nevertheless, it is suggested in authoritative commentaries to COTIF/CIM that it is for the sender always to prove his loss.[47] In determining what the carrier is obliged to do, national law applies.[48]

In case the services of a freight forwarder fall outside the mandatory carrier regime of COTIF/CIM or CMR, his failure to follow instructions from his customer – including failure to follow instructions to require payment in cash before releasing documents or the goods to the consignee – would be considered a breach of contract normally subject to the general monetary limit of his liability as stipulated in the applicable general conditions.

8.7.3 *Documentary credits*

Particularly in the sale of commodities, or when the parties have not established an ongoing commercial relationship, it is customary that the seller wishes to be paid by a bank – usually in his own country – when presenting documents to the bank as agreed. The buyer may at the same time obtain credit from his bank with or without the bank using the goods in transit as security for the credit pending the arrival of the goods at destination. The system now described is called a *documentary credit*, since payment is to be made against the presentation of documents, but is also referred to as *letter of credit* (*L/C*). The practice in connection with this method of payment and security is almost invariably based upon the Uniform Customs and Practice for Documentary Credits, now in a version from 1993 called *UCP 500*.[49] Compared with the protection available to the seller by his right of withholding delivery of the goods or documents controlling their disposition until the buyer pays for the goods (cf. Art. 58 CISG), the documentary

47 See, e.g., Béla von Nánássy, Das Internationale Eisenbahnfrachtrecht, Wien 1956 p. 384, J. Wick, Le droit international des transports par chemins de fer, Neuchâtel, 1976 p. 194 as well as, as to the interpretation of CMR Art. 21, W. Muth & H. Glöckner, Leitfaden zur CMR, Berlin 1983 p. 154.

48 See B. Mercadal, Conclusion of the contract of carriage: the role of the consignment note and the general conditions (Arts 4, 5, 6, 7, 9, 11, 21) [in J. Theunis ed., International Carriage of Goods by Road (CMR), London 1987] pp. 31–42] at p. 38. Reference is made to the decision by the German BGH, reported in ETL 1983.32, where the acceptance of a cheque by the carrier was insufficient, and the contrary view appearing from the French cases BT 1957.127 and BT 1983.183.

49 ICC Publ. No. 500.

credit gives the seller further protection. That is, he does not have to wait until the goods or the documents are presented to the buyer at destination, with the risk that the buyer may not appear to take delivery. Instead, he may be paid on dispatch of the goods from the country of exportation, provided he is able to present the correct documents to the bank.

When the parties agree on a documentary credit to be opened by the buyer for the benefit of the seller, it is important that they specify as precisely as possible in their contract which documents the seller must present to the bank in order to be paid. But it is also important that they bear the nature of the documentary credit in mind and refrain from instructing the bank to control matters relating to the transaction between them and which, from the viewpoint of the bank, would have nothing to do with the documents as such. In order to function properly, the documentary credit, as for that matter any other type of commercial guarantee, should in principle be kept separate from the underlying transaction.[50] Otherwise, the bank would in fact become a kind of arbitrator to resolve disputes between sellers and buyers, which would delay payment to such an extent that the service would become unattractive. That said, it follows that the parties in their contract should only specify such documents as the buyer needs to ensure that the seller has fulfilled his main obligation to hand the goods over for carriage or make them available to the buyer in the manner agreed. Thus, UCP 500 stipulates[51] that instructions should be »complete and precise» but that »banks should discourage any attempt ... to include excessive detail in the credit ...».

Once the parties have agreed in their contract of sale as above, it is for the buyer to open a credit in accordance with the terms of the contract. If the buyer fails to do so at the agreed time, then this would constitute a breach of his payment obligation (cf. Art. 54 CISG). It is important for the seller that the buyer opens the credit in such time that the seller may prepare the documents and present them to the bank before expiry of the credit. Therefore, the seller would usually require the buyer to open the credit before a specified time (e.g., 30 days before the agreed date of delivery as under the ICC Model International Sale Contract[52]).

50 The doctrine of separability: UCP 500 Art. 3.

51 Art. 5 (a).

52 Clause 5.3.

The required documents depend upon the trade term chosen by the parties.[53] In a CIF sale, the documents would include the invoice, the bill of lading, and the insurance policy. In addition to this, the buyer may wish to ensure that the goods conform to the contract of sale by requesting a certificate of inspection. The transport documents, of course, are of decisive importance and should have such characteristics that the seller is estopped from controlling the disposition of the goods[54] once the transport document has been surrendered to the bank. A bill of lading would qualify for that purpose and also any other document with irrevocable instructions for delivery of the goods to a named person. In this context, it is important to observe the distinction between a sea waybill with and without such irrevocable instructions.

Under UCP 500, in relation to the bank the buyer becomes an applicant for the credit and the seller a beneficiary. It appears from UCP 500 that the banks expect complete and exact instructions[55] and that the bank undertakes to examine the documents with *reasonable care* in order to ascertain that they *on their face* conform to such instructions.[56] But the banks assume no liability for the genuineness of the documents or their legal characteristics. In particular, they are not responsible for checking the actual condition of the goods, such as quantity, weight, quality, packaging, or value. Again, it is important to bear in mind that banks are not concerned with the underlying transactions between sellers and buyers and that their attention is focused on the documents and nothing else. The banks are not responsible for performance of the seller's obligations under the contract of sale or for obligations of shippers, carriers, forwarders, insurers, or other persons involved in implementing the contract of sale.[57]

Nor are the banks concerned with any other contracts entered into between the applicant and the beneficiary, or between other parties, even if the documentary credit somehow refers to such contracts. It appears from UCP 500[58] that the documentary credit is separate from these underlying transactions. That being so, one might query whether it is wise for the buyer to instruct a bank to pay when he still risks not obtaining the goods in conformity with the contract of sale. Much will depend upon the type of

53 See the Incoterms A8-clauses.
54 In the sense of Art. 58 CISG.
55 Art. 5.
56 Art. 13.a.
57 Art. 15.
58 Art. 3.

documents that the bank is instructed to collect before payment. However, no matter how careful the buyer may be when stipulating the required documents, he still risks finding himself left with a right of action against the seller for breach of contract. At worst, as has happened in some cases, he may find that the ship and goods as evidenced by a forged bill of lading did not exist. So, it is appropriate to repeat that a contract never becomes any better than the contracting parties and that buyers should be careful not to become involved with unreliable parties.

Since the buyer should at least enjoy the protection of the documents that he has instructed the bank to collect, it follows that the banks – although their duty is limited to checking the documents on their face – have to fulfil that obligation strictly (*the doctrine of strict compliance*).[59] Or, as was said in a leading English case:

> There is no room for documents which are almost the same, or which will do just as well ... if it (the bank) does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs form the conditions laid down, it acts at its own risk»[60]

The banks, acting as they should under the doctrine of strict compliance, may sometimes be criticized by their customers for being too ambitious when pointing out discrepancies of no or little relevance. However, it seems that this is an unavoidable consequence that follows from the very nature of the service. In practice, though, the zealous control of the banks results in an appalling number of cases where the documents fail exactly to conform to instructions. In many cases, it would be possible for the bank to exercise its discretion according to UCP 500[61] to ask the applicant for a waiver of a discrepancy and obtain the approval of the applicant so that documents with minor and presumably irrelevant discrepancies would be accepted. However, when the paying bank informs the issuing bank, and that bank in turn asks the applicant, it may well be that the applicant would exploit the situation by requesting a discount of the price or some other benefits from the seller. If there is no time to communicate with the issuing bank and the applicant, then the paying bank may still pay *under reserve,* particularly if the beneficiary is a reputable customer of the bank. If the applicant rightfully complains about the discrepancy after payment has

59 Cf. *supra* note 40.

60 *Equitable Trust Co. of New York* v. *Dawson Partners Ltd.* (1927) 27 Ll.L.R. 49 at p. 52.

61 Art. 14.c.

been made in this way, then the bank may claim reimbursement of its payment to the beneficiary.

The contractual relations in a documentary credit are rather complicated. First, there is a contractual relation between the applicant and the bank accepting the opening of the credit to the benefit of the beneficiary. The instruction to the bank might be revocable or irrevocable. If the instruction to the bank does not clearly express anything in this respect, the instruction is considered to be irrevocable (according to UCP 1983[62], the presumption was the opposite). If the contract of sale obliges the buyer to open an irrevocable documentary credit but the buyer nevertheless asks the bank for a revocable credit, then this would constitute a breach of the buyer's payment obligation (cf. CISG Art. 54). This, however, does not concern the bank, which is only obliged to follow instructions given and thus would have to comply with the buyer's revocation. It is therefore important for the seller to check as early as possible that the instructions to the bank conform to the terms of the contract of sale.

The next stage, after the documentary credit has been issued, follows when the issuing bank instructs another bank to notify the beneficiary. This instruction establishes a contractual relationship between the issuing and the advising banks. The latter bank, however, has no independent duty to the beneficiary to pay, since it only acts as instructed by the issuing bank. However, with the advising bank notifying the beneficiary that an irrevocable documentary credit has been opened in his favour, a contractual relationship is established between beneficiary and *issuing* bank. A contractual relationship between the *advising* bank and the beneficiary will only be established if that bank confirms the credit.[63] When the advising bank confirms the credit, the beneficiary will in the first place require payment from the confirming bank. However, if payment does not materialize, then he would turn against the issuing bank, since both banks are liable to pay him jointly and severally. The practice of getting a documentary credit confirmed as above might be particularly appropriate when the seller has reason to expect problems in the country where the credit has been issued. If, for instance, the issuing bank were prevented by a governmental prohibition from reimbursing the bank that confirmed the credit, then the prohibition may constitute an exemption of liability for the issuing bank. This

62 Art. 6.c.
63 Art. 9.b.

would only be available to the confirming bank if a governmental prohibition impeded that bank from paying as well.

The instructions to the bank have to specify a date and a place for presentation of the documents.[64] In addition, a documentary credit requiring a document of transport should also stipulate a period for presentation of that document from the date of shipment.[65] If no such period of time has been stipulated, banks should reject transport documents presented later than 21 days after the date of shipment (*stale documents*). The documents must, of course, be presented before the expiry date of the credit.

Traditionally, as we have seen, the bill of lading has been the most important document in documentary credit transactions. It was not until the 1983 version of UCP that other types of documents could also be accepted for carriage of goods by sea. In any event, it must appear from the document that it has been issued by a carrier, or a named agent for or on behalf of the carrier, and that the carrier has received the goods for carriage.

In UCP 500,[66] sea waybills are mentioned as acceptable but this requires that they have been mentioned in the instructions to the bank. It is important for the buyer only to accept a sea waybill if it appears from the document that the seller is estopped from controlling the disposition of the goods. Moreover, the issuing bank has to be instructed accordingly, since UCP 500 make no distinction between sea waybills with or without irrevocable instructions to the carrier to deliver the goods to the named consignee. So, the buyer has to specifically instruct the bank to require a sea waybill with irrevocable instructions to deliver the goods to the person named as consignee/receiver.

UCP 500 also contain particular stipulations as to multimodal transport documents,[67] air waybills[68], waybills for road and rail carriage as well as documents for carriage on inland waterways[69] and documents for carriage by courier or mail.[70]

UCP 500 clarify that, unless the instructions to the bank provide otherwise, the bank will only accept such documents issued by freight forwarders which show that the freight forwarder has undertaken the carriage in the

64 Art. 42.
65 Art. 43.
66 Art. 24.
67 Art. 26.
68 Art. 27.
69 Art. 28.
70 Art.29.

capacity of carrier or multimodal transport operator.[71] This, as we have seen, is the case with FBL and FWB but not with FCT and FCR.

As to bills of lading, it is stipulated that, unless otherwise agreed, it has to be a bill of lading evidencing shipment onboard (*onboard bill of lading*[72]). The ship's rail has traditionally been understood as the dividing line between the seller's and the buyer's functions, costs and risks. It is therefore understandable that the *onboard bill of lading*, and not the *received for shipment bill of lading*, is stipulated as the main rule in UCP 500. If the seller, upon handing over the goods to the carrier, has been given a received for shipment bill of lading, this can be transformed into an onboard bill of lading by a statement on the bill of lading that the goods have been loaded on board. Moreover, bills of lading are usually issued in several originals, in which case the buyer should secure the possession of all originals, so that he does not risk competition with other holders. UCP therefore stipulate that, if more than one original has been issued, a full set must be delivered to the bank.[73]

According to UCP 500,[74] bills of lading containing an indication that it may be subject to a charterparty are acceptable,[75] provided the instructions to the bank require or permit such documents. This being so, the buyer should ensure that a charterparty bill of lading will give him at least the same rights against the carrier as a Hague Rules bill of lading would have done.

A particular problem arises where the documentary credit stipulates that transhipment is prohibited. Such instructions to the bank are common, since transhipment may expose the goods to risks in connection with additional cargo handling and, at worst, the goods may become lost or remain at the place of transhipment. If the instructions do not contain a prohibition against transhipment, then banks may accept transport documents indicating that transhipment will take place but only if the whole carriage is covered by the transport document concerned (e.g., a *through bill of lading*). This is the important principle of continuous documentary cover.[76]

Particular problems arise where goods are to be carried in container traf-

71 Art. 30.

72 Art. 23.a.ii.

73 Art. 23.a.iv.

74 Art. 25.

75 See as to the requirements of the contract of sale in this respect Debattista, Sale of Goods pp. 178–184.

76 Art. 23.c and 24.c.

fic or roll on/roll off traffic. The fact that the container, truck, trailer, semi-trailer, or railway wagon is lifted on board the ship or rolls on the ferry after a preceding land carriage does not mean that the goods as such are *transhipped*, since they remain in the container or on the vehicle. In a sense the ship or the ferry, in case of vehicles moving on and off, could be regarded as a bridge across the water. Presumably, it is not this type of *transhipment* that buyers are concerned about. UCP 500 contains specific stipulations for cases when the goods are to be carried in containers or on trailers or barges. In these cases, even if the instructions to the bank contain a prohibition against transhipment, the banks would accept documents showing that transhipment of the container, the trailer, or the barge may occur. However, this is always provided that the document covers the whole transit[77]. The same principle applies to multimodal transport documents[78]. In addition to this it is stipulated that the banks, in spite of a transhipment prohibition, may accept such documents which in the printed text give the carrier a right to tranship the goods in certain cases, *transhipment clauses*. Since practically all transport documents include these transhipment clauses, a prohibition for the banks to accept such documents would otherwise have defeated the documentary credit service entirely.

As mentioned, through documentary credit the buyer obtains reasonable security that the seller has fulfilled his main obligation to hand over the goods for transmission to the buyer. This, under most jurisdictions, is further secured by the mandatory obligation of the carrier to check the apparent good order and condition of the goods.

If, when checking the goods, the carrier notes that they do not conform to their description in the bill of lading, he is obliged to enter a notation to this effect on the transport document. If this is done the transport document is regarded as *unclean*. According to UCP 500,[79] the banks would then reject the transport document unless the instruction to the bank expressly declares that notations of the type entered in the transport documents are acceptable. This may, for instance, be the case where the goods are to be carried in *used drums*, which then should be an acceptable notation on the transport document. In fact, the definition of *a clean transport document* in UCP 500[80] stipulates that a document is clean when it »bears no

77 Art. 23.d, 24.d and 28.d.
78 Art. 26.b.
79 Art. 32.b.
80 Art. 32.a.

clause or notation which expressly declares a defective condition of the goods and/or the packaging». It could be argued that the mere fact that *used drums* appears as a notation on the transport document does not amount to such an express declaration of a defective condition of the goods and/or the packaging. Nevertheless, it is certainly appropriate for the parties to give the bank explicit instructions in this respect. Sometimes the instructions to the bank state that the documents must be *clean*. This, however, does not add anything to the obligation of the bank to reject *unclean* transport documents.[81] In spite of the above definition of a *clean transport document* in UCP 500,[82] disputes often arise as to the importance of various notations on transport documents. It is to be expected that banks may not be inclined to give the seller the benefit of doubt and that they will reject documents with notations regarding the goods unless the buyer has in advance instructed the bank, or subsequently agrees, that they may be accepted.

The buyer's co-operation may be important to the seller in several respects. CISG[83] defines the buyer's obligation to take delivery by distinguishing between such acts as could reasonably be expected of him to enable the seller to make delivery on the one hand and the taking over the goods on the other hand. An illustration of an act clearly needed to enable the seller to make delivery would be the buyer's obligation to nominate the ship under the trade terms FAS and FOB. The buyer's failure to do so would constitute a clear breach of contract. Indeed, as we have seen, this could also be considered non-performance of his payment obligation. A documentary credit under a FOB sale would require the seller to present an onboard bill of lading. This, of course, becomes inaccessible if the buyer fails to nominate the ship. In such a case, the seller's right of action in damages against the buyer may be cold comfort when the buyer is difficult to reach or has become insolvent. The seller may therefore in such a case be tempted to deviate from the FAS- or FOB-term and contract for carriage himself and thereby obtain the bill of lading needed to collect payment under the documentary credit. As mentioned, this possibility is not recognized under FAS and FOB, as distinguished from FCA. Nevertheless, the seller may argue that he merely complied with his general duty to take measures to mitigate his loss.[84] Indeed, in any event the seller may be prepared

81 UCP 500 Art. 32.b.
82 Art. 32.a.
83 In Art. 60.
84 As he is obliged to do under Art. 77 CISG.

to take the risk connected with obtaining the bill of lading as above even if he had to pay freight for later re-imbursement by the buyer.

The seller may well succeed in fulfilling his delivery obligation when the buyer does not appear to take over the goods – such as when the seller merely has to make the goods available at his own premises or some other particular place. However, the buyer's failure to take delivery may give rise to considerable inconvenience. Provided the goods have been duly identified, then the risk of loss of or damage of the goods would pass to the buyer according to Incoterms 2000 as soon as the goods have been made available to him. Moreover, in any event risk passes when the buyer commits a breach of contract by not taking delivery.[85] Nevertheless, the seller facing the need perhaps to institute an action in damages against an insolvent buyer may have to insure the goods and thus incur costs that may or may not later on be reimbursed by the buyer. In particular, extra costs may occur for storage and, at worst, demurrage payable to carriers when the transport vehicle is not released from the goods, or when containers are not redelivered to the carrier in time.[86]

It should particularly be noted that there is a remaining obligation on the buyer to take over the goods from the transport vehicle under the C-terms of Incoterms. Under some D-terms, the co-operation of the buyer may not be necessary when the seller fulfils his delivery obligation by reaching a certain agreed point (*DAF*, *DEQ*). In some cases, however, the co-operation of the buyer may also be necessary under D-terms, since the buyer has to receive the goods from the carrier engaged by the seller (*DES*, *DDU*, or *DDP*). Although CISG does not specifically deal with the obligation of the buyer to take delivery in these situations, failure to do so could constitute a breach of contract. For this, the buyer would be responsible under CISG, in particular by having to pay damages for any extra costs incurred by the seller.

The above doctrine of strict compliance may cause banks to reject documents which, according to the contract of sale, would not be seen as non-conforming. It is not for the bank to consider what is required under the contract of sale since, according to the doctrine of separability expressed in UCP 500,[87] the bank is not bound by or concerned with the contract of

85 Art. 69.1 CISG.

86 See K. Grönfors, Container i retur [Festskrift J. Ramberg, Stockholm 1996 pp. 185–194] at p. 191 *et seq.*

87 Art. 3.

sale. Therefore, the situation might arise where the seller does not obtain payment under the documentary credit but nevertheless is entitled to require payment from the buyer. If the buyer does not waive the discrepancy where the document conforms with requirements of the contract of sale but not with the instructions given to the bank, then the question arises how to resolve the incompatibility between the contract of sale and the instructions to the bank. One would then have to determine whether the buyer may avoid the contract merely because the agreed mode of payment failed due to the seller's incapability to present the document requested by the bank or whether, alternatively, the seller could insist upon implementation of the contract and the obligation of the buyer to pay in return for a document conforming with the stipulations of the contract of sale.

This question would have to be resolved by applying the principle of Art. 25 CISG on fundamental breach. First, a breach by the seller must be established. It may be that the reason why the bank rejected the document was because the buyer in the instructions to the issuing bank failed correctly to describe the document(s) required according to the contract of sale. If so, the breach would be on the buyer and not on the seller. However, if the document which the bank has been instructed to request from the seller failed to conform with the contract of sale, then one would have to decide whether the discrepancy amounted to a fundamental breach.

It may be that the discrepancy has no or very little importance for the buyer and that, if he suffers any loss as a result of the discrepancy, his remedy would be limited to compensation for that loss according to the principles of Art. 74 CISG. In Art. 25 CISG the breach is considered to be fundamental »if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract«. A minor discrepancy in a document that the seller is obliged to tender to the buyer would normally not amount to such a substantial detriment. But, even if there is a material discrepancy, this may not be sufficient if »the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result«. Nevertheless, if the seller knew that the buyer had entered into a contract with a second buyer or that such a further sale was contemplated by the buyer perhaps also under a documentary credit to be opened by that second buyer on identical terms, then the requirements of Art. 25 CISG on fundamental breach may well be fulfilled.

If the documentary credit has expired because of discrepancy of the document(s), then the seller has no right to insist upon a renewal of the docu-

mentary credit where he would be given the opportunity to get paid by corrected document(s). In most cases, his right to a second tender of documents would become unavailable under Art. 34 CISG, since the time for presentation of the document(s) would have expired. But if the buyer were unable to avoid the contract in the absence of the seller's fundamental breach and the parties failed to agree on any mode of payment, then one would have to apply Art. 58 CISG, which could take effect in the absence of any particular agreement as to payment between the seller and the buyer.

So, if the discrepancy relates to the transport document, then it would be sufficient, if the goods had not yet been dispatched, for the seller to tender to the buyer the document controlling disposition of the goods and obtain payment of the price in return for such a document[88]. If the goods had been dispatched, then the seller would[89] request payment against handing over the goods, alternatively a document enabling the buyer to take delivery from the carrier. As we have seen, a negotiable bill of lading, a straight bill of lading, or a sea waybill with irrevocable instructions to deliver the goods to the buyer would suffice for the seller to request payment. If the goods had already reached destination, then the seller may either make the goods available for the buyer to take delivery, alternatively provide him with such a document which would be required to take delivery from a carrier or a warehouse. In the latter case, the document must, as required by the contract of sale and Incoterms 2000, cover the contract goods and enable the buyer irrevocably to take delivery without having to pay to the carrier or the warehouse any amount in addition to what is required under the contract of sale.

8.8 Clearing goods for export and import

8.8.1 *Obligations under Incoterms 2000 clauses A2 and B2*

Incoterms 2000, in the A2- and B2-clauses, deal with obligations to clear goods for export and import and, where applicable, also procure the transit of goods through any country. With two exceptions, it is for the seller to take care of the export clearance of goods and for the buyer to take care of import clearance. The first exception is EXW, which represents the minimum obligation of the seller. That obligation does not include the obliga-

88 Art. 58.2.

89 Under Art. 58.1.

tion to clear goods for export. Instead, clause A2 of EXW stipulates that »the seller must render the buyer, at the latter's request, risk and expense every assistance in obtaining, where applicable, any export license or other official authorization necessary for the export of the goods».

The other exception applies under DDP Incoterms 2000 clause A2 and B2. As follows from the very name of the term DDP (*for Delivered Duty Paid*), it is for the seller to obtain at his own risk and expense not only the export license but also the import license and any other official authorization or other documents and to carry out, where applicable, all customs formalities necessary not only for export of the goods and for their transit through any country but also for their import. The buyer, according to clause B2, must render the seller at the latter's request, risk and expense every assistance in obtaining, where applicable, any import license or other official authorization necessary for the import of the goods. The obligations to clear the goods for export and import are not limited to an obligation of best efforts. This means that, in principle, whenever such a duty falls upon a party, the risk of non-performance will rest upon that party. In this sense, the nature of the obligation follows not directly from Incoterms 2000 but from the law applicable to the contract of sale.

8.8.2 *Exemptions from liability for failure to clear goods*

If CISG applies, then non-performance by a party to clear the goods through customs may exceptionally be excused through the application of Art. 79 on exemptions. However, it must then be proven that the failure to perform »was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences». Normally, it should be possible to foresee difficulties in connection with clearing of the goods for export, through third countries or for import. However, in some cases unexpected events – such as war, warlike operations or terrorism, or aggravated tension in trade relations between countries – may make it difficult to foresee the impossibility to get licenses or permissions needed for the export, transit, or import of goods. If so, Art. 79 CISG may provide the non-performing party with an exemption of liability.

However, in view of the importance of this matter and similar impediments for the performance of the contract, one would usually find clauses

agreed between the parties in the contract of sale which are more elaborate than Art. 79 CISG. An illustration is clause 13 on force majeure in the ICC International Sale Contract Part B, which provides more exemptions than Art. 79 CISG. This clause does not, as Art. 79 CISG, merely deal with exemption from liability to pay damages but also relieves the party affected by the impediment from his obligation to perform as long as the impediment lasts. And if the impediment subsists for a longer period of time, then either party would be entitled to terminate the contract upon notice. The period in clause 13.4 is set at six months.

Similarly, in the general ICC force majeure clause of 2003[90] a party may be excused from the duty of performance but here no period has been determined for termination in case of long lasting impediments. Instead, each party may terminate the contract according to the same principle as applies according to CISG dealing with the situation in case of breach of contract.[91] Thus, if a long-lasting impediment causes such detriment to either party as substantially to deprive him of what he is entitled to expect under the contract, then the right of termination would be available. Moreover, the 2003 ICC force majeure clause enumerates, as is customary, some events that qualify as force majeure events. But even if a party may point at an event of the type listed in the clause, it would be necessary for him to prove that such event, or its effects, could not have been avoided or overcome. However, it would be presumed that a listed event was beyond control and reasonably unforeseeable.

90 ICC Publ. 650.

91 Art. 25.

9 Risk distribution under contracts of sale and contracts of carriage

9.1 Risk transfer at delivery point under Incoterms 2000 clauses A4/B4 and A5/B5

Transfer of the risk of loss of or damage to the goods is dealt with in the A4/B4 and A5/B5-clauses of Incoterms 2000. Importantly, this concerns the risk of physical loss of or damage to the goods and does not include the risk of non-performance. Incoterms 2000 are not concerned with the consequences of breach of contract. These have to be determined according to the applicable law and the terms of the contract of sale.

A seller under a contract on FOB terms is frequently required by the contract of carriage concluded by the buyer or by the seller as agent for the buyer to hand over the goods to the carrier at a cargo terminal or a container freight station. This would involve bearing not only continuing risk for loss of or damage to the goods until they have passed the ship's rail, but also the risk of non-performance of the contract until the FOB point has been reached. This could be avoided by choosing FCA. Similarly, a seller on CFR or CIF terms would be under a continuing risk after handing over the goods to a carrier under the contract of carriage concluded by the seller for the benefit of the buyer until the same FOB point has been reached. If there is loss of or damage to the goods, he would at least be able to seek recourse from the carrier as his own contracting party. However, he is not relieved from the non-performance risk, which may impose upon him an obligation to find substitute goods in time in order to avoid consequences of breach of contract under the contract of sale. The risks of the seller could be modified by the choice of CPT or CIP, as the risk point is now when the goods are handed over to the first carrier in case of a transport before the FOB point.

As EXW represents the minimum obligation of the seller, then according to clause A4 he need only place the goods at the disposal of the buyer

at the named place of delivery, not loaded on any collecting vehicle, on the date or within the period agreed or, if no such time is agreed, at the usual time for delivery of such goods. If no specific point has been agreed within the named place, and if there are several points available, then the seller may select the point at the place of delivery which best suits his purpose. According to A5, the risk is transferred to the buyer when the goods have been placed at his disposal as above. The seller, according to A7, must give the buyer sufficient notice as to when and where the goods will be placed at his disposal. However, the seller's notice is not required for the risk to pass. In this respect, EXW Incoterms 2000 differ from Art. 69 CISG. According to Art. 69.1 CISG, which deals with the case where the buyer should take delivery at a particular place, the risk does not pass merely because the buyer fails to take over the goods when they are placed at his disposal. It is also required that he commits a breach of contract by failing to take delivery.

This stipulation may be appropriate where the seller has the goods under his immediate control and presumably also adequately insured. Nevertheless, Incoterms 2000 has retained the traditional simplified transfer of risk at the time where the seller, as agreed in the contract of sale, places the goods at the disposal of the buyer. It is assumed that the buyer even before that time would have arranged appropriate insurance against the risk of loss of or damage to the goods effective from the agreed time for the seller's placing the goods at the disposal of the buyer. Hence, it is not, as required by Art. 69.2 CISG, necessary that the buyer is aware of the fact that the goods have been placed at his disposal. It is sufficient that he knows that the goods may be put at his disposal at the agreed time and, further, that the goods are in fact made available for him as agreed. Incoterms 2000 replace the stipulation of Art. 69 for the transfer of the risk, since an agreement to apply Incoterms 2000 constitutes a valid departure from the stipulations of CISG.[1]

Both under Incoterms 2000 and CISG the risk may pass to the buyer before delivery. But this premature passing of the risk is under CISG subject to the general requirement that the risk does not pass until »the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise».[2] A similar principle is expressed in Incoterms B5 stipulating as a requirement for the

1 According to Art. 6 CISG.
2 Art. 67.2 CISG.

transfer of the risk »that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods».

Incoterms 2000 do not, as Art. 69.1 CISG, when the goods are to be taken over by the buyer require that »he commits a breach of contract by failing to take delivery». The risk transfer under Incoterms 2000 occurs as soon as the seller has fulfilled his delivery obligation in accordance with the A4-clause. This is referred to in A5 on transfer of risks and, specifically under FOB, CFR and CIF, the risk does not pass »until such time as they (the goods) have passed the ship's rail at the port of shipment».[3] Hence, under Incoterms 2000 it is not necessary for the risk to pass that the buyer commits a breach of contract. If the contract of sale allows the buyer a period within which, at his option, he may take delivery any day during that period, then risk passes on the first day of the period provided the goods under EXW are placed at his disposal at such time. Under Art. 69.2 CISG, this principle only applies if the buyer is bound to take over the goods at a place other than the seller's place of business. In that case, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

As to the requirement that the goods must be *clearly identified to the contract* for the risk to pass, Art. 67.2 CISG stipulates that identification may be made by markings on the goods, by shipping documents, by notice given to the buyer, or otherwise. Incoterms, in the B5-clause, instead refer to »that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods». Thus, the requirements for identification are basically the same but the words *appropriated to the contract* are broad enough to include situations where the goods have been shipped in bulk intended for different consignees. In such cases, a part of the bulk may be covered by a bill of lading and, in this sense, that part could be *appropriated* to the contract. So, if the whole bulk is lost or damaged, then each consignee would have to bear its loss in proportion. This is generally held to be the correct solution for the transfer of risk under shipment contracts. However, the word *identified* invites the conclusion that there can be no transfer of the risk until each part has been separated from the bulk, which could normally only be done when the ship has arrived at destination. This matter has been considered sufficiently important

3 A5.

to require an amendment of the English Sale of Goods Act in order to support the above conclusion.[4]

Notably, neither CISG nor Incoterms 2000 deal with transfer of property rights (*transfer of title*). Unfortunately, transfer of property rights are dealt with according to widely different concepts and rules in different jurisdictions and it has therefore been impossible to achieve worldwide consensus.[5] Suffice it to mention the frequent clauses whereby the unpaid seller retains title to the goods until paid (*Romalpa* clauses).[6] In some jurisdictions, such clauses are not always given the intended effect to protect sellers against the risk of losing the goods to other creditors in the event of the buyer's insolvency. True, the principle of risk and transfer of property rights may coincide when possession of the goods, or documents controlling their disposition, passes from seller to buyer. However, this is not necessarily the case. A reminder to this effect appears in Art. 67.1 CISG: »(t)he fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk».

As we have seen, it has been possible in some cases through Incoterms 2000 to add specificity to the general principles of CISG as to delivery of the goods. However, such specificity would have to rest on consistent worldwide practice, which is not always possible to ascertain. As to sale of manufactured goods, it has been possible in FCA clause A4 to distinguish between the case where the named place is the seller's premises and other cases. Thus, when the seller's premises are the *named point*, delivery is completed »when the goods have been loaded on the means of transport provided by the carrier nominated by the buyer or another person acting on his behalf». In other cases, however, it is sufficient that the goods are placed at the disposal of the carrier, or another person nominated by the buyer or chosen by the seller, on the seller's means of transport not unloaded. The reason is that, in these cases, the seller's own loading facilities are unavailable and carriers would customarily take care of the unloading of containers or goods from arriving vehicles.

4 See, as to claims to goods forming part of a bulk, R. Goode, Commercial Law, Oxford 1995 pp. 228–237.

5 See the survey by A. v.Ziegler, J.H. Ronøe, C. Debattista and O. Plégat-Kerrault, Transfer of Ownership in International Trade, ICC publ. 546, Paris-New York, 1999.

