

# CHAPTER 18

## COMPLEXITY IN THE MANAGEMENT OF CLAIMS FROM CARRIAGE OF GOODS BY MULTIMODAL OPERATIONS

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### **I INTRODUCTION**

Many attempts have been made to define "Multimodal Transport" or "Combined Transport" which occurs in a contract for carriage of goods using combinations of several modes of transport such as road, rail, air and sea conveyance. However, this remained a sector involving complicated transactions commercially difficult to scrutinise. The business involved the cooperation and coordination of many differing interests and parties in the supply services chain around the globe<sup>1</sup>. The development of modern transportation techniques and unitization of goods by standard containers since the 1960s also introduced a significant need for modification of commercial and traditional legal approaches to determine claims resulting from the carriage of goods contracts. Goods are now conveniently shipped in fixed shipping units termed "TEU" or "FEU"<sup>2</sup> and undertaken on "door to door" basis (sometimes referred to as "through transport services") by freight forwarders who contracted as "non-vessel owning carriers" (NVO) involving a network of service providers.

The contract of carriage, usually a house bill of lading (HB/L) or a multimodal transport B/L, would be issued by the freight forwarding agent operating as a multimodal transport operator (MTO) or legally contracting as carrier but they do not own the vehicles or the vessels on which the goods are transported. The

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1 Peter F M Jones "Multimodal Transport of Goods: The FBL Solution" (July 1995) No 9 Asia Business Law Review.

2 "TEU" means Twenty Foot Equivalent Unit and "FEU" means Forty-Foot Equivalent Unit. The common denominator for use in shipping carriage unit is TEU and so FEU is the equivalent of two TEUs.

commonly argued position in support of this business is that, in practice, shippers or consignees need only pursue one single operator in the event of any loss of or damage to the goods handled by the MTO rather than against the performing carrier or other contractors in the services providers' chain, which is demanding and meticulous.

However, in reality, because of traditional carriage of goods practices, there will be several other carriage documents issued alongside the bills of lading (B/Ls). This increases the complexity in many claims in addition to an already demanding routine. This is due to the industry practice, that is still in the developing stage and there are no unified legal regimes or uniformity in practice governing the multimodal transportation industry.

Whilst there are currently some established carriage of goods laws and conventions already in place, these are still in fragments because a multimodal transport contract comprised a number of unimodal stages of transport and the process sometimes involved several different parties usually in different jurisdictions. Therefore, any claim against them will be subject to questions on the applicability of national laws and regulations. On top of that, there could be legislation already in place governing that particular stage of transport but such may be inconsistent or insufficient to cover that particular unique claim situation which occurred, for example, loss of or damage to goods in between different modes of transportation and in between parties located in different territories. The claimants are often perplexed by having to work through the issues involved to find the applicable and enforceable position in a selected forum.

The freight forwarder performing duty as carrier, without the ownership or management of any vessels or vehicles, is only responsible when the goods are "received for shipment" and deemed to be in their custody but not in their control when goods are "shipped on board".<sup>3</sup> Then it is for the many services providers in between to conduct the loading and unloading services, especially the stevedores, to transfer or load and unload the goods. There are already many decided authorities on the role of stevedores acting as agents but where the truckers or the intermediate land transporter, such as rail operators, are involved, these parties are "carriers" in their own right. Therefore, within the multimodal contract of carriage, there are multiple enforceable contracts of carriage. So when all these intermediate cross-border parties are involved, a chain of complexity arises because these services providers could also rely on their own carriage contract which contained

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3 "Received for shipment" is commonly found in the Trucker's Bill or House Bill of Lading issued by a freight forwarder or MTO and "Shipped on Board" is traditionally found in Ocean or Master Bill of Lading issued by the shipping agency acting for the carrier.

among others, their standard trading conditions<sup>4</sup> (STC) incorporating their own limitation terms, exclusions, selected laws and jurisdictions.

## II THE LEGAL REGIMES

Unlike the traditional carriage of goods by sea regimes, no single or a unified international convention that regulates comprehensively the multimodal carriage of goods is currently in force or exists as law. It is however possible that under certain circumstances, one of the existing laws, international conventions or a carriage of goods by sea regime that have been incorporated into the contract will deal with the multimodal contract but because of the parties involved, managing the claims arising from this contract could be complex. To add further challenges, not all jurisdictions require specific rules on multimodal carriage and as such, the results might be different if the claimant proceeds on certain paths to conduct their claim<sup>5</sup>. If an operator of one leg, for example, the railroad carrier, wishes to avoid liability under a convention, he can easily do so by neglecting to issue a rail consignment note<sup>6</sup> and thus rely on the former services provider's contract of carriage to cover them with the required protection at law. The *Multimodal Convention*<sup>7</sup> which sought to implement the concept of multimodal transportation of goods so as to unify and improve some of the transnational territorial and jurisdictional issues that were not addressed by the *Hague Rules*<sup>8</sup> was introduced in 1980. However, the convention received practically no support from member states and hence did not enter into force of law.

