

An International Legal Instrument on the Liability of Multimodal-Transport Carriers

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Abstract

Multimodal-transport operations (MTOs) are transport operations that combine at least two modes of transport under the same contract for the carriage of goods. For the development of MTOs, there is a need for a legal instrument governing such operations at the international level. Although repeated attempts have been made to establish such a legal instrument, no such attempt has been successful in the sense of coming into force. With the ambition of helping to bring such a legal instrument into force, this thesis examines the minimum standards that a legal instrument must satisfy to gain support from the transport industry. As the rules relating to the basis of liability, the limitation of liability, and the time bar are most problematic, this thesis focuses on the standards for these rules. It shows that the industry needs a legal instrument governing MTOs that is certain, predictable, and fair. Therefore, to gain the support from the industry necessary to come into force, any legal instrument should ensure certainty, predictability, and fairness. Because the criterion of certainty is essentially a matter of drafting, this thesis focuses instead on predictability and fairness. For the rules to be predictable, a legal instrument should adopt a uniform-liability approach. For the purposes of fairness, rules relating to the basis of liability should (1) adopt a presumed-fault approach and (2) allocate damage rather than risks. For the rules relating to any limitation of such liability to be fair, this thesis distinguishes limitation of liability for so-called contemplatory loss (which at law will generally be ‘reasonably foreseeable’) and so-called non-contemplatory loss. In particular, for contemplatory loss, the floor on liability should be the weighted average of the unimodal limitations of liability. For non-contemplatory loss, the limitation of liability should be equal to the total freight payable and no more. For the time bar provided by it to be fair, the instrument should adopt a time bar of nine months.

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ATTESTATION OF AUTHORSHIP

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements), nor used artificial intelligence tools or generative artificial intelligence tools (unless it is clearly stated, and referenced, along with the purpose of use), nor material which to a substantial extent has been submitted for the award of any other degree or diploma of a university or other institution of higher learning.

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LIST OF ABBREVIATIONS

AFAMT	ASEAN Framework Agreement on Multimodal Transport
ALADI	Latin American Integration Association
ASEAN	Association of Southeast Asian Nations
BIMCO	Baltic and International Maritime Council
CMI	Comité Maritime International
COGSA	Carriage of Goods by Sea Act (US)
EC	European Community
EU	European Union
FIATA	International Federation of Freight Forwarders Associations
ICC	International Chamber of Commerce
ITC	Inland Transport Committee (UNECE)
MERCOSUR	Southern Common Market
MT	multimodal transport
MTC	multimodal transport carrier
MTO	multimodal transport operation
SDG	Sustainable Development Goal (UN)
SDR	Special Drawing Right
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECE	United Nations Economic Commission for Europe
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNIDROIT	International Institute for the Unification of Private Law
WTO	World Trade Organization

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German Commercial Code

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United Nations Convention on International Multimodal Transports of Goods 1980 (MT Convention)

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INTRODUCTION

The international multimodal transport of goods, which involves the carriage of goods between countries by combining two or more modes of transport (particularly sea, rail, and road) under a single contract,¹ plays an essential role in international trade. Multimodal transport (MT) moves goods from one country to another in a safe and timely manner by utilising the strengths of each mode of transport.²

Although MT has been developing since the 17th century,³ no attempts to create an international uniform instrument governing MT have achieved success, in the sense of widespread incorporation into national law. The absence of any international legal framework on MT has proved an obstacle to the development of MT operations (MTOs).⁴ Intergovernmental organisations, such as the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), United Nations Conference on Trade and Development (UNCTAD), and United Nations Commission on International Trade Law (UNCITRAL), have led different projects to find a way to address this obstacle, in order to further the development of MTOs worldwide.⁵

Different options to create an international instrument governing MTOs have been proposed for discussion at the intergovernmental level. One of the options that enjoys the support of the

¹ United Nations Convention on International Multimodal Transports of Goods 1980 (MT Convention), art 1(1).

² Aman Dua and Deepankar Sinha, 'The Multimodal Transportation: Research Trend and Literature Review' (2016) 39 (4) Udyog Pragati 1.

³ United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), 'Manual on Modernization of Inland Water Transport for Integration within a Multimodal Transport System' (ESCAP/ST/2285, 2004) 4.