6 The clause is named after the case *Aluminium Industrie Vaassen BV* v. *Romalpa Aluminium Ltd* [1976] WLR 676. See on such clauses Debattista, Sale of Goods pp. 100–101, Retentions of Title, ICC publ. 501 and A. Holmqvist-Persson, Förbehållsklausuler. En studie om en säkerhetsrätts nuvarande och framtida ställning, Stockholm 1998.

The same principle applies generally according to the DDU and DDP clause A4,where it is enough that the goods are made available to the buyer »on any arriving means of transport not unloaded, at the named place of destination on the date or within the period agreed for delivery». However, it is not possible to ascertain a consistent worldwide practice as to cases where it is for the buyer to take delivery at the carriers' cargo terminal or from independent terminal operators. Hence, there is no specific rule for these cases in the DDU and DDP clause A4. Instead, one would have to find out whether the parties to the contract of sale have established any practices between themselves or whether there is a usage that the parties knew or ought to have known about at the time of concluding their contract (cf. Art. 9 CISG).

As to sale of goods under C-terms, it is impossible to establish a consistent commercial practice relating to the buyer's taking delivery under the B4-clause. This simply states that »(t)he buyer must accept delivery of the goods when they have been delivered in accordance with A4 and receive them from the carrier at the named place (or port of destination)». The reference to clause A4 is simply to the FOB point, but the modalities as to the buyer's taking delivery at destination have been left unspecified. Particularly as to the sale of commodities, it is for the parties to agree in their individual contracts of sale as to discharge of the goods from the ship and as to the time available to the buyer if he is to assume responsibility for discharging the goods. Since, under CFR and CIF, the seller normally would have chartered the ship, then he would be responsible as against the shipowner for any excess of time used for loading and discharge, paying compensation known as *demurrage* to the carrier. Conversely, saving time to the benefit of the shipowner may entitle the charterer to dispatch money. Hence, it is of vital importance that the terms of the contract of sale in each case match the terms of the charterparty. As to manufactured goods the situation is different. Here, if CFR and CIF are used, one would have to determine whether it is for the seller to conclude a contract of carriage on liner terms. This signifies that loading and unloading is performed by the liner shipping company and that the goods unloaded from the ship are made available to consignees.

If, under C-terms, the parties have failed to specify the contract of carriage to be concluded by the seller for the benefit of the buyer or the modalities for the buyer's taking delivery of the goods at destination, then the necessary gaps would have to be filled according to any practice which the parties themselves might have established or which is generally known in the trade concerned (cf. Art. 9 CISG).

Difficulties might also arise in contracts of sale under DES and DEQ. Although it follows from the very name of these terms that the goods are made available to the buyer from the ship at destination (Delivery Ex Ship) or from the quay (Delivery Ex Quay), the modalities for the buyer's taking delivery may not be known. Thus, the A4 clause only contains main guidelines. The DES clause A4 stipulates that the seller must place the goods at the disposal of the buyer:

- on board the vessel,
- at the unloading point,
- in the named port of destination,
- on the date or within the agreed period,
- in such a way as to enable them to be removed from the vessel by unloading equipment appropriate to the nature of the goods.

In DEQ A4, no such guidelines have been thought necessary. The contract of sale would usually name the quay at which the goods should be made available to the buyer so that, if not, the seller may then select the quay at the named port of destination that best suits his purpose.

As noted, the main purpose of the negotiable bill of lading is to enable the buyer, and subsequent buyers, to sell the goods in transit. However, Incoterms 2000 do not contain any particular clause relating to such sales. This may seem surprising but is explained by the very nature of Incoterms to reflect customary practice. Merchants have not felt any need for a particular trade term as to sale of goods in transit. Therefore, they have been content to use the traditional terms FOB, CFR or CIF which all provide for transfer of risk at the FOB point, i.e., when the goods pass the ship's rail at the port of shipment.

But how should this principle be applied to contracts made subsequently? CISG Art. 68 regulates the transfer of risk when the goods are sold in transit. Here, it is stipulated that the risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. The reason is that it would be illogical to let the risk pass before there is any contract at all and retroactively from a time prior to concluding the contract when the goods pass the ship's rail. Nevertheless, the same article[7] further stipulates that, if the circumstances so indicate, then the buyer assumes the risk from the time the goods are handed over to the carrier who issued the

7 Art. 68, second sentence.

documents embodying the contract of carriage. The choice of FOB, CFR, or CIF would constitute such an indication and therefore the main rule, however logical, would be superseded by the choice of any of these terms. Indeed, it would be highly exceptional to find a contract for sale of goods in transit with no reference to a trade term. Therefore, the main rule would have no practical importance.

The dilemma with retroactive passing of risk may be solved by regarding sale of goods in transit as a sale of documents rather than a sale of goods. The buyer as holder of the documents – the bill of lading and under CIF the insurance policy as well – could exercise rights under these documents and thus obtain the goods or, if they have been lost or damaged, compensation from the carrier or, under CIF, also from the insurer. But this is not equivalent to his position as a buyer under the contract of sale, as the seller would also have to assume responsibility for conformity of the goods. Thus, it would be far too simple to regard the sale of goods in transit as a sale of documents. Rather, it is a sale of goods and documents.[8] In addition, it might happen that the seller at the time of concluding the contract knew or ought to have known that the goods had been lost or damaged. In that event, he is under a duty to disclose this to the buyer.[9] If he does not, loss or damage is at his risk.

9.2 Incompatibility between seller's liability under contract of sale and liability of transport operators under contract of carriage

The basis of liability under CISG[10] is akin to the general exemption of liability applicable in non-maritime carriage. However, some nuances may make carrier liability even more stringent compared with Art. 79 CISG. The particular provisions relating to circumstances attributable to the shipper or the nature of the goods make no significant difference compared with liability under a contract of sale where a similar risk distribution would normally follow from the terms of the contract. However, as to maritime carriage a significant difference exists because of the particular defenses

8 Cf. *supra* note 8.40 on the distinction between »documentary breach« and »physical breach«.

9 According to Art. 68.

10 According to Art. 79 CISG.

available to the carrier of goods by sea for errors in the navigation and management of the vessel and of fire. Moreover, the obligation to provide a seaworthy ship is reduced to an obligation to exercise due diligence in such respect. Further, strict liability with exemption for circumstances beyond control is reduced to a liability for presumed fault or neglect.

To take one example, if under a sale on D-terms the goods are lost due to a collision at sea, then the carrier may normally escape liability to the shipper. On the other hand, the shipper as seller would be liable to the buyer according to CISG stipulating that each party is liable for its subcontractors.[11] As far as the seller is concerned, such vicarious liability would include not only suppliers as subcontractors but also carriers engaged by the seller for the performance of his obligations under D-terms. In contracts on C-terms, the risk would have to be borne by the buyer. This is not only a matter of insurance as, under a sale on D-terms, the seller will be under a continuing liability to deliver the goods until they reach their destination. If he fails to do so, he would have to provide for substituted delivery at the time agreed, unless excused by a relief clause in the contract of sale.

As we have seen, carriers generally benefit from monetary limitations of their liability. This constitutes a major difference compared to the liability of sellers, who have to compensate their buyers for all consequences following their failure to provide conforming goods. This is subject only to the exclusion of such loss that they at the time of the conclusion of the contract did not foresee or ought not to have foreseen as a possible consequence of the breach of contract (cf. Art. 74 CISG). If sellers wish to avoid such exposure, then they would have to agree with the buyers on a monetary limitation in the contract of sale – which is also often done.

Perhaps, the most significant difference between carrier liability and liability under contracts of sale concerns loss other than loss of or damage to goods and delay in delivery. Such loss with few exceptions (e.g. failure to collect cash on delivery) falls outside the mandatory carrier regimes. By contrast, contracts of sale governed by CISG do not distinguish between different types of loss.The frequent disclaimers of liability for indirect or consequential loss in contracts of carriage put sellers and buyers at risk. This is all the more serious as it is usually not possible to insure as a protection against such risks. Moreover, insurers providing carriers with insurance against liability to their customers might find it unattractive to extend insurance cover to risks other than those that can be quantified in advance.

11 Art. 79.2.

Hence, the general risk of non-performance incumbent upon sellers and buyers would have to be borne by them without possibilities of recourse against carriers except some recovery in cases of physical loss of or damage to goods as well as delay in delivery.

Although such carrier liability is generally subject to mandatory law, protection would only be fully effective if the carrier was under a continuing liability from point of origin to point of ultimate destination. Otherwise, there would be stages before, during, and after transport where protection by mandatory law did not apply. Moreover, the types of loss covered by mandatory law could be covered by cargo insurance – with the exception of delay in delivery. In essence, therefore, mandatory law imposed upon carriers merely serves to enhance the possibilities of cargo insurers to recover their payments to sellers and buyers from the carriers' liability insurers. In other words, mandatory law of carriage of goods is more or less reduced to a weapon in the battle between insurers.

As we have seen, in contemporary commercial practice complete logistics services are offered and in demand. While transport of goods remains of primary importance, it would be commercially unwise to maintain the traditional disclaimers for indirect, consequential, or other mere pecuniary loss. This is because the very objective of third party logistics service providers would be to ensure not only the flow of goods but also of money and information. Hence, it is to be expected that transport operators undertaking such services would accept liability compatible with liability under a contract of sale. If so, they might limit their exposure in the same way as their customers do, namely by an over-all monetary limitation to an amount appropriate considering the nature and value of their service.

9.3 Cargo insurance

As noted, the risks of physical loss of or damage to the goods can be assessed in advance. Moreover, insurance protection against such risks is readily available. Owing to the risks of maritime transport in particular, the seller or buyer usually take out such insurance, depending upon the risk distribution under the contract of sale. As we have seen, transfer of risk is an important matter regulated by the applicable law as supplemented or superseded by Incoterms 2000 and the terms of the individual contract of sale.

Traditional marine insurance cover was offered in order to provide cover for the major casualties affecting both ship and cargo. Additional cover was

provided as requested by the party to be insured. This explains the present structure of insurance offered by the Institute of London Underwriters under the Institute Cargo Clauses. Here, the traditional basic insurance cover appears in Risks Clause C. As covered casualties are mentioned:

»fire or explosion»
»vessel or craft being stranded, grounded, sunk or capsized»
»overturning or derailment of land conveyance»
»collision or contact of vessel, craft or conveyance with any external object other than water»
»discharge of cargo at the port of distress»
»loss of or damage to the subject-matter insured caused by general average sacrifice or jettison»

In addition, the insurance covers general average and salvage charges.

In Clause B the cover is extended to include, in particular,

Entry of sea, lake or river water into vessel, craft, hold, conveyance, container, lift, van or place of storage.

Total loss of any package lost over board or dropped whilst loading onto, or unloading from, vessel or craft.

In Clause A the insurance covers all risks of loss of or damage to the subject-matter insured.

Generally, and irrespective of the Clause chosen, there are exclusions from the insurance cover. These inclusions i.a. refer to

Wilful misconduct of the Assured, ordinary leakage or loss in weight or volume or ordinary wear and tear of the subject-matter insured

Insufficiency or unsuitability of packing

Inherent vice or nature of the subject-matter insured

Loss, damage or expense approximately caused by delay

Loss, damage or expense arising from insolvency or financial default of the owners, managers, charterers or operators of the vessel

Loss, damage or expense arising from the use of any weapon of war employing atomic or nuclear fissure and/or fusion or other like reaction or radioactive force or matter.

Further, there is a general exclusion for unseaworthiness of the vessel and unfitness of the transport equipment but only where the assured or the servants of the assured are privy to such unseaworthiness or unfitness at the time the subject-matter insured is loaded.

War and strikes are generally excluded.

The duration of the insurance cover follows the Transit Clause and attaches from the time the goods leave the warehouse or place of storage at the place named in the policy for the commencement of the transit and continues during the ordinary course of transit. The cover terminates on delivery to the consignee or other final warehouse or place of storage mentioned in the insurance policy, alternatively to any other warehouse or place of storage which the assured elects to use. The cover ceases in any event to have effect on the expiry of 60 days after completion of discharge over side of the goods from the oversea vessel at the final port of discharge.

As to sale of manufactured goods, it is customary that exporters and importers enter into agreements with cargo insurers annually, usually with premiums paid provisionally for later adjustment on the basis of reports showing the quantity of insured goods dispatched or received. In commodity trading, insurance may be arranged for each individual shipment *ad hoc*.

It seems surprising that buyers are at all interested to agree on CIF and CIP terms, as it would normally not be difficult to arrange insurance cover generally in advance or ad hoc. However, in some countries difficulties might arise or policy considerations might cause sellers or buyers to take out insurance domestically. Such policy might even influence their choice of trade terms, so that exporters prefer CIF or CIP, while importers prefer CFR or CPT. Further, when a sale of the goods in transit is contemplated, insurance would usually have to be covered in advance, as it would be unwise to leave the goods unprotected by insurance until insurance cover has been arranged by a prospective buyer. Consequently, sale of commodities intended to be sold in transit would usually be on CIF terms and with cover on clause A, B, or C as appropriate considering the nature of the goods and the contemplated risks.

When, under CIF and CIP Incoterms 2000, the insurance is to be provided by the seller, it would not generally be possible to choose between the available options of insurance cover as any subsequent contracts of sale are not known beforehand. Therefore, the principle of cover on minimum terms has been chosen with the buyer's possibility to ask for additional cover as appropriate. The CIF and CIP seller's obligations as to insurance are

stipulated in Incoterms 2000.[12] It is for the seller to obtain at his own expense cargo insurance as agreed in the contract so that the buyer, or any other person having an insurable interest in the goods, is entitled to claim directly from the insurer. Moreover, the seller has to provide the buyer with the insurance policy or other evidence of insurance cover. Notably, this particular document does not appear in clause A8, which has been reserved for proof of delivery, transport document, or equivalent electronic message.

The seller has to contract for insurance with underwriters or an insurance company of good repute. Unless otherwise agreed, the cover should be in accordance with the minimum cover of the Institute of Cargo Clauses, that is, on risks clause C. The insurance must be effective from the moment the risk is transferred to the buyer according to Incoterms 2000 clauses B4 and B5, that is under CIF from the time when the goods have passed the ship's rail at the port of shipment and under CIP from the time when the goods have been delivered to the carrier or, under both CIF and CIP, from the moment the buyer may incur the risk prior to delivery of the goods because of his failure to give the required notice to the seller. If required by the buyer, the seller should also at the buyer's expense provide insurance covering war, strikes, riots and civil commotion risks, if procurable. The insurance should cover the price provided in the contract plus 10 per cent and should be provided in the currency of the contract. The added 10 per cent represents the average imaginary profit on the sale.

12 Clause A3 b.

10 The transport operator's right of retention and lien

10.1 Right of retention

It is a general principle in most jurisdictions that a carrier or a freight forwarder is under no obligation to release the goods unless charges relating to the goods themselves are paid.[1] However, in relation to the consignee such charges must be ascertainable from the transport document. This follows from the general principle that the consignee should have a right, independently of the shipper, to claim the goods from the carrier. The carrier is estopped from invoking matters relating to his relationship to the shipper when the consignee in good faith has relied upon the information appearing from the transport document.[2] If, for instance, a bill of lading has been marked *freight prepaid*, but the freight in fact has not been paid by the shipper, then the carrier, in relation to the consignee, would be estopped from retaining the goods until being paid.

If the carrier does not receive payment, then he would have a right to sell the goods if, after expiry of a reasonable period, he has not received from the person entitled to dispose of the goods instructions to the contrary that he may reasonably be required to carry out. After such sale, he may collect his charges on the goods from the proceeds of the sale. The procedure would be determined by the law or custom of the place where the goods are situated.[3]

1 See, e.g., CMR Art. 13.2 and the 1999 Montreal Convention Art. 13.1.
2 Cf. the Hague/Visby Rules Art. 3.4
3 Cf. CMR Art. 16.3–5.

10.2 Lien

The term *lien* is customarily used for a more extended right than the right of retention. In lien clauses, one would usually find a general right to use goods, or documents controlling the disposition of the goods, as security for any claims against the debtor, irrespective of whether such claims concern the goods or unrelated claims stemming from the contractual relationship between the claimant and the debtor. Such an extended right may not be recognized in all jurisdictions. Indeed, in most cases it would require an agreement between the claimant and the debtor, usually in the form of a particular clause in the individual contract or the applicable standard form. Such clauses are common in charterparties[4] and in bills of lading.[5] [6] As the bill of lading is intended to be transferred to the consignee, then the same restrictions would apply as have been mentioned as to the right of retention. Only such claims as appear from the bill of lading itself would be chargeable against the consignee. Consequently, the consignee would not have to pay any claims unrelated to the goods as a condition for claiming their delivery.

In general conditions applicable to freight forwarding services, the general lien clause entitles the freight forwarder to use any goods or documents controlling the disposition of the goods not only for claims related to such goods but also generally for all claims against the customer. This right might even extend to goods owned by parties other than the debtor, provided the freight forwarder has received them in good faith, e.g. in a situation where they have been handed over to the freight forwarder by a commission agent without property rights in the goods.[7] Moreover, the unpaid seller's right according to a retention of title clause may become ineffective as soon as a freight forwarder at destination has taken the goods into his possession under a contract with the buyer/consignee.[8] In that event, the

4 See, e.g., the Gencon charterparty clause 8, the Baltime charterparty clause 18.

5 See, e.g., Conline bill clause 12 and FBL clause 14.

6 See T. Falkanger, Maritime liens on cargo: A survey of the provisions in the Norwegian Maritime Code, Simply 2002 pp. 83–113, D.R. Thomas, Maritime Liens (Vol. 14 of British Shipping Laws), London 1980 *passim* and W. Tetley, Maritime Liens and Claims, Montreal 1998 *passim*.

7 See as to the general lien under § 14 of NSAB 2000 J. Ramberg, NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders. Commentary, publ. by Nordiskt Speditörförbund, Stockholm 2001 pp. 26–33.

8 See, e.g., the Swedish Supreme Court case NJA 1985 s. 879.

freight forwarder may use the goods as security for his claims against his contracting party, the buyer.

The 1996 FIATA Model Rules for Freight Forwarding Services[9] state that:

> »the freight forwarder shall have a general lien on the Goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Customer including storage fees and the cost of recovering the same, and may enforce such lien in any reasonable way that he may think fit».

However, there is a reminder that this only applies »to the extent permitted by the applicable law».

Freight forwarding conditions generally extend the freight forwarder's security right so that it applies not only to claims related to the goods or documents in the possession of the freight forwarder but also to unrelated claims that may have arisen owing to services earlier performed. In addition, the security right is sometimes extended to compensation payable by insurance companies, carriers, or others when the goods have been lost or destroyed.[10] In charterparties, the security right is similarly extended to encompass freight payable to the charterer.[11]

In most jurisdictions, there is no statutory support for a security right beyond the general principle that goods or documents may be retained and used to satisfy claims related to such goods or documents (*the right of retention*). However, a statutory general lien extends to the benefit of the French *commissionaire de transport* (*privilège*). The *Code de Commerce*[12] gives such support generally to commission agents. Indeed, it has been considered appropriate to apply the same principle to the benefit of *commissionaires de transport*, the reason being that it would be impractical and unreasonable to require the *commissionaire de transport* to close the account as to each shipment for the avoidance of the credit risk. Thus, one would have to accept a running account so that accumulated claims could at any given moment be satisfied through sale of goods in the possession of the *commissionaire de transport*.[13] If general conditions are consistently used in a particular country, then the general lien of such conditions may apply even without refer-

9 Clause 15.

10 NSAB 2000 § 14 second paragraph.

11 Lien on subfreight, Baltime clause 18 and Gencon clause 8.

12 Art. 95.

13 See R. Rodière, Traité Général du Droit Maritime Vol. III p. 146 *et seq.*

ence to the conditions in the individual case.[14] However, the general lien would normally require either statutory support, as in France, or a clear reference to the applicable general conditions containing a general lien clause.

14 Decision by the Supreme Court of Norway reported in Rt. 1973 s. 967.

11 Claims

11.1 Notice of claims

The rules relating to notice of claims are inconsistent and complicated, as different principles are used. Moreover, distinctions have to be made between apparent and non-apparent loss or damage, as well as different types of loss. It is important to distinguish between the effect of a late notice:

- to establish a presumption of non-liability;
- to bar the possibility to pursue the claim;
- to interrupt the running of the time-bar.

As to the presumption of non-liability, the consequences of a late notice are rather modest. It would be for the claimant in any event to localize loss or damage to the period when goods were in the possession of a party. Assessment of the evidence may usually be made with or without a presumption of non-liability. Needless to say, the longer the time the goods are in the possession of a prospective claimant after delivery, the more difficult it becomes to meet the burden of proving that the loss or damage occurred while the goods were in the possession of the carrier or the freight forwarder. Conversely, in many cases a presumption of non-liability would be fairly easy to rebut. To take one example, when after a late notice it is established that the goods had been damaged by salt water, it is difficult for the carrier to insist that the damage to the goods occurred after discharge from the ship.

As to loss other than loss of or damage to the goods, one would have to fix a particular time for the running of the period for notice. The FIATA Model Rules[1] refer to »the date upon which the Customer became or should have become aware of any event or occurrence alleged to give rise to such claim».[2] In some cases, a notice may have the effect of interrupting the

1 In Clause 9.2.

2 A similar provision appears in NSAB 2000 § 29 second paragraph and BIFA § 28 A.

running of the period allowed for actions against the carrier. This principle follows from CMR.[3] The period starts to run again when the carrier rejects the claim by notification in writing and returns the documents attached thereto. The same principle applies according to COTIF/CIM 1999.[4]

International conventions generally distinguish between apparent and non-apparent loss or damage. If the loss or damage is apparent, then there is no reason why the notice should not be given immediately. If this is not done, a presumption of non-liability generally applies. The Hamburg Rules and the Multimodal Convention extend the time for the notice in case of apparent damage to »the working day after the day when the goods were handed over to the consignee».[5] In case of non-apparent loss or damage, further time has been given for the notice varying between three days[6] to 15 consecutive days.[7] A medium position is taken in CMR (7 days)[8] and the Warsaw Convention (14 days).[9]

However, in the Warsaw Convention as in the 1999 Montreal Convention,[10] the right of action is lost if in case of damage notice is not given within 14 days from the date of receipt of the cargo. The same principle of barring further action appears in the UNCITRAL/CMI Draft,[11] where the period has been set at 21 consecutive days following delivery of the goods. The last-mentioned principle also applies according to the general conditions of freight forwarders in Germany referring to HGB,[12] where the right to claim expires 21 days after delivery unless notice is given. The shorter period of 14 days barring further action applies according to the general conditions used in Hong Kong, Kenya and, as noted, in BIFA and NSAB 2000 as to other loss than loss of or damage to the goods. According to the conditions used in Singapore, the right of action is lost if notice is not given within 7 days after the scheduled time of delivery. According to the general conditions used in the United Arab Emirates (UAE), failure to give notice in case of visible loss or damage would bar further action.

3 Art. 32.2.
4 Art. 48.3.
5 Art. 19.1 and Art. 24.1 respectively.
6 Hague/Visby Rules Art. 3 and the UNCITRAL/CMI Draft Art. 6.9.1.
7 Hamburg Rules Art. 19.2 and Multimodal Convention Art. 24.2.
8 Art. 30.1.
9 Art. 26.2.
10 Art. 31.2.
11 Art. 6.9.2.
12 § 438.

Compared with the law of carriage of goods and the general conditions used by freight forwarders, the requirements under contracts of sale according to CISG[13] are less strict. First, no specific periods appear. Second, reference as to the examination of the goods upon delivery is made to »as short a period as is practicable in the circumstances».[14] Further, if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.[15] In some cases, where the seller knew or ought to have known of the possibility of the goods being redirected or re-dispatched, examination may be deferred until after the goods have arrived at the new destination.[16] The buyer loses the right to rely on any lack of conformity of the goods if he does not give notice within a reasonable time after he has discovered it or ought to have discovered it.[17] In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.[18]

Short periods available for notice under contracts of carriage may be detrimental to parties to a contract of sale. Buyers may find that the time allowed for examination under the contract of sale[19] is incompatible with the shorter time allowed for actions against carriers and freight forwarders. As a result, time for action against carriers and freight forwarders has run out when it is eventually established that the loss or damage should be attributed to them. Under sales on the D-terms of Incoterms 2000, it is particularly difficult for sellers as they are usually not present at destination when inspection of the goods takes place. As the sellers in such sales have to bear the risk until the goods arrive at destination, they will often experience that the time for claims against carriers and freight forwarders has expired before they are put on notice by their buyers. Hence, their right of recourse against carriers and freight forwarders would be lost.

The widely different concepts, principles, and detailed provisions relating to notice of claims within the law of carriage of goods and under freight forwarders' general conditions are unfortunate. Indeed, they often create

13 Art. 38 and 39.
14 Art. 38.1.
15 Art. 38.2.
16 Art. 38.3.
17 According to Art. 39.1.
18 Art. 39.2.
19 According to Art. 38.1 CISG.

considerable risks of losing rights of recourse against parties liable. Interestingly, the general conditions applicable in Italy determine that the freight forwarders would not be liable if notice is given only when any rights of recourse have been lost.[20] Particularly where a transport operator would use subcontractors for the performance of his contract, he might find that the right of action against a carrier or a freight forwarder as subcontractor has been lost due to late notice, even though the claim against himself had not yet been notified or, if notified, sufficiently established.

11.2 Time for suit

The same inconsistencies as apply to time for notice also apply as to time available for suit. First, if a late notice would already bar any further action, it would not be necessary to have a particular provision relating to a general time-bar to the effect that legal action within a certain period is required to preserve the claim. Second, where, as in CISG, the right to claim is preserved if notice has been given in time,[21] the question remains how long a time is available in case the parties do not agree on settlement of the claim. Here, the 1974 UN Convention on Limitation Periods in International Sale of Goods might apply. If so, then the buyer must institute a legal action against the seller within four years from the time when the goods were handed over to him.

The time for suit under international conventions ranges between one year and two years. The one-year-period has been chosen in the Hague and Hague/Visby Rules[22] as well as in CMR[23] and as a main rule in COTIF/CIM 1999[24] and in the UNCITRAL/CMI Draft,[25] while a period of two years has been chosen in the Hamburg Rules, the Multimodal Transport Convention, the Warsaw Convention, and the 1999 Montreal Convention. Importantly, the Hague/Visby Rules, as well as the UNCITRAL/CMI Draft, refer to liability in respect of the goods, while the Hamburg Rules and the Multimodal Convention refer to »any action relating to carriage of goods». CMR refers to »an action arising out of carriage under the

20 Art. 44.
21 Art. 38 and Art. 39.
22 Art. 3.6.
23 Art. 32.1.
24 Art. 48.1.
25 Art. 14.1.

convention» and this principle has also been followed in COTIF/CIM 1999. The Warsaw Convention and the 1999 Montreal Convention refer to »the right to damages».

The cited expressions of CMR, COTIF/CIM 1999, the Hamburg Rules as well as the Multimodal Convention would be broad enough also to comprise an action by the carrier against the shipper and consignee. Consequently, the carrier's claim for freight would also be time-barred if an action is not instituted to recover the freight within the period. Under the Hague and Hague/Visby Rules, as well as according to the UNCITRAL/CMI Draft, there will be no particular time-bar for recovering the freight. This is important as it often happens that the shipper or consignee would try to set off a claim for damages against the carrier's claim for freight. Such a set off is disallowed according to several general conditions applicable to freight forwarding services. In NSAB 2000, the freight forwarder's recovery of freight or other remuneration for his services will be subject to simplified collection procedures, while claims against the freight forwarder would be subject to arbitration. Splitting claims and counter-claims as above has been considered appropriate, since claims for loss or damage are usually a matter for the liability insurer, while the claim for freight should not be suspended pending settlements of such insured claims.

The time available for suit may be prolonged upon agreement between the parties. However, such prolongation must take the form of »a declaration in writing».[26] The »in writing» requirement has been dropped in the UNCITRAL/CMI Draft.[27]

Owing to the different periods of time for suit, it may happen that a lawsuit within a two-year-period would have been initiated after the one-year-period available for recourse action against such carriers who may invoke the shorter one-year-period. In particular, transport operators subcontracting performing carriers may find that recourse actions cannot be initiated within the stipulated time. This problem has been observed in the Hague/Visby Rules[28] as well as in the Hamburg Rules[29] and the Multimodal Convention.[30] According to these provisions, if further time is allowed by the law of the State where proceedings are instituted, an action for indemnity may be instituted after the expiration of the period mentioned in the con-

26 Hamburg Rules Art. 20.4 and the Multimodal Convention Art. 25.3.
27 Art. 14.3.
28 Art. 3.6.
29 Art. 20.5.
30 Art. 25.4.

vention if such action is taken within three months commencing from the day when the person bringing the action for indemnity has settled the claim or has been served with process in the action against himself. The period of three months has been exchanged for ninety days in the Hamburg Rules and the Multimodal Transport Convention as well as in the UNCITRAL/CMI Draft.[31] However, a problem arises when it is not known what the State where the action for indemnity is instituted would allow, which may well happen if that State is not a party to any of the conventions extending time for such actions. In general conditions, freight forwarders generally seek to shorten the time-bar in order to preserve their rights of recourse. The periods of the time-bar range from six months to one year. The FIATA Model Rules have opted for a medium position by setting the period at nine months in the same way as the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents[32] but with the addition of clause 13 in the last-mentioned Rules. Here, there is a reminder that mandatory law might defeat the shorter period of nine months. As noted, mandatory law in many cases would only apply as to the shipper's or consignee's claim against the carrier for loss of or damage to the goods or delay in delivery, while the time-bar relating to other claims is left to the applicable law and general conditions.

11.3 Dispute resolution

Generally, carriers and freight forwarders prefer to have disputes settled by jurisdiction in the place where they have their habitual place of business and with the application of the law of that country. Choice of law clauses are generally approved since, under the principle of freedom of contract, it belongs to the autonomy of the parties to make such choice. Indeed, this principle is set forth in the 1980 Rome Convention[33] on choice of law as to contractual obligations. However, it is different with jurisdiction. In order to give effect to mandatory law, it is sometimes held that jurisdiction must be reserved to convention countries or to such other countries where it may be expected that the mandatory law will be applied.

31 Art. 14.4 b.
32 Clause 10.
33 Art. 3.

Consignees in particular might find it troublesome to institute an action against a party with whom the seller has concluded a contract of carriage under C-terms. In many cases, the carrier would be domiciled in the same country as the shipper/seller, which may put the consignee at a disadvantage. For this reason, the Hamburg Rules and the MT Convention offer the plaintiff, at his option, a number of different places for the action namely:

- the principal place of business or habitual residence of the defendant;
- the place where the contract was made;
- the port of loading or the port of discharge;
- any additional place designated in the contract of carriage;

with the addition in the MT Convention[34] that »such other place must be evidenced in the multimodal transport document».

In many cases, it would be better to agree on arbitration instead of litigation before courts of law. Here, the Hamburg Rules and the MT Convention[35] provide for the same options available to the plaintiff as in case of actions before courts of law. This, however, is incompatible with the very nature of arbitration. Arbitrators acting under a valid arbitration clause may continue with the case irrespective of whether an action is ongoing or instituted before arbitrators in another country. Moreover, if they give an award, this may be recognized and enforced according to the 1958 New York Convention, which has been ratified by most countries all over the world. That convention would compel the States that ratified the convention to enforce the award.

To take one example, if arbitrators are asked by a carrier to give a declaratory award on non-liability, then that award would have to be recognized according the New York Convention, irrespective of whether the plaintiff in a later arbitration in another country would succeed in getting an award on liability. In the Scandinavian Maritime Codes, having adopted the principles of the Hamburg Rules, the method used is to stipulate that the parties to the contract of carriage should be taken to have concluded an arbitration agreement compatible with the multiple choice provisions. In arbitration law, however, such a *deemed to be arbitration* clause may not be recognized as an *agreement in writing* required for the recogni-

34 Art. 26.1 d.

35 In Art. 22 and Art 27 respectively.

tion and enforcement of an arbitral award under the 1958 New York Convention.[36]

Most general conditions used by freight forwarders are content to leave disputes to be resolved by courts of law. However, in some conditions, there is a preference for arbitration, such as in NSAB 2000.[37] However, it is considered that disputes concerning amounts not exceeding 30.000 EUR should not be subject to arbitration unless otherwise agreed. The reason here is that the cost of arbitration and the joint and several liability of the parties for the remuneration of the arbitrators might be less suitable in minor cases. Interestingly, it is the other way around in the general conditions used in Spain, where arbitration will only be available if the amount of dispute does not exceed about 3.000 EUR. So, according to those conditions, arbitration is only considered suitable as to minor disputes.