During the early 1970s, there were attempts at development of modern forms of multimodal transport documents incorporating the various stages of carriage used in an attempt at unifying the multimodal carriage contract. However, most of the

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- 4 STC are standard terms of contract stipulating the liabilities and responsibilities of parties to the contract. These form part of the terms of the contract of carriage subscribed by members of an association, for example, FIATA (International Federation of Freight Forwarders Association) and the STC could be incorporated into contract by actual incorporation into the documents or by reference. The courts usually recognised the existence of these STC as part of contract.
  - 5 Marian Hoeks *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International, 2010) at 109.
  - 6 Paul Bugden *Goods in Transit* (2<sup>nd</sup> ed, Sweet & Maxwell, 2010) at 19.
  - 7 "United Nations Convention on International Multimodal Transportation of Goods", introduced at Geneva on 24 May 1980 also known as the MTO Convention. This Convention did not enter force of law.
  - 8 "International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading", signed at Brussels on 25 August 1924.

developments are based on the terms of the traditional B/L and issued in the form of a combined transport or multimodal B/L.<sup>9</sup> Therefore, the laws on multimodal carriage of goods retain the elements established in the carriage of goods by sea laws.

Most goods today are shipped by any combination of rail, land, sea and air, from "door to door" instead of just unimodal or via a single mode of carriage. The contract of carriage, usually a Combined Transport HB/L, is issued by the freight forwarder or an MTO, acting as a carrier. "A contract for the multimodal carriage of goods contains an undertaking by a carrier, who is called the multimodal transport operator, to perform carriage of goods by at least two different modes of transport from the place where the goods are taken in charge of to a place designated for delivery."<sup>10</sup> Because of this, many of the journeys or voyages undertaken by the actual carrier,<sup>11</sup> that is, the MTO or the Non-vessel Operating Common Carrier, crossed from one mode to another in order to reach the intended destination.

In some instances, separate carriage documents are issued when the goods are received by the freight forwarder and the operating carrier of any one of the transportation modes to undertake that particular carriage and the shipper is the contracting party with the operating carrier. However, these are now rare as the contracts of carriage are now issued by the operating or performing carrier to the MTO instead of the shipper so that the MTO undertakes responsibilities for the entire carriage from "door to door" contracting as a carrier with the shipper. The growing use of MTO HB/Ls is now widely accepted in view of the demand by bankers issuing documentary credits to finance the purchase of the goods. In turn, these fuel the growth of the transportation industry. The past practice of only performing carriers, who owned or operate vessels, issuing "shipped on board" documents are now being blurred when the MTO issues the same but does not own or operate the conveying vessels and nor even manage the vessels.

Therefore, the proposition that the MTO is a carrier probably sounded inaccurate at law. However, it can be argued that legally the MTO, who issued the

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9 David A Glass *Freight Forwarding and Multimodal Transport Contracts* (LLP Singapore, 2004) at 15.

10 Ralph De Wit *Multimodal Transport: Carrier Liability and Documentation* (Lloyd's of London Press Ltd, 1995) at 3.

11 The word "actual carrier" usually refers to the NVOC or the MTO as opposed to the "performing carrier" which is the actual owner or operator of the vessel. The NVOC issues a "Port to Port" HBL and does not handle the goods whilst the MTO issues a "Door to Door" HBL by receiving the goods for shipment.

document and contracted as carrier cannot subsequently deny the statement or representation made to other parties, such as the shipper or consignee, who relied upon that even if proved to have been inaccurate when the statement was made. In other words, when the MTO, contracting as the actual carrier, issued a "shipped on board" B/L and even if the performing carrier, that is the party that owns or managed the vehicles or vessels, failed to carry the goods on board, the MTO cannot rely on the statement made in the HB/L to mean that they only "received for shipment" the goods entrusted to them because the liability on these two duties differs slightly.

In practice, the MTO will create a chain of "back to back" contracts so that where the claim occurred on the sea voyage, the Carriage of Goods by Sea Act [1992] (COGSA)<sup>12</sup> or any counterpart legislation, governing the issue of a bill of lading by incorporating the Hague-Visby Rules<sup>13</sup> and/or the Rotterdam Rules<sup>14</sup> to that particular jurisdiction where the carrier is operating from, will apply to determine the liability of the contracting carrier. Where the claim occurred on land, there is the CMR<sup>15</sup> that will be available to determine the road carrier's liability. However, having said that "It might be of interest to consider how foreign hybrid regimes will impact on future carriage claims ... even if the bill of lading contains a choice of law clause or clause paramount selecting the foreign hybrid regime."<sup>16</sup>

### **III LEGAL STATUS OF THE PARTIES**

#### **A The Agent and the Principal**

The positions of the "Agent" and the "Principal" are the parties in every contract. However, defining the duties and authority of an agent and his liability at law posed yet another complex and difficult task. In most instances of carriage of goods claims, the agent is at the core of the dispute but as it is with a carriage

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12 The United States of America has its COGSA which dates back to 1936 and which remained unchanged for more than 70 years.

13 This is the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to the Bills of Lading", signed at Brussels on 23 June 1977/24 Feb 1982.

14 United Nations Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea came into force on 23 September 2009, after it was signed and ratified by 24 member states. It is also known as "the Rotterdam Rules".

15 Convention on the Contract for the International Carriage of Goods by Road signed in Geneva on 19 May 1956 signed and ratified by most European States.

