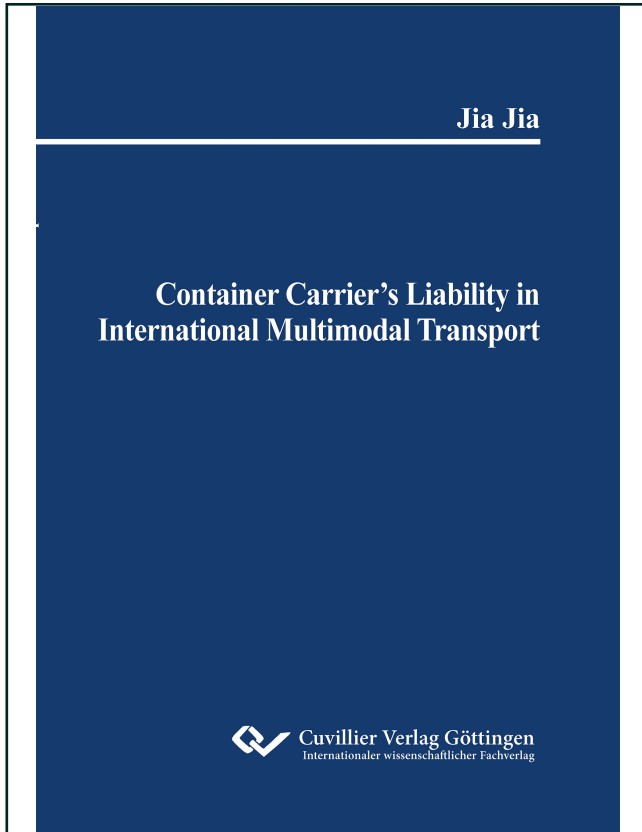




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Container Carrier's Liability in International Multimodal Transport



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CHAPTER 1 Introduction

1.1 The Importance of Container Transport

Freight has always been transferred by different modes of transport but its development had been severely restricted due to special vehicles and the roughness of road and storms at sea before the twentieth century.¹ Nowadays, cargo is conveyed worldwide irrespective of the boundaries and the total value of world merchandise in 2016 was 43.712 trillion dollars.² The global economic growth is attributable to the rapid circulation of goods and the cargo is commonly transported from the premises of a consignor in a country to the premises of a consignee in another country. During the transit, a carrier can use a variety of methods to carry the goods which may consist of a mixture of traditional modes of transport.³ The law of carriage of goods is traditionally based on unimodal transport. However, the wide use of more than two modes of transport produces a new legal concept, international multimodal transport. One substantial contribution to the rapid development of international multimodal transport is the container revolution since the 1960s. The use of truck-trailer-sized containers from the mid-1970s onwards has largely minimised the time and expense of shifting cargo between different modes of transport.⁴ A container facilitates seamless freight transport that responds to the demand for efficiency in contemporary commercial and transportation industries.⁵ Apart from the container itself, the economic value of container transport reflects the importance of this monograph. Due to the common standard of a container, its volume, the Twenty-Foot Equivalent Unit ('TEU'), is used as a unit of measurement for assessing the capacity of container ships and container terminals. The volume of global container trade attained 165 million TEUs in 2021 compared to about 60 million TEUs in 2000 and the amount has increased nearly 2.75 times within the period of 21 years.⁶ Europe is an important region for the distribution of global container trade and represented 18 percent of the total distribution in 2015.⁷ These statistics show the economic value of container trade in Europe and around the

¹ Arthur Donovan, 'Intermodal Transportation in Historical Perspective' (2000) 27 *Transp L J* 317, 317 and 322.

² World Trade Organisation, 'World Trade Statistical Review 2022', Tables A4 and A5. <[wtsr_2022_e.pdf \(wto.org\)](#)> accessed 10 July 2023.

³ There are five traditional modes of transport: sea, road, rail, air and inland waterway.