Court proceedings as well as arbitration would usually be much too costly considering the amount of the dispute. Hence, some simplified procedure is called for. Conciliation and mediation would always be preferable but, unfortunately, the parties often fail to reach a settlement. In some cases, arbitration institutes may manage disputes by a simplified procedure, such as according to the institutional rules in Norway and Sweden.[38] [39]

36 Cf. K.M. Siig, Norwegian law on the formal validity of arbitration agreements, Simply 2000 pp. 1–41 commenting on the merits of an »in writing« requirement, without, however, discussing the incompatibility between such requirement and the deemed-to-be multiple choice arbitration clause of the Scandinavian Maritime Codes.

37 § 31.

38 § 31 NSAB 2000.

39 See J. Ramberg, NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders. Commentary, publ. by Nordiskt Speditörförbund, Stockholm 2001 p. 72.

12 Shortcomings of the traditional approach[1]

12.1 Focus on unimodal transport

Traditionally, regulation of the different modes of transport relates to the *hardware* rather than the *software* of transportation. Legislators have for some reason preferred to discuss each and every mode of transport in isolation, while more or less disregarding the need for rules applicable to the transport of goods from one point to another. But one may well ask why this has been tolerated by the carriers' customers, who should be less interested in being involved in the intricacies and complications following from the disparities of transport law.

The efforts of legislators to avoid clashes between different modes of transport are admirable but ineffective. The first problems arose in connection with combined sea/rail and sea/road transport. Instead of simply adopting the well-known methodology of disregarding any particular rules following from another type of contract by simply permitting the rules of the main contract to supersede,[2] the method chosen was to preserve the particularities relating to carriage of goods by sea. This is evidenced by Art. 63 COTIF/CIM and Art. 2 CMR.

True, the principle of letting the main contract for carriage of goods by road supersede any other mode when the goods are not unloaded from the road vehicle is expressed. But then the difficulties start with the exception allowing particular rules relating to another mode of transport to prevail when it is proved that any loss, damage, or delay in delivery of the goods was not caused by an act or omission of the carrier by road but by some event that could only have occurred in the course of and by reason of the carriage by that other means of transport. If so, then the liability of the car-

1 This chapter basically corresponds to J. Ramberg, The future law of transport operators and service providers, Scand. Stud. L. 2004, pp. 135–151.

2 See, e.g., the methodology of CISG Art. 3 (2) using the criterion »preponderant part» in order to exclude a service contract from the rules applicable to sale of goods.

rier by road is determined – not by CMR but in the way in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport.

In the absence of such *prescribed conditions*, the liability of the carrier should be determined by CMR. This famous – or rather infamous – provision of CMR based on a kind of hypothetical contract is unworkable, since there is no other international convention *prescribing* the rules in the same way as CMR, which provides that any direct or indirect derogation from the provisions of the convention should be null and void.[3] Thus, CMR even prevents the carrier from extending his liability to the *benefit* of the customer except to the extent that a declaration of value has been made and a surcharge agreed.[4] However, there is nothing similar to be found in other international conventions, which all permit the carrier to extend his liability if he so wishes. With some good will, however, it is possible to interpret CMR Art. 2 so that the rules applicable to the carriage of goods by sea under the Hague Rules or some similar type of convention is injected simply because any departure from these rules to the *detriment* of the customer would be disallowed.[5]

The methodology used in these stipulations of COTIF/CIM and CMR constitutes the very basis for the development of a system known as the *network system*. This could either be restricted in a way corresponding to Art. 2 CMR or expanded to a pure network system signifying that the rules applicable to different modes of transport are triggered by the simple fact that loss or damage could be localized to a particular segment of the transport. If so, such rules would apply irrespective of whether they are to be found in an international convention, a national law, or general conditions of transport. An exponent of such a pure network liability system appears in NSAB 2000.[6]

3 In Art. 41.

4 Art. 24.

5 See J. Ramberg, Deviation from the legal régime of the CMR (Art. 2) [in Theunis, J. ed., International Carriage of Goods by Road (CMR), London 1987 pp. 19–30].

6 See J. Ramberg, The Law of Freight Forwarding, Zürich 2000 [publ. by FIATA] p. 27 *et seq.* and *id.*, NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders. Commentary, Stockholm 2001 publ. by Nordiskt Speditörförbund pp. 47–49.

A modified type of network liability is to be found in the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents. Here, the particular defenses available to the carrier for carriage by sea or inland waterways have been expressed,[7] namely error in navigation and the management of the vessel as well as fire. Further, the monetary limits applicable to carriage of goods by sea have been made generally applicable[8] (666.67 SDR per package or unit or 2 SDR per kilo) but with a particular provision[9] to the effect that when the multimodal transport does not include carriage of goods by sea or by inland waterways the liability is limited to an amount not exceeding 8.33 SDR per kilo (in other words the monetary limit applicable under Art. 23 CMR).

An even more modified network liability principle appears from the 1980 United Nations Convention on International Multimodal Transport of Goods.[10] Here, as to localized damage it is stipulated that a *higher limit of liability* than the limit that would follow from applying the convention (920 SDR per package or 2.75 SDR per kilo or, in case of non-maritime carriage, 8.33 SDR per kilo) would apply, provided it follows from an international convention or mandatory national law. However, the network principle does not apply to the basis of liability but only to the monetary limitation of liability. Further, it only applies to the benefit of the customer, according him a right to claim compensation on top of the monetary limitation under the MT convention. He would then be in more or less the same position as if he had been given the right of direct action against the performing carrier, regardless of whether such performing carrier is identical with his own contracting party or appears as the contracting carrier's subcontractor. Clearly, the rules of the MT convention took the 1978 Hamburg Rules as a point of departure, since under those rules the partic-

7 In Art. 5.4.
8 In Art. 6.1.
9 In Art. 6.3.
10 Art. 19.

ular defenses of error in navigation or management of the vessel had been removed.[11]

The efforts of legislators to provide a workable liability system for multimodal transport have remained unsuccessful. The 1980 MT convention has not entered into force and probably never will. The particular rules under COTIF/CIM and CMR are complicated and inappropriate. Within the confines of mandatory transport law, the efforts by UNCTAD and ICC in the 1991 Rules for Multimodal Transport Documents have been more successful as they have been reproduced in particular by FIATA in the Negotiable FIATA Multimodal Transport Bill of Lading (FBL). Moreover, they have been used by BIMCO in its corresponding document known as MULTIDOC.[12] The ongoing efforts by UNCITRAL in co-operation with CMI to establish a new convention for carriage of goods by sea are facing the same type of problems as evidenced by the network systems mentioned if the convention is to be expanded to cover more than the maritime segment.[13]

It should be noted that the 1978 Hamburg Rules limit the application to maritime carriage port to port,[14] as the particular aspects of multimodal transport were intended to be taken care of by the 1980 MT convention. It remains to be seen whether the bold efforts in the ongoing UNCITRAL/CMI work will result and, if so, in what form. As we have seen from the

11 See J. Ramberg, Claims under the Hamburg Rules [in Memoriam of Demetrios Markianos, Athens 1988 pp. 63–75] at p. 67 and for general expositions of multimodal transport D. Richter – Hannes, Die UN-Konvention über die Internationale Multimodale Güterbeförderung, R. Herber, The European legal experience with multimodalism, Tulane Law Review 1989 pp. 611–629, D. Faber *et al.*, Multimodal Transport – avoiding legal problems, London – Hong Kong, 1997 *passim*, de Wit, *passim*, J. Ramberg, Multimodal transport – a new dimension of the law of carriage of goods? [in Études offertes à René Rodière, Paris, Dalloz 1981 pp. 481–492, also in Revista de Comité Maritimo Venezolano, 1982:2 pp. 223–240], M. Riccomagno (ed.), Il trasporto multimodale nella realtà guiridica odierna, Turin 1997, P. Vestergaard Pedersen, Modern regulation of International Unimodal and Multimodal Transport of Goods (Simply Yearbook 1999 publ. by the Scandinavian Institute of Maritime Law pp. 53–108), I Carr, International Multimodal Transport – United Kingdom, International Transport Law Review 1998:3 and A. Pozdnakova, Unification of International Multimodal Transport, Law and Justice 2004 pp. 24–30 at p. 28.

12 See J. Ramberg, The UNCTAD/ICC Rules for Multimodal Transport Documents – Genesis and Contents [Essays in honour of Hugo Tiberg, Stockholm 1996 pp. 513–523].

13 At present this seems to be the majority view. See F. Berlingieri, A New Convention on the Carriage of Goods by Sea: Port-to-Port or Door-to-Door?, ULR 2003 pp. 265–280 at p. 267.

14 Art. 6.1.

limited success of the 1978 Hamburg Rules and the total failure of the 1980 MT convention, the prospects of reaching international consensus on an appropriate structure of *door-to-door liability* are rather bleak.

12.2 Transport logistics

The transport industry has developed considerably, while legislators have wrestled with transport law, seeking to preserve unimodalism in the form of particular rules for particular modes of transport with some modifications to take care of the injection of one unimodal regime into the other. Owing to modern means of communication and electronic data interchange, the focus has more or less shifted from unimodal transport to the only thing that really matters, namely that the goods should be carried from one point to another and preferably arrive just in time (*JIT*). Industry is clearly aware of the need to achieve a rational system whereby storage of goods and unavailability of the goods during prolonged transport is kept to a minimum. This is known as logistics[15] and the successful implementation of the principles of logistics is necessary for most types of economic activity.

Under contracts of sale, it is important for sellers and buyers to achieve an efficient transportation system whereby goods may be carried from point of origin to point of destination and arrive in right order and condition – just in time. In addition, it is often possible to obtain added value services from the operators engaged for carriage and distribution. In many instances, it may be possible for suppliers of goods to obtain assistance from those storing, distributing, or carrying the goods. This may take the form of receiving and confirming orders, adapting the goods to conform with the required specifications, packing the goods, clearing them for export and import, and installing them at the buyer's place of business. Assistance could be further expanded to include collection of documents and money, labelling, reloging and marketing of the goods. In such cases, logistics would not be restricted to whatever takes place within one and the same enterprise. To the contrary, it could be expanded to the relation between seller and buyer under a contract of sale, and even further expanded by introducing third

15 See for recent studies S.O. Johansson ed., Transportören, speditören och juridiken, (Gothenburg Maritime Law Association publ. 76 (2003)) and, in particular, the study therein by M. Knoblock, Logistikerns ansvar för mervärdetjänster utförda i köparens lokaler (pp. 73–145).

parties into the logistic chain. Such third party logistics is known as *3PL.*[16] Through the development of electronic data interchange systems, a considerable expansion of 3PL is expected.

It goes without saying that the methodology used in the above network liability systems is impossible to implement when a variety of transportation and ancillary services are included in contracts with a 3PL service provider (*3PLS*). The search for a great number of hypothetical contracts and the *localization* of physical loss of or damage to goods or simply pecuniary loss to each and every of such hypothetical contracts would be a hopeless task. Indeed, the peculiar injections of rules from a *foreign* mode of transport into the main contract of carriage, as we have seen in COTIF/CIM[17] and CMR[18] is explained by the clashes between different types of *mandatory* transport law. Indeed, we are now facing quite another type of problem, namely the clashes between mandatory and non-mandatory systems of law. This would require a different type of methodology, namely a distinction between transport law on the one hand and the general law of contract on the other hand.

12.3 Logistics and freight forwarding

The law relating to freight forwarding offers itself as a natural starting point when dealing with the more sophisticated service under 3PL contracts. Indeed, there is no difficulty in including such added value services in the more traditional services offered by freight forwarders. One will have to deal with the contractual obligations undertaken, irrespective of whether the service provider is classified as a freight forwarder or a 3PLS. The extent of such obligations, as well as liability for non-performance, would in the same way as applies to sale of goods and services worldwide be regulated by general conditions, preferably unhampered by the straitjacket of mandatory law. Such general conditions would instead be controlled by the superseding principle of an obligation for each contracting party to fulfil their

16 Third Party Logistics, which from the viewpoint of the party requiring such services means outsourcing to a third party. The term Fourth Party Logistics (4PL) has also been introduced but it is somewhat obscure, and perhaps not necessary, if only an expansion of Third Party Logistics services is intended.

17 Art. 63.

18 Art. 2.

obligations in good faith and in accordance with fair dealing.[19] Further, the increasing competition between service providers will in most cases suffice to reach an appropriate balance between the interests affected, preferably in the form of agreed documents where organizations representing the parties in the transaction will participate in elaborating the conditions.[20]

An exponent of such an agreed document appears in NSAB 2000, which contain two distinct parts. One deals with contractual liability outside the scope of mandatory law, while the other relates to the liability of the freight forwarder as contracting carrier. Here, of course, regard must be had to the mandatory provisions of transport law. The clashes between different types of mandatory law stemming from the particular rules of the different modes of transport are taken care of by employing the network liability system.[21] In addition, NSAB 2000 provide for a particular liability in order to ensure just in time (JIT) promises.

Efforts have also been made to implement this dual system of liability in the 1996 FIATA Model Rules for Freight Forwarding Services.[22] As far as concerns the type of liability for services falling outside the scope of mandatory transport law, the well-known principle of liability for failure to exercise due diligence could serve as a common denominator. This would be particularly so if strengthened by a principle placing the burden of proof on the service provider. In that way, liability arises if he fails to prove that any physical loss of or damage to goods or pecuniary loss inflicted on his customer because of delay or otherwise has not resulted from his failure to exercise due diligence. The matter of monetary limitation of liability is more

19 See for such a superseding principle the 2004 UNIDROIT Principles of International Commercial Contracts Art. 1.7 and Principles of European Contract Law Art. 1:201 and on the acceptance of the UNIDROIT Principles by law courts and arbitral tribunals M.J. Bonell, UNIDROIT Principles 2004. The new edition of the Principles of International Commercial Contracts adopted by the International Institute for the unification of private law, ULR 2004.1 pp. 5–40 at pp. 16–17.

20 The agreement may be extended to comprise an agreement on the commentary to the conditions. See, e.g., J. Ramberg, NSAB 2000 General Conditions of the Nordic Association of Freight Forwarders. Commentary, publ. by Nordiskt Speditörförbund, Stockholm 2001, Preface at p. 2. See also for an example of an agreed document the German insurance system (ADSp/SpV 2002) and the comments by J. Ramberg in The Law of Freight Forwarding, publ. by FIATA, Zürich 2002 pp. 30–31.

21 NSAB 2000 § 23.

22 See J. Ramberg, The Law of Freight Forwarding pp. 89–94, *id.* The FIATA Model Rules for Freight Forwarding Services, Dir. Mar. 1997 pp. 284–291 and *id.* Unification of the Law of International Freight Forwarding, ULR 1998 pp. 5–13.

controversial. However, it is still required in order to provide better certainty than is usually offered by applying the law purporting to reduce liability to foreseeable loss as a consequence of breach of contract.[23]

12.4 Particular rules for storage of goods?

Storage of goods may require some particular rules. First, the accumulation of goods from different storage contracts would expose the service provider to a potential liability of considerable magnitude. For this reason, it is customary to put a cap on the total exposure more or less in the same way as is done to limit the exposure of shipowners under Limitation Conventions.[24] Second, storage is sometimes closely connected to transport, so it might therefore be appropriate to supplement the liability of the carrier with the liability of the storage service provider, particularly as losses are more frequent when the goods are at rest than when the goods are in motion together with the transportation vehicle and thus less accessible to theft.

In order to fill these gaps, a mandatory regime has been offered by the 1991 UN Convention on the Liability of Operators of Transport Terminals (*the OTT Convention*). It is a requirement for applicability of the convention that the goods are *involved in international carriage.* The liability rules and monetary limitation correspond to the rules of the 1980 MT convention. However, particular difficulties arise in deciding the very basis for applying the OTT Convention, namely that the goods should be *involved in international carriage.*[25] Further, liability under the OTT Convention becomes highly complicated when different modes of transport might be intended. If so, one would have to decide whether maritime or non-maritime carriage is intended, since the monetary limit of 8.33 SDR per kilo would apply for the liability of the storage service provider in case a non-maritime carriage is intended.

23 See J. Ramberg, Breach of Contract and Recoverable Losses [Making Commercial Law. Essays in Honour of Roy Goode, Oxford 1997 pp. 191–200]. See for a similar view A. Gran, Vertragsgestaltung im Logistikbereich, TranspR 1-2004 p. 1 at p. 11 where he stresses that the carrier liability system has become inappropriate and, instead, one would have to consider other sanctions typical for contracts of services (liquidated damages or bonus/malus systems).

24 In particular the 1976 International Convention on Limitation of Liability for Maritime Claims.

25 See *supra* 6.6.3. and J. Ramberg & E. Vincenzini, La convenzione sulla responsabilità degli operatori di transport terminals nel commercio internazionale, Diritto dei trasporti 1990:2.

The OTT Convention has not yet come into force and, in any event, it is unlikely that it will meet worldwide success. Moreover, the OTT-Convention is inappropriate when the storage service provider extends his service in 3PL contracts. This, as already indicated, may well comprise a full distribution service including receipt of orders and order confirmation with subsequent dispatch of the goods appropriately packed and perhaps also adapted to meet the order specifications. Such expanded service would be more or less disassociated from transport and storage as such.

12.5 The need for a new approach[26]

Although the traditional focus on the different modes of transport (*unimodalism*) supplemented with injecting the rules of particular modes into the main contract of carriage is demonstrably insufficient to meet the demands of modern international trade, an expansion of unimodal transport to comprise other modes of transport – such as creating a maritime door-to-door regime – would not be helpful. Difficulty in reaching international consensus on any such innovation is well demonstrated by the limited success of the 1978 Hamburg Rules and the failure of the 1980 MT convention as well as the 1991 OTT Convention.

Thus, the better option seems to be to retain the conventions covering the different modes of transport in their present form, with some adaptations if necessary, and to develop an *entirely new legal regime* clearly based on the contract rather than on the means used to perform it. Such a contractual approach should, of course, follow the main principles of the 1980 Convention on Contracts for International Sale of Goods (CISG), which has met with worldwide success and must be regarded as a strong basis for regulating international trade. After all, it is normally the contract of sale that sets the ball rolling and triggers the ancillary contracts of carriage, insurance, and payment.[27] True, the type of liability under CISG – strict liability with exemptions only for circumstances beyond control – may well be

26 See from the deliberations within the E.C.E. (Trans/WP. 29/1999/2) where it was stressed that there is a need to achieve »an international legal régime providing easily understandable, transparent, uniform and cost-effective liability provisions for all relevant transport operations, including transhipment and temporary storage, from the point of departure to the point of final destination».

27 See for efforts to explain the interrelation Ramberg, International Commercial Transactions *passim*.

unattractive to those used to a more modest liability, as would the absence of a monetary limitation of liability. But, in return, the service providers would have the possibility to adapt their liability, using freedom of contract to the extent that it is not limited by the duty to act in good faith and in accordance with fair dealing.

Undoubtedly, there will be considerable reluctance to abstain from traditional restrictions by specific mandatory law, as there is no certainty that the service providers will offer their customers appropriate protection. But, indeed, it is cold comfort for sellers and buyers to enjoy some sort of protection by mandatory provisions applicable only to the stage of the transport itself, while they in any event would have to suffer from any shortcomings of the law or contract terms applicable to services surrounding the transport, such as for storage, distribution, freight forwarding services, and value added services by 3PLS. Moreover, customers of service providers are themselves accustomed to using their freedom of contract to agree as they please. And, in most cases, in an appropriate fashion.

12.6 Main ingredients of a prospective international convention

Previous efforts to expand mandatory liability applicable under the various international conventions for carriage of goods by sea, rail, road and air have been basically unsuccessful and there is no reason to believe why this should change. Minor adaptations of the respective conventions may be possible but beyond that it would be impossible to reach international consensus. Any efforts to introduce innovations in the present international conventions would probably only contribute to further disunity of the law.[28]

It follows from what has been said that there is no strong commercial need for significant amendments to the existing international conventions in transport law. But appropriate regulation is needed in order to assist sellers and buyers in international trade in ensuring delivery of the goods to the buyer, including any added services as required but without necessarily

28 See, e.g., H. Honka *op.cit.* note 4.30 p. 119.

specifying any particular mode or modes of transport to achieve this aim[29]. The main ingredients of a prospective convention could be described as follows.

It should:

- *Apply* to any contract by a service provider taking goods in charge for delivery to a party as instructed but *should not apply* to a person having undertaken to perform carriage of the goods by specified mode or modes of transport or having declared that he acts as an agent only.
- *Cover* all obligations arising from the contract, including labelling, packing, reloging, installation, adaptation, storage, transhipment, and clearance of the goods for export or import as well as collecting documents or money and any additional services.
- *Oblige* the service provider to issue upon demand a document, or an equivalent EDI-message, evidencing taking in charge of the goods and an irrevocable promise to deliver them to a party as instructed.
- *Cover* the service provider's liability for any breach of contract.
- *Provide* for the same type of liability as under CISG in order to ensure full compatibility[30] between the liability of the seller to the buyer and the liability of the service provider to either of them.
- *Allow* the parties to opt out of the convention wholly or in part.

Contracts falling under such a convention would be regarded as *sui generis*. Thus, the risk of conflict with any mandatory regime applicable to a particular mode of transport would be avoided. Nevertheless, actual performance by the service provider of transport may trigger the application of mandatory law. This should be no major problem except where the service provider would choose to reduce his liability below the level of the applicable mandatory law.[31]

29 See in particular R. Asariotis *et al.*, Intermodal transportation and carrier liability, publ. by the European Commission, Luxemburg June 1999 and J. Ramberg, The Future of International Unification of Transport Law, Dir.Mar. 2001 pp. 643–649 [also in Scand. Stud.L. Vol. 41 pp. 453–458].

30 The incompatibility is best demonstrated by an example where a person obliged to carry goods from point to point does so by integrating the obligation in a contract of sale on delivered terms (DAF, DES, DEQ, DDU or DDP Incoterms 2000) rather than in a separate contract of carriage. In the latter case his liability is mandatory but limited, while in the former case it is strict, without monetary limits, but non-mandatory.

31 Cf. the savings clause in Art. 13 of the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents.

It may perhaps be difficult to induce UNCITRAL to undertake the task of elaborating a convention according to these or similar principles, since the present efforts to up-date the rules relating to maritime transport may prove to be insufficient to obtain worldwide international consensus and thus inject a feeling of hopeless frustration. However, it would undoubtedly be much easier to work outside the confines of mandatory law and to focus on an area where there is a clear commercial need. The incompatibility between rules relating to sale of goods and rules relating to contracts for ancillary services for implementing the seller's main obligation to the buyer is disturbing and should be removed. The resounding success of CISG should encourage UNCITRAL to go ahead but if that should not occur then one will have to choose the second best alternative by engaging non-governmental organizations such as ICC, preferably in co-operation with UNCITRAL, UNIDROIT, or UNCTAD, in order to establish rules for voluntary adoption following the well-known methodology represented by Incoterms 2000, UCP 500, and the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents.

Appendices

Legislation

1980, May 24 **Multimodal transport**

UNITED NATIONS CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT OF GOODS(*1)

The states parties to this convention,
Recognizing

(a) that international multimodal transport is one means of facilitating the orderly expansion of world trade;
(b) the need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned;
(c) the desirability of ensuring the orderly development of international multimodal transport in the interest of all countries and the need to consider the special problems of transit countries;
(d) the desirability of determining certain rules relating to the carriage of goods by international multimodal transport contracts, including equitable provision concerning the liability of multimodal transport operators;
(e) the need that this Convention should not affect the application of any international convention or national law relating to the regulation and control of transport operations;
(f) the right of each State to regulate and control at the national level multimodal transport operators and operations;
(g) the need to have regard to the special interest and problems of developing countries, for example, as regards introduction of new technologies, participation in multimodal services of their national carriers and operators, cost efficiency thereof and maximum use of local labour and insurance;
(h) the need to ensure a balance of interests between suppliers and users of multimodal transport services;
(i) the need to facilitate customs procedures with due consideration to the problems of transit countries;
agreeing to the following basic principles:
(a) that a fair balance of interests between developed and developing countries should be established and an equitable distribution of activities between these groups of countries should be attained in international multimodal transport;
(b) that consultation should take place on terms and conditions of service, both before and after the introduction of any new technology in the multimodal transport of goods, between the multimodal transport operator, shipper, shippers' organizations and appropriate national authorities;
(c) the freedom for shippers to choose between multimodal and segmented transport services;
(d) that the liability of the multimodal transport operator under this Convention should be based on the principle of presumed fault or neglect,
have decided to conclude a Convention for this purpose and have thereto agreed as follows:

PART I. – GENERAL PROVISIONS

Art. 1. – Definitions
For the purposes of this Convention:
1. 'International multimodal transport' means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.
2. 'Multimodal transport operator' means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who

(*1)EVR 1980 vol. XV no. 5 p. 487.

acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.

3. 'Multimodal transport contract' means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.

4. 'Multimodal transport document' means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.

5. 'Consignor' means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.

6. 'Consignee' means the person entitled to take delivery of the goods.

7. 'Goods' includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.

8. 'International convention' means an international agreement concluded among States in written form and governed by international law.

9. 'Mandatory national law' means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.

10. 'Writing' means, *inter alia,* telegram or telex.

Art. 2. – Scope of application

The provisions of this Convention shall apply to all contracts of multimodal transport between places in two States, if:

(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State, or

(b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.

Art. 3. – Mandatory application

1. When a multimodal transport contract has been concluded which according to article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract.

2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.

Art. 4. – Regulation and control of multimodal transport

1. This Convention shall not affect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations.

2. This Convention shall not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, betweeen multimodal transport operators, shippers, shippers' organizations and appropriate national authorities on terms and conditions of service; licensing of multimodal transport operators; participation in transport; and all other steps in the national economic and commercial interest.

3. The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.

PART II. – DOCUMENTATION

Art. 5. – Issue of multimodal transport document

1. When the goods are taken in charge by the multimodal transport operator, he shall

issue a multimodal transport document which, at the option of the consignor, shall be in either negotiable or non-negotiable form.

2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.

3. The signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued.

4. If the consignor so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the particulars stated in article 8 to be contained in the multimodal transport document. In such a case the multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such document shall for the purpose of the provisions of this Convention be deemed to be a multimodal transport document.

Art. 6. – Negotiable multimodal transport document

1. Where a multimodal transport document is issued in negotiable form:

(a) It shall be made out to order or to bearer;

(b) If made out to order it shall be transferable by endorsement;

(c) If made out to bearer it shall be transferable without endorsement;

(d) If issued in a set of more than one original it shall indicate the number of originals in the set;

(e) If any copies are issued each copy shall be marked 'non-negotiable copy'.

2. Delivery of the goods may be demanded from the multimodal transport operator or a person acting on his behalf only against surrender of the negotiable multimodal transport document duly endorsed where necessary.

3. The multimodal transport operator shall be discharged from his obligation to deliver the goods if, where a negotiable multimodal transport document has been issued in a set of more than one original, he or a person acting on his behalf has in good faith delivered the goods against surrender of one of such originals.

Art. 7. – Non-negotiable multimodal transport document

1. Where a multimodal transport document is issued in non-negotiable form it shall indicate a named consignee.

2. The multimodal transport operator shall be discharged from his obligation to deliver the goods if he makes delivery thereof to the consignee named in such non-negotiable multimodal transport document or to such other person as he may be duly instructed, as a rule, in writing.

Art. 8. – Contents of the multimodal transport document

1. The multimodal transport document shall contain the following particulars:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the consignor;

(b) The apparent condition of the goods;

(c) The name and principal place of business of the multimodal transport operator;

(d) The name of the consignor;

(e) The consignee, if named by the consignor;

(f) The place and date of taking in charge of the goods by the multimodal transport operator;

(g) The place of delivery of the goods;

(h) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties;

(i) A statement indicating whether the multimodal transport document is negotiable or non-negotiable;

(j) The place and date of issue of the multimodal transport document;

(k) The signature of the multimodal transport operator or of a person having authority from him;

(l) The freight for each mode of transport, if expressly agreed between the parties, or the freight, including its currency, to the extent payable by the consignee or other indication that freight is payable by him.

(m) The intended journey route, modes of transport and places of transhipment, of known at the time of issuance of the multimodal transport document;

(n) The statement referred to in paragraph 3 of article 28;

(o) Any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.

2. The absence from the multimodal document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.

Art. 9. – Reservations in the multimodal transport document

1. If the multimodal transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the multimodal transport operator or a person acting on his behalf knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the multimodal transport operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these inaccuracies, grounds of suspicion or the absence of reasonable means of checking.

2. If the multimodal transport operator or a person acting on his behalf fails to note on the multimodal transport document the apparent condition of the goods, he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.

Art. 10. – Evidentiary effect of the multimodal transport document

Except for particulars in respect of which and to the extent to which a reservation permitted under article 9 has been entered:

(a) The multimodal transport document shall be *prima facie* evidence of the taking in charge by the multimodal transport operator of the goods as described therein; and

(b) Proof to the contrary by the multimodal transport operator shall not be admissible if the multimodal transport document is issued in negotiable form and has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods therein.

Art. 11. – Liability for intentional misstatements or omissions

When the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraph 1 (a) or (b) of article 8 or under article 9, he shall be liable, without the benefit of the limitation of liability provided for in this Convention, for any loss, damage or expenses incurred by a third party, including a consignee, who acted in reliance on the description of the goods in the multimodal transport document issued.

Art. 12. – Guarantee by the consignor

1. The consignor shall be deemed to have guarenteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document.

2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has

been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

Art. 13. – Other documents

The issue of the multimodal transport document does not preclude the issue, if necessary, of other documents relating to transport or other services involved in international multimodal transport, in accordance with applicable international conventions or national law. However, the issue of such other documents shall not affect the legal character of the multimodal transport document.

PART III. – LIABILITY OF THE MULTIMODAL TRANSPORT OPERATOR

Art. 14. – Period of responsibility

1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.

2. For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods:

(a) from the time he has taken over the goods from:

(i) the consignor or a person acting on his behalf; or

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.

3. In paragraphs 1 and 2 of this article, reference to the multimodal transport operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignor or consignee shall include their servants or agents.

Art. 15. – The liability of the multimodal transport operator for his servants, agents and other persons

Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.

Art. 16. – Basis of liability

1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when 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 of a diligent multimodal transport operator, having regard to the circumstances of the case.

3. If the goods have not been delivered within 90 consecutive days following the date of delivery determined according to paragraph 2 of this article, the claimant may treat the goods as lost.

Art. 17. – Concurrent causes

Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any other person referred to in article 15 combines with another cause to produce loss, damage or delay in delivery, the multimodal transport operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.

Art. 18. – Limitation of liability

1. When the multimodal transport operator is liable for loss resulting from loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package or other shipping unit or 2.75 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogramme of gross weight of the goods lost or damaged.

4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.

5. The aggregate liability of the multimodal transport operator, under paragraphs 1 and 4 or paragraphs 3 and 4 of this article, shall not exceed the limit of liability for total loss of the goods as determined by paragraph 1 or 3 of this article.

6. By agreement between the multimodal transport operator and the consignor, limits of liability exceeding those provided for in paragraphs 1, 3 and 4 of this article may be fixed in the multimodal transport document.

7. 'Unit of account' means the unit of account mentioned in article 31.

Art. 19. – Localized damage

When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1 to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

Art. 20. – Non-contractual liability

1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal transport operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.

2. If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent or such other person shall be entitled to avail himself of

the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention.

3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport operator and from a servant or agent or any other person of whose services he makes use for the performance of the multimodal transport contract shall not exceed the limits of liability provided for in this Convention.

Art. 21. – Loss of the right to limit liability

1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

PART IV. – LIABILITY OF THE CONSIGNOR

Art. 22 – General rule

The consignor shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignor, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignor shall be liable for such loss if the loss is caused by fault or neglect on his part.

Art. 23. – Special rules on dangerous goods

1. The consignor shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the consignor hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignor shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignor fails to do so and the multimodal transport operator does not otherwise have knowledge of their dangerous character:

(a) The consignor shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2 (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the multimodal transport operator is liable in accordance with the provisions of article 16.

PART V. – CLAIMS AND ACTIONS

Art. 24. – Notice of loss, damage or delay

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing

over is *prima facie* evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties or their authorized representatives at the place of delivery, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the multimodal transport operator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the day when the goods were delivered by handing over to the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2 (b) (ii) or (iii) of article 14.

6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 (b) of article 14, whichever is later, the failure to give such notice is *prima facie* evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.

7. If any of the notice periods provided for in paragraphs 2, 5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.

8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, of to the consignor, respectively.

Art. 25. – Limitation of actions

1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.

2. The limitation period commences on the day after the day on which the multimodal transport operator has delivered the goods or part thereof or, where the goods have not been delivered, on the day after the last day on which the goods should have been delivered.

3. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.

Art. 26. – Jurisdiction

1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the place of taking the goods in charge for international multimodal transport or the place of delivery; or

(d) any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document.

2. No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in paragraph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.

4. (a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;

(b) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.

Art. 27. – Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.

2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch of agency through wich the contract was made; or

(iii) the place of taking the goods in charge for international multimodal transport or the place of delivery; or

(b) any other place designated for that purpose in the arbitration clause or agreement.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.