16 Paul Myburg *Uniformity of Unilateralism in the Law of Carriage of Goods by Sea?* (Victoria University of Wellington, AustLII, 2002).

contract, he can also be the principal. On the one hand, the agent is entrusted with the goods as a carrier whose duties, among others, are to undertake care custody and control of the goods entrusted by the owner to deliver the goods as directed to a third party, the performing carrier and finally to a consignee, safely as an agent. On the other hand, it appears that the agent might be a principal or as an agent of the carrier and not responsible for certain loss of or damage to the goods that he is being entrusted with. This is because he is protected by law from being made liable for certain duties available to the carrier under common law, statutes or any of the international conventions. It is therefore virtually impossible to define an agent or the position of an agent except in terms of duties and from the facts of the claims that could happen in any carriage of goods contract. Fridman<sup>17</sup> cited Valin J who said:<sup>18</sup>

Agency is the relationship that exists between two persons [*or parties*]<sup>19</sup> when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or disposition of property.

In the case of *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd*<sup>20</sup>, the House of Lords decided:

where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but can claim the benefit of the contract made with their employers on whose behalf they were acting.

This case proposed that if an agent, whether impliedly or expressly, performed his duties as required by the principal, he is vicariously immuned from any claim under tort and his liability under contract is also limited because the agent has the benefits of the exclusions or limitation of liability based on his principal's carriage contract made between the principal and the shipper, owner or consignee of the goods and the agent is employed by the principal to ship the goods as directed.

This position created some problems and so in the case of *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*<sup>21</sup>, the Privy Council ruled that the principal, that is the shipping company, a sister company of the stevedoring

17 Fridman GHL *The Law of Agency* (7<sup>th</sup> ed, Butterworths, 1996) at 11.

18 Valin J in *Labreche v Harasymiw* (1992) B89 DLR (4<sup>th</sup>) 95 at 107.

19 Emphasis in italics added for clarity.

20 [1924] AC 522.

21 [1975] AC 154 also known as *The Eurymedon*.

company, had contracted as the agent of his agents (the stevedores) who ultimately handled the cargo and damaged it in the course of their work. In order to have the benefits of the exemption clause, they have to be declared and be made known to the damaged cargo owner unless it was specified beforehand that they could delegate their authority to the stevedores and they were not prohibited from doing so. Therefore, if the principal carrier did not disclose his agent or the agent did not disclose that he was acting as instructed by his principal, the agent is not entitled to the protection available under the terms of the exclusions and or limitation of liability under the B/L or any contract of carriage.

As a result of this, modern HB/L or Ocean B/L (issued by performing carriers) are often drafted in the widest possible terms so as to permit the actual carrier or the performing carrier and generally the MTO from delegating or sub-contracting the carriage to any parties they desire. Therefore, in the case of *Harlow & Jones Ltd v P J Walker Shipping & Transport Ltd*<sup>22</sup>, it was held that the defendants, who had been contracted to carry goods, acted as agents even though they had entered into a charterparty with the owners of the vessel in which their customers' goods were carried in the defendant's own name. That is the charterer of the vessel was also the shipper of the goods to which the B/L was issued. There are not however many decided authorities which could clarify this position further.

### ***B The Independent Contractor and the Carrier***

One of the basic obligations is for the contracting carrier to carry the goods to their destination and to deliver the goods to the party entitled to take delivery of the goods, that is, the consignee or the final interested third party, usually the buyer of the goods, based on the shipper's order, in a complete and undamaged shipment. The presumption is that the failure to do so will make the carrier liable<sup>23</sup> and this is contained in the contract of carriage issued as evidenced by B/L containing among other things, limitations and exemptions of liability, usually written in favour of the contracting carrier. In the case of *Certain underwriters at Lloyds v Barber Blue Sea Line*,<sup>24</sup> the court stated that only when a B/L refers to a class of persons such as "agents" and "independent contractors" and this includes all of those persons engaged by the carrier to perform the function and duties of the carrier within the

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22 [1986] 2 Lloyd's Rep 141.

23 Alexander von Ziegler "The Liability of the Contracting Carrier" (2009) 44 Texas International Law Journal 329 at 333.

24 [1982] AMC 2638 (11<sup>th</sup> Cir) p 2642.

scope of carriage, that is referring only to the chain of suppliers of services performing the carriage as those who could benefit from the exclusion terms. This effectively limits the number of parties eligible to claim limitation of liability, which is one step towards clarity from the rulings in *The Himalaya*<sup>25</sup> and *The Eurymedon*<sup>26</sup> thus narrowing the parties entitled to claim exclusions and limitations of liability as opposed to any party involved in the carriage contract as a whole maritime adventure.