⁴ Arthur Donovan, 'Intermodal Transportation in Historical Perspective' (2000) 27 *Transp L J* 317, 318.

⁵ *Ibid.*

⁶ United Nations Conference on Trade and Development ('UNCTAD'), 'Review of Maritime Transport 2022', (UNCTAD/RMT/2021) Figure 1.6.

⁷ United Nations Economic and Social Commission for Asia and Pacific ('UNESCAP'), 'Study on Regional Shipping and Port Development: Container Traffic Forecast 2007 Update', (26th December 2007), p 29 and 30.

world. Therefore, it is unavoidable to assess the legal framework of international multimodal transport in Europe which will be discussed in the following chapters.⁸ However, the rapid developments in terms of transport patterns and technology are not completely reflected in the current liability regime for container carriers.⁹ Although the methodological changes in multimodal transport are remarkable, they are not reflected in the current liability regime. For instance, the International Convention for the Safety of Life at Sea 1974 ('SOLAS') recognises several developments regarding unseaworthiness and weight verification of containers. Besides, the container itself may cause new problems such as concealed loss or damage and container stuffing before the loading stage.¹⁰

1.2 The Concept of International Multimodal Transport

The most authoritative legal definition of international multimodal transport is provided by the United Nations Conference on a Convention on International Multimodal Transport 1980 (the 'MT Convention') which represents a model for any legislation designed to govern multimodal transport that has been enacted over the past thirty years at national, regional and sub-regional levels.¹¹ Therefore, this monograph adopts the definition in the MT Convention but due to the objectives of this monograph, there are some restrictions. 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'.¹² In this section, two constitutive factors of the concept of international multimodal transport will be discussed and this monograph makes some limitations in order to achieve its purpose.

One of the essential constitutive factors is the use of more than two different modes of transport. There are five traditional modes of transport, but this monograph is limited in scope due to its purpose. **This monograph aims to evaluate the current liability regime of a container carrier in the context of international multimodal transport.** Despite the existence of several types of containers, the most common container is a

⁸ See chapters 2-5.

⁹ UNCTAD, 'Multimodal Transport: The Feasibility of an International Instrument', (13 January 2003) UN Doc UNCTAD/SDTE/TLB/2003/1, para 11.

¹⁰ See the container stuffing issue in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2018] UKHL 61 in section 3.2.1.1.2.

¹¹ Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Wolters Kluwer, 2010) 62.

¹² Art 1.1 of the MT Convention.

twenty-foot length container.¹³ Considering that the normal physical length of a container is not suitable for air transport, the modes of transport in this monograph excludes air and the concept of international multimodal transport does not cover a combination of air and other modes of transport. As there is no definition of the term ‘mode of transport’, this gap gives rise to the problem whether the lighter aboard ship (‘LASH’) service should be regarded as two different modes of transport. In the United States, the mother vessel and the barge are regulated by the Federal Maritime Commission as one mode while in Europe, the mother vessel would be governed by the sea regime and the barge would be regulated by the inland waterway regime. Given that this monograph will discuss the influence of an international convention for inland waterway which is ratified by European countries, the author will treat the LASH service as two different modes of transport.

A further constitutive factor is international carriage. The definition of international multimodal transport in the MT Convention only requires that the entire journey is international but does not mention the requirement of internationality of segments. For instance, an international sea carriage from Shanghai (China) to Rotterdam(the Netherlands) with a national road carriage from Rotterdam to Amsterdam could be seen as international multimodal transport in the MT Convention. The case is an international carriage with an incidental domestic leg by other modes of transport and it is not the object of this monograph. This monograph aims to answer the question whether an international convention governing the liability of the carrier in the context of international multimodal transport by containers is required. The legislative work is considered from an international level rather than national level because different countries are involved and one national law cannot adequately deal with this issue. In order to achieve goals of this monograph, it is essential to consider different international conventions for different segments that require internationality for the whole journey and segments.