⁴ UNESCAP, 'Virtual Expert Group Meeting on Legal Frameworks for Multimodal Transport Operation in Asia and the Pacific Bangkok, 26–27 August 2020' <https://www.unescap.org/sites/default/files/Background%20note%20by%20ESCAP_multimodal%20legal%20frameworks%20for%20VEGM%20August%202020.pdf> accessed 3 January 2021.

⁵ In 2018, as requested by UNESCAP member states, UNESCAP launched a project to investigate possible ways to develop a legal framework for MT operations for Asia and the Pacific. See UNESCAP, 'Development of Intermodal Transport Corridors and Multimodal Transport Operation in Asia and the Pacific' (ESCAP/DP/WG/2019/3, 2019). UNCITRAL, as requested by the People's Republic of China in 2019, has been working on a new draft legal instrument for multimodal negotiable transport documents that can be used for non-maritime MTOs. See UNCITRAL, 'Work Programme: Possible Future Work on Railway Consignment Notes – Proposal by the Government of the People's Republic of China' (A/CN.9/998, 2019).

majority of stakeholders is a mandatory uniform instrument at the international level to ensure that countries around the world take the same approach to MT.⁶

To bring such a legal instrument closer to reality, it is necessary to learn from the failures of previous attempts to create it. Any organisation attempting (as UNCTAD and UNCITRAL did) to create a legal instrument for MTOs would need to ensure that any new drafts gain support from the member states and other key stakeholders who may influence whether member states sign the draft or not. In other words, the organisation would need to determine what standards (or criteria) a legal instrument on MTOs would need to meet.

As noted above, UNESCAP has investigated the possibility of such an instrument. In fact, a model law on MTOs for Asia and the Pacific was one of the options supported by the majority of UNESCAP member states in 2003.⁷ However, member states stated that they needed an option which could immediately help them harmonise their legal frameworks on MTOs, because a model law on MT would take longer to become a reality.⁸ Therefore, in 2021, UNESCAP ended up preparing guidelines on rules governing MTOs for Asia and the Pacific.⁹ UNESCAP has since decided not to pursue a model law on MTOs for Asia and the Pacific. The reason is that its member states expressed stronger support for an alternative guidance—specifically, the development of non-binding guidelines on rules governing MTOs. However, there is still a need for a uniform law governing MTOs not only in Asia and the Pacific but also globally.

⁶ In 2003, an UNCTAD report showed that 58% of the respondents supported a mandatory uniform regime regulating MTC liability at a global level. See UNCTAD, 'Multimodal Transport: The Feasibility of an International Legal Instrument' (SDTE/TLB/2003/1, 2003) para 79. In 2009, 50 out of 58 of stakeholders in Europe expressed their demand to have a mandatory uniform regime regulating MTC liability at a global level instead of a regional level. See European Commission, 'Study on the Details and Added Value of Establishing a (Optional) Single Transport (Electronic) Document for All Carriage of Goods, Irrespective of Mode, as Well as a Standard Liability Clause (Voluntary Liability Regime), with regard to Their Ability to Facilitate Multimodal Freight Transport and Enhance the Framework Offered by Multimodal Waybills and or Multimodal Manifests' (Final Report, TREN/CC/01-2005/LOT1/Legal Assistance Activities 2005) <https://transport.ec.europa.eu/system/files/2016-09/2009_05_19_multimodal_transport_report.pdf> accessed 5 February 2024.

⁷ UNESCAP, 'Proposed Structure on Guidelines for Harmonization of National Laws on Multimodal Transport in Asia and the Pacific' (2019) <https://www.unescap.org/sites/default/d8files/event-documents/June15_Guideline_for_harmonization_of_multimodal_transport_laws.pdf> accessed 13 December 2023.

⁸ *ibid.*

⁹ *ibid.*

This thesis proposes a solution for the scenario of an international organisation drafting a uniform legal instrument on MTOs: a draft that, it is argued, would gain support from the organisation's member states and therefore end up coming into force. For these purposes, this thesis will answer the following research questions:

1. What are the minimum standards relating to the liability of multimodal transport carriers (MTCs)¹⁰ which a uniform instrument would need to meet in order to gain support from member states and other stakeholders, especially the transport industry?¹¹
2. How could a uniform instrument meet these standards?