Therefore, in the case of *Caterpillar Overseas SA v Marine Transport Inc.*,<sup>27</sup> the trucking company was not able to rely on the exclusions in the B/L since it was acting as an "independent contractor" having custody of the goods. The principle of exclusion of liability for acts of an agent in the "*Himalaya Clause*" permits the carrier to protect his agents, servants and independent contractors to exclude or limit liability under the contract of carriage. However, an agent will be held directly or personally liable to the third party, if property belonging to the principal, but held in the agent's possession for the principal, is assigned or charged by the principal to or in favour of the third party. Similarly, liability on the part of the agent occurs only if the principal directs the agent to pay the third party from the money held by the agent to the use of the principal; provided that the agent thereupon contracts with the third party to pay him.<sup>28</sup> So, if the agent was trading as an independent contractor and bailee of goods for the shipper, he is not entitled to benefit under the terms of the carriage contract. This appears to be consistent with the case of *Scruttons Ltd v Midland Silicones Ltd*,<sup>29</sup> where the House of Lords ruled, among other things, that the intention in the contract must be clearly stated that the contracting party is acting not only on its own behalf but also as agent for the third party. Lord Reid said,

I agree ... that "carrier" in the bill of lading *does not* include stevedores, and if that is so I can find nothing in the bill of lading which states or even implies that the parties to it intended the limitation of liability to extend to the stevedores. *Even if it could be said that reasonable men in the shoes of these parties would have agreed that the stevedores should have this benefit, that would not be enough to make this an implied term of the contract...*<sup>30</sup> there is certainly nothing to indicate that the carrier

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25 *Adler v Dickson* [1951] 1 QB 158.

26 Above n 22.

27 [1991] AMC 75 (4<sup>th</sup> Cir. 1990).

28 Fridman GH *The Law of Agency* (7<sup>th</sup> ed, Butterworths, 1996) at 301.

29 [1962] AC 446 (HL).

30 Emphasis in italics added for clarity.



was contracting agent for the stevedores in addition to contracting on its own behalf. Therefore, it appears to me that the agency argument must fail.

The complexity in defining the legal position of the parties to the contract depended on the facts and final outcome of each claim. Whilst there could still be a distinction between the agent and the independent contractor based on whether their duties are supervised by the principal, this could only be evident where the agent's act is clearly outside the scope of the contract. Slessor LJ in the case of *Honeywill and Stein Ltd v Larkin Brothers Ltd*<sup>31</sup> said,

It is well established as a general rule of English law that an employer is *not liable* for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other *depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance*,<sup>32</sup> in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

In determining whether the freight forwarder is the agent or principal, the courts will be guided by the consideration such as whether the forwarder held himself out as carrier and whether the forwarder arranged "to collect" rather than to "arrange for the collection" of the goods, or whether he has agreed "to carry" rather than to "arrange for the carriage of the goods". These words and facts are important in order to determine the liability of each of the parties to the contract of carriage evidenced by the issue of the B/L. In the case of *Marston Excelsior Ltd v Arbuckle Smith & Co*,<sup>33</sup> the court ruled that the remuneration which the agent received for the transportation of the goods will determine if the role is one of agency.

In the unreported case of *SSOE v GLES*,<sup>34</sup> the shipper bought some 20 TEUs of white rice from Myanmar and EFR – G Link Express (EFR), a member of the G Link Express network of agencies, was the MTO agent in Myanmar tasked to handle the shipment from Yangon to Chittagong. There were two HB/Ls issued by

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31 [1934] 1 KB 191.

32 Emphasis in italics added for clarity.

33 [1971] 2 Lloyd's Rep 306 (CA).

34 *Swiss Singapore Overseas Enterprise Pte Ltd v G Link Express Logistics (Singapore) Pte Ltd* [2011]. This claim was filed at the Singapore District Court, now called States Court.

G Link Express Logistics Singapore Pte Ltd (GLES) against the OBLs, which was issued by Evergreen Lines, a commercial ocean liner, to GLES, hence a "back to back" issue. SSOE paid lump sum freight to EFR and a HB/L fee to GLES but all the payment were made to GLES in Singapore. There were errors in the name of the consignee at Chittagong on the HB/Ls and this was subsequently discovered and amended. EFR issued an apology to SSOE with a "promise of refund" saying that GLES will reimburse SSOE after the consignee had cleared the goods with the amended and reissued HB/Ls. An amount of USD40,144 in delays and detention charges was incurred. The consignee paid the charges and took delivery of the goods after deducting the amount from the proceeds of sale to SSOE which then brought a claim against GLES who defended the action as "wrong defendants and no case to answer" at first instance. The court however held that EFR acted as agents for GLES and as the principal they have a case to answer since they issued the B/L and freight and handling charges paid were collected by GLES. It is uncertain if this case will be successful if it moves into a court fight because an error is a commonly accepted risk. For the claimant, it is a case of pursuing a party most conveniently located in their jurisdiction and one with funds for the claim in the form of valid insurance cover rather than anything else. Due to the small amount of claim involved, the claim was summarily settled.

This lower court ruling appears consistent with the case of *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna*, where Hobhouse J<sup>35</sup> ruled that where a lump sum was charged as freight, this would indicate the forwarder's role as carrier. However, further complications will arise when the agent's own nominated agent in the destination territory issued their own HB/L to the final interested third party. This issue will be taken up in the unreported case of *JGL v ZTI Tires*<sup>36</sup>.

#### **IV THE STANDARD FORMS OF CONTRACT**

##### **A Which is the Contract of Carriage?**

Generally, in any contract of carriage, where:<sup>37</sup>

A person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, including any incorporated conditions, whether he has actually read them or not, and however unusual or unreasonable they are and

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35 [1986] 1 Lloyds Rep 45.

36 *JGL v ZTI Tires* (Case file No: 06/2011) is a claim lodged in the USA. The action was commenced in Florida but was later discontinued due to the complexity involved by the various MTO documents.