1.3 The Status Quo: the Lack of a Single Uniform Solution

It is important to underline the fact that the law of carriage of goods is traditionally based on only one mode of transport and that currently there is no mandatory convention applicable to international multimodal transport. This monograph aims to evaluate a carrier’s liability in the context of international multimodal transport by containers and

¹³ See International Organisation for Standardisation (‘ISO’), *ISO 668: Series 1 Freight Containers- Classification, Dimensions and Ratings* Ref ISO 668:2013, Table 1.

the starting point should be the current framework of carrier's liability in international unimodal conventions in the form of container transport. In order to achieve purposes of this monograph, it is necessary to consider the effectiveness of the international conventions relating to the carriage of goods by sea, road, rail and inland waterways.

The status of maritime conventions is somewhat complicated. In relation to sea carriage, there are three international conventions that are already in force. The first one is the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the 'Hague Rules'). The second one is the Protocol to Amend the international Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the 'Hague-Visby Rules'). The Hague and Hague-Visby Rules have received worldwide recognition to a large extent. The United Kingdom incorporated the Hague Rules into domestic law through the Carriage of Goods by Sea Act ('COGSA') 1924, and the Hague-Visby Rules through the COGSA 1971. The United Nations Convention on the Carriage of Goods by Sea 1978 (the 'Hamburg Rules') came into force in 1992 but has arguably been less successful in the sense that major shipping nations, such as the United Kingdom, have not ratified it. However, English law permits the parties to incorporate the Hamburg Rules into a contract of carriage on a voluntary basis and some relevant provisions of the Hamburg Rules will be analysed in this monograph. With regards to rail carriage, the original convention is the Convention concerning International Carriage by Rail ('COTIF') in 1890 which has since been modified by several Protocols. The latest one is the Vilnius Protocol 1999 revising the COTIF and the Appendix B to the COTIF, namely Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the 'COTIF-CIM'). With the desire to standardise the conditions governing contracts for the international carriage of goods by road, the Convention on the Contract for the International Carriage of Goods by Road (the 'CMR') was completed in 1956 and the United Kingdom incorporated it into domestic law by way of a Schedule to the Carriage of Goods by Road Act 1965. This Act came into force on 19 October 1967 and was amended by the Carriage by Air and Road Act 1979. The CMR was partly modelled on the COTIF because, in the context of combined transport, road and rail carriage were regarded as being in direct competition and hence it was considered necessary for the liability regimes to be assimilated as far as possible. Concerning inland waterways, the current legal regime is the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000 (the 'CMNI').

One essential pre-requisite is that these international unimodal conventions are applicable to international multimodal transport but the determination of applicable law

is not an easy task. The applications of these conventions depend on the occurrence of loss of or damage to goods or delay but the widespread use of containers in international multimodal transport increases the difficulty in finding the precise location. Even if they could apply, the nature of these unimodal conventions results in their limited and uncertain applications to international multimodal transport. Furthermore, the carrier's liability varies dramatically in different international unimodal conventions, particularly in terms of the standard of liability and limitation of liability.

Apart from these international unimodal conventions, there is one convention made specially for international multimodal transport which is the United Nations Convention on International Multimodal Transport of Goods 1980 (the 'MT Convention'). Unfortunately, given the absence of sufficient ratifications, the MT Convention has not come into force for almost 40 years. In spite of its failure, the impact of the MT Convention on the legislative works in the field of international multimodal transport is considerable and it is necessary to look at how the MT Convention regulates a multimodal transport operator's liability. It is essential to consider the reasons why it failed and the lessons can be learnt. The latest attempt is the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (the 'Rotterdam Rules'). The Rotterdam Rules can apply to international multimodal transport but an international sea carriage is required. The sea-plus approach can be neglected if the volume of containers in maritime transport is considered.