Since the previous attempts to create an international instrument for MTOs failed mainly due to the issue of liability,¹² this thesis will focus on this issue. In particular, it will focus on standards for rules relating to (1) the scope of application (namely, to what extent such rules cover MTOs), (2) the period of potential liability (namely, for what period of time in the carriage operation MTCs will be responsible), (3) the basis of liability (namely, how MTC liability will be determined), (4) the limitation of liability (namely, to what extent MTCs will be responsible for damage to and loss of goods [i.e., a negative change to the value of goods¹³] and delay in delivery), and (5) time bars (namely, how long a claimant has to sue MTCs). This thesis will also examine how these rules can meet the standards of the transport industry.

To find answers to the above questions, this thesis will adopt a doctrinal legal methodology—that is, an approach based on the interpretation of legislation, court decisions, and secondary sources such as reports, scholarly publications, and United Nations (UN) reports.¹⁴ In particular, this thesis compares the rules relating to liability in MT that exist (or

¹⁰ Multimodal transport carriers are those who enter into contracts with consignors (those who send goods) to arrange the carriage of goods for consignors and bear full liability for the carriage.

¹¹ I will measure the potential satisfaction of the transport industry based on the comments made by its members on (1) the previous attempts at an international legal instrument on MT, (2) regional frameworks, and (3) soft law. These comments are widely available in reports and scholarly literature related to developments in MT produced by UNCTAD and regional institutions. See for example UNCTAD, 'Multimodal Transport' (n 6).

¹² Mahin Faghfour, 'International Regulation of Liability for Multimodal Transport' (2006) 5 WMU Journal of Maritime Affairs 95, 113–14.

¹³ Lucila Fernández Alle, 'The Concept of Damage and the Harm Principle' (2020) 7 Latin American Legal Studies 314–24.

¹⁴ Micheal Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conducts of Legal Research* (Pearson Education 2007) 45–58.

have existed) at the international, regional, and national levels, including in so-called soft law.¹⁵ This comparison of the various rules in the above legal documents will explore what both states and stakeholders would expect from a new draft law on MTOs. Based on the results of this comparison, this thesis will propose standards that a uniform instrument on MT would need to meet to gain support from both states and stakeholders and then assess how a uniform instrument could meet the standards.

This thesis is divided into three chapters, excluding this introduction and the conclusion.

Chapter 1 introduces MTOs generally and the legal issues that typically arise in relation to them and would therefore be of interest to both states and stakeholders in any attempt to create an international uniform law. The chapter defines MTOs and clarifies the differences between the various terms that are used to refer to MTOs. In particular, it explains why this thesis adopts the term ‘multimodal transport’ (MT) to refer to the form of carriage at its core—that is, carriage involving at least two different modes of transport and governed by a single contract. The chapter then goes on to explain why there is a need to develop MTOs, what legal difficulties the MT industry encounters due to the lack of a uniform instrument, and why the MT industry needs an international uniform instrument to address these difficulties. With these questions in mind, the chapter examines how a draft international uniform instrument on MT could gain sufficient support to come into force. Based on these discussions, the analysis suggests that the absence of an international uniform legal instrument leads to uncertainty, unpredictability, and unfairness in determining MTC liability. It further considers whether a mandatory uniform legal instrument would help reduce unpredictability, and whether there may be a need for such an instrument at the international level. If so, the chapter also discusses

¹⁵ The term ‘soft law’ refers to a set of rules by which parties agree to be bound (it does not have legally binding force unless the parties agree that it does). In this sense, in principle, soft law operates through contractual incorporation rather than through mandatory legal force. Courts therefore do not apply soft law directly as binding law, but rather treat it as part of the contractual terms agreed between the parties. Where soft law conflicts with (mandatory) hard law, the hard law will prevail. (See Pauline Westerman, Jaap Hage, Stephan Kirste and Anne Ruth Mackor (eds), *Legal Validity and Soft Law* (Springer 2018) 145-164.

whether support from the international transport industry would be necessary for such instrument come into force.