37 Paul Bugden *Goods in Transit* (2<sup>nd</sup> ed, Sweet & Maxwell, 2010) at 377-378.

whether or not specifically brought to his attention, unless the signature is shown to have been obtained by fraud or misrepresentation or there is a mistake in law so as to vitiate assent.

In multimodal transport contracts, the reality is that there are several contracts simultaneously issued; the primary contract of carriage is usually the "Combined" Transport or Multimodal B/L on top of any contract of carriage issued by other parties for the same shipment. The differences between these documents are notoriously difficult to pin down because they are used interchangeably<sup>38</sup> and sometimes issued to several different parties as switched B/L but for the same shipment. As a result of this, it is very difficult to establish at law, the applicable contract and the terms which the carriage is based upon. Adding to this difficulty, the practice is always a "back to back" situation where the actual carrier is contracting as agent to the performing carrier and the parties supplying services to the carriers are contracting as agents even if they issued their own contracts to their principals.

In the case of *ZTI Tires*,<sup>39</sup> a shipment of 40 TEUs said to contain automobile tires was shipped from Jakarta, Indonesia to Florida, USA. The HB/L was issued by PT G Link Express, an Indonesian agency network of G Link Express Logistics (Singapore) Pte. Ltd. (GLES) operating as NVO. Tires Direct who are the interested consignee appeared as "notify party" in the HB/L but this document was never released to them. Tires Direct located in Mexico had ordered the shipment from ZTI Tires (Florida) and the shipment was managed by Jacobson Global Logistics (JGL), a through transport operator who had issued an MTO contract, holding themselves as "Global Transport International" (GTI) reflecting exactly what was contained in the GLES HB/L. ZTI Tires appeared as the "notify party" in the GTI contract and this document was released to Tires Direct, the final consignee. There were some errors in the various parties' addresses in the originating GLES HB/L and this was reflected in the same GTI contract, a typical problem when parties "cut and paste". The errors caused problems, which resulted in a claim against GLES under the HB/L following the same claim from Tires Direct against ZTI Tires.

The shipment arrived on 3 June 2011 at Florida but due to the errors in the addresses, which were recorded in the performing carrier's database, JGL did not

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38 Stephen Girvin *Carriage of Goods by Sea* (2<sup>nd</sup> ed, Oxford University Press, 2011) at 48.

39 Above n 37.

receive the notification of arrival of goods although they had earlier received the GLES HB/L. On 23 August 2011, Tires Direct, who had on hand a copy of the GTI document, asked ZTI Tires for the shipment and a search was conducted only to discover that the shipment was sitting in port for more than 81 days, which incurred detention and demurrage charges amounting to some US\$60,326. JGL took immediate remedial action to retrieve and clear the goods and redirected the same to Tires Direct on 1 September 2011. Tires Direct refused to pay for the detention and demurrage charges incurred and so ZTI Tires recovered the same from JGL by deducting from their invoices. JGL filed a non-payment action but ZTI Tires defended. JGL sought to recover the same from GLES. However, it was advised against doing so because the GLES HB/L was never released to the final party. In addition, the two contracts involved contained different sets of laws and jurisdictions, which complicated the claim.

Even if JGL had proceeded to recover from PT GLE and GLES, the HB/L contained exclusions and limitation of liability and the application of Singapore laws. "[A]part from certain statutory and judicial curtailments, standard form contracts, however one sided in its terms, are recognised as necessary for business efficacy and so regularly enforced."<sup>40</sup> The fundamental question in this case was which is the head contract of carriage; the document issued to the shipper which is transferable to the consignee, or the contract which the final party entitled to take delivery of the goods has at hand. In addition, there will always be the question of where the loss or damage took place. The practice of issuing "back to back" contracts might also produce different results unless there are uniformity in the terms and the legal jurisdictions.

In the case of *Parlus SpA v M & U Imports Pty Ltd and another*<sup>41</sup>, the claimant purchased 10,000 hairdryers from an Italian manufacturer "FOB Italian port" and the contract of carriage was entered with a freight forwarder, GIF, to carry the goods from the factory gate to the port of loading and the consignment was to be shipped to Melbourne, Australia. A standard form B/L was issued covering several modes of transport and involved different sub-contracted carriages, practically an MTO document. On delivery, it was found that 40% of the shipment was missing. At first instance, when the claim was lodged by the consignee, the court found the manufacturer liable for the short delivery. In addition, since the importer failed to show that the B/L covered the Italian leg of their carriage, the claim against the

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40 Toh Kian Sing SC "Jurisdiction Clauses in Bills of Lading – The Cargo Claimant's Perspective" (Nov 2001) Legal Digest (Rajah & Tann, Singapore).

41 [2008] VSCA 161, Court of Appeal 21 VR 170.

freight forwarder also failed. On appeal, Cavanaugh AJA at the final court of appeal, said,

It was implicit in the FIATA Multimodal Transport Bill of Lading as pre-printed that, unless something was entered into the space provided under the rubrics "place of receipt" and "place of delivery" to show to the contrary, the bill should be understood as port to port bill only.