1.4 The Objectives, Methodology and Structure

The primary objective of this monograph is to re-examine and assess the current liability regime for container carriers in international unimodal conventions and international multimodal conventions. The secondary objective is to evaluate solutions provided by the MT Convention and the Rotterdam Rules for container carriers in international multimodal transport. Hence, this monograph particularly concentrates on the container carrier's liability and provide further recommendations with regard to provisions of the Rotterdam Rules. The central research question addressed by this monograph is: **Has the current liability regime provided a sufficient framework for container carriers in international multimodal transport?** More specifically, the question will be divided into three pieces. Firstly, how wide should the scope of application of a convention be to cover the period of liability of container carriers in international multimodal transport? Secondly, do the existing conventions provide a proper and satisfactory framework to govern the container carrier's liability? The liability regime

consists of many issues but due to the objectives and limits of this monograph, the author discusses the framework from the following five aspects: basis of liability, exceptions, burden of proof, liabilities of relevant third parties and limitation of liability. Thirdly, if not, what solutions can be adopted?

In order to answer these questions, this monograph adopts various research methods. The first one is that several methods of interpretation with regard to international conventions which established by the English courts are used in this monograph. One important principle is international uniformity. It is well established that even in a contact governed by English law, provisions deriving from an international convention are intended to have an internationally uniform effect and should be construed by broad principles of general acceptance, rather than principles of purely domestic application adopted by national courts.¹⁴ Therefore, the foreign decisions should be considered to interpret international conventions. The American law is material on the construction of the Hague Rules since the words of these Rules arise from the Harter Act enacted in the United States.¹⁵ Judgments of other common law countries are referred when the English courts interpret the Hague and Hague-Visby Rules.¹⁶ Besides, the English courts adopt the same principle in construing the CMR and refer to the expression of words of the CMR in other foreign languages and other European authorities.¹⁷ Additionally, Lord Sumption pointed out in *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA*¹⁸ that some common law principles such as the rules of proving negligence of the carrier in the carriage of goods can also apply to interpret the Hague and Hague-Visby Rules if they are common to civil law jurisdictions as well.¹⁹ The author thinks this method is necessary because international uniformity is essential to the application of an international convention.

The next method to refer to *travaux préparatoires* of international conventions. *Travaux préparatoires* are not decisive but useful as throwing light on the general objectives and the trend of discussions of the time.²⁰ The court believes that the evidence of *travaux*

¹⁴ *Stag Line Ltd v Foscolo Mango Co Ltd* [1932] AC 328 (HL) 350 (Lord Macmillan).

¹⁵ Unless the language of the Hague and Hague-Visby Rules differs from the Harter Act. See *Gosse Miller Ltd v Canadian Government Merchant Marine Ltd (The 'Canadian Highlander')* [1929] AC 223 (HL) 230, 233 and 237.

¹⁶ See in *Whitesea Shipping and Trading Co and Another v El Paso Rio Clara Ltda and Others (The 'Marielle Bolten')* [2009] EWHC 2552 (Comm), three Australian cases are considered.

¹⁷ See *James Buchanan Co Ltd v Babco Forwarding and Shipping Ltd* [1978] AC 141 (HL) 151 and 161; *Quantum Co Inc and Others v Plane Trucking Ltd and Another* [2002] EWCA Civ 350, [38]-[59].

¹⁸ [2018] UKSC 61.

¹⁹ *Ibid*, [16]. See further discussion on the burden of proof under the Hague and Hague-Visby Rules in section 3.2.1.3.

²⁰ Guenter H Treitel and Francis M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para. 9.098.

préparatoires is available only if they clearly and indisputably point to a definite legal intention,²¹ which is said that ‘only a bull’s eye accounts and nothing less will do’²². These principles are also consistent with Arts 31 and 32 of the Vienna Convention on the Law of Treaties 1969 which was ratified by the United Kingdom in 1971.