PART VI. – SUPPLEMENTARY PROVISIONS

Art. 28. – Contractual stipulations

1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation shall not affect the validity of other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the multimodal transport operator or any similar clause shall be null and void.

2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.

3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee.

4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the ommission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.

Art. 29 – General average

1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.

2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.

Art. 30 – Other conventions

1. This Convention does not modify the rights or duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of owners of sea-going vessels of 25 August 1924; in the Brussels International Convention relating to the limitation of the liability of owners of sea-going ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating to the limitation of liability of owners of sea-going ships and inland navigation vessels.

2. The provisions of articles 26 and 27 of this Convention do not prevent the application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention. However, this paragraph does not affect the application of paragraph 3 of article 27 of this Convention.

3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or

(b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of this Convention, in so far as such States are bound to apply the provisions of such Conventions to such carriage of goods.

Art. 31. – Unit of account or monetary unit and conversion

1. The unit of account referred to in article 18 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in article 18

shall be converted into the national currency of a State according to the value of such currency on the date of the judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in its territory shall be fixed as follows: with regard to the limits provided for in paragraph 1 of article 18 to 13,750 monetary units per package or other shipping unit or 41.25 monetary units per kilogramme of gross weight of the goods, and with regard to the limit provided for in paragraph 3 of article 18 to 124 monetary units.

3. The monetary unit referred to in paragraph 2 of this acticle corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amount referred to in paragraph 2 of this article into national currency shall be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion referred to in paragraph 3 of this article shall be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 18 as is expressed there in units of account.

5. Contracting States shall communicate to the depositary the manner of calculation pursuant to the last sentence of paragraph 1 of this article, or the result of the conversion pursuant to paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.

PART VII. – CUSTOMS MATTERS

Art. 32. – Customs transit

1. Contracting States shall authorize the use of the procedure of customs transit for international multimodal transport.

2. Subject to provisions of national law or regulations and intergovernmental agreements, the customs transit of goods in international multimodal transport shall be in accordance with the rules and principles contained in articles I to VI of the Annex to this Convention.

3. When introducing laws or regulations in respect of customs transit procedures relating to multimodal transport of goods, Contracting States should take into consideration articles I to VI of the Annex to this Convention.

PART VIII. – FINAL CLAUSES

Art. 33. – Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Art. 34. – Signature, ratification, acceptance, approval and accession

1. All States are entitled to become Parties to this Convention by:

(a) Signature not subject to ratification, acceptance or approval; or

(b) Signature subject to and followed by ratification, acceptance or approval; or

(c) Accession.

2. This Convention shall be open for signature as from 1 September 1980 until and including 31 August 1981 at the Headquarters of the United Nations in New York.

3. After 31 August 1981, this Convention shall be open for accession by all States which are not signatory States.

4. Instruments of ratification, acceptance, approval and accession are to be deposited with the depositary.

5. Organizations for regional economic integration, constituted by sovereign States members of UNCTAD, and which have competence to negotiate, conclude and apply international agreements in specific fields covered by this Convention shall be similarly entitled to become Parties to this Convention in accordance with the provisions of paragraphs 1 to 4 of this article, thereby assuming in relation to other Parties to this Convention the rights and duties under this Convention in the specific fields referred to above.

Art. 35. – Reservations

No reservation may be made to this Convention.

Art. 36. – Entry into force

1. This Convention shall enter into force 12 months after the Governments of 30 States have either signed it not subject to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the depositary.

2. For each State which ratifies, accepts, approves or accedes to this Convention after the requirements for entry into force given in paragraph 1 of this article have been met, the Convention shall enter into force 12 months after the deposit by such State of the appropriate instrument.

Art. 37. – Date of application

Each Contracting State shall apply the provisions of this Convention to multimodal transport contracts concluded on or after the date of entry into force of this Convention in respect of that State.

Art. 38. – Rights and obligations under existing conventions

If, according to articles 26 or 27, judicial or arbitral proceedings are brought in a Contracting State in a case relating to international multimodal transport subject to this Convention which takes place between two States of which only one is a Contracting State, and if both these States are at the time of entry into force of this Convention equally bound by another international convention, the court or arbitral tribunal may, in accordance with the obligations under such convention, give effect to the provisions thereof.

Art. 39. – Revision and amendments

1. At the request of not less than one third of the Contracting States, the Secretary-General of the United Nations shall, after the entry into force of this Convention, convene a conference of the Contracting States for revising or amending it. The Secretary-General of the United Nations shall circulate to all Contracting States the texts of any proposals for amendments at least three months before the opening date of the conference.

2. Any decision by the revision conference, including amendments, shall be taken by a two thirds majority of the States present and voting. Amendments adopted by the conference shall be communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information.

3. Subject to paragraph 4 below, any amendment adopted by the conference shall enter into force only for those Contracting States which have accepted it, on the first day of the month following one year after its acceptance by two thirds of the Contracting States. For any State accepting an amendment after it has been accepted by two thirds of the Contracting States, the amendment shall enter into force on the first day of the month following one year after its acceptance by that State.

4. Any amendment adopted by the conference altering the amounts specified in article 18 and paragraph 2 of article 31 or substituting either or both the units defined in paragraphs 1 and 3 of article 31 by other units shall enter into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Contracting States which have accepted the altered amounts or the substituted units shall apply them in their relationship with all Contracting States.

5. Acceptance of amendments shall be effected by the deposit of a formal instrument to that effect with the depositary.

6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of any amendment adopted by the conference shall be deemed to apply to the Convention as amended.

Art. 40. – Denunciation

1. Each Contracting State may denounce this Convention at any time after the expiration of a period of two years from the date on which this Convention has entered into force by means of a notification in writing addressed to the depositary.

2. Such denunciation shall take effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary.

in witness whereof the undersigned, being duly authorized thereto, have affixed their signatures hereunder on the dates indicated.

done at Geneva on 24 May 1980 in one original in the Arabic, Chinese, English, French, Russian and Spanish languages, all texts being equally authentic.

The 1991 UNCTAD/ICC Rules for Multimodal Transport Documents ICC Publication N° 481

UNCTAD/ICC RULES FOR MULTIMODAL TRANSPORT DOCUMENTS*

1. Applicability

1.1. These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the 'UNCTAD/ICC Rules for multimodal transport documents,' irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not.

1.2. Whenever such a reference is made, the parties agree that these Rules shall supersede any additional terms of the multimodal transport contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the multimodal transport operator.

2. Definitions

2.1. *Multimodal transport contract* (multimodal transport contract) means a single contract for the carriage of goods by at least two different modes of transport.

2.2. *Multimodal transport operator* (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.

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

2.4 *Consignor* means the person who concludes the multimodal transport contract with the multimodal transport operator.

2.5 *Consignee* means the person entitled to receive the goods from the multimodal transport operator.

2.6 *Multimodal transport document* (MT document) means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be,

(a) issued in a negotiable form or.

(b) issued in a non-negotiable form indicating a named consignee.

2.7. *Taken in charge* means that the goods have been handed over to and accepted for carriage by the MTO.

2.8 *Delivery* means

(a) the handing over of the goods to the consignee, or

(b) the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery, or

(c) the handing over of the goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.

2.9 *Special Drawing Right* (SDR) means the unit of account as defined by the International Monetary Fund.

2.10. *Goods* means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

3. Evidentiary effect of the information contained in the multimodal transport document

The information in the *MT document* shall be *prima facie* evidence of the taking in charge

(*) Doc. no. 321–34, adapted by the ICC Executive Board, Paris, 11 June 1991. Entry into force 1 January 1992. ICC publ. no. 481.

by the MTO of the goods as described by such information unless a contrary indication, such as 'shipper's weight, load and count', 'shipper-packed container' or similar expressions, has been made in the printed text or superimposed on the document. Proof to the contrary shall not be admissible when the *MT document* has been transferred, or the equivalent electronic data interchange message has been transmitted to and acknowledged by the consignee who in good faith has relied and acted thereon.

4. Responsibilities of the multimodal transport operator

4.1. *Period of responsibility*
The responsibility of the MTO for the goods under these Rules covers the period from the time the MTO has taken the goods in his charge to the time of their delivery.

4.2. *The liability of the MTO for his servants, agents and other persons*
The multimodal transport operator shall be responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the contract, as if such acts and omissions were his own.

4.3. *Delivery of the goods to the consignee*
The MTO undertakes to perform or to procure the performance of all acts necessary to ensure delivery of the goods:
(a) when the *MT document* has been issued in a negotiable form 'to bearer', to the person surrendering one original of the document, or
(b) when the *MT document* has been issued in a negotiable form 'to order', to the person surrendering one original of the document duly endorsed, or
(c) when the *MT document* has been issued in a negotiable form to a named person, to that person upon proof of his identity and surrender of one original document; if such document has been transfered 'to order' or in blank the provisions of (b) above apply, or
(d) when the *MT document* has been issued in a non-negotiable form, to the person named as consignee in the document upon proof of his identity, or
(e) when no document has been issued, to a person as instructed by the consignor or by a person who has acquired the consignor's or the consignee's rights under the multimodal transport contract to give such instructions.

5. Liability of the multimodal transport operator

5.1. *Basis of Liability*
Subject to the defences set forth in Rule 5.4 and Rule 6, the MTO shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Rule 4.1., unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in Rule 4 has caused or contributed to the loss, damage or delay in delivery. However, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO.

5.2. *Delay in delivery*
Delay in delivery occurs when 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 of a diligent MTO, having regard to the circumstances of the case.

5.3. *Conversion of delay into final loss*
If the goods have not been delivered within ninety consecutive days following the date of delivery determined according to Rule 5.2., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

5.4. *Defences for carriage by sea or inland waterways*

Notwithstanding the provisions of Rule 5.1, the MTO shall not be responsible for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

– act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

– fire, unless caused by the actual fault or privity of the carrier,

however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the MTO can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

5.5. *Assessment of compensation*

5.5.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the multimodal transport contract, they should have been so delivered.

5.5.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

6. Limitation of liability of the multimodal transport operator

6.1. Unless the nature and value of the goods have been declared by the consignor before the goods have been taken in charge by the MTO and inserted in the *MT document*, the MTO shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

6.2. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the *MT document* as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

6.3. Notwithstanding the above-mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

6.4. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined be reference to the provisions of such convention or mandatory national law.

6.5. If the MTO is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport.

6.6. The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the goods.

7. Loss of the right of the multimodal transport operator to limit liability

The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

8. Liability of the consignor

8.1. The consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the goods were taken in charge by the MTO, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion in the *MT document*.

8.2. The consignor shall indemnify the MTO against any loss resulting from inaccuracies in or inadequacies of the particulars referred to above.

8.3. The consignor shall remain liable even if the *MT document* has been transferred by him.

8.4. The right of the MTO to such indemnity shall in no way limit his liability under the multimodal transport contract to any person other than the consignor.

9. Notice of loss of or damage to the goods

9.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the MTO when the goods are handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the MTO of the goods as described in the *MT document*.

9.2. Where the loss or damage is not apparent, the same *prima facie* effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were handed over to the consignee.

10. Time-bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with Rule 5.3., failure to deliver the goods would give the consignee the right to treat the goods as lost.

11. Applicability of the rules to actions in tort

These Rules apply to all claims against the MTO relating to the performance of the multimodal transport contract, whether the claim be founded in contract or in tort.

12. Applicability of the rules to the multimodal transport operator's servants, agents and other persons employed by him

These Rules apply whenever claims relating to the performance of the multimodal transport contract are made against any servant, agent or other person whose services the MTO has used in order to perform the multimodal transport contract, whether such claims are founded in contract or in tort, and the aggregate liability of the MTO of such servants, agents or other persons shall not exceed the limits in Rule 6.

13. Mandatory law

These Rules shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the multimodal transport contract.

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FIATA MODEL RULES
FOR FREIGHT FORWARDING SERVICES

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FIATA MODEL RULES FOR FREIGHT FORWARDING SERVICES

PART I

GENERAL PROVISIONS

1. Applicability

1.1.

These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract by referring to the FIATA Model Rules for Freight Forwarding Services.

1.2.

Whenever such reference is made, the parties agree that these Rules shall supersede any additional terms of the contract which are in conflict with these Rules, except insofar as they increase the responsibility or obligations of the Freight Forwarder.

2. Definitions

2.1.

Freight Forwarding Services means services of any kind relating to the carriage, consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods.

2.2.

Freight Forwarder means the person concluding a contract of Freight Forwarding Services with a Customer.

2.3.

Carrier means any person actually performing the carriage of the Goods with his own means of transport (performing Carrier) and any person subject to carrier liability as a result of an express or implied undertaking to assume such liability (contracting Carrier).

2.4.

Customer means any person having rights or obligations under the contract of Freight Forwarding Services concluded with a Freight Forwarder or as a result of his activity in connection with such services.

2.5.

Goods means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder.

2.6.

SDR means a Special Drawing Right as defined by the International Monetary Fund.

2.7.

Mandatory Law means any statutory law the provisions of which cannot be departed from by contractual stipulations to the detriment of the Customer.

2.8.

In writing includes telegram, telex, telefax or any recording by electronic means.

2.9.

Valuables means bullion, coins, money, negotiable instruments, precious stones, jewellery, antiques, pictures, works of art and similar properties.

2.10.

Dangerous Goods means Goods which are officially classified as hazardous as well as Goods which are or may become of a dangerous, inflammable, radioactive noxious or damaging nature.

3. Insurance

No insurance will be effected by the Freight Forwarder, except upon express instructions given in writing by the Customer. All insurances effected are subject to the usual exceptions and conditions of the Policies of the Insurance Company or Underwriters taking the risk. Unless otherwise agreed in writing the Freight Forwarder shall not be under any obligation to effect a separate insurance on each consignment, but may declare it on any open or general Policy held by the Freight Forwarder.

4. Hindrances

If at any time the Freight Forwarder's performance is or is likely to be affected by any hindrance or risk of any kind (including the conditions of the Goods) not arising from any fault or neglect of the Freight Forwarder and which cannot be avoided by the exercise of reasonable endeavour, the Freight Forwarder may abandon the carriage of the Goods under the respective contract and, where reasonably possible, make the Goods or any part of them available to the Customer at a place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such Goods shall cease. In any event, the Freight Forwarder shall be entitled to the agreed remuneration under the contract and the Customer shall pay any additional costs resulting from the above-mentioned circumstances.

5. Method and route of transportation

The Freight Forwarder shall carry out his services according to the Customer's instructions as agreed. If the instructions are inaccurate or incomplete or not according to contract, the Freight Forwarder may at the risk and expense of the Customer act as he deems fit.

Unless otherwise agreed, the Freight Forwarder may without notice to the Customer arrange to carry the Goods on or under deck and choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the Goods.

PART II

THE FREIGHT FORWARDER'S LIABILITY

6. The Freight Forwarder's liability (except as principal)

6.1. Basis of liability

6.1.1. The Freight Forwarder's duty of care

The Freight Forwarder is liable if he fails to exercise due diligence and take reasonable measures in the performance of the Freight Forwarding Services, in which case he, subject to Art.8, shall compensate the Customer for loss of or damage to the Goods as well as for direct financial loss resulting from breach of his duty of care.

6.1.2. No liability for third parties

The Freight Forwarder is not liable for acts and omissions by third parties, such as, but not limited to, Carriers, warehousemen, stevedores, port authorities and other freight forwarders, unless he has failed to exercise due diligence in selecting, instructing or supervising such third parties.

7. The Freight Forwarder's liability as principal

7.1. The Freight Forwarder's liability as Carrier

The Freight Forwarder is subject to liability as principal not only when he actually performs the carriage himself by his own means of transport (performing Carrier), but also if, by issuing his own transport document or otherwise, he has made an express or implied undertaking to assume Carrier

liability (contracting Carrier).

However, the Freight Forwarder shall not be deemed liable as Carrier if the Customer has received a transport document issued by a person other than the Freight Forwarder and does not within a reasonable time maintain that the Freight Forwarder is nevertheless liable as Carrier.

7.2. The Freight Forwarder's liability as principal for other services

With respect to services other than carriage of Goods such as, but not limited to, storage, handling, packing or distribution of the Goods, as well as ancillary services in connection therewith, the Freight Forwarder shall be liable as principal:

1. when such services have been performed by himself using his own facilities or employees or

2. if he has made an express or implied undertaking to assume liability as principal.

7.3. The basis of the Freight Forwarder's liability as principal

The Freight Forwarder as principal shall, subject to Art. 8, be responsible for the acts and omissions of third parties he has engaged for the performance of the contract of carriage or other services in the same manner as if such acts and omissions were his own and his rights and duties shall be subject to the provisions of the law applicable to the mode of transport or service concerned, as well as the additional conditions expressly agreed or, failing express agreement, by the usual conditions for such mode of transport or services.

8. Exclusions, assessment, and monetary limits of liability

8.1. Exclusions

The Freight Forwarder shall in no event be liable for:

1. Valuables or Dangerous Goods unless declared as such to the Freight Forwarder at the time of the conclusion of the contract,

2. loss following from delay unless expressly agreed in writing,

3. indirect or consequential loss such as, but not limited to, loss of profit and loss of market.

8.2. Assessment of compensation

The value of the Goods shall be determined according to the current commodity exchange price or, if there is not such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of the Goods of the same kind and quality.

8.3. Monetary limits

8.3.1. Loss of or damage to the Goods

The provisions of Art. 7.3. notwithstanding, the Freight Forwarder shall not be or become liable for any loss of or damage to the Goods in an amount exceeding the equivalent of 2 SDR per kilogram of gross weight of the Goods lost or damaged unless a larger amount is recovered from a person for whom the Freight Forwarder is responsible. If the Goods have not been delivered within ninety consecutive days after the date when the Goods ought to have been delivered, the claimant may, in the absence of evidence to the contrary, treat the Goods as lost.

8.3.2. Limitation of liability for delay

If the Freight Forwarder is liable in respect of loss following from delay, such liability shall be limited to an amount not exceeding the remuneration relating to the service giving rise to the delay.

8.3.3. Other type of loss

The provisions of Art. 7.3. notwithstanding, the Freight Forwarder's liability for any type of loss not mentioned in 8.3.1. and 8.3.2. shall not exceed the total amount of ..... SDR *) for each incident unless a larger amount is received from a person for whom the Freight Forwarder is responsible.

*) The maximum liability amount is intentionally left open and has to be completed according to the situation in the country where the Model Rules are applied.

9. Notice

9.1.

Unless notice of loss of or damage to the Goods, specifying the general nature of such loss or damage, is given in writing to the Freight Forwarder by the person entitled to receive the Goods when they are handed over to him, such handing over is prima facie evidence of the delivery of the Goods in good order and condition. Where such loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the Goods were handed over to the person entitled to receive them.

9.2.

With respect to all other loss or damage, any claim by the Customer against the Freight Forwarder arising in respect of any service provided for the Customer or which the Freight Forwarder has undertaken to provide shall be made in writing and notified to the Freight Forwarder within 14 days of the date upon which the Customer became or should have become aware of any event or occurrence alleged to give rise to such claim. Any claim not made and notified as aforesaid shall be deemed to be waived and absolutely barred except where the Customer can show that it was impossible for him to comply with this time limit and that he has made the claim as soon as it was reasonably possible for him to do so.

10. Time bar

The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these Rules unless suit is brought within 9 months after the delivery of the Goods, or the date when the Goods should have been delivered, or the date when failure to deliver the Goods would give the consignee the right to treat the Goods as lost.

With respect to other loss than loss of or damage to the Goods the 9 months period should be counted from the time when the failure of the Freight Forwarder giving right to the claim occurred.

11. Applicability to actions in tort

These Rules apply to all claims against the Freight Forwarder whether the claim be founded in contract or in tort.

12. Liability of servants and other persons

These Rules apply whenever any claim is made against a servant, agent or other person the Freight Forwarder engaged for the performance of the service (including any independent contractor) whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and such servants, agents or other persons shall not exceed the limit applicable to the service concerned as expressly agreed between the Freight Forwarder and the Customer or following from these Rules.

PART III

THE CUSTOMER'S OBLIGATIONS AND LIABILITY

13. Unforeseen circumstances

In the event that the Freight Forwarder, in case of unforeseen circumstances, acts in the best interest of the Customer extra costs and charges have to be borne by the Customer.

14. No set-off

All monies due shall be paid without any reduction or deferment on account of any claim, counter-claim or set-off.

15. General lien

The Freight Forwarder shall, to the extent permitted by the applicable law, have a general lien on the Goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Customer including

reasonable manner which he may think fit.

16. Information

The Customer shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the Goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the Goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the Goods, as furnished by him or on his behalf.

17. Duty of indemnification

17.1. General duty of indemnification

Except to the extent that the Freight Forwarder is liable according to the provisions of Part II, the Customer shall indemnify the Freight Forwarder for all liability incurred in the performance of the Freight Forwarding Services.

17.2. Duty of indemnification in respect of General Average

The Customer shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

18. The Customer's liability

The Customer shall be liable to the Freight Forwarder for all loss or damage, costs, expenses and official charges resulting from the Customer's inaccurate or incomplete information or instructions or the handing over by the Customer or any person acting on his behalf to the Freight Forwarder, or to any other person to whom the Freight Forwarder may become liable, of Goods having caused death or personal injury, damage to property, environmental damage or any other type of loss.

PART IV

DISPUTES AND MANDATORY LAW

19. Jurisdiction and applicable law

Unless otherwise agreed, actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his principal place of business and shall be decided according to the law of the country of that place.

20. Mandatory Law

These Rules shall only take effect to the extent that they are not contrary to the mandatory provisions of international conventions or national law applicable to the Freight Forwarding Services.

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CMI UNIFORM RULES FOR SEA WAYBILLS*

1. Scope of Application

(i) These Rules shall be called the «CMI Uniforms Rules for Sea Waybills».

(ii) They shall apply when adopted by a contract of carriage which is not covered by a bill of lading or similar document of title, whether the contract be in writing or not.

2. Definitions

In these Rules:

«Contract of carriage» shall mean any contract of carriage subject to these Rules which is to be performed wholly or partly by sea.

«Goods» shall mean any goods carried or received for carriage under a contract of carriage.

«Carrier» and «Shipper» shall mean the parties named in or identifiable as such from the contract of carriage.

«Consignee» shall mean the party named in or identifiable as such from the contract of carriage, or any person substituted as consignee in accordance with rule 6(i).

«Right of Control» shall mean the rights and obligations referred to in rule 6.

3. Agency

(i) The shipper on entering into the contract of carriage does so not only on his own behalf but also as agent for and on behalf of the consignee, and warrants to the carrier that he has authority so to do.

(ii) This rule shall apply if, and only if, it be necessary by the law applicable to the contract of carriage so as to enable the consignee to sue and be sued thereon. The consignee shall be under no greater liability than he would have been had the contract of carriage been covered by a bill of lading or similar document of title.

4. Rights and Responsibilities

(i) The contract of carriage shall be subject to any International Convention or National Law which is, or if the contract of carriage had been covered by a bill of lading or similar document of title would have been, compulsorily applicable thereto. Such convention or law shall apply notwithstanding anything inconsistent therewith in the contract of carriage.

(ii) Subject always to subrule (i), the contract of carriage is governed by:

(a) these Rules;

(b) unless otherwise agreed by the parties, the carrier's standard terms and conditions for the trade, if any, including any terms and conditions relating to the non-sea part of the carriage;

(c) any other terms and conditions agreed by the parties.

(iii) In the event of any inconsistency between the terms and conditions mentioned under subrule (ii)(b) or (c) and these Rules, these Rules shall prevail.

5. Description of the Goods

(i) The shipper warrants the accuracy of the particulars furnished by him relating to the goods, and shall indemnify the carrier against any loss, damage or expense resulting from any inaccuracy.

(ii) In the absence of reservation by the carrier, any statement in a sea waybill or similar document as to the quantity or condition of the goods shall

(a) as between the carrier and the shipper be prima facie evidence of receipt of the goods as so stated;

(b) as between the carrier and the consignee be conclusive evidence of receipt of the goods as so stated, and proof to the contrary shall not be permitted, provided always that the consignee has acted in good faith.

6. Right of Control

(i) Unless the shipper has exercised his option under subrule (ii) below, he shall be the only party entitled to give the carrier instructions in relation to the contract of carriage. Unless prohibited by the applicable law, he shall be entitled to change the name of the consignee at any time up to the consignee claiming delivery of the goods after their arrival at destination, provided he gives the carrier reasonable notice in writing, or by some other means acceptable to the carrier, thereby undertaking to indemnify the carrier against any additional expense caused thereby.

(ii) The shipper shall have the option, to be exercised not later than the receipt of the goods by the carrier, to transfer the right of control to the consignee. The exercise of this option must be noted on the sea waybill or similar document, if any. Where the option has been exercised the consignee shall have such rights as are referred to in subrule (i) above and the shipper shall cease to have such rights.

7. Delivery

(i) The carrier shall deliver the goods to the consignee upon production of proper identification.

(ii) The carrier shall be under no liability for wrong delivery if he can prove that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party.

8. Validity

In the event of anything contained in these Rules or any such provisions as are incorporated into the contract of carriage by virtue of rule 4, being inconsistent with the provisions of any International Convention or National Law compulsorily applicable to the contract of carriage, such Rules and provisions shall to that extent but no further be null and void.

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CMI RULES FOR ELECTRONIC BILLS OF LADING*

1. Scope of Application

These rules shall apply whenever the parties so agree.

2. Definitions

a. «Contract of Carriage» means any agreement to carry goods wholly or partly by sea.

b. «EDI» means Electronic Data Interchange, i.e. the interchange of trade data effected by teletransmission.

c. «UN/EDIFACT» means the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport.

d. «Transmission» means one or more messages electronically sent together as one unit of dispatch which includes heading and terminating data.

e. «Confirmation» means a Transmission which advises that the content of a Transmission appears to be complete and correct, without prejudice to any subsequent consideration or action that the content may warrant.

f. «Private Key» means any technically appropriate form, such as a combination of numbers and/or letters, which the parties may agree for securing the authenticity and integrity of a Transmission.

g. «Holder» means the party who is entitled to the rights described in Article 7 (a) by virtue of its possession of a valid Private Key.

h. «Electronic Monitoring System» means the device by which a computer system can be examined for the transactions that it recorded, such as a Trade Data Log or an Audit Trail.

i. «Electronic Storage» means any temporary, intermediate or permanent storage of electronic data including the primary and the back-up storage of such data.

3. Rules of procedure

a. When not in conflict with these Rules, the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, 1987 (UNCID) shall govern the conduct between the parties.

b. The EDI under these Rules should conform with the relevant UN/EDIFACT standards. However, the parties may use any other method of trade data interchange acceptable to all of the users.

c. Unless otherwise agreed, the document format for the Contract of Carriage shall conform to the UN Layout Key or compatible national standard for bills of lading.

d. Unless otherwise agreed, a recipient of a Transmission is not authorised to act on a Transmission unless he has sent a Confirmation.

e. In the event of a dispute arising between the parties as to the data actually transmitted, an Electronic Monitoring System may be used to verify the data received. Data concerning other transactions not related to the data in dispute are to be considered as trade secrets and thus not available for examination. If such data are unavoidably revealed as part of the examination of the Electronic Monitoring System, they must be treated as confidential and not released to any outside party or used for any other purpose.

f. Any transfer of rights to the goods shall be considered to be private information, and shall not be released to any outside party not connected to the transport or clearance of the goods.

4. Form and content of the receipt message

a. The carrier, upon receiving the goods from the shipper, shall give notice of the receipt of the goods to the shipper by a message at the electronic address specified by the shipper.

b. This receipt message shall include:
   (i) the name of the shipper;
   (ii) the description of the goods, with any representations and reservations, in the same tenor as would be required if a paper bill of lading were issued; -
   (iii) the date and place of the receipt of the goods;
   (iv) a reference to the carrier's terms and conditions of carriage; and
   (v) the Private Key to be used in subsequent Transmissions.

   The shipper must confirm this receipt message to the carrier, upon which Confirmation the shipper shall be the Holder.

c. Upon demand of the Holder, the receipt message shall be updated with the date and place of shipment as soon as the goods have been loaded on board.

d. The information contained in (ii), (iii) and (iv) of paragraph (b) above including the date and place of shipment if updated in accordance with paragraph (c) of this Rule, shall have the same force and effect as if the receipt message were contained in a paper bill of lading.

5. Terms and conditions of the Contract of Carriage

a. It is agreed and understood that whenever the carrier makes a reference to its terms and conditions of carriage, these terms and conditions shall form part of the Contract of Carriage.

b. Such terms and conditions must be readily available to the parties to the Contract of Carriage.

c. In the event of any conflict or inconsistency between such terms and conditions and these Rules, these Rules shall prevail.

6. Applicable law

The Contract of Carriage shall be subject to any international convention or national law which would have been compulsorily applicable if a paper bill of lading had been issued.

7. Right of Control and Transfer

a. The Holder is the only party who may, as against the carrier:

   (1) claim delivery of the goods;
   (2) nominate the consignee or substitute a nominated consignee for any other party, including itself;
   (3) transfer the Right of Control and Transfer to another party;
   (4) instruct the carrier on any other subject concerning the goods, in accordance with the terms and conditions of the Contract of Carriage, as if he were the holder of a paper bill of lading.

b. A transfer of the Right of Control and Transfer shall be effected: (i) by notification of the current Holder to the carrier of its intention to transfer its Right of Control and Transfer to a proposed new Holder, and (ii) confirmation by the carrier of such notification message, whereupon (iii) the carrier shall transmit the information as referred to in article 4 (except for the Private Key) to the proposed new Holder, whereafter (iv) the proposed new Holder shall advise the carrier of its

acceptance of the Right of Control and Transfer, whereupon (v) the carrier shall cancel the current Private Key and issue a new Private Key to the new Holder.

c. If the proposed new Holder advises the carrier that it does not accept the Right of Control and Transfer or fails to advise the carrier of such acceptance within a reasonable time, the proposed transfer of the Righ of Control and Transfer shall not take place. The carrier shall notify the current Holder accordingly and the current Private Key shall retain its validity.

d. The transfer of the Right of Control and Transfer in the manner described above shall have the same effects as the transfer of such rights under a paper bill of lading.

8. The Private Key

a. The Private Key is unique to each successive Holder. It is not transferable by the Holder. The carrier and the Holder shall each maintain the security of the Private Key.

b. The carrier shall only be obliged to send a Confirmation of an electronic message to the last Holder to whom it issued a Private Key, when such Holder secures the Transmission containing such electronic message by the use of the Private Key

c. The Private Key must be separate and distinct from any means used to identify the Contract of Carriage, and any security password or identification used to access the computer network.

9. Delivery

a. The carrier shall notify the Holder of the place and date of intended delivery of the goods. Upon such notification the Holder has a duty to nominate a consignee and to give adequate delivery instructions to the carrier with verification by the Private Key. In the absence of such nomination, the Holder will be deemed to be the consignee.

b. The carrier shall deliver the goods to the consignee upon production of proper identification in accordance with the delivery instructions specified in paragraph (a) above: such delivery shall automatically cancel the Private Key.

c. The carrier shall be under no liability for misdelivery if it can prove that it exercised reasonable care to ascertain that the party who claimed to be the consignee was in fact that party.

10. Option to receive a paper document

a. The Holder has the option at any time prior to delivery of the goods to demand from the carrier a paper bill of lading. Such document shall be made available at a location to be determined by the Holder, provided that no carrier shall be obliged to make such document available at a place where it has no facilities and in such instance the carrier shall only be obliged to make the document available at the facility nearest to the location determined by the Holder. The carrier shall not be responsible for delays in delivering the goods resulting from the Holder exercising the above option.

b. The carrier has the option at any time prior to delivery of the goods to issue to the Holder a paper bill of lading unless the exercise of such option could result in undue delay or disrupts the delivery of the goods.

c. A bill of lading issued under Rules 10 (a) or (b) shall include : the information set out in the receipt message referred to in Rule 4 (except for the Private Key); and (ii) a statement to the effect that the bill of lading has been issued upon termination of the procedures for EDI under the CMI Rules for Electronic Bills of Lading. The aforementioned bill of lading shall be issued at the option of the Holder either to the order of the Holder whose name for the purpose shall then be inserted in the bill of lading or « to bearer ».

d. The issuance of a paper bill of lading under Rule 10 (a) or (b) shall cancel the Private Key and terminate the procedures for EDI under these Rules. Termination of these procedures by the Holder or the carrier will not relieve any of the parties to the Contract of Carriage of their rights, obligations or liabilities while performing under the present Rules nor of their rights, obligations or liabilities under the Contract of Carriage.

e. The Holder may demand at any time the issuance of a print-out of the receipt message referred to in Rule 4 (except for the Private Key) marked as « non-negotiable copy ». The issuance of such a print-out shall not cancel the Private Key nor terminate the procedures for EDI.