From this decision, it can be argued that the criterion for identifying the scope or period of the carrier's responsibility is its actual custody, the actual and factual sphere of control of the contracting carrier. However, where the carrier or his agent had in fact no effective control over the goods due to reasons beyond their control, the definition of the period of responsibility must be adjusted accordingly. The custody period is also one defined by contract and the parties may agree on the time and location of receipt and delivery of the goods thereby defining the scope of liability. It could also be observed that traditionally, the transport B/L commonly involves segmented responsibility split between the various carriers. The existence of segmented liability presents special difficulties, which form a large part of the reason for the development of combined transport bills.<sup>42</sup>

Then, there is also in practice, switching of B/L where one document, usually an Ocean B/L issued by the performing carrier to an original consignee-buyer could be switched by use of a HB/L and certain original details were masked from being seen by the final party who bought the shipment. In the case of *Samsung Corp v Devon Industries Sdn Bhd*,<sup>43</sup> there were two sets of B/Ls issued for the shipment of a cargo of 7,500 tons of soya bean oil at US\$398 per ton FOB Port Rosario, Argentina to Chittagong, Bangladesh. The shipping agent issued 18 sets of B/Ls on the back of these two sets of carriers' B/Ls denoting the buyers as shipper-sellers on the same shipment to sub-buyers. Disputes arose due to payment problems between the actual sellers and buyers resulting in the delay over the release of the original B/Ls. In the meantime, the sub-buyers made payment on the "switched" global bills, which were released well before the original B/Ls were received. The court commented that the buyers acted fraudulently and in "abject disregard" of the sellers' interests by negotiating the global bills without making payments for the original bills. In short, title to the goods had not yet passed from the original seller

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42 David A Glass *Freight Forwarding and Multimodal Transport Contracts* (LLP, 2004) at 226.

43 [1996] 1 SLR 469.

to the buyer and so the buyer-shipper could not sell or receive any proceeds from the goods. However, Selvam J (at paragraph 10) said,

The practice of cutting and releasing 'global bills of lading' is perfectly in order provided the authentic bills of lading issued to the real shippers, the true owners of the cargo at that stage, have been accomplished, that is, that they have been received lawfully by the defendants duly indorsed and surrendered to the ship-owners or their agents... That did not happen in this case. In abject disregard of the plaintiffs' interests, the shipping agents combined with the defendants and unlawfully issued a second set of bills of lading. The defendants unlawfully negotiated them and received enormous sums of money. In short, the defendants acted fraudulently with the cooperation of the shipping agents.

This authority appears to suggest that a switched B/L is acceptable but in the same breath, the court issued a condemnation. Therefore, the lines are blurred. Hence, "Employment of switch bill in a sale contract may in certain circumstances be hazardous to sellers."<sup>44</sup> To add further confusion to what is already complex, in the case of *Noble Resources Limited v Cavalier Shipping Corporation*<sup>45</sup>, because the switched B/L was not authorised by the original owner, who probably would have mislaid some of the goods, the claim for short delivery based on the switched contract of carriage failed.

### ***B The Jurisdiction Clause***

The jurisdiction clause is probably another complex legal issue as it involved the conflict of laws. Counsel's advice in the *ZTI Tires*<sup>46</sup> case recommended that even if the claim was first brought before the US courts, the Indonesian courts might not recognise the decision for the purpose of enforcement because the HB/L states Singapore laws and jurisdiction. In all carriage contracts, there will almost certainly be a laws and jurisdiction clause, which will apply in the event of a claim. "The cardinal principle of international maritime law is the principle of sovereignty of nations. This principle has been rarely violated unless one country subjugates another, with or without justification."<sup>47</sup> The jurisdiction clause is therefore fundamental to the contract. In the case of *The Eastern Trust*<sup>48</sup>, the shippers were a

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44 Toh Kian Sing "Of Straight and Switch Bills of Lading" (November 2011) Legal Digest (Rajah & Tann, Singapore).

45 [1996] 1 Lloyd's Rep 642.

46 Above n 37.

47 Ashoke Kumar Bansal "The Four Pillars of International maritime Law and Bills of Lading" (2007) ICMA XVI Congress Papers Chapter 51, Singapore.

48 [1994] 2 SLR 526.

Chinese company and goods of Chinese White Garlic were shipped on a Liberian registered vessel but managed by a Taiwanese company. The consignees of the goods were a Singapore company and the shipment arrived in damaged condition. A claim was issued at the Singapore High Court but the ship manager sought to stay the claim in favour of the Taiwan court. The Singapore court stayed the action because *Lai Kew Chai J* (as he was then) said that the Singapore claimant could not have known in advance what the contractual forum of the defendants was except for what had been expressly named in the contracts of carriage relied upon. The information of the foreign forum was also not something readily accessible and so the application to refer the claim to a Taiwan court was denied.

The Privy Council in the case of *The Pioneer Container*<sup>49</sup> approved the use of jurisdiction clauses for any cargo claims that arose out of a particular voyage as opposed to the carrier's preferred jurisdiction. In fact, this is one of the often challenged positions whenever there is a claim because the claimant will want his claim to be heard in a forum based on the laws and jurisdiction of the courts where he is likely to get the best settlement. Under the principle of privity of contract, only the parties to the contract may claim the benefits of the terms within the contract but because there are so many parties to the contract, there is complexity in establishing the appropriate forum. However, as the B/L is an international document, it will include parties acting as agents and by incorporation and reference will incorporate international laws such as *The Hague-Visby Rules*<sup>50</sup> and some other legislation<sup>51</sup> where the jurisdiction is determined by convention. The laws and jurisdiction clause found in any B/L would usually be that of the issuer or the principal place of business of the contracting or actual carrier.