Chapter 2 discusses the historical attempts made to create rules governing MTC liability at the international, regional, and national levels, as well as efforts made by the transport industry itself. The chapter also explores the reasons why the previous attempts failed. It then considers which types of liability rules would be likely to gain support under the existing instruments: rules that promote certain, predictable, and fair. The analysis suggests that all existing instruments contain liability rules that are, to varying degrees, *uncertain*, *unpredictable*, and *unfair*. In light of this analysis, the chapter further explores whether the industry needs a legal instrument governing MTC liability that ensures certainty, predictability, and fairness in determining MTC liability.

Chapter 3 then proposes a benchmark for rules on MTC liability and examines how the rules could meet this benchmark. In particular, the chapter examines which standards the rules on MTC liability must satisfy to gain support from the transport industry. It then explores ways to enable such rules to meet the standards. With these questions in mind, the analysis argues that to gain support from the industry, a legal instrument may need to promote certainty, predictability, and fairness. Since certainty is a matter of drafting, the chapter focuses on predictability and fairness. For the rules to be predictable, this chapter examines whether a legal instrument would need to adopt a uniform approach to liability.

For the purposes of fairness, the chapter considers whether rules relating to the basis of liability should (1) adopt a presumed-fault approach and (2) allocate damage rather than risks. Next, for the rules relating to any limitation of such liability to be fair, the chapter distinguishes limitation of liability between so-called contemplatory loss (which at law will generally be ‘reasonably foreseeable’) and so-called non-contemplatory loss. In particular, for contemplatory loss, the chapter examines whether the floor on liability should be the weighted

average of the unimodal limitations of liability. For non-contemplatory loss, the chapter explores whether the limitation of liability should be equal to the total freight payable and no more. Finally, for the time bar provided by it to be fair, the chapter considers whether the instrument should adopt a time bar of nine months.

CHAPTER 1

MULTIMODAL-TRANSPORT OPERATIONS AND TYPICAL LEGAL ISSUES

This chapter contextualises the rest of this thesis by providing an introduction to MTOs and the legal issues arising in relation to them. It first defines what MTOs are and addresses the differences between various terms used to refer to them. The chapter then discusses why there is a need to develop MTOs. It further explains what the main legal issues are that arise in relation to MTOs and would therefore be of interest to both states and stakeholders in any attempt to create an international uniform law, and examines whether stakeholders need an international uniform law relating to these issues. Finally, the chapter examines what factors determine whether a draft uniform law could gain sufficient support to come into force.

In relation to what MTOs are and what the differences are between various terms used to refer to them, there are various terms, in addition to MT, which are used to describe the form of carriage which involves a combination of different modes of transport to carry goods from one place to another under a single contract. In addition to ‘multimodal transport’ (MT), these terms include ‘intermodal transport’, ‘combined transport’, ‘co-modality’, and ‘synchro-modality’. While the term MT appears to have the broadest meaning, this chapter considers whether it is the best term to refer to an international transport of goods involving at least two different modes of transport under a single contract.

The chapter also examines why there is a need to develop MTOs, what the main legal issues are that arise in relation to them, and whether stakeholders need an international uniform law relating to these issues. In particular, it considers whether the absence of an international uniform law governing MTOs may create significant obstacles to the development of MTOs. The chapter further examines whether the absence of such a legal instrument may lead to

uncertainty and unpredictability in determining MTC liability, which in turn increases the overall cost of MTOs (including freight rates, insurance premiums, and dispute-resolution expenses). This thesis uses the term ‘uncertainty’ to refer to difficulty in determining the substantive basis of liability, which is a logical consequence of ‘unpredictability’, which in this thesis refers to difficulty in determining the applicable legal regime. Against this background, this chapter explores whether, to promote the development of MTOs, it would be beneficial to establish an international uniform instrument governing MTC liability.

Finally, in relation to what factors would determine whether a draft uniform instrument would gain sufficient support to come into force, this chapter examines the three main theories of international relations—realism, constructivism, and liberalism—to identify which factors could affect state-level decisions to ratify (or not to ratify) a uniform instrument on MTOs. Drawing on insights from all three theories, the chapter considers the extent to which the support of the international transport industry would be a decisive factor in motivating states to ratify the instrument. Consequently, this chapter explores whether, for an international legal instrument governing MTC liability to obtain sufficient support from states to come into force, the instrument would have to address the practical needs of the international transport industry. This chapter further considers whether, if the instrument did so and the international transport industry therefore supported the instrument, the industry would be likely to lobby the states to ratify the instrument, thereby facilitating its coming into force.