11. Electronic data is equivalent to writing

The carrier and the shipper and all subsequent parties utilizing these procedures agree that any national or local law, custom or practice requiring the Contract of Carriage to be evidenced in writing and signed, is satisfied by the transmitted and confirmed electronic data residing on computer data storage media displayable in human language on a video screen or as printed out by a computer. In agreeing to adopt these Rules, the parties shall be taken to have agreed not to raise the defence that this contract is not in writing.

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Consignor

Emblem of National Association

FBL

NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING

issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481).

Consigned to order of

Notify address

Place of receipt

Ocean vessel | Port of loading

Port of discharge | Place of delivery

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8).

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
Cargo Insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's	Stamp and signature
For delivery of goods please apply to:		

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- «Freight Forwarder» means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier
- «Merchant» means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods
- «Consignor» means the person who concludes the multimodal transport contract with the Freight Forwarder
- «Consignee» means the person entitled to receive the goods from the Freight Forwarder
- «Taken in charge» means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL
- «Goods» means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability

Notwithstanding the heading «FIATA Multimodal Transport Bill of Lading (FBL)» these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1. By issuance of this FBL the Freight Forwarder

a) undertakes to perform and/or in his own name to procure the performances of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL,

b) assumes liability as set out in these conditions

2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1. This FBL is issued in a negotiable form unless it is marked «non negotiable». It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods hereon mentioned.

3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as «shipper's weight, load and count», «shipper-packed container» or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when this FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

4. Dangerous Goods and Insurance

4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.

4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage or expense arising out of their being taken in charge, or their carriage, or at any service incidental thereto.

The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.

4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless, if such danger was not caused by the fault and neglect of the Freight Forwarder but shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.

5. Description of Goods and Merchant's Packing and Inspection

5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.

The Consignor shall indemnify the Freight Forwarder against all loss, damage and expenses resulting from any inaccuracy or inadequacy of such particulars.

The Consignor shall remain liable even if the FBL has been transferred by him.

The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.

5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder or his servants or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Clause 2.1.a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. The Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.

6.4. If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events, specified in a – e of the present clause, it shall be presumed that it was so caused. It shall, however, then be the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events.

a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge,

b) inadequacy or defective condition of the packaging or marks and/or numbers,

c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant;

d) inherent vice of the goods;

e) strike, lockout, stoppages or restraint of labour.

6.6. Defences for carriage by sea or inland waterways

Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where they are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether carried on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3. Subject to the provisions of subclauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged

8.6. a) Where the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable shall not exceed US$ 5.00 per package or in the case of goods not packed in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions shall apply to all claims against the Freight Forwarder relating to the performances of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1. The benefit of every exception and limitation relating to the performances of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and whether the legal liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into the contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does so not only on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to the contract.

10.3. However, it it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of a person referred to in Clause 10.1., done with the intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 7.2. and 10.1 shall not exceed the limits provided for in these conditions

11. Method and Route of Transportation

Without notice to the Merchant the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12. Delivery

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL or when the goods have been handed over to any authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder

12.3. If at any time of the transit the FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event the Freight Forwarder shall be entitled to full freight under this FBL, and the Merchant shall pay any additional costs resulting from the above mentioned circumstances

13. Freight and Charges

13.1. Freight shall be paid in cash without any reduction or deferment on account of any claim, counterclaim or set-off whether prepaid or payable at destination.

Freight shall be deemed earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or at the Freight Forwarder's option in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.

Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.

13.4. The Merchant shall indemnify the Freight Forwarder in proportion to the amount of freight for any costs for detention or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure

13.5. The Merchant warrants the correctness of the declaration of particulars, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct freight and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable

13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14. Lien

The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15. General Average

The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection

16. Notice

16.1 Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.

16.2. Where such loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12

17. Time bar

The Freight Forwarder shall unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost

18. Partial invalidity

If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19. Jurisdiction and applicable law

Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL, and shall be decided according to the law of the country in which that place of business is situated.

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Shipper

LINER BILL OF LADING

B/L No.

Reference No.

Consignee

Notify address

Pre-carriage by*	Place of receipt by pre-carrier*
Vessel	Port of loading
Port of discharge	Place of delivery by on-carrier*

Marks and Nos.	Number and kind of packages; description of goods	Gross weight	Measurement

Particulars furnished by the Merchant

Freight details, charges etc.

Daily demurrage rate (additional Clause 4)

SHIPPED on board in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, for carriage to the Port of Discharge or so near thereunto as the Vessel may safely get and lie always afloat, to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns, they paying freight as indicated to the left plus other charges incurred in accordance with the provisions contained in this Bill of Lading.
In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant.
One original Bill of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.
IN WITNESS whereof the Master of the said Vessel has signed the number of original Bills of Lading stated below, all of this tenor and date, one of which being accomplished, the others to stand void.

* Applicable only when document used as a Through Bill of Lading

Freight payable at	Place and date of issue
Number of original Bs/L	Signature

Printed and sold by Fr. G. Knudtzon A/S
55 Toldbodgade, DK-1253 Copenhagen K, Telefax +45 33 93 11 84,
by authority of The Baltic and International Maritime Conference,
(BIMCO), Copenhagen.

99-0

LINER BILL OF LADING

(Liner terms approved by The Baltic and International Maritime Conference)
Code Name: "CONLINEBILL"

Amended January 1st, 1950, August 1st, 1952, January 1st, 1973 July 1st, 1974, August 1st, 1978, January 1st 1978

1. Definition.
Wherever the term "Merchant" is used in this Bill of Lading, it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the Bill of Lading and the Owner of the cargo.

2 General Paramount Clause
The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
Trades where Hague-Visby Rules apply
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968 The Hague-Visby Rules - apply compulsorily, the provisions of the respective legislation shall be considered incorporated in this Bill of Lading. The Carrier takes all reservations possible under such applicable legislation, relating to the period before loading and after discharging and while the goods are in the charge of another Carrier and to deck cargo and live animals

3. Jurisdiction.
Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein.

4 Period of Responsibility.
The Carrier or his Agent shall not be liable for loss of or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.

5. The Scope of Voyage.
As the vessel is employed in liner service the intended voyage shall not be limited to the direct route but shall be deemed to include any proceeding or returning to or stopping or slowing down at or off any ports or places for any reasonable purpose connected with the service including maintenance of vessel and crew

6. Substitution of Vessel, Transhipment and Forwarding.
Whether expressly arranged beforehand or otherwise, the Carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to tranship, land and store the goods either on shore or afloat and reship and forward the same at Carrier's expense but at Merchant's risk. When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's port of discharge, the Carrier acts as Forwarding Agent only.
The responsibility of the Carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by him for damage or loss of goods arising during any other part of the transport even though the freight for the whole transport has been collected by him.

7 Lighterage.
Any lightering in or off ports of loading or ports of discharge to be for the account of the Merchant.

8 Loading, Discharging and Delivery
of the cargo shall be arranged by the Carrier's Agent unless otherwise agreed
Landing, storing and delivery shall be for the Merchant's account.
Loading and discharging may commence without previous notice.
The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive and - but only if required by the Carrier - also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be relieved of any obligation to load such cargo and the vessel may leave the port without further notice and dead freight is to be paid.
The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver and - but only if required by the Carrier - also outside ordinary working hours notwithstanding any custom of the port. Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed a true fulfilment of the contract, or alternatively to act under Clause 16.
The Merchant shall bear all overtime charges in connection with tendering and taking delivery of the goods as above.
If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.
The Merchant shall accept his reasonable proportion of unidentified loose cargo.

9. Live Animals and Deck Cargo
shall be carried subject to the Hague Rules as referred to in Clause 2 hereof with the exception that notwithstanding anything contained in Clause 19 the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo.

10 Options.
The port of discharge for optional cargo must be declared to the vessel's Agents at the first of the optional ports not later than 48 hours before the vessel's arrival there, in the absence of such declaration the Carrier may elect to discharge at the first or any other optional port and the contract of carriage shall then be considered as having been fulfilled. Any option can be exercised for the total quantity under this Bill of Lading only.

11. Freight and Charges.
(a) Prepayable freight, whether actually paid or not, shall be considered as fully earned upon loading and non-returnable in any event. The Carrier's claim for any charges under this contract shall be considered definitely payable in like manner as soon as the charges have been incurred.
Interest at 6 per cent., shall run from the date when freight and charges are due.
(b) The Merchant shall be liable for expenses of fumigation and of gathering and sorting loose cargo and of weighing onboard and expenses incurred in repairing damage to and replacing of packing due to excepted causes and for all expenses caused by wrong description of the cargo for any of the aforementioned reasons.
(c) Any dues, duties, taxes and charges which under any denomination may be levied on any basis such as amount and/or weight of cargo or tonnage of the vessel shall be paid by the Merchant.
(d) The Merchant shall be liable for all fines and/or losses which the Carrier, vessel or cargo may incur through non-observance of Custom House and/or import or export regulations.
(e) The Carrier is entitled in case of incorrect declaration of contents, weights, measurements or value of the goods to claim double the amount of freight which would have been due if such declaration had been correctly given. For the purpose of ascertaining the actual facts, the Carrier reserves the right to obtain from the Merchant the original invoice and to have the contents inspected and the weight, measurement or value verified.

12. Lien.
The Carrier shall have a lien for any amount due under this contract and costs of recovering same and shall be entitled to sell the goods privately or by auction to cover any claims.

13. Delay.
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.

14. General Average and Salvage.
General Average to be adjusted at any port or place at Carrier's option and to be settled according to the York-Antwerp Rules 1974. In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Carrier is not responsible by statute, contract or otherwise, the Merchant shall contribute with the Carrier in General Average to the payment of any sacrifice, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving vessel is owned or operated by the Carrier, salvage shall be paid for as fully as if the salving vessel or vessels belonged to strangers.

15. Both-to-Blame Collision Clause. (This clause to remain in effect even if unenforcible in the Courts of the United States of America).
If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, negligence or default of the Master, Mariner, Pilot or the servants of the Carrier in the navigation or in the management of the vessel, the Merchant will indemnify the Carrier against all loss or liability to the other or non-carrying vessel or her Owner in so far as such loss or liability represents loss or damage to or any claim whatsoever of the owner of the said goods paid or payable by the other or non-carrying vessel or her Owner to the owner of such cargo and in addition, or prosecuted by the other or non-carrying vessel or her Owner as part of his claim against the carrying vessel or Carrier. The foregoing provisions shall also apply where the Owner, operator or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

16. Government directions, War, Epidemics, Ice, Strikes, etc.
(a) The Master and the Carrier shall have liberty to comply with any order or directions or recommendations in connection with the transport under this contract given by any Government or Authority, or anybody acting or purporting to act on behalf of such Government or Authority, or having under the terms of the insurance on the vessel the right to give such orders or directions or recommendations.
(b) Should it appear that the performance of the transport would cause the vessel or any goods on board to risk of seizure or damage or delay, resulting from war, warlike operations, blockade, riots, civil commotions or piracy, or any person onboard to the risk of loss of life or freedom, or that any such risk has increased, the Master may discharge the cargo at port of loading or any other safe and convenient port.
(c) Should it appear that epidemics, quarantine, ice - labour troubles, labour obstructions, strikes, lockouts, any of which onboard or on shore - difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the Master may discharge the cargo at port of loading or any other safe and convenient port.
(d) The discharge under the provisions of this clause of any cargo for which a Bill of Lading has been issued shall be deemed due fulfilment of the contract, if in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the Merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.
(e) If any situation referred to in this clause may be anticipated, or if for any such reason the vessel cannot safely and without delay reach or enter the loading port or must undergo repairs, the Carrier may cancel the contract before the Bill of Lading is issued.
(f) The Merchant shall be informed if possible.

17. Identity of Carrier.
The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to breach of or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness, if, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
It is further understood and agreed that as the Line Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.

18. Exemptions and Immunities of all servants and agents of the Carrier.
It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading.
The Carrier shall be entitled to be paid by the Merchant on demand any sums recoverable or recoverable by the Merchant or any other from such servant or agent of the Carrier for any such loss, damage or delay or otherwise.

19. Optional Stowage, Unitization.
(a) Goods may be stowed by the Carrier as received, or, at Carrier's option, by means of containers, or similar articles of transport used to consolidate goods
(b) Containers, trailers and transportable tanks, whether stowed by the Carrier or received by him in a stowed condition from the Merchant, may be carried on or under deck without notice to the Merchant.
(c) The Carrier's liability for cargo stowed as aforesaid shall be governed by the Hague Rules as defined above notwithstanding the fact that the goods are being carried on deck and the goods shall contribute to general average and shall receive compensation in general average.

ADDITIONAL CLAUSES

(To be added if required in the contemplated trade).

A. Demurrage.
The Carrier shall be paid demurrage at the daily rate per ton of the vessel's gross register tonnage as indicated on Page 2 if the vessel is not loaded or discharged with the dispatch set out in Clause 8, any delay in waiting for berth at or off port to count, it is agreed that if the delay is due to causes beyond the control of the Merchant, 24 hours shall be deducted from the time on demurrage.
Each Merchants shall be liable towards the Carrier for a proportionate part of the total demurrage due, based upon the total freight on the goods to be loaded or discharged at the port in question.
No Merchants shall be liable in demurrage for any delay arisen only in connection with goods belonging to other Merchants.
The demurrage in respect of each parcel shall not exceed its freight.
(This Clause shall only apply if the Demurrage Box on Page 2 is filled in)

B. U.S. Trade, Period of Responsibility.
In case the Contract evidenced by this Bill of Lading is subject to the U.S. Carriage of Goods by Sea Act, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entire time the goods are in the Carrier's custody.

Code Name: "MULTIWAYBILL 95"

Consignor

MT Doc. No.

Reference No.

MULTIMODAL TRANSPORT WAYBILL

Issued by The Baltic and International Maritime Council (BIMCO), subject to the UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication No 481) and to the CMI Uniform Rules for Sea Waybills

Issued 1995

Consignee (not to order)

Notify party/address

Place of receipt

Ocean Vessel | Port of loading

Port of discharge | Place of delivery

Marks and Nos.	Quantity and description of goods	Gross weight, kg. Measurement, m³

Particulars above declared by Consignor

Freight and charges

RECEIVED the goods in apparent good order and condition and, as far as ascertained by reasonable means of checking, as specified above unless otherwise stated.

The MTO, in accordance with and to the extent of the provisions contained in this MT Waybill, and with liberty to sub-contract, undertakes to perform and/or in his own name to procure performance of the multimodal transport and the delivery of the goods, including all services related thereto, from the place and time of taking the goods in charge to the place and time of delivery and accepts responsibility for such transport and such services.

The Consignor shall be entitled to transfer right of control of the cargo to the Consignee, the exercise of such option to be noted on this MT Waybill and to be made no later than the receipt of the cargo by the Carrier.

Consignor's declared value of .....

subject to payment of above extra charge.

Note:

The Merchant's attention is called to the fact that according to Clauses 10 to 12 of this MT Waybill, the liability of the MTO is, in most cases, limited in respect of loss of or damage to the goods.

Freight payable at

Place and date of issue

Signed for the Multimodal Transport Operator as (MTO)

..... as Carrier

by .....

As agent(s) only to the MTO

p.t.o.

MULTIMODAL TRANSPORT WAYBILL

CODE NAME: "MULTIWAYBILL 95"

I. GENERAL PROVISIONS

1. Applicability

The provisions of this Contract shall apply irrespective of whether there is a unimodal or a Multimodal Transport Contract involving one or several modes of transport.

2. Definitions

"Multimodal Transport Contract" means a single Contract for the carriage of Goods by at least two different modes of transport.

"Multimodal Transport Waybill" (MT Waybill) means the document evidencing a Multimodal Transport Contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and is issued in a non-negotiable form clearly indicating a named Consignee.

"Multimodal Transport Operator" (MTO) means the person named on the face hereof who concludes a Multimodal Transport Contract and assumes responsibility for the performance thereof as a Carrier

"Carrier" means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the Multimodal Transport Operator or not.

"Merchant" includes the Shipper, the Receiver, the Consignor, the Consignee and the owner of the Goods.

"Consignor" means the person who concludes the Multimodal Transport Contract with the Multimodal Transport Operator.

"Consignee" means the person entitled to receive the Goods from the Multimodal Transport Operator.

"Taken in charge" means that the Goods have been handed over to and accepted for carriage by the MTO.

"Delivery" means

(i) the handing over of the Goods to the Consignee; or
(ii) the placing of the Goods at the disposal of the Consignee in accordance with the Multimodal Transport Contract or with the law or usage of the particular trade applicable at the place of delivery, or
(iii) the handing over of the Goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the Goods must be handed over.

"Special Drawing Rights" (SDR) means the unit of account as defined by the International Monetary Fund.

"Goods" means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck.

3. MTO's Tariff

The terms of the MTO's applicable tariff at the date of shipment are incorporated herein. Copies of the relevant provisions of the applicable tariff are available from the MTO upon request. In the case of inconsistency between this MT Waybill and the applicable tariff, this MT Waybill shall prevail.

4. Time Bar

The MTO shall, unless otherwise expressly agreed, be discharged of all liability under this MT Waybill unless suit is brought within nine months after:

(i) the Delivery of the Goods, or
(ii) the date when the Goods should have been delivered; or
(iii) the date when, in accordance with sub-clause 10 (a) failure to deliver the Goods would give the Consignee the right to treat the Goods as lost.

5. Law and Jurisdiction

Disputes arising under this MT Waybill shall be determined by the courts and in accordance with the law at the place where the MTO has his principal place of business.

II. PERFORMANCE OF THE CONTRACT

6. Methods and Routes of Transportation

(a) The MTO is entitled to perform the transport in any reasonable manner and by any reasonable means, methods and routes.

(b) In accordance herewith, for instance, in the event of carriage by sea, vessels may sail with or without pilots, undergo repairs, assist equipment, drydock and tow vessels in all situations.

7. Optional Stowage

(a) Goods may be stowed by the MTO by means of containers, trailers, transportable tanks, flats, pallets, or similar articles of transport used to consolidate Goods.

(b) Containers, trailers, transportable tanks and covered flats, whether stowed by the MTO or received by him in a stowed condition, may be carried on or under deck without notice to the Merchant.

8. Delivery of the Goods to the Consignee

The MTO undertakes to perform or to procure the performance of all acts necessary to ensure delivery of the Goods, subject to proof of his identity, to the person named as Consignee in the document or a person as instructed by the Consignor or by a person who has acquired the Consignor's or the Consignee's rights under the Multimodal Transport Contract to give such instructions.

9. Hindrance, etc. Affecting Performance

(a) The MTO shall use reasonable endeavours to complete the transport and to deliver the Goods at the place designated for Delivery

(b) If at any time the performance of the Contract as evidenced by this MT Waybill is or will be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, and if by virtue of sub-clause 9 (a) the MTO has no duty to complete the performance of the Contract, the MTO (whether or not the transport is commenced) may elect to

(i) treat the performance of this Contract as terminated and place the Goods at the Merchant's disposal at any place which the MTO shall deem safe and convenient; or
(ii) deliver the Goods at the place designated for Delivery

(c) If the Goods are not taken Delivery of by the Merchant within a reasonable time after the MTO has called upon him to take Delivery, the MTO shall be at liberty to put the Goods in safe custody on behalf of the Merchant at the latter's risk and expense.

(d) In any event the MTO shall be entitled to full freight for Goods received for transportation and additional compensation for extra costs resulting from the circumstances referred to above.

III. LIABILITY OF THE MTO

10. Basis of Liability

(a) The responsibility of the MTO for the Goods under this Contract covers the period from the time the MTO has taken the Goods into his charge to the time of their Delivery

(b) Subject to the defences set forth in Clauses 11 and 12, the MTO shall be liable for loss of or damage to the Goods, as well as for delay in Delivery, if the occurrence which caused the loss, damage or delay in Delivery took place while the Goods were in his charge as defined in sub-clause 10 (a), unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in sub-clause 10 (c) has caused or contributed to the loss, damage or delay in Delivery.

However, the MTO shall only be liable for loss following from delay in Delivery if the Consignor has made a written declaration of interest in timely Delivery which has been accepted in writing by the MTO.

(c) The MTO shall be responsible for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the performance of the Contract, as if such acts and omissions were his own.

(d) Delay in Delivery has occurred when 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 of a diligent MTO, having regard to the circumstances of the case.

(e) If the Goods have not been delivered within ninety (90) consecutive days following the date of Delivery determined according to Clause 10 (d) above, the claimant may, in the absence of evidence to the contrary, treat the Goods as lost.

11. Defences for Carriage by Sea or Inland Waterways

Notwithstanding the provisions of Clause 10 (b), the MTO shall not be responsible for loss, damage or delay in Delivery with respect to Goods carried by sea or inland waterways when such loss, damage or delay during such carriage results from:

(i) act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the vessel;
(ii) fire, unless caused by the actual fault or privity of the Carrier;
(iii) causes listed in the Hague-Visby Rules article 4.2 (c) to (p); .

however, always provided that whenever loss or damage has resulted from unseaworthiness of the vessel, the MTO can prove that due diligence has been exercised to make the vessel seaworthy at the commencement of the voyage.

12. Limitation of Liability

(a) Unless the nature and value of the Goods have been declared by the Consignor before the Goods have been taken in charge by the MTO and inserted in the MT Waybill, the MTO shall in no event be liable for any loss of or damage to the Goods in an amount exceeding:

(i) when the Carriage of Goods by Sea Act of the United States of 1936 (COGSA) applies USD 500 per package or customary freight unit; or
(ii) when sub-clause (i) does not apply, the equivalent of 666.67 SDR per package or unit or two SDR per kilogramme of gross weight of the Goods lost or damaged, whichever is the higher.

(b) Where a container, pallet, or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the bill of lading as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

(c) Notwithstanding the above-mentioned provisions, if the Multimodal Transport does not, according to the Contract, include carriage of Goods by sea or by inland waterways, the liability of the MTO shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the Goods lost or damaged.

(d) In any case, when the loss of or damage to the Goods occurred during one particular stage of the Multimodal Transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the MTO's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

(e) If the MTO is liable in respect of loss following from delay in Delivery, or consequential loss or damage other than loss of or damage to the Goods, the liability of the MTO shall be limited to an amount not exceeding the equivalent of the freight under the Multimodal Transport Contract for the Goods concerned.

(f) The aggregate liability of the MTO shall not exceed the limits of liability for total loss of the Goods

(g) The MTO is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in Delivery resulted from a personal act or omission of the MTO done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

13. Assessment of Compensation

(a) Except as otherwise provided, the value for loss of or damage to the Goods shall be made by reference to the value of such Goods at the place and time they are delivered to the Consignee or at the place and time when, in accordance with the Multimodal Transport Contract, they should have been so delivered

(b) The value of the Goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of Goods of the same kind and quality.

14. Notice of Loss of or Damage to the Goods

(a) Unless notice of loss of or damage to the Goods, specifying the general nature of such loss or damage, is given in writing by the Consignee to the MTO when the Goods are handed over to the Consignee, such handing over is prima facie evidence of the Delivery by the MTO of the Goods as described in the MT Waybill.

(b) Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within six consecutive days after the day when the Goods were handed over to the Consignee.

15. Defences and Limits for the MTO, Servants, etc.

(a) The defences and limits of this Contract apply to all claims against the MTO relating to the performance of the Multimodal Transport Contract, whether the claim be founded in contract or in tort.

(b) The Merchant undertakes that no claim shall be made against any servant, agent or other persons whose services the MTO has used in order to perform the Multimodal Transport Contract and if any claim should nevertheless be made, to indemnify the MTO against all consequences thereof.

(c) However, the provisions of this Contract apply whenever claims relating to the performance of the Multimodal Transport Contract are made against any servant, agent or other person whose services the MTO has used in order to perform the Multimodal Transport Contract, whether such claims are founded in contract or in tort in entering into this Contract, the MTO, to the extent of such provisions, does so not only on his own behalf but also as agent or trustee for such persons. The aggregate liability of the MTO and such persons shall not exceed the limits in Clause 12.

IV. DESCRIPTION OF GOODS

16. MTO's Responsibility

The information in the MT Waybill shall be prima facie evidence of the taking in charge by the MTO of the Goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, have been made in the printed text or superimposed on the document. As between the Carrier and the Consignee the information in the MT Waybill shall be conclusive evidence of receipt of the Goods as so stated and proof to the contrary shall not be permitted provided always that the Consignee has acted in good faith.

17. Consignor's Responsibility

(a) The Consignor shall be deemed to have guaranteed to the MTO the accuracy, at the time the Goods were taken in charge by the MTO, of all particulars relating to the general nature of the Goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the Goods as furnished by him or on his behalf for insertion in the MT Waybill.

(b) The Consignor shall indemnify the MTO for any loss or expenses caused by inaccuracies in or inadequacies of the particulars referred to above.

(c) The right of the MTO to such indemnity shall in no way limit his liability under the Multimodal Transport Contract to any person other than the Consignor

(d) The Consignor shall remain liable even if the Goods have been delivered.

18. Return of Containers

a) Containers, pallets or similar articles of transport supplied by or on behalf of the MTO shall be returned to the MTO in the same order and condition as handed over to the Merchant, normal wear and tear excepted, with interiors clean and within the time prescribed in the MTO's tariff or elsewhere

b)(i) The Consignor shall be liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignor and return to the MTO for carriage.

(ii) The Consignor and the Consignee shall be jointly and severally liable for any loss of, damage to, or delay, including demurrage, of such articles, incurred during the period between handing over to the Consignee and return to the MTO

19. Dangerous Goods

(a) The Consignor shall comply with all internationally recognised requirements and all rules which apply according to national law or by reason of international conventions, relating to the carriage of Goods of a dangerous nature, and shall in any event inform the MTO in writing of the exact nature of the danger before Goods of a dangerous nature are taken in charge by the MTO and indicate to him, if need be, the precautions to be taken.

(b) If the Consignor fails to provide such information and the MTO is unaware of the dangerous nature of the Goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation and the Consignor shall be liable for all loss, damage, delay or expenses arising out of or in connection with the charge, or their carriage, or of any service incidental thereto.

The burden of proving that the MTO knew the exact nature of the danger constituted by the carriage of the said Goods shall rest upon the Claimant.

(c) If any Goods shipped with the knowledge of the MTO as to their dangerous nature become a danger to life or property, or of cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the MTO without liability on the part of the MTO except to contribute in average, if any.

20. Consignor-packed Containers, etc.

(a) If a container has not been filled, packed or stowed by the MTO, the MTO shall not be liable for any loss of or damage to its contents and the Consignor shall indemnify the MTO against losses incurred by the MTO if such loss, damage or expense has been caused by

(i) negligent filling, packing or stowing of the container;
(ii) the contents being unsuitable for carriage in container; or
(iii) the unsuitability or defective condition of the container unless the container has been supplied by the MTO and the unsuitability or defective condition would not have been apparent upon reasonable inspection at or prior to the time when the container was filled, packed or stowed.

(b) The provisions of sub-clause (a) of this Clause also apply with respect to trailers, transportable tanks, flats and pallets which have not been filled, packed or stowed by the MTO.

(c) The MTO does not accept liability for damage due to the unsuitability or defective condition of reefer equipment or trailers supplied by the Merchant.

V. FREIGHT AND LIEN

21. Freight

(a) Freight shall be deemed earned when the Goods have been taken into charge by the MTO and shall be paid in any event (b) The Merchant's attention is drawn to stipulations concerning currency in which the freight and charges are to be paid, rate of exchange, devastation and other contingencies relative to freight and charges and retainment of cargo. Where no such stipulation as to devaluation exists or is applicable the following provisions shall apply:

If the currency in which freight and charges are quoted is devalued or revalued between the date of the freight agreement and the date when the freight and charges are paid, then all freight and charges shall be automatically and immediately changed in proportion to the extent of the devaluation or revaluation of the said currency. When the MTO has consented to payment in other currency than the above mentioned currency, then all freight and charges shall – subject to the preceding paragraph – be paid at the Highest selling rate of exchange for bankers' sight drafts current on the day when such freight and charges are paid, if the banks are closed on the day when the freight is paid the rate to be used will be that one in force on the last previous day the banks were open.

(c) For the purpose of verifying the freight basis, the MTO reserves the right to have the contents of containers, trailers or similar articles of transport inspected in order to ascertain the weight, measurement, value, or nature of the Goods. If on such inspection it is found that the declaration is not correct, it is agreed that a sum equal either to five times the difference between the correct freight and the freight charges or to double the correct freight less the freight charges, whichever sum is the smaller, shall be payable as liquidated damages to the MTO notwithstanding any other sum having been stated on this M Waybill as the freight payable.

(d) All dues, taxes and charges levied on the Goods and othe expenses in connection therewith shall be paid by the Merchan

22. Lien

The MTO shall have a lien on the Goods for any amount du under this Contract and for the costs of recovering the same and may enforce such lien in any reasonable manner, including sale or disposal of the Goods.

VI. MISCELLANEOUS PROVISIONS

23. General Average

(a) General Average shall be adjusted at any port or place at th MTO's option and it shall be settled according to the York-Antwer Rules 1994, or any modification thereof, this covering all Goods whether carried on or under deck. The New Jason Clause a appended by BIMCO to be considered as incorporated herein

(b) Such security including a cash deposit as the MTO ma deem sufficient to cover the estimated contribution of the Goods and any salvage and special charges thereon, shall, required, be submitted to the MTO prior to Delivery of the Goods

24. Both-to-Blame Collision Clause

The Both-to-Blame Collision Clause as adopted by BIMCO sha be considered incorporated herein.

25. U.S. Trade

In case the Contract evidenced by this MT Waybill is subject t U.S. COGSA, then the provisions stated in said Act shall govern before loading and after discharge and throughout the entir time the Goods are in the Carrier's custody.

1. Shipbroker	RECOMMENDED THE BALTIC AND INTERNATIONAL MARITIME COUNCIL UNIFORM GENERAL CHARTER (AS REVISED 1922, 1976 and 1994) (To be used for trades for which no specially approved form is in force) CODE NAME: "GENCON" Part I
	2. Place and date
3. Owners/Place of business (Cl. 1)	4. Charterers/Place of business (Cl. 1)
5. Vessel's name (Cl. 1)	6. GT/NT (Cl. 1)
7. DWT all told on summer load line in metric tons (abt.) (Cl. 1)	8. Present position (Cl. 1)
9. Expected ready to load (abt.) (Cl. 1)	
10. Loading port or place (Cl. 1)	11. Discharging port or place (Cl. 1)
12. Cargo (also state quantity and margin in Owners' option, if agreed; if full and complete cargo not agreed state "part cargo") (Cl. 1)	
13. Freight rate (also state whether freight prepaid or payable on delivery) (Cl. 4)	14. Freight payment (state currency and method of payment; also beneficiary and bank account) (Cl. 4)
15. State if vessel's cargo handling gear shall not be used (Cl. 5)	16. Laytime (if separate laytime for load. and disch. is agreed, fill in a) and b). If total laytime for load. and disch., fill in c) only) (Cl. 6)
17. Shippers/Place of business (Cl. 6)	(a) Laytime for loading
18. Agents (loading) (Cl. 6)	(b) Laytime for discharging
19. Agents (discharging) (Cl. 6)	(c) Total laytime for loading and discharging
20. Demurrage rate and manner payable (loading and discharging) (Cl. 7)	21. Cancelling date (Cl. 9)
	22. General Average to be adjusted at (Cl. 12)
23. Freight Tax (state if for the Owners' account (Cl .13 (c))	24. Brokerage commission and to whom payable (Cl. 15)
25. Law and Arbitration (state 19 (a), 19 (b) or 19 (c) of Cl 19; if 19 (c) agreed also state Place of Arbitration) (if not filled in 19 (a) shall apply) (Cl. 19)	
(a) State maximum amount for small claims/shortened arbitration (Cl. 19)	26. Additional clauses covering special provisions, if agreed

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter Party which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

Signature (Owners)	Signature (Charterers)

Printed and sold by Fr. G. Knudtzon Ltd., 56 Toldbodgade, DK-1253 Copenhagen K. Telefax +45 33 93 11 84
by authority of The Baltic and International Maritime Council (BIMCO), Copenhagen

PART II
"Gencon" Charter (As Revised 1922, 1976 and 1994)

It is agreed between the party mentioned in Box 3 as the Owners of the Vessel named in Box 5, of the GT/NT indicated in Box 6 and carrying about the number of metric tons of deadweight capacity all told on summer loadline stated in Box 7, now in position as stated in Box 8 and expected ready to load under this Charter Party about the date indicated in Box 9, and the party mentioned as the Charterers in Box 4 that:

The said Vessel shall, as soon as her prior commitments have been completed, proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo (if shipment of deck cargo agreed same to be at the Charterers' risk and responsibility) as stated in Box 12, which the Charterers bind themselves to ship, and being so loaded the Vessel shall proceed to the discharging port(s) or place(s) stated in Box 11 as ordered on signing Bills of Lading, or so near thereto as she may safely get and lie always afloat, and there deliver the cargo.