### ***C Limitation of Liability – Time Bar***

There are two different time bars found in most MTO B/Ls or HB/Ls: nine months and twelve months. This is based on the Hague-Visby Rules which would be found in most contracts of carriage. The courts have arrived at differing results in different jurisdictions. In the case of *Press Automation Technology v Trans-Link*

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49 [1994] 2 AC 324.

50 International Convention for the Unification of Certain Rules of Laws Relating to the Bills of Lading (1924), The First Protocol (1968) and the Second Protocol (1979).

51 For example, the Carriage of Goods by Sea (Act) which is a US law because the US is not a signatory to the Hague-Visby Rules.

*Exhibition Forwarding*,<sup>52</sup> the Singapore High Court held that the nine months limitation clause for claims to be lodged was acceptable. Prakash J said,

Internationally, it was the practice of freight forwarders to trade on standard terms which included time bar periods and limitation of liability clauses. Further, in Singapore, it was the practice of freight forwarders generally, who were members of the Singapore Logistics Association ("SLA"), to trade on either the SLA Conditions or their predecessor, the SFFA Conditions. Translink had not shown that, as between itself and Patec, it was necessary for Translink to put a 9 month time bar in place to protect its right of recourse against the third party actual carrier... .

It was quite clear that the time limitation bar was in practice for some time already and this was also something acceptable to the industry players. Hence, it was almost inevitable that the Singapore courts would issue their endorsement. However, with the same legal brush because the two decisions happened around the same time, the English Court of Appeal found the nine months time limitation to be unreasonable. In the case of *Granville Oil & Chemicals v Davis Turner*<sup>53</sup>, there was also a similar nine months time bar. On appeal, Tuckey LJ expressed doubts that the time limitation of nine months was reasonable.

It can be rationalised that the nine months time bar is only an arbitrary limitation period adopted by the multimodal transport or freight forwarding industry. There are other limitation conventions that give longer time bars, but where a freight forwarder, trading as NVOG or MTO, adopts the nine months time bar, it is something that is contractually agreed between carrier and shipper based on the *laissez faire* principle. However, there are some arguments to the contrary because the parties are never in fair bargaining positions based on the standard B/L conditions. In fact, it was also highlighted that the nine months time bar limitation was to enable the NVOG or MTO to obtain insurance, such as TT Club or Raets Club,<sup>54</sup> against claims thus enabling them to provide affordable freight services by insuring their liability for claims against them by claimants. So, the nine months' time bar is to enable claimant to bring a claim such that it could facilitate the expedient investigation of any potential claim so that the carrier or insurer could seek recovery against any other third party responsible for the claim.

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52 [2003] 1 SLR 712.

53 [2003] 2 Lloyd's Rep 356.

54 This "TT Club" or Through Transport Club is a mutual insurance that covers members practising as MTO or NVOG. There are other insurance providers issuing Multimodal Protection and Indemnity Insurance covers that provided similar insurance such as Raetsmarine Insurance BV or "Raets Club".



At this point of time, the *Rotterdam Rules*, which provide a 24 months limitation of liability period, is still not recognised as law because the Convention has not been ratified by the required number of nations in order for it to become international law.

### ***D Monetary and Package Limitation***

The *Multimodal Convention*,<sup>55</sup> similar to the *Hague-Visby Rules*, sets out a double limitation basis; one by monetary limit, which stipulates 2.75 SDR per kilograms and the other at 920 SDR per package or shipping unit, whichever is the higher. However, the limitations and exceptions have to be stipulated and incorporated into the contract of carriage. It can also be argued that as these are only contractual limitations; the practice is that parties are at liberty to stipulate their own limitation recommended by virtue of their membership of associations and incorporated as the STC into the contract of carriage.

Where the forwarder acts as a principal, that is contracting as carrier, the monetary limitation may fall within a compulsory rule applicable to the carriage of goods regime, example COGSA. In such a case, the limits of liability imposed by the trading conditions will be subject to compulsory rules (sometimes called "Clause Paramount") and be nullified to the extent that they do not permit departure from the limitation. But whilst these limitation regimes, for example the *Hague-Visby Rules*, *CMR* and *Warsaw Convention*, which are usually made with reference to "Clause Paramount" under the contracts of carriage, the legal position is still one of liability at law and at contract. In *Serena Navigation Ltd v Dera Commercial Establishment*,<sup>56</sup> the case was one of limitation under the air convention. In his judgment, Burton J commented that the sea carrier's liability will be unlimited where the cargo interests sustain recoverable economic loss in circumstances where the cargo is not physically damaged. But:<sup>57</sup>

The right to limit liability, and in fact also more generally the defences under the Rules apply to all claims brought by a contracting party in tort as well as in contract and whether brought against the carrier or his servants and agent but there is no right to limit on the part of any such parties where the claim is brought by a person who is not a party to the contract of carriage.

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55 Under Article 18 of the MTO Convention. SDR means "Standard Drawing Rights".

56 [2008] 2 Lloyd's Rep 166 (Also known as "*The Limnos*").