1. Defining multimodal-transport operations

Since the 17th century, merchants have used single routes combining at least two different modes of transport, including sea, train and road, to transport their cargo from one place to another.¹⁶ Various terms have been used to describe such use of single routes, from different perspectives: ‘multimodal transport’ (MT), ‘intermodal transport’, ‘combined transport’, ‘co-

¹⁶ UNESCAP, ‘Manual on Modernization’ (n 3) 4.

modality‘ and ‘synchro-modality’.¹⁷ This section analyses those terms to assess the similarities and differences between them. Among them, MT has the broadest meaning. As this thesis examines MTC liability for the entire carriage of goods by different modes of transport, this section considers whether MT is the most appropriate term for use throughout this thesis.

The term ‘international multimodal transport’ is defined in the United Nations Convention on International Multimodal Transports of Goods 1980 (hereafter MT Convention). Under the MT Convention, international MT is ‘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’.¹⁸ Under this definition, MT is a type of transportation of goods that has two core features: (1) it uses more than one mode of transport¹⁹ and (2) is performed under a single carriage contract. In other words, MT describes any type of carriage of goods performed using at least two different modes of transport under a single contract of carriage.

MT is sufficiently broad as a term to cover many cases that may arise in practice. The term includes carriage where there is (1) a change in modes of transport and (2) a need for the goods to be handled, whatever the ordering of modes of transport. For example, consider a cargo of grapes transported from Auckland, New Zealand, to Toronto, Canada. This cargo is first handed to an MTC and loaded onto a truck for transport to the Auckland Airport. It is then unloaded from the truck and loaded onto an aircraft for carriage to Toronto. Upon arrival, the cargo is unloaded from the aircraft and handed to a consignee, namely, a person who is entitled to receive the cargo. In this case, the shipment involves both a change in modes of transport

¹⁷ Vasco Reis and Rosário Macário, *Intermodal Freight Transportation* (Elsevier 2019) 44.

¹⁸ MT Convention, art 1(1).

¹⁹ A mode of transport could be understood as ‘a means of transport, which, in the case of where one single agreement is concluded, falls within the scope of application of one regime’. (see Jason Chuah, *Research Handbook on Maritime Law and Regulation* (Edward Elgar Publishing 2019) 36.

modes—from truck and aircraft—and handling operations at each transfer point. Accordingly, the entire process can be accurately described as MT. However, to fall within the MT Convention definition of MT, goods carried by MT must be stored in a load unit, such as containers and pallets. Under the MT Convention, only containers, pallets or similar load units are treated as goods.²⁰

MT is ‘under a single contract of carriage’ in that the transportation services are contracted directly with the carrier, who is responsible for the performance of the entirety of the carriage, as well as for any damage to or loss of goods occurring during the carriage. This is a responsibility towards the consignor, namely, the person who requests the transportation services. The terms ‘MT operators’ and ‘MT carriers’ are synonymous. Importantly, the terms do not include freight forwarders, who merely act as agents to arrange the transport services for consignors, without performing any of the carriage.²¹ The transport document relating to this carriage operation is a single one, issued by the MT carrier to the consignor for the entirety of the transport service, and for all modes of transport used in it.

‘Intermodal transport’ is a term commonly used in the European Union (EU), the successor to the European Community (EC).²² The term describes ‘the movement of goods in one and the same unit or vehicles which uses successively several modes of transport without handling of goods themselves in changing modes’.²³ Intermodal transport is at its core a type of MT, as it is a type of carriage of goods by more than one mode of transport. However, the term ‘intermodal transport’ refers to a specific form of MT: one in which goods are packed in load units, such as containers or pallets, in order to reduce the need for handling of goods when

²⁰ MT Convention, art 1(2) provides that “[g]oods” includes any container, pallet or similar article of transport or packaging, if supplied by the consignor’.

²¹ MT Convention, art 1(2) clarifies that ‘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 acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multi modal transport operations, and who assumes responsibility for the performance of the contract’.