Owners' Responsibility Clause

The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the Vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager.

And the Owners are not responsible for loss, damage or delay arising from any other cause whatsoever, even from the neglect or default of the Master or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this Clause, be responsible, or from unseaworthiness of the Vessel on loading or commencement of the voyage or at any time whatsoever.

Deviation Clause

The Vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist Vessels in all situations, and also to deviate for the purpose of saving life and/or property.

Payment of Freight

(a) The freight at the rate stated in Box 13 shall be paid in cash calculated on the intaken quantity of cargo.

(b) *Prepaid.* If according to Box 13 freight is to be paid on shipment, it shall be deemed earned and non-returnable, Vessel and/or cargo lost or not lost.

Neither the Owners nor their agents shall be required to sign or endorse bills of lading showing freight prepaid unless the freight due to the Owners has actually been paid.

(c) *On delivery.* If according to Box 13 freight, or part thereof, is payable at destination it shall not be deemed earned until the cargo is thus delivered. Notwithstanding the provisions under (a), if freight or part thereof is payable on delivery of the cargo the Charterers shall have the option of paying the freight on delivered weight/quantity provided such option is declared before breaking bulk and the weight/quantity can be ascertained by official weighing machine, joint draft survey or tally.

Cash for Vessel's ordinary disbursements at the port of loading to be advanced by the Charterers, if required, at highest current rate of exchange, subject to two (2) per cent to cover insurance and other expenses.

Loading/Discharging

(a) Costs/Risks

The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterers shall provide and lay all dunnage material as required for the proper stowage and protection of the cargo on board, the Owners allowing the use of all dunnage available on board. The Charterers shall be responsible for and pay the cost of removing their dunnage after discharge of the cargo under this Charter Party and time to count until dunnage has been removed.

(b) Cargo Handling Gear

Unless the Vessel is geerless or unless it has been agreed between the parties that the Vessel's gear shall not be used and stated as such in Box 15, the Owners shall throughout the duration of loading/discharging give free use of the Vessel's cargo handling gear and of sufficient motive power to operate all such cargo handling gear. All such equipment to be in good working order. Unless caused by negligence of the stevedores, time lost by breakdown of the Vessel's cargo handling gear or motive power – pro rata the total number of cranes/winches required at that time for the loading/discharging of cargo under this Charter Party – shall not count as laytime or time on demurrage.

On request the Owners shall provide free of charge cranemen/winchmen from the crew to operate the Vessel's cargo handling gear, unless local regulations prohibit this, in which latter event shore labourers shall be for the account of the Charterers. Cranemen/winchmen shall be under the Charterers' risk and responsibility and as stevedores to be deemed as their servants but shall always work under the supervision of the Master.

(c) Stevedore Damage

The Charterers shall be responsible for damage (beyond ordinary wear and tear) to any part of the Vessel caused by Stevedores. Such damage shall be notified as soon as reasonably possible by the Master to the Charterers or their agents and to their Stevedores, failing which the Charterers shall not be held responsible. The Master shall endeavour to obtain the Stevedores' written acknowledgement of liability.

The Charterers are obliged to repair any stevedore damage prior to completion of the voyage, but must repair stevedore damage affecting the Vessel's seaworthiness or class before the Vessel sails from the port where such damage was caused or found. All additional expenses incurred shall be for the account of the Charterers and any time lost shall be for the account of and shall be paid to the Owners by the Charterers at the demurrage rate.

Laytime

* *(a) Separate laytime for loading and discharging*

The cargo shall be loaded within the number of running days/hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time used shall count.

The cargo shall be discharged within the number of running days/hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time used shall count.

* *(b) Total laytime for loading and discharging*

The cargo shall be loaded and discharged within the number of total running days/hours as indicated in Box 16, weather permitting, Sundays and holidays excepted, unless used, in which event time used shall count.

(c) Commencement of laytime (loading and discharging)

Laytime for loading and discharging shall commence at 13.00 hours, if notice of readiness is given up to and including 12.00 hours, and at 06.00 hours next working day if notice given during office hours after 12.00 hours. Notice of readiness at loading port to be given to the Shippers named in Box 17 or if not named, to the Charterers or their agents named in Box 18. Notice of readiness at the discharging port to be given to the Receivers or, if not known, to the Charterers or their agents named in Box 19.

If the loading/discharging berth is not available on the Vessel's arrival at or off the port of loading/discharging, the Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there, whether in free pratique or not, whether customs cleared or not. Laytime or time on demurrage shall then count as if she were in berth and in all respects ready for loading/discharging provided that the Master warrants that she is in fact ready in all respects. Time used in moving from the place of waiting to the loading/discharging berth shall not count as laytime.

If, after inspection, the Vessel is found not to be ready in all respects to load/discharge time lost after the discovery thereof until the Vessel is again ready to load/discharge shall not count as laytime.

Time used before commencement of laytime shall count.

* *Indicate alternative (a) or (b) as agreed, in Box 16.*

7. Demurrage

Demurrage at the loading and discharging port is payable by the Charterers at the rate stated in Box 20 in the manner stated in Box 20 per day or pro rata for any part of a day. Demurrage shall fall due day by day and shall be payable upon receipt of the Owners' invoice.

In the event the demurrage is not paid in accordance with the above, the Owners shall give the Charterers 96 running hours written notice to rectify the failure. If the demurrage is not paid at the expiration of this time limit and if the vessel is in or at the loading port, the Owners are entitled at any time to terminate the Charter Party and claim damages for any losses caused thereby.

8. Lien Clause

The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo, for freight, deadfreight, demurrage, claims for damages and for all other amounts due under the Charter Party including costs of recovering same.

9. Cancelling Clause

(a) Should the Vessel not be ready to load (whether in berth or not) on the cancelling date indicated in Box 21, the Charterers shall have the option of cancelling this Charter Party.

(b) Should the Owners anticipate that, despite the exercise of due diligence, the Vessel will not be ready to load by the cancelling date, they shall notify the Charterers thereof without delay stating the expected date of the Vessel's readiness to load and asking whether the Charterers will exercise their option of cancelling the Charter Party, or agree to a new cancelling date.

Such option must be declared by the Charterers within 48 running hours after the receipt of the Owners' notice. If the Charterers do not exercise their option of cancelling, then this Charter Party shall be deemed to be amended such that the seventh day after the new readiness date stated in the Owners' notification is substituted for the original cancelling date.

The provisions of sub-clause (b) of this Clause shall operate only once, and in case of the Vessel's further delay, the Charterers shall have the option of cancelling the Charter Party as per sub-clause (a) of this Clause.

10. Bills of Lading

Bills of Lading shall be presented and signed by the Master as per the "Congenbill" Bill of Lading form, Edition 1994, without prejudice to this Charter Party, or by the Owners' agents provided written authority has been given by Owners to the agents, a copy of which is to be furnished to the Charterers. The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the signing of bills of lading as presented to the extent that the terms or contents of such bills of lading impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners under this Charter Party.

11. Both-to-Blame Collision Clause

If the Vessel comes into collision with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or the Owners.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

12. General Average and New Jason Clause

General Average shall be adjusted in London unless otherwise agreed in Box 22 according to York-Antwerp Rules 1994 and any subsequent modification thereof. Proprietors of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see Clause 2).

If General Average is to be adjusted in accordance with the law and practice of the United States of America, the following Clause shall apply: "In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute, contract or otherwise, the cargo shippers, consignees or the owners of the cargo shall contribute with the Owners in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo. If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Owners, or their agents, may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the goods to the Owners before delivery.".

13. Taxes and Dues Clause

(a) *On Vessel* -The Owners shall pay all dues, charges and taxes customarily levied on the Vessel, howsoever the amount thereof may be assessed.

(b) *On cargo* -The Charterers shall pay all dues, charges, duties and taxes customarily levied on the cargo, howsoever the amount thereof may be assessed.

(c) *On freight* -Unless otherwise agreed in Box 23, taxes levied on the freight shall be for the Charterers' account.

PART II
"Gencon" Charter (As Revised 1922, 1976 and 1994)

1. **Agency**
In every case the Owners shall appoint their own Agent both at the port of loading and the port of discharge.

2. **Brokerage**
A brokerage commission at the rate stated in Box 24 on the freight, dead-freight and demurrage earned is due to the party mentioned in Box 24.
In case of non-execution 1/3 of the brokerage on the estimated amount of freight to be paid by the party responsible for such non-execution to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be agreed.

3. **General Strike Clause**
(a) If there is a strike or lock-out affecting or preventing the actual loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling this Charter Party. If part cargo has already been loaded, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.
(b) If there is a strike or lock-out affecting or preventing the actual discharging of the cargo on or after the Vessel's arrival at or off port of discharge and same has not been settled within 48 hours, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging until the strike or lock-out terminates and thereafter full demurrage shall be payable until the completion of discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charter Party and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance to the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.
(c) Except for the obligations described above, neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or affecting the actual loading or discharging of the cargo.

4. **War Risks ("Voywar 1993")**
(1) For the purpose of this Clause, the words:
(a) The "Owners" shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and
(b) "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all Vessels or imposed selectively against Vessels of certain flags or ownership), or against certain cargo or crews, or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.
(2) If at any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Contract of Carriage, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, the Owners may give notice to the Charterers cancelling this Contract of Carriage, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Contract of Carriage provides that loading or discharging is to take place within a range of ports, and at least one port or ports nominated by the Charterers the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks, the Owners shall first require the Charterers to nominate any other safe port which lies within the range for loading or discharging, and may only cancel this Contract of Carriage if the Charterers shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.
(3) The Owners shall not be required to continue to load cargo for any voyage, or to sign Bills of Lading for any port or place, or to proceed or continue on any voyage, or on any part thereof, or to proceed through any canal or waterway, or to proceed to or remain at any port or place whatsoever, if where it appears, either after the loading of the cargo commences, or at any stage of the voyage thereafter before the discharge of the cargo is completed, that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo (or any part thereof), crew or other persons on board the Vessel (or any one or more of them) may be, or are likely to be, exposed to War Risks. If it should so appear, the Owners may by notice request the Charterers to nominate a safe port for the discharge of the cargo or any part thereof, and if within 48 hours of the receipt of such notice, the Charterers shall not have nominated such a port, the Owners may discharge the cargo at any safe port of their choice (including the port of loading) in complete fulfilment of the Contract of Carriage. The Owners shall be entitled to recover from the Charterers the extra expenses of such discharge and, if the discharge takes place at any port other than the loading port, to receive the full freight as though the cargo had been carried to the discharging port and if the extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route, the Owners having a lien on the cargo for such expenses and freight.
(4) If at any stage of the voyage after the loading of the cargo commences, it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessel, her cargo, crew or other persons on board the Vessel may be, or are likely to be, exposed to War Risks on any part of the route (including any canal or waterway) which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the Owners shall give notice to the Charterers that this route will be taken. In this event the Owners shall be entitled, if the total extra distance exceeds 100 miles, to additional freight which shall be the same percentage of the freight contracted for as the percentage which the extra distance represents to the distance of the normal and customary route.
(5) The Vessel shall have liberty:-
(a) to comply with all orders, directions, recommendations or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery or in any way whatsoever which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government which so requires, or any body or group acting with the power to compel compliance with their orders or directions;
(b) to comply with the orders, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;
(c) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;
(d) to discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;
(e) to call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions;
(f) where cargo has not been loaded or has been discharged by the Owners under any provisions of this Clause, to load other cargo for the Owners' own benefit and carry it to any other port or ports whatsoever, whether backwards or forwards or in a contrary direction to the ordinary or customary route.
(6) If in compliance with any of the provisions of sub-clauses (2) to (5) of this Clause anything is done or not done, such shall not be deemed to be a deviation, but shall be considered as due fulfilment of the Contract of Carriage.

5. **General Ice Clause**
Port of loading
(a) In the event of the loading port being inaccessible by reason of ice when the Vessel is ready to proceed from her last port or at any time during the voyage or on the Vessel's arrival or in case frost sets in after the Vessel's arrival, the Master for fear of being frozen in is at liberty to leave without cargo, and this Charter Party shall be null and void.
(b) If during loading the Master, for fear of the Vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for the Owners' benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter Party to be forwarded to destination at the Vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Charterers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per this Charter Party.
(c) In case of more than one loading port, and if one or more of the ports are closed by ice, the Master or the Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section (b) or to declare the Charter Party null and void unless the Charterers agree to load full cargo at the open port.
Port of discharge
(a) Should ice prevent the Vessel from reaching port of discharge the Charterers shall have the option of keeping the Vessel waiting until the re-opening of navigation and paying demurrage or of ordering the Vessel to a safe and immediately accessible port where she can easily discharge without risk of detention by ice. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the impossibility of reaching port of destination.
(b) If during discharging the Master for fear of the Vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge.
(c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

6. **Law and Arbitration**
* (a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.
For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.
* (b) This Charter Party shall be governed by and construed in accordance with Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the said parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for purposes of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc..
For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25** the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc..
* (c) Any dispute arising out of this Charter Party shall be referred to arbitration at the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.
(d) If Box 25 in Part I is not filled in, sub-clause (a) of this Clause shall apply.

* *(a), (b) and (c) are alternatives; indicate alternative agreed in Box 25.*
** *Where no figure is supplied in Box 25 in Part I, this provision only shall be void but the other provisions of this Clause shall have full force and remain in effect.*

Adopted by the Documentary Committee of the Chamber of Shipping of the United Kingdom and the Documentary Committee of The Japan Shipping Exchange, Inc.

Issued 1/1/1909
Amended 1/1/1911
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Amended 1/1/1950
Amended 1/1/1974

THE BALTIC AND INTERNATIONAL MARITIME CONFERENCE
UNIFORM TIME-CHARTER (Box Layout 1974)
CODE NAME: "BALTIME 1939"

PART I

1. Shipbroker	2. Place and date
3. Owners/Place of business	4. Charterers/Place of business
5. Vessel's name	6. GRT/NRT
7. Class	8. Indicated horse power
9. Total tons d.w. (abt.) on Board of Trade summer freeboard	10. Cubic feet grain/bale capacity
11. Permanent bunkers (abt.)	
12. Speed capability in knots (abt.) on a consumption in tons (abt.) of	
13. Present position	
14. Period of hire (Cl. 1)	15. Port of delivery (Cl. 1)
	16. Time of delivery (Cl. 1)
17. (a) Trade limits (Cl. 2)	
(b) Cargo exclusions specially agreed	
18. Bunkers on re-delivery (state min. and max. quantity) (Cl. 5)	
19. Charter hire (Cl. 6)	20. Hire payment (state currency, method and place of payment; also beneficiary and bank account) (Cl. 6)
21. Place or range of re-delivery (Cl. 7)	22. War (only to be filled in if Section (C) agreed) (Cl. 21)
23. Cancelling date (Cl. 22)	24. Place of arbitration (only to be filled in if place other than London agreed) (Cl. 23)
25. Brokerage commission and to whom payable (Cl. 29)	26. Numbers of additional clauses covering special provisions, if agreed

It is mutually agreed that this Contract shall be performed subject to the conditions contained in this Charter which shall include Part I as well as Part II. In the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict.

Signature (Owners)	Signature (Charterers)

Printed and sold by Fr. G. Knudtzon Ltd., 55, Toldbodgade, Copenhagen,
by authority of The Baltic and International Maritime Conference, Copenhagen.

PART II
"BALTIME 1939" Uniform Time-Charter (Box Layout 1974)

It is agreed between the party mentioned in Box 3 as Owners of the Vessel named in Box 5 of the grossinet Register tonnage indicated in Box 6, classed as stated in Box 7 and of indicated horse power as stated in Box 8, carrying about the number of tons deadweight indicated in Box 9 on Board of Trade summer freeboard inclusive of bunkers, stores, provisions and boiler water, having as per builder's plan a cubic-feet grain/bale capacity as stated in Box 10, exclusive of permanent bunkers, which contain about the number of tons stated in Box 11, and fully loaded capable of steaming about the number of knots indicated in Box 12 in good weather and smooth water on a consumption of about the number of tons best Welsh coal or oil-fuel stated in Box 12, now in position as stated in Box 14 and the party mentioned as Charterers in Box 4, as follows:

1. Period/Port of Delivery/Time of Delivery
The Owners let, and the Charterers hire the Vessel for a period of the number of calendar months indicated in Box 14 from the time (not a Sunday or a local Holiday unless taken over) the Vessel is delivered and placed at the disposal of the Charterers between 9 a.m. and 5 p.m., or between 9 a.m. and 2 p.m. if on Saturday, at the port stated in Box 15 in such available berth where she can safely lie always afloat, as the Charterers may direct, she being in every way fitted for ordinary cargo service.
The Vessel to be delivered at the time indicated in Box 16.

2. Trade
The Vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat as the Charterers may direct, Box 17.
No live stock nor injurious, inflammable or dangerous goods (such as acids, explosives, calcium carbide, ferro silicon, naphtha, motor spirit, tar, or any of their products) to be shipped.

3. Owners to Provide
The Owners to provide and pay for all provisions and wages, for insurance of the Vessel, for all deck and engine-room stores and maintain her in a thoroughly efficient state in hull and machinery during service.
The Owners to provide one winchman per hatch. If further winchmen are required, or if the stevedores refuse are not permitted to work with the Crew, the Charterers to provide and pay qualified shore-winchmen.

4. Charterers to Provide
The Charterers to provide and pay for all coals, including galley coal, oil-fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen bookage, lights, tug-assistance, consular charges (except those pertaining to the Master, Officers and Crew), canal, dock and other dues and charges, including any foreign general municipality or state taxes, also all dock, harbour and tonnage dues at the ports of delivery and re-delivery (unless incurred through cargo carried before delivery or after re-delivery), agencies, commissions, also to arrange and pay for towing, trimming, (including any trimmings) and shifting boards, excepting any already on board), unloading weighing, tallying and delivery of cargoes, surveys or reports when suspected by officials and men in their service and all other charges and expenses whatsoever including detentions and expenses through quarantine (including cost of fumigation and disinfection).
All ropes, slings and special runners actually used for loading and discharging at any ports to be kept, including special ropes, hawsers and chains required by the custom of the port for mooring to be for the Charterers' account. Vessel not to be fitted with winches, derricks, wheels and ordinary runners capable of handling lifts up to 2 tons.

5. Bunkers
The Charterers at port of delivery and the Owners at port of re-delivery to take over and pay for all coal or oil-fuel remaining in the Vessel's bunkers at current prices at respective ports.
The Vessel to be re-delivered with not less than the number of tons and not exceeding the number of tons of coal or oil-fuel in the Vessel's bunkers stated in Box 18.

6. Hire
The Charterers to pay as hire the rate stated in Box 19 per 30 days, semi-monthly in accordance with Clause 1 until her re-delivery to the Owners.

Payment
Payment of hire to be made in cash, in the currency stated in Box 20, without discount, every 30 days, in advance, and in the manner prescribed in Box 20.
In default of payment the Owners to have the right of withdrawing the Vessel from the service of the Charterers, without noting any protest and without interference by any other formality whatsoever and without prejudice to any claim the Owners may otherwise have on the Charterers under the Charter.

7. Re-delivery
The Vessel to be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers' option at the place or within the range stated in Box 21, between 9 a.m. and 5 p.m., or 9 a.m. and 2 p.m. on Saturday, but the day of re-delivery shall not be a Sunday or legal Holiday.

Notice
The Charterers to give the Owners not less than ten days' notice at which port and on about which day the Vessel will be re-delivered.
Should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers to have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow re-delivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers to pay the market rate if higher than the rate stipulated herein.

8. Cargo Space
The whole reach and burthen of the Vessel, including lawful deck-capacity to be at the Charterers' disposal, reserving proper and sufficient space for the Vessel's Master, Officers, Crew, tackle, apparel, furniture, provisions and stores.

9. Master
The Master to prosecute all voyages with the utmost despatch and to render customary assistance with the Vessel's Crew. The Master to be under the orders of the Charterers as regards employment, agency or other arrangements. The Charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods.
The Owners not to be responsible for shortage, mixture, marks, nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise.
If the Charterers have reason to be dissatisfied with the conduct of the Master, Officers, or Engineers, the Owners on receiving particulars of the complaint, promptly to investigate the matter, and, if necessary and practicable, to make a change in the appointments.

10. Directions and Logs
The Charterers to be furnish the Master with all instructions and sailing directions and the Master and Engineer to keep full and correct logs accessible to the Charterers or their Agents.

11. Suspension of Hire etc.
(A) In the event of breaking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the Vessel and continuing for more than twenty-four consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service Vessel/used required. Any hire paid in advance to be adjusted accordingly.
(B) In the event of the Vessel being driven into the port or anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering detention by or through any detention of the Vessel and/or expenses resulting from such detention to be for the Charterers' account, even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the Owners' servants.

12. Cleaning Boilers
Cleaning of boilers whenever possible to be done during service, but if impossible the Charterers to give the Owners necessary time for cleaning. Should the Vessel be detained beyond 48 hours hire to cease until again ready.

13. Responsibility and Exemptions
The Owners not to be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods occasioned by such delay or loss thereof caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and tight and fit for the voyage or any other personal act or omission or default of the Owners or their Manager. The Owners not to be responsible for any other cause or damage or delay whatsoever and howsoever caused even if caused by the neglect or default of their servants (a) to be liable for loss or damage arising or resulting from strikes, lock-outs or stoppage or restraint of labour (including those of Masters, Officers or Crew) whether partial or general.
The Charterers to be responsible for loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless loading, shifting, stowing or discharging of goods or any other improper or negligent act on their part or of their servants.

14. Advances
The Charterers or their Agents to advance to the Master, if required, the necessary funds for ordinary disbursements for the Vessel's account at any port charging only interest at 6 per cent. p. a., such advances to be deducted from hire.

15. Excluded Ports
The Vessel not to be ordered to nor bound to enter: a) any place where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel
Ice
b) any ice-bound place or any place where lights, lightships, marks and buoys are or are likely to be withdrawn by reason of ice on the Vessel's arrival or where there is risk that ordinarily the Vessel will not be able on account of ice to reach the place or to get out after having completed loading or discharging. The Vessel not to be obliged to force ice if on account of ice the Master, Owners or Charterers to consider it unsafe to reach loading or discharging place for fear of the Vessel being frozen in and/or damaged, he has liberty to proceed to the nearest open place and await the Charterers' fresh instructions.
Unforeseen detention through any of above causes to be for the Charterers' account.

16. Loss of Vessel
Should the Vessel be lost or missing, hire to cease from the date when she was lost. If the date of loss cannot be ascertained half hire to be paid from the date the Vessel was last reported until the calculated date of arrival at the destination. Any hire paid in advance to be adjusted accordingly.

17. Overtime
The Vessel to work day and night if required. The Charterers to refund the Owners their outlays for all overtime paid to Officers and Crew according to the hours and rates stated in the Vessel's articles.

18. Lien
The Owners to have a lien upon all cargoes and sub-freights belonging to the Time-Charterers and on any Bill of Lading freight for all claims under this Charter, and the Charterers to have a lien on the Vessel for all moneys paid in advance and not earned.

19. Salvage
All salvage and assistance to other vessels to be for the Owners' and the Charterers' equal benefit after deducting the Master's and Crew's proportion and all legal and other expenses including hire paid under the charter for time lost in the salvage, also repairs of damage and coal or oil-fuel consumed. The Charterers to be bound to the all measures taken by the Owners in order to secure payment of salvage and to fix its amount.

20. Sublet
The Charterers to have the option of subletting the Vessel, giving due notice to the Owners, but the original Charterers always to remain responsible to the Owners for due performance of the Charter.

21. War
(A) The Vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone defined as dangerous as the result of any actual or threatened act of war, war hostilities, warlike operations, acts of piracy or of hostility or malicious damage against this or any other vessel or its cargo by any person, body or State whatsoever, revolution, civil war, civil commotion or the operation of international law, nor be exposed in any way to any risks or penalties whatsoever consequent upon the intepretation of sanctions, nor carry any goods that may in any way expose her to any risks of seizure, capture, penalties or any other interference of any kind whatsoever by the belligerent or fighting powers or parties or by any Government or Ruler.
(B) Should the Vessel approach or be ordered or ordered within such zone, or be exposed in any way to the said risks, (1) the Owners to be entitled from time to time to insist that the Vessel proceeds to the Vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit, the Charterers to procure such fund to the Owners of the premium on demand; and (2) notwithstanding the terms of Clause 11 hire to be paid for all time lost including any time lost owing to loss of or injury to the Master, Officers, or Crew or to the action of the Crew in refusing to proceed to such zone or to be exposed to such risks.
(C) In the event of the wages of the Master, Officers and/or Crew or the cost of insurance of ship or stores for deck and/or engine room and/or insurance premiums being increased by reason of or during the currency of the Charter as mentioned in section (A) the amount of any increase to be added to the hire and paid by the Charterers on production of the Owners' account therefor, such account being rendered monthly.
(D) The Vessel to have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or in any other wise whatsoever given by the Government of the nation under whose flag she sails or any other Government or any person (or body) acting or purporting to act with the authority of such Government or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such orders or directions.
(E) In the event of the nation under whose flag the Vessel sails becoming involved in war, hostilities, warlike operations, revolution, or civil commotion, both the Owners and the Charterers may cancel the Charter and, unless otherwise agreed, the Vessel to be re-delivered to the Owners at the port of destination or, if discharged through the provisions of section (A) from reaching or entering it, then at a near open and safe port at the Owners' option, after discharge of any cargo on board.
(F) If in compliance with the provisions of this clause anything is done or is not done, such not to be deemed a deviation.
Section (C) is optional and should be considered deleted unless agreed according to Box 22.

22. Cancelling
Should the Vessel not be delivered by the date indicated in Box 23, the Charterers to have the option of cancelling.
If the Vessel cannot be delivered by the cancelling date, the Charterers, if required, to declare within 48 hours after receiving notice thereof whether they cancel or will take delivery of the Vessel.

23. Arbitration
Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed upon) before one Arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.

24. General Average
General Average to be settled according to York/Antwerp Rules, 1974. Hire not to contribute to General Average.

25. Commission
The Owners to pay a commission at the rate stated in Box 25 to the party mentioned in Box 25 on any hire paid under the Charter, but in no case less than is necessary to cover the actual expenses of the Brokers and a reasonable fee for their work, if the full hire is not paid owing to breach of Charter by either of the parties the party liable therefor to indemnify the Brokers against their loss of commission.
Should the parties agree to cancel the Charter, the Owners to indemnify the Brokers against any loss of commission but in such case the commission not to exceed the brokerage on one year's hire.

BSL - Information

BSL Bundesverband Spedition und Logistik e.V.

German Freight Forwarders' Standard Terms and Conditions - ADSp -

Announcements no.59 dated July 6th, 1998 (in the Bundesanzeiger issue no.130 of July 17th, 1998) no.4 of January 13th, 1999 (Bundesanzeiger issue no.18 of January 28th, 1999) and no. 182 of September 19th, 2001 (Bundesanzeiger issue no 184 of September 29th, 2001).

(The following text is a translation from the German language original. In case of disputes the German language original of the ADSp are applicable)

Preface

The terms and conditions are recommended for use, starting January 1st, 2002, by the Federal Association of German Industry, the Federal Association of German Wholesalers and Exporters, the Federal Association of German Freight Forwarders and Logistics Operators, the Association of German Chambers of Industrie and Commerce, and the German Association of Retailers. This recommendation is not obligatory. Contract parties can formulate different agreements.

1. Interest of the principal and due care

The freight forwarder shall act in the interest of his principal and fulfil his duties with due care.

2. Area of application

2.1 The ADSp apply to all contracts for the transportation of goods, irrespective of whether they concern freight forwarding, carriage, warehousing or other services common to the forwarding trade; these also include logistical services commonly provided by freight forwarders in connection with the carriage or storage of goods.

2.2 In the case of forwarding services regulated by sections 453 to 466 of the German Commercial Law (HGB), the freight forwarder is only responsible for arranging the necessary contracts required for the performance of these services, unless other legal provisions take precedence.

2.3 The ADSp are not applicable for contracts that deal exclusively with

- packaging,
- the carriage of removal goods and their storage,
- crane lifting, assembly jobs or heavy lift and high volume transports, except for normal transhipment services of the freight forwarder.

2.4 The ADSp are not applicable for transport contracts with consumers. Consumers are natural persons concluding the contract for reasons other than commercial or in pursuit of their professional activities.

2.5 If trade customs or legal provisions differ from the ADSp, the ADSp take precedence unless these legal provisions are mandatory.

For contracts of carriage by air, sea, inland waterways or for multi-modal transports different contractual arrangements may be made in accordance with the terms of carriage devised for these transports.

2.6 The freight forwarder is authorised to agree to normal standard terms and conditions of third parties.

2.7 In the relationship between a principal freight forwarder and an intermediate freight forwarder, the ADSp are deemed to be the general terms and conditions of the intermediate freight forwarder.

3. Instructions, transmission errors, contents, dangerous goods

3.1 Forwarding instructions, other instructions, directives and communications are valid even if given informally. Subsequent modifications must be specifically identifiable as being amendments.

The burden of proof for the correct and complete transmission lies with the party referring to it.

3.2 If statements must be made in writing, they are deemed to having been made in writing when using electronic data communication or any other machine readable form for as long as the originator of the message is identifiable.

3.3 The principal must inform the freight forwarder, at the time of giving the instructions, that the transport contract concerns:

- dangerous goods
- live animals and plants
- perishables
- valuable goods
- currency, bonds and shares or official documents

3.4 The principal must specify in his instructions addresses, marks, numbers, quantity, nature and contents of the packages as well as declaring the properties of the goods, as required by section 3.3 and any other information relevant for the proper execution of the forwarding instructions.

3.5 In the case of dangerous goods, the principal must inform the freight forwarder in writing - at the time of giving the instructions - of the exact nature of the hazard and, if appropriate, about precautionary measures. In the case of dangerous goods subject to the law for the carriage of dangerous goods or other goods, the carriage of which is subject to specific regulations regarding dangerous goods, their handling or their disposal, the principal has to make the necessary declarations required for the proper execution of the forwarding instruction, especially the classification in accordance with the regulations for dangerous goods.

3.6 The freight forwarder is under no obligation to check or add to the specifications made in accordance with sections 3.3 to 3.5.

3.7 The forwarder is under no obligation to verify signatures of statements regarding the goods or on any documents, or to verify the authority of the signatory, unless there is reasonable doubt about the authenticity or authority.

4. Packaging, provision of loading and packaging aids, weighing and checking

4.1 Unless specifically stated, the forwarding instruction does not cover

4.1.1 the packaging of the goods,

4.1.2 the weighing, checking, measures to preserve or enhance the goods and its packaging, unless this is customary for this kind of transaction,

4.1.3 the provision or exchange of pallets or other loading or packaging aids. If they are not swapped one-for-one, they are only picked up as part of a new forwarding instruction. This does not apply if the exchange is intentionally not carried out by the freight forwarder.

4.2 The services under section 4.1 are charged for separately.

5. Customs clearance

5.1 The instruction for shipment to a destination in another country includes instructions for customs clearance, if this is necessary for arranging the transport to the place of destination.

5.2 The freight forwarder is entitled to an extra fee for the customs clearance, over and above the actual costs incurred.

5.3 The instruction to forward bonded goods or to deliver them free house, authorises the freight forwarder to effect the customs clearance and to advance customs and excise duties and fees.

6. Packaging and marking obligation of the principal

6.1 The packages have to be clearly and durably marked by the principal to facilitate their proper handling, e.g. addresses, marks, numbers, symbols for handling and properties; old marks must be removed or made illegible.

6.2 In addition, the principal is under obligation:

6.2.1 to mark all packages belonging to the same consignment in such a way that they are easily recognised as forming one consignment,

6.2.2 to prepare packages in such a way that they may not be accessed without leaving visible trace (adhesive tape, bands, etc. are only permissible when they are individually designed or otherwise difficult to imitate; foil wrapping must be thermally sealed);

6.2.3 in case of a consignment being part of a forwarders consolidation, to group the individual packages or units of this consignment into larger units if their strap length (largest circumference plus longest side) is less than 1 metre;

6.2.4 to combine a consignment of hanging garments consisting of several individual units into wrapped units for easier handling;

6.2.5 to mark packing units with a gross weight of at least 1,000 kilograms with the weight specification as prescribed for heavy loads to be transported by ship.

6.3 Packages are single packages or units of packages, formed by the principal for the purpose of being carried according to the forwarding instruction, e.g., boxes, wireboxes, pallets, handling units, enclosed loading units such as covered wagons, wagons with tarpaulin covers, semi-trailers, swap bodies, containers or igloos.

7. Supervisory duties of the freight forwarder

7.1 At specific interfaces the freight forwarder is under the obligation to:

7.1.1 check packages regarding their quantity, identity and apparent good order and whether seals and fastenings are intact;

7.1.2 document irregularities (e.g. in the accompanying document or by special notification

7.2 An interface is any point at which the responsibility for the packages is passed on to another operator/agent or the handing over point at the end of each stage of the transportation process.