Then, the principal research method in this monograph is the comparative analysis approach. This monograph aims to compare provisions of international unimodal and multimodal conventions in consideration of different scholastic arguments. Firstly, given that the sea carriage normally occupies the majority of the entire international multimodal transport by containers, it is necessary to compare the different liability frameworks of international sea conventions in the chronological order to discover the progress. Secondly, this monograph makes comparison among different international unimodal conventions to evaluate the differences. Furthermore, this monograph analyses underlying reasons why the differences exist and how to accommodate divergences in one liability regime regulating the container carrier’s liability in international multimodal transport, namely the Rotterdam Rules.

Last but not the least, this monograph examines case law, particularly English law applicable to existing international conventions and some common law rules to fill the gaps. In order to clarify the issues occurred in international multimodal transport, academic works including books and journals are also considered.

This monograph consists of nine chapters to answer the above three research questions.

Chapter 1 (this chapter) provides a general background of international multimodal transport in form of containers and some legal concepts arising from international multimodal transport. Besides, it briefly introduces why the object of this monograph has been chosen and how the structure of this monograph is organised.

Chapter 2 discusses the scope of application issue under international unimodal conventions because it is a prerequisite for a unimodal convention to apply to international multimodal transport. Their unimodal natures determine that they apply to certain mode of transport in principle. However, the wide use of containers changes the traditional transport industry and these unimodal conventions are interpreted to cover additional journeys. The problem is even if applicable, there might be gaps or overlaps between different conventions. It is necessary to examine the scope of application provisions and evaluate how they can apply to international multimodal transport by containers.

²¹ *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (HL) 278 (Lord Wilberforce).

²² *Effort Shipping Co Ltd v Linden Management SA and Others (The ‘Giannis NK’)* [1998] AC 605 (HL) 613 (Lord Steyn).

Chapter 3, 4 and 5 will consider the container carrier's liability framework under international unimodal conventions which will be evaluated from the following three perspectives: the standard of liability, the person to whom the carrier is liable for and limitation of liability. The standards of carrier's liability in each convention are analysed from three parts: basis of liability, exceptions and the burden of proof. Despite the apparent differences in different international unimodal conventions, the emphases of these three chapters are to explore how these conventions accommodate international multimodal transport by containers.

Chapter 6 introduces both theoretical and practical liability approaches to the multimodal transport operator (the contractual carrier in international multimodal transport operator). The MT Convention and the Rotterdam Rules adopt different approaches albeit their modified natures. This chapter will analyse the pros and cons of two approaches and find a suitable liability system for container carrier international multimodal transport.

Chapter 7 deals with the first convention on international multimodal transport, the MT Convention. Despite its failure, it introduces some novel concepts in the field of international multimodal transport and affects the drafts of later contractual terms and the Rotterdam Rules.

Chapter 8 will consider the container's liability from the perspective of the international multimodal transport in the Rotterdam Rules. In order to answer the central question whether current regime governing container carrier's liability in international multimodal transport is satisfied, the Rotterdam Rules as the latest convention should be examined. In chapter 8, the author will provide suggestions for selected provisions of the Rotterdam Rules and explain why the author thinks the Rotterdam Rules provide an imperfect yet effective liability regime for container carrier in international multimodal transport.

Chapter 9 will review the author's conclusions for the three research questions and contain summaries of all findings of the author.

CHAPTER 2 The Scopes of Application of International Unimodal Conventions

To consider the legal framework for the carrier's liability, the initial step is to examine the effectiveness of the current international unimodal conventions. The first issue is whether international unimodal conventions could apply to international multimodal transport. To determine the scopes of application of international unimodal conventions, three sub-issues are discussed in this section. The basic question is what basics of the international unimodal conventions are in determining the scopes of application. Normally, a contract is defined as the basis of the obligations of the parties.²³ But the situation of four international sea conventions is a little complicated because they adopt different approaches to define the contract of carriage.²⁴ Other unimodal conventions are based on carriage contract despite of subtle differences.²⁵

This chapter will discuss whether the multimodal transport contract which is widely used in container transport can be covered by international unimodal conventions. Furthermore, the scope of application issue is generally considered from three perspectives: the meaning of the contract of carriage, the temporal and territorial scopes of application. An additional special matter in relation to containers is deck cargo in international sea conventions which might be an exclusion.