²² Organisation for Economic Co-operation and Development (OECD), ‘Intermodal Freight Transport: Institutional Aspects’ (23 February 2001) <https://read.oecd-ilibrary.org/transport/intermodal-freight-transport_9789264189126-en#page1> accessed 24 November 2020.

²³ Commission of the European Communities, ‘Intermodality and Intermodal Freight Transport in the European Union’ COM(1997) 243 final.

there is a change of mode of transport. Furthermore, in intermodal transport, operators may be actual carriers, namely, carriers who actually perform the carriage (typically as sub-contractors of carriers, with carriers contracting with consignors) or freight forwarders. Indeed, the EU's definition of 'intermodal transport' does not require there to be a single contract and *only* a single contract for the entire duration of the transport operation.²⁴ Consignors in intermodal transport may hold multiple transport documents for a single door-to-door delivery.²⁵ Consequently, the consignors may also have multiple actual carriers to sue—given the multiple modes of transport used in the carriage operation—if there is damage to or loss of goods.

'Combined transport', on the other hand, is a closely related term used by the EU to refer to a form of transport specifically within Europe. Directive 92/106/EEC describes combined transport as:²⁶

The transport of goods between Member States where the lorry, trailer, semi-trailer, with or without tractor unit, swap body or container of 20 feet or more uses the road on the initial or final leg of the journey and, on the other leg, rail or inland waterway or maritime services where this section exceeds 100 km as the crow flies and make the initial or final road transport leg of the journey;

— between the point where the goods are loaded and the nearest suitable rail loading station for the initial leg, and between the nearest suitable rail unloading station and the point where the goods are unloaded for the final leg, or;

— within a radius not exceeding 150 km as the crow flies from the inland waterway port or seaport of loading or unloading.

²⁴ UNESCAP, 'Strengthening Capacity for Operationalizing Sustainable Transport Connectivity along the China-Central Asia-West Asia Economic (CCWA) Corridor to Achieve the 2030 Agenda: Concept of Multimodality Scope and Function of Freight Forwarders to Support Seamless Logistics Network' (Virtual Workshop 25 November 2022) <https://www.unescap.org/sites/default/d8files/event-documents/2_Multimodality.pdf> accessed 25 November 2025.

²⁵ *ibid.*

²⁶ Council Directive 92/106/EEC of 7 December 1992 on the Establishment of Common Rules for Certain Types of Combined Transport of Goods between Member States [1992] OJ L368/38, art 1.

Based on this definition, combined transport refers to goods being carried in a single loading unit, such as a container or pallet, by at least two modes of transport. Additionally, combined transport involves any road transport being performed (1) only at the beginning or the end of the journey and (2) for a maximum of 150 km (or less).

Essentially, under the EU definition, combined transport is a form of intermodal transport, in that it is a form of transport of goods by load unit and in which the goods, when moved between modes of transport, will therefore not be handled themselves. In other words, combined transport is necessarily a kind of transport service which involves the goods—sent by the consignors—being carried by at least two different modes of transport. Furthermore, it is not a necessary feature of combined transport that combined transport operators be actual carriers. However, combined transport is a special form of intermodal transport because of how road transport is used in it: in combined transport, road transport is used in the initial or final leg, and for a maximum of 150 km. More specifically, combined transport involves a maximum carriage of goods by road of either 100 km or 150 km: 100 km within road-rail segments and 150 km within road-inland water or road-sea segments.

Combined transport contrasts with ‘co-modality’. The term ‘co-modality’ was first used by the EU in 2006, in a white paper.²⁷ This term refers to a transport trend which involves ‘the efficient use of different modes on their own and in combination’ for ‘an optimal and sustainable utilisation of resources’.²⁸ On this basis, co-modal transport can be understood as a form of MT in that it refers to a transport operation involving different modes of transport. However, unlike intermodal transport and combined transport, co-modal transport *may* involve the handling of goods between modes of transport. The emphasis of the term ‘co-modal transport’ is different, as it is placed on how modes of transport may be used in an energy-

²⁷ Commission of the European Communities, ‘Keep Europe Moving – Sustainable Mobility for Our Continent: Mid-term Review of the European Commission’s 2001 Transport White Paper’ COM(2006) 314 final.