8. Receipt

8.1 Upon request by the principal, the freight forwarder shall issue a certificate of receipt.

With this certificate the freight forwarder confirms the quantity and type of packages, but not their contents, value or weight. In the case of bulk goods, full loads and such like the certificate of receipt does not state the gross weight or any other description of the quantity of the goods.

8.2 As proof of delivery the freight forwarder requests from the consignee a receipt of the packages as named in the forwarding instruction or other accompanying transport documents. Should the consignee refuse to sign for the receipt of the goods, the freight forwarder must request further instructions. If the goods have already been unloaded at the consignee, the freight forwarder is entitled to regain possession.

9. Instructions

9.1 An instruction remains valid for the freight forwarder until revoked by the principal.

9.2 In the case of insufficient or impractical instructions the freight forwarder may use his professional judgement.

9.3 An instruction to hold goods at the disposal of a third party can no longer be revoked after instructions from the third party have been received by the freight forwarder.

10. Freight payment, cash on delivery

10.1 The statement by the principal that the instruction is to be executed freight unpaid or that the costs are to be paid by the consignee or a third party does not affect his liability for payment of all charges.

10.2 The statement in section 10.1 does not concern cash on delivery instructions.

11. Deadlines

11.1 In the absence of specific agreements, neither loading or delivery deadlines are guaranteed, nor the sequence of the handling of goods of the same means of transport.

11.2 This does not affect the freight forwarder's statutory liability with regard to missing deadlines.

12. Obstacles

12.1 Obstacles beyond the freight forwarder's control relieve him, for their duration, from the duties that are affected by these obstacles.

In the case of such obstacles, the freight forwarder or the principal have the right to withdraw from the contract even if it has already been partially performed.

If the freight forwarder or the principal withdraws from the contract, the freight forwarder is entitled to the costs which he deemed to be necessary to be incurred or which were incurred in the interest of the principal.

12.2 The freight forwarder is only obliged within the framework of his ordinary professional care to advise the principal about legal or official restrictions concerning the shipment (e.g., import/export restrictions). If, however, the freight forwarder, through public statements or in the course of negotiations, created the impression that he has expert knowledge about specific circumstances, he has to act appropriately to this knowledge and expertise.

12.3 Governmental and/or official acts beyond the freight forwarder's control do not affect the rights of the freight forwarder towards his principal; the principal is liable towards the freight forwarder for all claims arising out of such acts. Claims of the freight forwarder against the state or third parties are not affected.

13. Delivery

Delivery is deemed to have been affected when the goods are handed over to any person present on the premises of the consignee, unless there are apparent reasonable doubts about their authority to receive goods on behalf of the consignee.

14. Right to information

14.1 The freight forwarder is obliged to provide the principal with all necessary information, to inform him, upon request, about the status of the transaction and to provide information about all transactions so far, however, he is only obliged to reveal the costs incurred if he acted in the name of the principal.

14.2 The freight forwarder is obliged to pass everything he receives/obtains while acting for him to the principal.

15. Warehousing

15.1 The choice of warehousing location (own or third party) lies with the freight forwarder. In case of a third party warehouse the freight forwarder must notify the principal in writing and immediately of the warehouse company and its address, or, in case of a warehouse warrant, to mark these on the warrant.

15.2 The principal is at liberty to inspect the warehouse. Objections or complaints about the storage of the goods must be made immediately. If he does not exercise the right of inspection, he waves all rights to objections against the storage and warehousing, for as long as the choice and type of storage complies with the usual professional care of a freight forwarder.

15.3 Access to the warehouse is only granted to the principal during the normal working hours of the freight forwarder and in his company.

15.4 If the principal handles the goods (e.g. sample taking) the freight forwarder may demand that the number, the weight and the status of the goods be inspected together with the principal. If the principal does not agree to this, the freight forwarder is not liable for damage discovered later, unless the damage was clearly not caused by such handling of the goods.

15.5 The principal is liable for all damage caused by him or his staff or agents to the freight forwarder, other warehouse clients or third parties whilst on the premises of the warehouse, unless he, his staff or agents are not responsible for such damage.

15.6 In case of inventory discrepancies, the freight forwarder is entitled to balance shortages and surpluses of the same principal.

15.7 If the freight forwarder has reasonable doubt about the security of his claim upon the value of the goods he is entitled to set a reasonable time limit for the principal to either secure the claims of the freight forwarder or to make alternative provisions for the storage of the goods. If the principal does not comply with this, the freight forwarder is entitled to terminate the contract without further notice.

16. Offers and Payment

16.1 Offers from the freight forwarder and agreements with him regarding price and services always refer to specified own services or those of third parties, and to goods of normal size, weight and nature; they presume normal unfettered transport situations, unimpeded access, the possibility of immediate on-shipment and that freight rates, exchange rates and tariffs upon which the quotation was based remain valid, unless changes could be foreseen under the current circumstances. The note "plus the usual ancillary charges" entitles the freight forwarder to charge for supplements and surcharges.

16.2 All quotations made by the freight forwarder are valid only for immediate acceptance and immediate execution of the relevant task, unless otherwise specified in the quotation, and when the instructions refer to the quotation.

16.3 In case of a cancellation of or withdrawal from the instruction the freight forwarder is entitled to the claims in accordance with §§ 415, 417 of the German Commercial Law (HGB).

16.4 In case of a COD- or other collection instruction being withdrawn retrospectively or if the money is not paid, the forwarder is still entitled to his collection fee.

16.5 If the consignee refuses to accept a consignment destined for him or, if the delivery is impossible for reasons beyond the control of the freight forwarder, the freight forwarder is entitled to the cartage charges for the return of the consignment.

17. Disbursements of the freight forwarder, exemption from third party claims

17.1 The freight forwarder is entitled to reimbursement for outlays which he could reasonably consider appropriate.

17.2 The instruction to accept incoming consignments entitles the freight forwarder - but does not oblige him - to advance freight, COD-sums, duties, taxes and other dues in connection with such consignments.

17.3 The principal has to relieve the freight forwarder immediately of demands regarding freight, average demands, customs duties, taxes or other dues directed against the freight forwarder as being agent for or possessor of the goods owned by third parties, when the freight forwarder is not responsible for such payments. The freight forwarder is entitled to take reasonable measures appropriate to protect himself. If the circumstances do not require immediate action, the freight forwarder must request instructions from his principal.

17.4 The principal must inform the freight forwarder in an appropriate way about all public/legal obligations, e.g. regarding customs regulations or trademark obligations, arising from the possession of the goods, unless it may reasonably be deduced from the quotation of the freight forwarder that he is aware of such obligations.

18. Invoices, arrears, foreign currencies

18.1 freight forwarders' invoices are due immediately.

18.2 The debtor is in arrears, without the need of a reminder or any other precondition, ten days after receipt of the invoice, unless legal provisions prescribe a shorter period.

18.3 In the case of his debtor being in arrears, the freight forwarder is entitled to interest of 3% above the base rate charged by the Deutsche Bundesbank (German Federal Reserve Bank) at the time of the debtor being in arrears.

18.4 The freight forwarder can demand from his foreign principals payment either in local or German currency.

18.5 If the freight forwarder owes foreign currency amounts, or if he advances sums in foreign currencies, he can demand payment either in German or in foreign currency. If he demands payment in German currency, the current exchange rate will be used, unless it can be proven that a different rate of exchange must be used or was used.

19. Settlement

Claims arising out of the forwarding contract and other related claims may only be set off against counter claims, if these are undisputed.

20. Lien and retention

20.1 The freight forwarder has a lien on all goods in his possession or other valuables in connection with any claim, whether due or not for any services for his principal in accordance with section 2.1. This lien does not exceed the general legal lien which applies.

20.2 The freight forwarder may exercise his lien for claims arising out of other contracts with the principal only if they are undisputed or if the financial situation of the debtor puts the claims of the freight forwarder at risk.

20.3 The time limit of one month as specified in section 1234 of the German commercial Law is superseded in all cases by a time limit of two weeks.

20.4 If the principal is in arrears, the freight forwarder is entitled, after due notice, to sell such a portion of the principal's goods in his possession as is necessary, after appropriate consideration, to meet his claims.

20.5 The freight forwarder is entitled to the usual sales commission on the net proceeds of the sale when exercising his lien.

21. Insurance of the goods

21.1 Irrespective of section 29, the freight forwarder only arranges for the insurance of the goods (e.g. transit or warehousing insurance) if instructed in writing and upon receipt of specifications about the sum to be insured and the risks to be covered. If in doubt, the freight forwarder can use his professional judgement about the type and scope of insurance and to arrange it for the usual terms and conditions.

21.2 If the freight forwarder himself is the policy holder he authorises the principal, upon request, to make claims directly against the insurers. The freight forwarder is then obliged to follow-up these claims only upon written instructions and at the expense and risk of the principal.

21.3 The freight forwarder is entitled to a special fee, apart from his reimbursements, for arranging the insurance, handling claims and other administrative tasks in connection with claims and averages.

22. Liability of the freight forwarder, cession of claims

22.1 The freight forwarder bears liability for all his services (section 2.1) according to legal regulations. Unless specified otherwise, however, the following shall apply.

22.2 If the freight forwarder is only responsible for arranging the contracts required for the services requested, his responsibility is limited to the careful choice of such third party service providers.

22.3 In all cases where the freight forwarder is liable for loss of or damage to goods, his liability will be in accordance with §§ 429, 430 of the German Commercial Law.

22.4 If §§ 425 pp and 461, section 1 of the German Commercial Law are not applicable, the freight forwarder is liable for damage resulting from:

22.4.1 - insufficient packaging or marking by the principal or third parties

22.4.2 - agreed or customary outdoor storage

22.4.3 - theft or robbery (§§ 243, 244, 249 German Penal Code)

22.4.4 - Acts of God, weather conditions, failure of appliances or wiring, influence of other goods, damage by animals, inherent vice

only, if there is evidence of the freight forwarder being at fault. If the damage could have arisen from one of the above circumstances it shall be deemed to have arisen from it.

22.5 If the freight forwarder has a claim against a third party for damage for which he is not liable, or if the freight forwarder has claims in excess of the sum for which he is liable, he must, on request, cede such claim to his principal, unless the freight forwarder, by special agreement, had undertaken to pursue such claims at the cost and risk of his principal.

The principal may also demand that the freight forwarder cedes all claims against third parties to him. § 437 of the German Commercial Law remains unaffected.

If the claims of the principal have been met by the freight forwarder or by the forwarders' insurance, the claim to be ceded is limited to that portion which exceeds that already paid by the freight forwarder or his insurance.

23. Limitation of liability

23.1 The liability of the freight forwarder for loss of or damage to goods, with the exception of warehousing on request, is limited:

23.1.1 to 5 per kilogram of gross weight of the consignment;

23.1.2 in case of damage occurring to goods whilst being carried, the damage is limited - contrary to section 23.1.1 - to the legally limited maximum amount specified for this type of carriage;

23.1.3 in case of a contract of multi-modal carriage - including sea transport - to 2 SDR per kg;

23.1.4 to 1 million or 2 SDR per kg per claim, whichever is the higher.

23.2 If only individual packages or parts of the consignment were damaged or lost the maximum liability is calculated on the basis of the gross weight

- **of the whole consignment, if it is rendered valueless,**
- **of that part of the consignment that is rendered valueless.**

23.3 The liability of the freight forwarder for damage other than to goods, excepting personal injury and damage to goods that are not subject of the contract of transportation, is limited to three times the fee charged by him, per claim.

23.4 The liability of the freight forwarder, irrespective of the number of claims per event is limited to 5 Millions per event or 2 SDR per kg of lost or damaged goods, whichever is the greater; in the case of more than one claimant the freight forwarder's liability is proportionate to their individual claims.

23.5. The SDR is calculated in accordance with § 431, section 4 of the German Commercial Law.

24. Liability limitations in the case of warehousing upon instruction

24.1 The liability of the freight forwarder for loss of or damage to goods in the case of warehousing upon instruction is limited

24.1.1 to 5 for each kg gross weight of the consignment,

24.1.2 to a maximum of 5,000 per claim; if the claim of a principal is based upon the difference between the nominal and actual inventory (section 15.6) the liability is limited to 25,000, irrespective of the number of events causing the inventory discrepancy. Section 24.1.1 is not affected.

24.2 Section 23.2 applies accordingly.

24.3 In the case of warehousing upon instruction the liability of the freight forwarder for claims other than for damage to goods, excepting personal injury and damage to goods that are not subject of the contract of transportation, is limited to 5,000 per claim.

24.4 Irrespective of the number of claims arising from an event, the liability of a freight forwarder is limited to 5 Millions per event; in the case of more than one claimant the freight forwarder's liability is distributed amongst them in proportion to their individual claims.

25. Burden of proof

25.1 The principal must provide evidence that goods of a specified quantity and state were handed to the freight forwarder in apparent good order (§ 438 German Commercial Law). The freight forwarder must provide evidence that he delivered the goods as he received them.

25.2 The burden of proof that goods were damaged whilst being transported (Section 23.1.2) in the means of transport lies with the party claiming such damage. If the place where the damage occurred is unknown, the freight forwarder must specify the sequence of transportation by documenting the interfaces (Section 7) if requested by the principal or the consignee. It is to be assumed that the damage occurred during that stage of the transportation for which the freight forwarder cannot provide a clean receipt.

25.3 The freight forwarder is obliged to ascertain, through appropriate enquiries and obtaining evidence, where the damage occurred.

26. Non-contractual claims

The aforementioned releases from and limitations of liability apply also, in accordance with §§ 434, 436 of the German Commercial Law, to claims not arising out of freight forwarding contracts.

27. Specific responsibility

The aforementioned releases from and limitations of liability do not apply, if the damage was caused:

27.1 By intent or gross negligence of the freight forwarder or his management staff *or* by violation of fundamental duties of the contract in which case damage claims shall be limited to foreseeable, typical damage;

27.2 by the freight forwarder in cases covered by §§ 425 pp, 461 Abs. 1 of the German Commercial Law or by persons specified in §§ 428, 462 of the German Commercial Law acting intentionally or recklessly, knowing that damage to the goods would be probable.

28. Notification of a claim

Claims have to be made in accordance with § 438 of the German Commercial Law.

29. Freight forwarding insurance

29.1 The freight forwarder is obliged, with an insurance company of his choice:

29.1.1 to cover his transport-related liability according to the ADSp and general legal requirements by obtaining insurance cover (liability insurance),

29.1.2 to cover claims which could arise for the principal out of the transportation contract (damage insurance) if the minimal requirements for the forwarding insurance attached to these ADSp apply.

29.2 There is no obligation to arrange insurance cover against damage if:

29.2.1 the principal declares in writing that he does not wish for such insurance cover,

29.2.2 the principal arranges with the freight forwarder a separate agreement in writing about the alternative insurance policy differing wholly or in part from the minimal conditions for the forwarding insurance as attached to these ADSp, being disadvantageous to the principal,

29.2.3 the principal is a freight forwarder applying the conditions of the ADSp.

29.3 The insurance contract to be affected by the freight forwarder in accordance with 29.1 may not differ to the disadvantage of the principal from the minimal conditions for the forwarding insurance as appended to the ADSp, with regard to

- the coverage of the liability insurance including the mandatory insurance and the conditions relating to direct claims
- the coverage of the damage insurance and the persons covered

29.4 If the freight forwarder has not taken out a liability insurance in accordance with section 29.1.2 he may not refer to the ADSp in his dealings with his principal. The same applies if he does not arrange for goods-in-transit-insurance in accordance with section 29.1.2; section 29.2 remains unaffected.

29.5 The freight forwarder must inform his principal which type of forwarding insurance he has taken out with which insurance company.

29.6 The freight forwarder as insured party owes the insurer the premium for the liability and the goods-in-transit-insurance. The premium for the liability insurance is paid by the freight forwarder himself. The premium for the goods-in-transit insurance, which the freight forwarder must charge, document and fully pay to the insurer for each forwarding contract, is to be reimbursed to the freight forwarder by the principal.

29.7 The duty of the principal to reimburse the premium of the goods-in-transit insurance in accordance with section 29.6 is limited to that part of the premium which relates to the coverage of risks not falling under the liability of the freight forwarder, is calculated appropriately for the risk and customary for the market.

29.8 If the premium exceeds the level customary for the market of the minimal conditions for the forwarding insurance as attached to these ADSp, it need only be paid by the principal if the higher premium is due to an extended cover which is objectively in the interest of the principal.

29.9 The burden of proof whether the premium charged to the principal is customary for the market lies with the freight forwarder. This applies also to the question of the objective interest of the principal in section 29.8.

29.10 If there is reasonable doubt about the premium sum, both freight forwarder and principal can appeal to an arbitrator appointed by the recommending organisations and in consultation with the insurance industry.

29.11 Due to the volume of claims against the insurer, the need arises for a reinstatement of the policy for the goods-in-transit insurance (section 29.1.2) the freight forwarder is entitled to charge the principal over and above the premium due plus insurance tax an appropriate extra fee for his additional work.

If no agreement can be reached about this, the freight forwarder is entitled to exclude the principal from the insurance cover of the goods-in-transit policy by giving one months' notice in writing.

29.12 The principal subjects himself and all persons in whose name and account he is acting to all clauses of the insurance in accordance with this section, for as long as these correspond to the minimal forwarding insurance conditions attached to these ADSp. In particular is he obliged to notify the insurer or the freight forwarder without delay of any insured event. The freight forwarder, if thus informed, is obliged to notify the insurer immediately.

30. Place of fulfilment, place of jurisdiction, applicable law

30.1 The place of fulfilment for all parties to the contract is the location of that branch office of the freight forwarder at which the instructions are directed.

30.2 The place of jurisdiction for all disputes arising out the instruction is for all participants, so far as they are business people, the location of that branch office of the freight forwarder at which the instructions are directed.

30.3 The legal relationship between the freight forwarder and the principal or his legal successors is governed by the law of the Federal Republic of Germany.

BRITISH INTERNATIONAL FREIGHT ASSOCIATION (BIFA) - STANDARD TRADING CONDITIONS 2000 EDITION

The Customer's attention is drawn to the Clauses hereof which exclude or limit the Company's liability and those which require the Customer to indemnify the Company in certain circumstances.

DEFINITIONS AND APPLICATION

1 In these Conditions:-

"Company"	is the BIFA Member trading under these Conditions.
"Person"	includes persons or any Body or Bodies Corporate.
"The Owner"	Means the Owner of the goods (including any packaging, containers or equipment) to which any business conducted under these Conditions relates and any other person who is or may become interested in them.
"Customer"	Means any person at whose request or on whose behalf the Company undertakes any business or provides advice, information or services.

2(A) Subject to Sub-Paragraph (B) below all and any activities of the Company in the course of business whether gratuitous or not are undertaken subject to these Conditions.

(B) If any legislation is compulsorily applicable to any business undertaken, these Conditions shall, as regards such business, be read as subject to such legislation and nothing in these Conditions shall be construed as a surrender by the Company of any of its rights or immunities or as an increase of any of its responsibilities or liabilities under such legislation and if any part of these Conditions be repugnant to such legislation to any extent such part shall as regards such business be overridden to that extent and no further

3 The Customer warrants that he is either the Owner or the authorised Agent of the Owner and also that he is accepting these Conditions not only for himself but also as Agent for and on behalf of the Owner

THE COMPANY

4(A) Subject to Clauses 11 and 12 below, the Company shall be entitled to procure any or all of its services as an Agent or to provide those services as a Principal.

(B) The Company shall on demand by the Customer provide evidence of any Contract entered into as Agent for the Customer. Insofar as the Company may be in default of this obligation it shall be deemed to have contracted with the Customer as a Principal for the performance of the Customer's instructions

5 Where the Company contracts as a Principal for any services, it shall have full liberty a) to perform such services itself or b) to subcontract the whole or any part of such services to third parties (including the Company's own parent, subsidiary, or associated companies)

6 Where the Company acts as an Agent on behalf of the Customer, the Company shall be entitled (and the Customer hereby expressly authorises the Company) to enter into all such Contracts on behalf of the Customer as may be necessary or desirable to fulfil the Customer's instructions and subject to the trading conditions of the parties with whom such contracts are made.

7 The Company reserves to itself a reasonable liberty as to the means, route and procedure to be followed in the handling, storage and transportation of goods.

8(A) Subject to Sub-Clause (B) hereof, the Company shall have a general lien on all goods and documents relating to goods in its possession, custody or control for all sums due at any time from the Customer or Owner and shall be entitled to sell or dispose of such goods or documents as Agent for and at the expense of the Customer and apply the proceeds in or towards the payment of such sums on 28 days notice in writing to the Customer. Upon accounting to the Customer for any balance remaining after payment of any sum due to the Company and the costs of sale or disposal the Company shall be discharged of any liability whatsoever in respect of the goods or documents.

(B) Where the goods are liable to perish or deteriorate, the Company's right to sell or dispose of the goods shall arise immediately upon any sum becoming due to the Company subject only to the Company taking reasonable steps to bring to the Customer's attention his intention of selling or disposing of the goods before doing so.

9 The Company shall be entitled to retain and be paid all brokerages, commissions, allowances and other remunerations customarily received by or paid to Freight Forwarders.

10(A) If delivery of the goods or any part thereof is not taken by the Customer, Consignee or Owner at the time and place when and where the Company is entitled to call upon such person to take delivery thereof, the Company shall be entitled to store the goods or any part thereof at the sole risk of the Customer, whereupon the liability of the Company in respect of the goods or that part thereof stored as aforesaid shall wholly cease and the cost of such storage if paid for or payable by the Company or any Agent or Sub-Contractor of the Company shall be payable upon demand be paid by the Customer to the Company.

(B) The Company shall be entitled at the expense of the Customer to dispose of (by sale or otherwise as may be reasonable in all the circumstances) :-

(i) on 28 days notice in writing to the Customer, or (where the Customer cannot be traced and reasonable efforts have been made to contact any parties who may reasonably be supposed by the Company to have any interest in the goods) without notice any goods which have been held by the Company for 90 days and which cannot be delivered as instructed; and

(ii) without prior notice goods which have perished, deteriorated or altered or are in immediate prospect of doing so in a manner which has caused or may reasonably be expected to cause loss or damage to the Company or Third Parties or to contravene any applicable laws or regulations

11(A) No insurance will be effected except upon express instructions given in writing by the Customer and all insurances effected by the Company are subject to the usual exceptions and conditions of the Policies of the insurance Company or Underwriters taking the risk. Unless otherwise agreed in writing the Company shall not be under any obligation to effect a separate insurance on each consignment but may declare it on any open or general Policy held by the Company.

(B) Insofar as the Company agrees to effect insurance, the Company acts solely as Agent for the Customer. The limits of liability under Clause 27(A)(B) of these Conditions shall not apply to the Company's obligations under Clauses 11(A) and (B)

12(A) Except under special arrangements previously made in writing or under the terms of a printed document signed by the Company, any instructions relating to the delivery or release of goods in specified circumstances only, such as (but without prejudice to the generality of this Clause) against payment or against surrender of a particular document, are accepted by the Company where the Company has to engage third parties to effect compliance with the instructions, only as Agents for the Customer

(B) The Company shall not be under any liability in respect of such arrangements as are referred to under Sub-Clause (A) hereof save where such arrangements are made in writing.

(C) In any event, the Company's liability in respect of the performance or arranging the performance of such instructions shall not exceed the limits set out in Clause 27(A) (B) of these Conditions.

13 Advice and information, in whatever form it may be given, is provided by the Company for the Customer only and the Customer shall not pass such advice or information to any Third Party without the Company's written agreement. The Customer shall indemnify the Company against all loss and damage suffered as a consequence of any breach of this Condition by the Customer.

14(A) Except under special arrangement previously made in writing the Company will not accept or deal with bullion, coin, precious stones, jewellery, valuables, antiques, pictures, human remains, livestock, pets or plants. Should any Customer nevertheless deliver any such goods to the Company or cause the Company to handle or deal with any such goods otherwise than under special arrangements previously made in writing the Company shall be under no liability whatsoever for or in connection with such goods howsoever arising

(B) The Company may at any time waive its rights and exemptions from liability under Sub-Clause (A) above in respect of any one or more of the categories of goods mentioned herein or of any part of any category. If such waiver is not in writing, the onus of proving such waiver shall be on the Customer.

15 Except following instructions previously received in writing and accepted by the Company, the Company will not accept or deal with goods of a dangerous or damaging nature nor with goods likely to harbour or encourage vermin or other pests, nor with goods likely to taint or affect other goods. If such goods are accepted pursuant to a special arrangement and then in the opinion of the Company they constitute a risk to other goods, property, life or health, the Company shall where reasonably practicable contact the Customer, but reserves the right at the expense of the Customer to remove or otherwise deal with the goods.

16 Where there is a choice of rates according to the extent or degree of the liability assumed by carriers, warehousemen or others, no declaration of value where optional will be made except under special arrangements previously made in writing

THE CUSTOMER

17 The Customer warrants:

(A) that the description and particulars of any goods furnished by or on behalf of the Customer are full and accurate.

(B) that all goods have been properly and sufficiently prepared, packed, stowed, labelled and/or marked, and that the preparation, packing, stowage, labelling and marking are appropriate to any operations or transactions affecting the goods and the characteristics of the goods

(C) that where the Company receives the goods from the Customer already stowed in or on a container, trailer, tanker, or any other device specifically constructed for the carriage of goods by land, sea or air (each hereafter individually referred to as "the transport unit"), the transport unit is in good condition, and is suitable for the carriage to the intended destination of the goods loaded therein or thereon

18 Should the Customer otherwise than under special arrangements previously made in writing as set out in Clause 16 above deliver to the Company or cause the Company to deal with or handle goods of a dangerous or damaging nature or goods likely to harbour or encourage vermin or other pests or goods liable to taint or affect other goods, he shall be liable for all loss or damage arising in connection with such goods and shall indemnify the Company against all penalties, claims, damages, costs and expenses whatsoever arising in connection therewith, and the goods may be dealt with in such manner as the Company or any other person in whose custody they may be at any relevant time shall think fit.

19 The Customer undertakes that no claim shall be made against any Director, Servant, or Employee of the Company which imposes or attempts to impose upon them any liability in connection with any services which are the subject of these Conditions and if any such claim should nevertheless be made, to indemnify the Company against all consequences thereof

20 The Customer shall save harmless and keep the Company indemnified from and against:-

(A) All liability, loss, damage, costs and expenses whatsoever (including without prejudice to the generality of the foregoing, all duties, taxes, imposts, levies, deposits and duties of whatsoever nature levied by any authority in relation to the goods) arising out of the Company acting in accordance with the Customer's instructions or arising from any breach by the Customer of any Warranty contained in these Conditions or from the negligence of the Customer and

(B) Without derogation from Sub-Clause (A) above, any liability assumed or incurred by the Company when by reason of carrying out the Customer's instructions the Company has reasonably become liable or may become liable to any other party, and

(C) All claims, costs and demands whatsoever and by whomsoever made or preferred in excess of the liability of the Company under the terms of these Conditions regardless whether such claims, costs and demands arise from or in connection with the negligence or breach of duty of the Company, its Servants, Sub-Contractors or Agents, and

(D) Any claims of a General Average nature which may be made on the Company

21(A) The Customer shall pay to the Company in cash or as otherwise agreed all sums immediately when due without reduction or deferment on account of any claim, counterclaim or set-off

(B) In respect of all sums which are overdue, the Customer shall be liable to pay to the Company interest calculated at 8% above the prevailing base rate of the London clearing banks.

22 Despite the acceptance by the Company of instructions to collect freight, duties, charges or other expenses from the Consignee or any other person the Customer shall remain responsible for such freight, duties, charges or expenses on receipt of evidence of proper demand and in the absence of evidence of payment (for whatever reason) by such Consignee or other person when due

23 Where liability for General Average arises in connection with the goods, the Customer shall promptly provide security to the Company or to any other party designated by the Company in a form acceptable to the Company.

LIABILITY AND LIMITATION

24 The Company shall perform its duties with a reasonable degree of care, diligence, skill and judgement

25 The Company shall be relieved of liability for any loss or damage if and to the extent that such loss or damage is caused by:-

(A) strike, lock-out, stoppage or restraint of labour, the consequences of which the Company is unable to avoid by the exercise of reasonable diligence;

(B) any cause or event which the Company is unable to avoid and the consequences whereof the Company is unable to prevent by the exercise of reasonable diligence.

26 Except under special arrangements previously made in writing the Company accepts no responsibility for departure or arrival dates of goods

27(A) Subject to clause 2(B) and 11(B) above and sub-clause (C) below the Company's liability howsoever arising and notwithstanding that the cause of loss or damage be unexplained shall not exceed:

(i) in the case of claims for loss or damage to goods, (a) the value of any goods lost or damaged, or (b) a sum at the rate of two Special Drawing Rights as defined by the International Monetary Fund (hereinafter referred to as SDR's), per kilo of the gross weight of any goods lost or damaged whichever shall be the least.

(ii) in the case of all other claims:
(a) the value of the goods the subject of the relevant transaction between the Company and its Customer, or (b) a sum at the rate of two SDR's per kilo of the gross weight of the goods the subject of the said transaction, or (c) 75,000 SDR's in respect of any one transaction whichever shall be the least.

For the purposes of Clause 27(A) the value of the goods shall be their value when they were or should have been shipped. The value of SDR's shall be calculated as at the date when the claim is received by the Company in writing.

(B) Subject to Clause 2(B) above, and Sub-Clause (D) below, the Company's liability for loss or damage as a result of failure to deliver or arrange delivery of goods in a reasonable time or (where there is a special arrangement under Clause 26) to adhere to agreed departure or arrival dates shall not in any circumstances whatever exceed a sum equal to twice the amount of the Company's charges in respect of the relevant transaction.

(C) Save in respect of such loss or damage as is referred to at Sub-Clause (B) and subject to Clause 2(B) above and Sub-Clause (D) below, the Company shall not in any circumstances whatsoever be liable for indirect or consequential loss such as (but not limited to) loss of profit, loss of market or the consequences of delay or detention however caused

(D) By special arrangement agreed in writing, the Company may accept liability in excess of the limits set out in Sub-Clauses (A) to (C) above upon the Customer agreeing to pay the Company's additional charges for accepting such increased liability. Details of the Company's additional charges will be provided upon request

28(A) Any claim by the Customer against the Company arising in respect of any service provided for the Customer or which the Company has undertaken to provide shall be made in writing and notified to the Company within 14 days of the date upon which the Customer became or should have become aware of any event or occurrence alleged to give rise to such claim and any claim not made and notified as aforesaid shall be deemed to be waived and absolutely barred except where the Customer can show that it was impossible for him to comply with this Time Limit and that he has made the claim as soon as it was reasonably possible for him to do so.

(B) Notwithstanding the provisions of Sub-Paragraph (A) above the Company shall in any event be discharged of all liability whatsoever howsoever arising in respect of any service provided for the Customer or which the Company has undertaken to provide unless suit be brought and written notice thereof given to the Company within nine months from the date of the event or occurrence alleged to give rise to a cause of action against the Company

JURISDICTION AND LAW

29 These Conditions and any act or contract to which they apply shall be governed by English Law and any dispute arising out of any act or contract to which these Conditions apply shall be subject to the exclusive jurisdiction of the English Courts.

FEDERATION DES ENTREPRISES DE
TRANSPORT ET LOGISTIQUE DE FRANCE

T. L. F.

71, Rue Desnouettes
75724 - PARIS Cedex 15

General Terms of Sale

governing operations performed
by transport and/or logistics operators

Article 1 – PURPOSE AND SCOPE

The purpose of the present text is to define the terms and conditions under which a "Transport and/or Logistics Operator" shall provide, acting in any capacity whatsoever (multimodal transport operator, warehousing agent, authorized agent, cargo handling contractor, logistics contractor –acting as a customs agent or not, international freight forwarder, carrier, etc.), services related to the physical transport of shipments and/or the management of goods flows, packaged or not, of any kind and from any source and for all destinations, in return for a freely agreed to fee that ensures fair remuneration for the services provided – in both domestic and international service.

The customer hereby accepts, without reservation of any kind, the terms and conditions set out hereafter every time it hires or conducts any kind of operation with the "Transport and/or Logistics Operator".

Irrespective of the transport technique used, the present terms and conditions govern the relationship between the customer and the "Transport and/or Logistics Operator".

The "Transport and/or Logistics Operator" shall perform the requested services according to the terms and conditions set out in article 7 below.

No special or other general terms of the customer shall take precedence over the present terms and conditions without prior formal acceptance by the "Transport and/or Logistics Operator".

Article 2 - DEFINITIONS:

For the purposes of the present General Terms of Sale, the terms hereafter are defined as follows:

2-1. CUSTOMER

"Customer" refers to the party that contracts the service with the "Transport and/or Logistics Operator" or the Customs Agent.