57 Paul Bugden *Goods in Transit* (2<sup>nd</sup> ed, Sweet & Maxwell, 2010) at 419.

### *E The Problem with Notification of Claims – Clean Bills of Lading*

There are not many authorities on notification of claims in MTO contracts as these are probably taken up under recovery by marine insurers or resolved on an *ex-gratia* basis. The position is therefore one of general contract law, that is, timely and sufficient notice has to be given to the defendants. However, if the contract of carriage is based on the incorporation of the *CMR*<sup>58</sup> as terms of notification, the claimant, through the agents or stevedores, is bound by law to reserve their rights before the claim can be lodged. One practice is to clause the B/L or delivery note on taking delivery. This practice however created problems for documentary credits and banks will object, as the consignee is required to produce "clean bills of lading".

In *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc*,<sup>59</sup> the sellers contracted to sell to the buyers 12,000 to 13,200 tons of sugar C&F Bandarshapur, Iran. The contract provided, among other things, that payment was to be made against a complete set of signed *clean and 'shipped on board'* B/L evidencing that freight had been paid. A fire broke out on the ship as a result of which 200 tons of sugar were damaged and had to be discharged. The remainder of the consignment was loaded and carried to its destination. The sellers tendered two B/Ls to the buyers. The first was in respect of the 200 tons of sugar, which had been lost, and the second was in respect of the balance of the consignment. The first bill in its printed clauses acknowledged shipment of the goods in apparent good order and condition and a typewritten note saying that part of the cargoes were discharged because it was damaged by fire and water that was sprayed to save the shipment. The court held that it was a "clean bill of lading".

However, in *MMGU v Abdul Karim and Another*<sup>60</sup>, even when the contract of carriage was substituted by a letter of indemnity issued by a bank, the words "said to contain" which are mirrored in the B/L was considered a "claused bill of lading" and hence inconsistent. The court ruled:

[I]n this case there was no misrepresentation of any kind relating to the apparent condition of the timber by the removal of the words "said to contain" in the bill of lading. By the removal of those words the shippers and carriers were merely employing an expedient method of avoiding delay and overcoming a difficulty out of

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58 Above n 16.

59 [1980] 1 WLR 495 (Also known as "*The Galatia*").

60 [1982] 1 MLJ 51.

proportion to its importance had the carriers been required to check on the pieces of timber.

## V CONCLUSION

The complexity in managing carriage of goods claims arising from the multimodal transport industry shows that there is a need for uniformity in practice and it calls for the implementation of a regime to govern the disparity for the beneficial economic developments of all countries. Trade is the economic lifeline of all nations and this is therefore an important issue. In the preamble to the *MTO Convention*<sup>61</sup>, it stipulates, among other things;

- (b) the need to stimulate the development of smooth, economic and efficient multimodal transport services adequate to the requirements of the trade concerned; [and]
- (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.

In Part II there is a call for development of the multimodal transport document, which is a logical step towards uniformity. At this stage, there is no unified regime, taking notice that the *Rotterdam Rules* is still not yet law, that regulates or prescribes the contents or the requirements to be contained in the MTO document. The laws on the multimodal carriage of goods, except the carriage of goods by sea portion, have not yet developed. There are some obvious reasons behind this phenomenon because in many of the claims before the courts, it is common to find insurance companies as obstacles to uniformity because few insurers or underwriters want to become the paymaster of claims. Large insured claims are often pursued to the final negligent party under recourse action. That is the sad truth; the carrier, their insurer and the cargo insurer will not yield an inch to any of the current conventions, which are in their respective favours. Most insurers will insist on the English common law system or their own jurisdiction in which the courts have the final say. This will remain a stalemate until the maritime industry can solve its own problems.<sup>62</sup> History has shown that strong international legislation in this field can ultimately produce the pressure required to bring the

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61 Above n 7.

62 Above n 17.

international community, especially the players and therefore their insurers in the transportation industry to a uniform solution.

Even with the *Multimodal Convention*,<sup>63</sup> there could still be a stalemate in the attempt to unify the legal regimes governing the multimodal carriage of goods. Article 30 says that the convention does not modify the rights, liability or duties provided for in national laws and other international carriage of goods convention. Like all other conventions, there is a need for a binding authority so that it eliminates some of the general complexity in the law. It can also be argued that subscribing to a convention will be a good start, where the convention provides for the specification of a proper procedure to resolve a claim based on a contractual specimen. The European Commission proposed the dematerialization of the multimodal contracts to facilitate the advent of a unified and harmonized regime.<sup>64</sup> In the final proposition, a legal and unified regime or the introduction of uniformed solution should resolve or at least reduce the complexity claimants face. The *Rotterdam Rules*, which purport to resolve many of the complexity, is a work in progress at the time of this writing.

In conclusion, rather than wait for a more comprehensive and stringent regime to be implemented, it might be necessary to perceive that complexity in the multimodal carriage of goods claims arose because there is blame in a claim and the blame carries the penalty in the form of compensation for the loss of or damage to the goods. One of the solutions to this could come in the form of an international risk pooling arrangement or a mutual scheme among all countries, perhaps through licensing, so that all who are exposed to a claim could share in contributing to the common adventure, as was practised in the days of old.

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63 Above n 7.

64 The European Commission issue on their 1999/93 EC Directive on Electronic Signatures and "The Economic Impact of Carrier Liability on Intermodal Freight Transport" dated 10.1.2011.

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