²⁸ *ibid* 21.

efficient manner, for the purposes of sustainable development and of environmentally friendly transport systems. Furthermore, there may be co-modality even if there is more than a single transport contract between the transport operators and the consignors. It is even possible for co-modal transport operators to be carriers or freight forwarders.

‘Synchro-modality’ is a newer term which was first used by Dutch scholars (including Tavasszy, Lugt, and Hagdom), in 2010.²⁹ This term refers to a specific development in MT that allows carriers to enjoy maximum flexibility in arranging modes of transport.³⁰ One of the definitions—which was cited in a report by the European Inland Barging Innovation Platform (EIBIP)—is proposed by a Dutch platform called Platform Synchromodaliteit.³¹ According to that platform, synchro-modality is ‘the optimally flexible and sustainable deployment of different modes of transport in a network under the direction of a logistics service provider, so that the customer (shipper or forwarder) is offered an integrated solution for his (inland) transport’.³² Meanwhile, Duin clarifies that synchro-modality is

the transport of maritime freight flows from port to hinterland destination or vice versa—without changing the load unit—whereby real-time changes can be made in the flexible and sustainable use of different transport modalities in a network. The logistics service provider has the control to offer optimally integrated solutions for all parties.³³

To date, the term ‘synchro-modality’ has not been formally defined by any authority such as the UN or the EU.

²⁹ LA Tavasszy and others, ‘Outline of Synchromodal Transportation System. Annex; Verkenning Synchromodaal Transportsysteem. Bijlage (Report No TNO-034-DTM-2010-04431, November 2010).

³⁰ Reis and Macário (n 17) 48.

³¹ EIBIP, ‘EU-Wide Strategy for Innovation Uptake in IWT’ <<https://indanube.eu/wp-content/uploads/sites/4/2016/04/170309-EIBIP-EU-Wide-Strategy-Version1-Final.pdf>> accessed 1 December 2020.

³² Platform Synchromodaliteit, ‘Wat is Synchromodaliteit (What Is Synchro-modality)’ (19 August 2013) <<https://unit45.com/files/pressreleases/pdf/Wat%20is%20synchromodaliteit.19-08-2013.pdf>> accessed 1 December 2020.

³³ JHR van Duin and others, ‘Synchromodal Transport: From Theory to Practice Case Study Port of Rotterdam: Identifying the Success/Fail Factors’ (Paper presented at the 98th Annual Meeting Transportation Research Board, Washington DC, January 2019) <https://www.researchgate.net/publication/330579559_SYNCHROMODAL_TRANSPORT_FROM_THEORY_TO_PRACTICE_CASE_STUDY_PORT_OF_ROTTERDAM_IDENTIFYING_THE_SUCCESSFAIL_FACTORS> accessed 3 December 2020.

Similarly to intermodal, combined, and co-modal transport, synchro-modal transport refers to the carriage of goods by different modes of transport in logistics chains. Additionally, synchro-modal transport involves operators either signing a contract with consignors to promise door-to-door delivery or acting as agent to arrange door-to-door delivery for consignors.

Synchro-modal transport focuses more on how different modes of transport can be used to support sustainable development and energy efficiency, as well as to achieve optimal cost and delivery time. In particular, synchro-modal transport operators use modern communication technology to receive information on the status of conveyances that is updated from one moment to the next, with this type of information being known as ‘real-time information’. Based on this information, synchro-modal transport operators may decide on changes to or rearrangements of modes of transport as appropriate at any time during the journey, to ensure on-time delivery, efficient consumption of energy, and cost-effectiveness.

To synthesise, the terms ‘multimodal transport’, ‘combined transport’, ‘intermodal transport’, ‘co-modality’ and ‘synchro-modality’ consider a general concept—that of the carriage of goods by a combination of different modes of transport—from different perspectives. MT refers to cases where (1) parcels and items are stored in a load unit and (2) MTOs act as carriers. Meanwhile, intermodal, combined, co-modal, and synchro-modal transport refer to various types of transport in which operators variously act as carriers or freight forwarders. Synchro-modality, for its part, focuses especially on cost efficiency, energy efficiency, delivery time, and environmental impact.