2-2. TRANSPORT AND/OR LOGISTICS OPERATOR

"Transport and/or Logistics Operator," **hereafter designated as the TLO,** refers to the party (multimodal transport operator, authorized agent, logistics contractor, international freight forwarder, primary carrier, etc.) that enters into a contract of carriage with a carrier to whom the party entrusts the performance of all or part of the transport operation and/or that enters into a logistics services contract with an assign (subcontractor), when the party doesn't perform said services itself.

2-2.1. – MULTIMODAL TRANSPORT OPERATOR

"Multimodal Transport Operator" (*organisateur-commissionnaire de transport* in French) refers to any service provider that organizes and provides for the performance of, under its responsibility and in its own name, in accordance with the provisions set out in article L 132-1 of the French Commercial Law *(Code du Commerce)*, the transport of goods according to modes and means of its choosing on behalf of a principal.

2-2.2. - LOGISTICS OPERATOR

"Logistics Operator" refers to any service provider that organizes, performs or provides for the performance of, under its responsibility and in its own name, in accordance with the provisions set out in article L 132-1 of the French Commercial Law *(Code du Commerce)*, any operation intended to manage physical goods flows as well as the related documentary and/or information flows.

2-2.3. – PRIMARY CARRIER

"Primary Carrier" refers to the carrier hired under the initial contract of carriage entered into with a customer or with a multimodal transport operator, who entrusts all or part of performance, under its responsibility, to another carrier.

2-3. CUSTOMS AGENT

"Customs Agent" refers to the authorized service provider that directly fulfils in the name of and on behalf of a customer (direct representation), or indirectly fulfils in its own name and on behalf of a customer (indirect representation), customs formalities and that intervenes, as required, to resolve any difficulties that may arise.

Direct representation is governed by agency contract rules and indirect representation by commissioning rules.

2-4. PARCEL

"Parcel" refers to one object or several objects comprising one material item, irrespective of the weight, dimensions and volume, constituting a unit load when handed over for transport (bin, cage, crate, carton, container, bundle, pallet strapped or stretch-wrapped by the customer, roll, etc.), and packaged by the consignor before handing over for transport, even if the contents are itemized in the consignment document.

2-5. SHIPMENT

"Shipment" refers to the goods (including packaging and packing materials) actually made available, at one time, to the TLO, whose transport is requested by one customer for one consignee from one loading place to one unloading place and covered by one consignment document.

Article 3 – PRICES OF SERVICES

Prices are calculated based on information supplied by the customer, particularly taking into consideration the services to be performed, the nature, weight and volume of the goods to be transported and the routes. Prices are quoted based on exchange rates in effect at the time they are given. They are also determined on the basis of assigns' (subcontractors') terms and rates, as well as the international laws, regulations and conventions in effect. If one or more of these basic elements are modified after prices have been quoted – including quotations by the TLO's assigns (subcontractors) – in a way that is binding on the TLO and based on evidence provided by the TLO, the original quoted prices will be modified accordingly. The same is true in the event any unforeseen circumstance results in one of the service elements being changed. Prices do not include charges, duties, fees and taxes due in accordance with any legislation, particularly fiscal or customs-related (such as excise duties, import duties, etc.).

Article 4 - GOODS INSURANCE

The TLO shall not take out insurance without **the customer's prior written and repeated order** for each shipment indicating the risks and values to be covered. If such an order is given, the TLO, acting on behalf of the customer, shall subscribe an insurance policy with an insurance company known to be solvent during the period of insurance coverage.

Unless specifically specified otherwise, only ordinary risks (excluding war and strike risks) shall be insured.

Acting, in this specific case, as an agent, the TLO shall in no way be considered as the insurer. The terms and conditions of the insurance policy are deemed to be known and approved by the consignors and consignees, who shall bear the cost. An insurance certificate shall be issued, as required.

Article 5 - PERFORMANCE OF SERVICES

Departure and arrival dates that may be communicated by the TLO are given for information purposes only. The customer is required to communicate in due course to the TLO the necessary and specific instructions so the TLO can perform the transport services as well as related and/or logistical services. The TLO is not required to verify the documents (sales invoice, packing list, etc.) supplied by the customer.

Any special delivery instructions (COD, etc.) must be provided **in writing for each shipment** and subject to the TLO's express approval. In all cases, this type of order is only incidental to the primary transport and/or logistics service being provided.

Article 6 – CUSTOMER OBLIGATIONS

Packaging

Goods must be packaged, wrapped, marked or countermarked in such a way that it can withstand transport and/or storage operations performed under normal conditions, including the successive handling that necessarily occurs during these operations. Goods shall not constitute a danger for driving or handling personnel, the environment, the safety of transport equipment, other goods transported or stored, vehicles or third parties.

In the event the customer entrusts the TLO with goods that contravene the provisions cited above, such goods shall travel entirely at the customer's risk and peril and subject to the complete discharge of any liability on the part of the TLO.

Labeling:

A clear label must be affixed to each parcel, item or packaging material to enable immediate and unequivocal identification of the consignor, consignee, delivery location and nature of goods. The label information must correspond to the information shown on the consignment document.

Declaratory obligations:

The customer shall be liable for the full consequences for any lack, insufficiency or defect in the packing, packaging, marking or labeling as well as any failure to fulfill an information or declaration obligation about the nature and characteristics of the goods (e.g.; regarding hazardous goods).

The customer alone shall bear any and all consequences resulting from erroneous, incomplete, inapplicable or late declarations or documents.

Exceptions:

In the event of any losses, spoilage or any other damage of the goods or in the case of a delay, the consignee or the receiving party shall be responsible for drawing up a regular and sufficient factual report, noting the concretely reasoned exceptions and in general carrying out all required procedures to preserve the consignee's right of legal recourse and confirm said exceptions in due form and within the prescribed legal deadlines. Failing that, the consignee shall waive its right to pursue legal recourse against the TLO or its assigns (subcontractors).

Refusal or default of the consignee:

In the event the consignee refuses goods or in the event it defaults for any reason whatsoever, the customer shall remain liable for all initial and additional expenses due and owing for the account of the goods.

Customs formalities:

In the event customs formalities need to be performed, the customer shall hold the customs agent harmless against any financial consequences resulting from erroneous instructions, inapplicable documents, etc., which may, in a general manner, entail payment of additional duties and/or taxes, penalties, etc., to the government service concerned.

Article 7 – LIABILITY

7.1. – Liability due to assigns (subcontractors):

The TLO's liability is limited strictly to its assigns' (subcontractors') liability for the operation assigned to the TLO. When intermediaries' or subcontractors' indemnity limits are unknown or are not stipulated by mandatory or legal provisions, they are deemed to be identical to the TLO's indemnity limits.

7.2. – The TLO's personal liability:

The indemnity limits set out below provide consideration for the liability assumed by the TLO.

7.2.1. – Losses and damages:

In the event the TLO's personal liability is established, for any reason and in any capacity whatsoever, it shall be strictly limited:

a) – for all damages to goods attributable to losses and damages during the transport operation and any consequences resulting thereof, to the indemnity ceilings established by the legal or regulatory provisions applicable to the transport concerned.

b) – in all cases where the damages to the goods or any consequences resulting thereof are not due to the transport operation, to 14 euros per kilogram of the missing or damaged goods' gross weight, provided it does not exceed, irrespective of the weight, volume, dimensions, nature or value of the goods concerned, the product of the goods' gross weight expressed in metric tons multiplied by 2,300 euros up to a maximum of 50,000 euros per claim.

7.2.2. – Other damages:

For all damages and especially those caused by late delivery duly confirmed in accordance with the above-mentioned provisions, the TLO's compensation as part of its personal liability shall be strictly limited to the cost of transporting the goods (excluding duties, taxes and miscellaneous expenses) covered by the contract. In no case shall this compensation exceed the amount due in case of loss or damage of the goods.

For all damages caused by a failure to perform the logistics service covered by the contract, the TLO's personal liability shall be strictly limited to the price of the service that led to the damage, which shall not exceed a maximum of 50,000 euros per claim.

7.3. - Quotations:

All price quotations, one-time price proposals and general rates are determined and/or published in view of the above-mentioned limits of liability (7.1 and 7.2).

7.4 –Declared value or insurance:

The customer may always state a declared value, established by him and accepted by the TLO, that has the effect of substituting the declared value amount for the above-mentioned indemnity ceilings (Articles 7.1 and 7.2). Stating declared value will lead to a surcharge.

The customer may also instruct the TLO, pursuant to article 4, to take out insurance on his behalf, subject to his payment of the corresponding premium, by specifying the risks and values to insure.
The instructions (declared value statement or insurance) must be renewed for each operation.

7.5 – Special interest in delivery:

The customer may always make a declaration of special interest in delivery, established by him and accepted by the TLO, that has the effect of substituting the declared amount for the above-mentioned indemnity ceilings (Articles 7.1 and 7.2). This declaration will lead to a surcharge. The instructions must be renewed for each operation.

Article 8 – SPECIAL TRANSPORT

For special transport (in tankers, non-divisible items, perishable goods in temperature-controlled vehicles, live animals, vehicles, goods subject to special regulations, especially hazardous goods, etc.), the TLO will provide the consignor with equipment that is appropriate for the conditions previously defined by the customer.

Article 9 – PAYMENT TERMS

Services are payable **cash upon receipt of invoice, without discount,** at the location where the invoice is issued. The customer is always liable for their payment.

Unilaterally deducting the amount of alleged damages from the price of services is prohibited.

In exceptional cases, when payment terms are granted, any partial payments will be credited first to the unsecured part of the debt. The non-payment of a single installment will automatically trigger the end of the payment term and the outstanding balance will become due immediately, even in case of payment by acceptance bills. Penalties will be charged automatically in the event any amount due is paid after the payment date shown on the invoice.

These penalties shall be equal to a rate one and a half times the legal interest rate pursuant to article L 441-6 of the French Commercial Law (*Code du Commerce).*

Article 10 - CONTRACTUAL POSSESSARY LIEN

Irrespective of the capacity the TLO may be acting in, the customer expressly acknowledges that the TLO has a contractual possessary lien providing a general, permanent preferential and retention right on all goods, values and titles held by the TLO. This lien serves as a guarantee for the total amount of debt (invoices, interest, incurred expenses, etc.) owed to the TLO, including debt prior to or outside the operations being carried out with regard to the said goods, values and documents held by the TLO.
The customs agent enjoys the same contractual possessary lien as the TLO.

Article 11 – LAPSE OF TIME FOR RECOURSE

The right to institute any legal proceedings pursuant to the contract entered into between the parties shall lapse one year after the said contract is executed.

Article 12 – VOIDANCE - SEVERABILITY

If any provision of the present General Terms of Sale is determined to be void or illegal, all other provisions shall continue to have full force and effect.

Article 13 – APPLICABLE JURISDICTION

In case of litigation or dispute, only the Commercial Courts in the TLO's head office locality shall have jurisdiction, even in the event of several defendants or several proceedings against guarantors.

The present General Terms of Sale of *"Fédération des Entreprises de Transport et Logistique de France (T.L.F.)"* take effect as of **October 1, 2001**.

Note: Authentic text in Danish, Finnish, Norwegian and Swedish respectively.

These conditions taking effect on June 1st, 1998, have been agreed between the Nordic Association of Freight Forwarders and the following organisations:

DENMARK:
Erhvervenes Transportudvalg

NORWAY:
Transportbrukernes Fellesorganisasjon

FINLAND:
Centralhandelskammaren
Industrins och Arbetsgivarnas Centralförbund
Handelns Centralförbund
Finlands Befraktarråd

SWEDEN:
Svensk Handel
Svenska Handelskammarförbundet
Sveriges Industriförbund
ICA Aktiebolag
Kooperativa förbundet
Lantbrukarnas Riksförbund

The conditions give the customer in all respects at least the degree of protection stipulated by the FIATA Model Rules for Freight Forwarding Services (1996 version).

INTRODUCTORY CONDITIONS

The General Conditions of the Nordic Association of Freight Forwarders set forth the freight forwarder's and the customer's rights and obligations, including the freight forwarder's liability under various transport law conventions, such as CIM, CMR, the Hague-Visby Rules and the Warsaw Convention.

APPLICABILITY

§ 1

Unless otherwise expressly agreed, these conditions will apply to members of national associations affiliated with the Nordic Association of Freight Forwarders, and also to other parties having agreed to apply them.

THE FREIGHT FORWARDER CONTRACT

§ 2

The freight forwarder contract may include the performance of:

- carriage of goods
- storage of goods
- other services in connection with the transport or storage of goods, such as
  1) clearance of goods,
  2) cooperation in the performance of the customer's obligations under public law,
  3) handling and marking of goods,
  4) signing of insurance,
  5) assistance with documents for export and import,
  6) collection of 'cash on delivery' charges and other assistance concerning the payment for the goods,
  7) advice in matters of transport and distribution.

The freight forwarder may carry out these services either on his own account or as intermediary.

A. The freight forwarder has a liability as **carrier** under §§15-23:
  a) when he performs the carriage of goods with his own means of transport (performing carrier), or
  b) when he has expressly or impliedly accepted liability as carrier (contracting carrier).

The freight forwarder shall be considered as contracting carrier:
  1) when he has issued a transport document in his own name,
  2) when in connection with marketing or in his offer he formulated his undertaking in such a way, e.g. quoting his own price for the transport, that it can be reasonably assumed that he has undertaken a liability as carrier,
  3) when he undertakes carriage of goods by road.

B. Under §§ 24 – 26 the freight forwarder has a liability as **intermediary**, without liability as carrier, with regard to carriage of goods not covered by A.

C. The freight forwarder's liability **includes liability** for those he has engaged to perform the contract (agents and independent contractors):
  a) when he has a liability as carrier in accordance with A.,
  b) when the services have been performed by himself with the help of his own equipment or employees, or
  c) when he has accepted responsibility for the services on his own account.

These conditions apply equally to the persons of whose services the freight forwarder makes use for the performance of the contract as to the freight forwarder himself, irrespective of the grounds for the customer's claims against the freight forwarder and such other persons. The aggregate liability of the freight forwarder and such other persons is limited to what applies to the freight forwarder's liability under these conditions.

When the freight forwarder has undertaken to perform the contract on his own account, in addition to what has been expressly agreed, general practice and generally accepted terms are applicable in so far as they do not deviate from these conditions.

In other cases than those mentioned under a) – c) the freight forwarder is responsible as intermediary **without liability** for other parties than his own employees.

D. With regard to **warehousing**, the conditions of § 27 apply.

THE CUSTOMER

§ 3

In the present conditions, the customer is the party that has concluded a contract with the freight forwarder, or that has acquired the rights of that party. The liability of the customer is governed by the conditions of § 28.

GENERAL CONDITIONS

THE PERFORMANCE OF THE CONTRACT

§ 4

It is incumbent upon the parties to provide each other with information necessary for the performance of the contract. The freight forwarder undertakes to collect, take care of and procure the transport of goods in accordance with the contract and in a suitable way for the customer with generally used means and routes of transport.

Instructions to the freight forwarder concerning the scope of the contract shall be given directly to him. Information contained in the invoice stating that goods have been sold cash on delivery or against a declaration of value specified in the dispatch instructions does not therefore mean that the freight forwarder has undertaken to collect the invoice amount or sign insurance.

§ 5

It is the duty of the freight forwarder to prove that, according to the contract, he has protected the customer's interests in a diligent manner.

Should the freight forwarder, or any of those for whom he is responsible, wilfully have caused damage, delay or other loss, he may not invoke the rules in these conditions which exonerate him from or limit his liability, or alter the burden of proof, unless otherwise stated in § 23.

§ 6

The freight forwarder is responsible for ensuring that the goods arrive within a reasonable time (without a time guarantee). When assessing such reasonable time, regard shall be had to information as to the expected time of arrival stated by the freight forwarder in his marketing or in connection with the signing of the contract.

The freight forwarder is (with a time guarantee) liable for the goods arriving within the time that:

- has been agreed upon in writing as a special, timeguaranteed transport
- has been submitted in writing as a condition of an offer expressly accepted by the freight forwarder
- has been presented by the freight forwarder in a written quotation that was accepted by the customer.

§ 7

If it becomes necessary for the freight forwarder in the performance of the contract to act before seeking instructions, he does so at the customer's risk and for his account.

If the risk of depreciation of goods already taken over arises or, if by reason of the nature of the goods, there is a danger to persons, property or to the environment, and the customer cannot be reached, or should he not, upon being requested to remove the goods, arrange to do so, the freight forwarder may take appropriate measures in respect of the goods, and, if necessary, sell the goods in an appropriate manner. The freight forwarder may, depending on the circumstances and without notice, sell on behalf of the customer, render harmless or destroy goods which are in danger of becoming worthless or extensively depreciated, or which give rise to imminent danger.

After deduction of reasonable expenses connected with the sale, the sum received from the sale shall be immediately reported to the customer.

The freight forwarder shall notify the customer as soon as possible of measures that have been taken, and, upon request, supply evidence of any expenses in connection herewith, as well as prove that he has exercised due diligence in limiting costs and risks.

For such expenses the freight forwarder may debit a special expense charge.

§ 8

The freight forwarder has a duty to notify a claim against a third party, where goods have been damaged, delayed or when some other loss has occurred due to that party's acts or omissions. The freight forwarder shall inform the customer and consult with him in order to take such steps as are necessary to secure the customer's claim to compensation from the party who has caused the damage or loss, or who is responsible therefore, and shall, when requested to do so, assist the customer in his relation to the third party.

If so requested, the freight forwarder shall transfer to the customer all rights and claims that the freight forwarder may have under his agreement with a third party.

§ 9

The freight forwarder's quotation is based on information relevant to the contract supplied to the forwarder, or else on circumstances that are deemed by the forwarder as normal for the intended contract. If the circumstances do not indicate otherwise, the freight forwarder should be able to assume that the goods which have been handed over for carriage are of such a nature and such a relation between weight and volume as are normal for the type of goods in question.

Unless otherwise agreed, the customer is obliged, upon request, to make advance payment for such expenses as may be incurred in the performance of the contract.

§ 10

Notwithstanding the customer's obligations as to payment under contracts of sale or freight agreements with parties other than the freight forwarder, he has a duty upon request, to pay the freight forwarder what is due for the contract (remuneration, advance payment, refund of outlays) against appropriate documentation.

Unless otherwise agreed, when the goods have not been delivered for transport, and the contract therefore cannot be wholly or partially executed as agreed, the freight forwarder has the right to receive the agreed payment for freight and other remuneration less what the freight forwarder has saved, or could reasonably have saved, by not having to execute the contract.

Although the freight forwarder has given the customer the right to defer payment until the arrival of the goods at destination, the customer has nevertheless a duty, when so requested, to pay the freight forwarder what is due, if, due to circumstances beyond the freight forwarder's control, the contract cannot be performed as agreed provided such non-performance is not due to a cause which is the freight forwarder's responsibility under these conditions.

§ 11

The freight forwarder has the right to special compensation for work which is clearly necessary in addition to what has been explicitly agreed upon or normally follows from the freight forwarder's contract. The compensation is determined in accordance with the same principles as those applying to the compensation for the services under the contract.

As regards outlays in addition to those which have been expressly agreed upon, or which normally follow from the freight forwarder's contract and which have not been paid in advance to him, the freight forwarder has the right to compensation for documented outlays and costs connected therewith.

§ 12

If the freight forwarder has to pay additional amounts for the agreed services, the customer has a duty upon request to refund

these amounts subject to appropriate documentation. It is the freight forwarder's duty to check, and if possible, ensure together with the customer, that the services rendered are within the scope of the contract, and that the amounts debited are reasonable. The freight forwarder shall, if possible, inform the customer prior to such payment being made.

§ 13

Should the performance of the contract be interrupted by reason of hindrances beyond the freight forwarder's control, he is entitled to refund of outlays incurred and work carried out against appropriate documentation.

LIEN, ETC.

§ 14

The freight forwarder has a lien on the goods under his control, for fees and expenses in respect of such goods – remuneration and warehousing charges included – as well as for all other amounts due from the customer under contracts according to § 2 above.

Should the goods be lost or destroyed, the freight forwarder has similar rights in respect of compensation payable by insurance companies, carriers or others.

Should the amount due to the freight forwarder not be paid, he has the right to arrange the sale, in a satisfactory manner, of as much of the goods as is required to cover the total amount due to him, including expenses incurred. The freight forwarder shall, if possible, inform the customer well in advance what he intends to do with regard to the sale of the goods.

SPECIAL CONDITIONS

THE FREIGHT FORWARDER'S LIABILITY AS CARRIER

§ 15

The freight forwarder is liable as carrier in accordance with §§ 16 – 23 for loss, depreciation of or damage to goods, occurring between the moment when the goods have been taken over for transport until the moment the goods have been delivered, as well as for delay in delivery.

In any event, the liability ceases 15 days after the freight forwarder has informed the party who has the right to receive the goods that the goods have arrived, or has forwarded a written notice in this respect to the address stated by the customer.

Thereafter, the freight forwarder is liable for taking care of the goods as agreed or follows from his duty to protect the customer's interests in a diligent manner under § 5.

§ 16

There is no liability if loss, depreciation, damage or delay is caused by:

a) fault or neglect of the customer,

b) handling, loading, stowage or unloading of the goods by the customer or anyone acting on his behalf,

c) the inherent nature of the goods to be easily damaged, e.g. by breakage, leakage, spontaneous combustion, rotting, rust, fermentation, evaporation or being susceptible to cold, heat or moisture,

d) lack of or insufficient packing,

e) faulty or insufficient address or marking of the goods,

f) faulty or insufficient information about the goods,

g) circumstances which the freight forwarder could not avoid and the consequences of which he was unable to prevent.

The stipulations of a) – f) notwithstanding, the freight forwarder is liable to the extent that his fault or neglect has caused or contributed to the loss, depreciation, damage or delay.

When assessing the freight forwarder's liability under points b), d) and e), consideration shall be taken of whether, despite his knowledge of the circumstances, the freight forwarder has approved or failed to object to the customer's measures concerning the goods.

Unless specifically agreed, the freight forwarder is not liable for money, securities and other valuables.

§ 17

Compensation for loss or depreciation of goods shall be calculated on the basis of their invoice value, unless it is proved that their market value, or the current value of goods of the same kind and nature at the time and place the freight forwarder took over the goods was different from the invoice value. Compensation will not be paid for antique value, sentimental value or other special value.

Freight charges, customs charges and other outlays connected with the transport of the goods lost will also be compensated. Apart from that, the freight forwarder is not obliged to pay any compensation, e.g. for loss of profit, loss of market or other loss of any kind whatsoever.

§ 18

Compensation for damaged goods shall be paid to an amount equivalent to the extent of depreciation in value. The amount is arrived at by using the percentage of depreciation in value consequent upon damage to the goods, in relation to the value of the goods, as laid down in § 17, par. 1. Expenses referred to in § 17, par. 2, first sentence, will also be paid to the same extent, but apart from this, the freight forwarder is not obliged to pay any further compensation.

§ 19

If the freight forwarder has paid the full value of the goods, he may take over title to the goods if he so desires.

§ 20

Delay

A. If the goods are delivered too late under § 6, par. 1, the freight forwarder shall compensate the customer for such direct and reasonable expenses as could have been foreseen as probable consequences of the delay at the time of the conclusion of the contract, although with an amount not exceeding a sum equivalent to the freight or other compensation agreed in the contract.

B. When a *time guarantee* has been agreed, according to § 6, par. 2, and the agreed time of transport has been exceeded, the freight forwarder shall, unless otherwise agreed, credit the customer for the freight or any other compensation agreed upon for the transport. This does not apply if the delay was caused by circumstances beyond the freight forwarder's own control, except that with regard to carriage of goods by road within Europe the freight forwarder is liable also for circumstances within the control of persons engaged by him for the performance.

The customer shall be considered to have suffered a loss equivalent to the amount of the freight, as long as it cannot be shown that the amount of the loss is smaller. In the latter case only the amount equivalent to the loss shall be credited.

Compensation for delay shall never exceed the amount of the freight.

§ 21

Delay and total loss

The customer has the right to compensation as if the goods had been lost if no delivery has been made

- with regard to international road transports, within 30 days after the expiry of the agreed period of time, or, if no particular period of time has been agreed upon, within 60 days from the moment the goods were accepted for transport
- for other types of transport, within 60 days from the time when the goods should have arrived.

The customer has no right to compensation as if for total loss if the freight forwarder can prove within the above mentioned time limits that the goods have not been lost and that they can be delivered within a reasonable period of time.

§ 22

For loss, depreciation of or damage to goods the freight forwarder's liability is limited to SDR 8,33 per kg gross of the part of the goods which has been lost, depreciated or damaged.

§ 23

If a certain mode of transport has been expressly agreed upon, or if it is proved that loss, depreciation, damage or delay has occurred whilst the goods were being carried by a particular means of transport, the freight forwarder shall instead be liable in accordance with the law applicable to such mode of transport and the commonly used and generally accepted conditions of carriage, to the extent that these deviate from what is laid down in § 5, par. 2 or §§ 15 – 22.

THE FREIGHT FORWARDER'S LIABILITY AS INTERMEDIARY

§ 24

The freight forwarder is liable for damage resulting from his lack of due diligence in the performance of the contract. It is the duty of the freight forwarder to prove that he has exercised such due diligence in order to protect the customer's interests according to the contract.

The freight forwarder is not liable for acts or omissions of third parties in performing the transport, loading, unloading, delivery, clearance, storage, collection or other services rendered by the freight forwarder, provided he can prove that he has acted with due diligence in choosing such third parties.

Unless specifically agreed, the freight forwarder is not liable for money, securities and other valuables.

§ 25

In calculating the extent of compensation for loss, depreciation, damage and delay, the stipulations of §§ 17 – 19 and § 20 A., shall be applied correspondingly.

§ 26

The freight forwarder's liability as intermediary, etc. is limited to SDR 50 000 in respect of each contract, always provided that compensation cannot exceed:

a) for delay a sum equivalent to the agreed payment for the contract,

b) for loss, depreciation of or damage to goods SDR 8,33 per kg gross of the part of the goods which has been lost, depreciated or damaged.

STORAGE

§ 27

A. For storage of goods in connection with a transport for which the freight forwarder is liable as carrier, he is liable for a period of 15 days after the transport in accordance with the provisions of §§ 15 – 23.

B. When the freight forwarder arranges storage as intermediary the provisions of §§ 24 – 26 apply.

C. For other storage the freight forwarder is liable also for persons engaged for the performance of the contract. The following additional conditions apply:

1. The freight forwarder shall check and issue receipts for whole packages of goods received, without any liability, however, for the content of the packages and invisible damage. At the request of the customer the freight forwarder shall make an inventory of the stock.
The freight forwarder shall, upon opening the packages, immediately notify the customer of any defect or damage that he has observed or should have observed.
The freight forwarder shall take care of the necessary delivery control.

2. If the customer has not left any special instructions with regard to the storage of the goods, the freight forwarder may freely choose between various storage possibilities, provided that he exercises due diligence in so doing.

3. Unless otherwise instructed in writing by the customer, the freight forwarder shall sign insurance for the risks of fire, water and burglary in his own name and for account of the customer based upon the invoice value at the time of storage + 10 %.
For loss, depreciation of or damage to the goods not covered by insurance in accordance with the above, or when no insurance has been taken out, the freight forwarder is liable for negligent acts or omissions with the determination and limitation of liability specified in §§ 17 – 19 and § 22. The freight forwarder's liability in relation to all customers is limited, however, to SDR 500 000 with regard to damages occurring on one and the same occasion.
The freight forwarder is liable for delay according to §§ 20 – 21.

4. If goods in store, by reason of their nature, are deemed to be a danger to property or persons, the customer has a duty to remove the goods immediately.

5. The customer shall inform the freight forwarder at the latest at the time of delivery of the address to which notice concerning the goods shall be sent and at which instructions shall be received, and inform the freight forwarder immediately of any changes thereof.

THE CUSTOMER'S LIABILITY

§ 28

The customer has a duty to hold the freight forwarder harmless for damage or loss incurred by the freight forwarder owing to the fact that:

a) the particulars concerning the goods are incorrect, unclear or incomplete,

b) the goods are incorrectly packed, marked or declared, or incorrectly loaded or stowed by the customer,

c) the goods have such harmful properties as could not have been reasonably foreseen by the freight forwarder,

d) due to errors or omissions by the customer the freight forwarder is obliged to pay duty or official taxes or to provide security.

In assessing the customer's responsibility in accordance with a) and b) regard shall be had to whether the freight forwarder, despite his knowledge of the circumstances, has accepted or failed to make an objection to the measures taken by the customer in respect of the goods.

Should the freight forwarder, in his capacity as charterer or shipper become liable in connection with carriage of the customer's goods by sea, to pay general average contribution to the shipowner or the carrier, or become exposed to claims from third parties for reasons stated above, the customer shall hold the freight forwarder harmless.

NOTICE OF CLAIM AND DISPUTES

NOTICE OF CLAIM

§ 29

Notice of claim shall be given to the freight forwarder without undue delay. In case of apparent depreciation or damage, notice should be given immediately upon the receipt of the goods.

If notice of claim is given later than within seven days from the day when the goods were received, it is up to the party who gave notice of claim against the freight forwarder to prove that the damage or depreciation of the goods had occurred before the goods were received. If the claimant fails to prove this, the goods will be considered to have been delivered in perfect condition. Notice of claim concerning matters other than damage to, or depreciation or loss of the goods shall be given within fourteen days from the day on which the customer knew or ought to have known about the circumstances forming the basis of the freight forwarder's liability. If such notice of claim has not been given, the customer has lost his right of claim.

When a particular mode of transport has been agreed upon with the freight forwarder, the statutory provisions and the generally approved conditions applicable to such mode of transport shall apply instead, to the extent that they deviate from what is stated in par. 1 above.

TIME-BAR (Denmark, Finland and Sweden)

§ 30

Legal proceedings against the freight forwarder shall be commenced within a period of one year, otherwise the right of claim will have become lost. The time limit period runs:

a) upon depreciation of or damage to goods from the day upon which the goods were delivered to the consignee,

b) upon delay, loss of the whole consignment or other kind of loss from the time at which the delay, total loss or other loss could at the earliest have been noticed.

This time-bar shall apply when the freight forwarder's habitual place of business is located in Denmark, Finland or Sweden.

When a particular mode of transport has been agreed upon with the freight forwarder, the statutory provisions and the generally approved conditions applicable to such mode of transport shall apply instead, to the extent they deviate from what is stated in par. 1 above.

ARBITRATION (Finland, Norway and Sweden)

§ 31

Finland

Except as stated below, disputes between the freight forwarder and his customer shall not be referred to the courts, but shall be decided by arbitration and according to Finnish law. The arbitrators shall be appointed by the Arbitration Institute of the Central Chamber of Commerce in Finland, and the arbitration shall be conducted according to the Rules of this Institute. The arbitration shall take place in the City of Helsinki. The commencement of legal proceedings for the collection of undisputed claims does not imply a waiver of arbitration with respect to disputed counter-claims which may not be enforced, litigated or set-off other than by means of arbitration.

Disputes concerning amounts which do not exceed FIM 200 000, or which concern customers who have entered into the contract mainly for private purposes shall not, however, be subject to arbitration.

Norway

Disputes between the freight forwarder and his customer shall not, except as stated below, be referred to the courts, but shall be decided by arbitration in accordance with the Rules for Arbitration and Alternative Dispute Resolution adopted by the Arbitration Institute of the Oslo Chamber of Commerce. This Institute will be allowed to decide whether the ordinary arbitration rules shall be applied in a given case, taking into consideration the complexity of the case, the value of the matter in dispute and other circumstances. The commencement of legal proceedings for the collection of undisputed claims does not imply a waiver of arbitration with respect to disputed counter-claims which may not be enforced, litigated or set-off other than by means of arbitration.

The Rules for Arbitration and Alternative Dispute Resolution of the Arbitration Institute of the Oslo Chamber of Commerce and Norwegian law shall apply when the freight forwarder's habitual place of business is located in Norway.

Disputes concerning amounts which do not exceed NOK 300 000, or which concern customers who have entered into the contract mainly for private purposes shall not, however, be subject to arbitration unless otherwise agreed.

Sweden

Disputes between the freight forwarder and his customer shall not, except as stated below, be referred to the courts, but shall be decided with the application of Swedish law by arbitration according to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The Rules for Simplified Arbitration shall apply unless the Institute due to the complexity of the case, the value of the matter in dispute or other circumstances decides that the Arbitration Rules of the Institute shall apply. If so, the Institute shall also decide whether the Arbitration Tribunal shall be constituted with one or three arbitrators.

The commencement of legal proceedings for the collection of undisputed claims does not imply a waiver of arbitration with respect to disputed counter-claims which may not be enforced, litigated or set-off other than by arbitration.

Disputes concerning amounts which do not exceed SEK 300 000, or which concern customers who have entered into the contract mainly for private purposes shall not, however, be subject to arbitration unless otherwise agreed.

JURISDICTION (Denmark)

§ 32

When the freight forwarder's habitual place of business is located in Denmark, legal proceedings against him shall be instituted before a court in Denmark and in accordance with Danish law.

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