The scope of application of international unimodal conventions will be discussed under the hypothetical case mentioned above: there is one multimodal transport contract covering the whole carriage. The central question whether the multimodal transport contract can be covered by international unimodal conventions is divided into two questions: **(a)** whether the international unimodal conventions can apply to a unimodal segment of in international multimodal transport; **(b)** if they can, whether there is conflict between different unimodal conventions.

2.1 The International Sea Conventions

During the preparation of the Rotterdam Rules, it was suggested that there are three main approaches adopted under international sea conventions to determine their scopes of application, namely documentary, contractual and trade approaches and each has its

²³ Berlingieri Francesco, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', paper delivered at the General Assembly of the International Association of Average Adjusters-AMD, Marrakesh, 5-6 November 2009, p 2.

²⁴ See the approaches adopted by the Hague and Hague-Visby Rules in sections 2.1.1 and 2.1.2, the Hamburg Rules in section 2.1.3 and the Rotterdam Rules in section 8.1.1.2.

²⁵ See the interpretations of the contract of carriage of the CMR, COTIF-CIM and the CMNI in sections 2.2.1, 2.3 and 2.4.

advantages and disadvantages.²⁶ The documentary approach is adopted by the Hague and Hague-Visby Rules and it would require the issuance certain types of documents covered by the contract of carriage to trigger the application.²⁷ The advantage of this approach is that the shipping industry is familiar with this approach and it promotes predictability and stability.²⁸ The major disadvantage of this approach is that it cannot cover the new documents generated by the market.²⁹ But the English courts improve it to some extent through a wide interpretation method which will be discussed in section 2.1.1.1. By the time of drafting the Hamburg Rules, it was noticed by the Working Group that a further coverage of various types of uninformed documents was necessary.³⁰ There was a consensus that the scope of application of the Hamburg Rules should extend to apply to ‘all contracts of carriage by sea’ except charter parties.³¹ That approach was later called ‘the contractual approach’ because it requires the contract of carriage of goods for the application with exclusions of certain types of contracts of carriage.³² One disadvantage of the contractual approach is to create possible definitional problems with regard to the ‘contract of carriage’ and excluded contracts.³³ The trade approach, proposed during the preparatory work of the Rotterdam Rules, would apply the convention on a mandatory basis to all contract in the ‘liner trade’.³⁴ The approach reflects well-established trade practice but could also cause definitional problems of the relevant categories.³⁵

2.1.1 The Hague Rules

Considering that the provisions of the Hague and Hague-Visby Rules are similar to a large extent, the same provisions would be discussed in the section of the Hague Rules and the differences would be analysed separately in the section of the Hague-Visby

²⁶ These three approaches were summarised by the Working Group III (Transport Law) during the preparation of the Rotterdam Rules. See United Nations Commission On International Trade Law (‘UNCITRAL’), ‘Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session’, (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 83.

²⁷ *Ibid.*, para. 84

²⁸ *Ibid.* But there is a problem that the terminology regarding documents differs between jurisdictions which will be discussed in section 2.1.1.1.

²⁹ UNCITRAL, ‘Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session’, (4-22 July 2005) 38th session UN Doc. A/CN.9/572, para. 84.

³⁰ Joseph Sweeney, ‘The UNCITRAL Draft Convention on Carriage of Goods by Sea Hamburg Rules (Part III)’, (1976) 7 *J Mar L & Com* 487, 495.

³¹ *Ibid.*, 499.

³² UNCITRAL, ‘Report of the Working Group III (Transport Law) on the Work of its Fourteenth Session’, (4-22 July 2005) 38th session UN Doc A/CN.9/572, para. 85.

³³ *Ibid.*

³⁴ *Ibid.*, para. 86.

³⁵ *Ibid.* Therefore, a hybrid of those approaches is preferred by the Rotterdam Rules which will be discussed in section 8.1.1.2.