However, if the focus is on the carriage of goods by different modes of transport under a single contract for the whole distance covered, the term ‘multimodal transport’ (MT) is the broadest and, for this reason, the most appropriate term for this thesis. Indeed, this thesis looks at the liability of the operators (who act as carriers) for the entire carriage of goods by different

modes of transport. Additionally, this thesis focuses on MT in an international environment, namely, as it occurs between countries. Accordingly, the term ‘multimodal transport’ (MT) is used in this thesis to describe the MT of goods from one country to another country—namely, with reference to the international carriage of goods.

2. The need to develop multimodal-transport operations

Building on the definitions established in Section 1, this section discusses why MTOs need to further develop. Many scholars have affirmed that MT serves as the backbone of the international merchandise trade, helping move goods from one country to another.³⁴ However, MT services remain limited, particularly in developing countries. This state of affairs is unfortunate, particularly because MT could serve sustainable development, on which the UN has—particularly since 2015—called for urgent action.³⁵ MT is an environmentally friendly approach to transport whose development would help UN member states achieve their sustainable development goals (SDGs).³⁶ Promoting MTOs would therefore support both the sustainable development of international merchandise trade and the achievement of global environmental objectives. Accordingly, this section explains how the development of MT may influence the development of the international merchandise trade and how any successful attempt at creating an international uniform instrument on MTO liability could help achieve sustainable development goals for environmental protection, broadening the significance of any such attempt.

Indeed, the growth of the international merchandise trade has resulted in an increase in demand for the movement of cargo between countries, namely, for the cross-border movement

³⁴ Dua and Sinha (n 2) 1.

³⁵ United Nations Department of Economics and Social Affairs, ‘Sustainable Development’ <<https://sdgs.un.org/goals>> accessed 24 December 2020.

³⁶ European Commission, ‘2018 – Year of Multimodality’ <https://ec.europa.eu/transport/themes/logistics-and-multimodal-transport/2018-year-multimodality_en> accessed 26 December 2020; and UNESCAP, ‘Virtual Expert Group Meeting’ (n 4).

of goods.³⁷ Better and more cost-effective transportation solutions would help to ‘increase the demand for goods and components’.³⁸ In particular, lower costs for transportation would not only make products themselves cost less, but also generate more profit for exporters. Better transportation would help cargo move more smoothly and expeditiously between countries. Improvements in transportation, such as lower costs and better-quality service, could lead to an increase in the consumption of goods, in exports and in imports. In other words, growth in the international merchandise trade would be promoted if transportation were less costly and of better quality.³⁹

The emergence of MT has facilitated international merchandise trade substantially.⁴⁰ As internet-based merchandise transactions—one of the key forms of e-commerce⁴¹—became commonplace, the international merchandise trade started to expand, creating a corresponding need for the movement of cargo. Goods must be transported from a location in one country (which is typically the seller’s factory or warehouse) to a location in another country (which is typically the factory or warehouse). The cross-border movement of cargo usually involves a combination of different modes of transport, especially when it is on a door-to-door basis. For example, for the delivery of a container of polyester yarn from a seller’s warehouse in Seoul, Korea, to a buyer’s factory in Ho Chi Minh City, Vietnam, there may be a combination of transport by road, rail, and sea (see Figure 1).⁴² Notably, road or rail transport will be used for

³⁷ There is a relation of interdependence between international trade and transport. By definition, transport is how goods are moved from one place to another place. Therefore, when international trade develops, the demand for transport will increase. Conversely, when transport develops, it facilitates the development of international trade. See Kee-hung Lai and others, ‘Are Trade and Transport Logistics Activities Mutually Reinforcing? Some Empirical Evidences from ASEAN Countries’ 4 (2019) *Journal of Shipping and Trade* 1.

³⁸ UNCTAD, ‘Efficient Transport and Trade Facilitation to Improve Participation by Developing Countries in International Trade’ (TD/B/COM.3/60, 2003) paras 16–17.

³⁹ Lai and others (n 37).

⁴⁰ UNCTAD, ‘Development of Multimodal Transport and Logistics Services’ (TD/B/COM.3/EM/20/2, 2003) para 1.

⁴¹ Carrying on e-commerce means ‘doing business over the Internet, selling goods, services which are delivered offline as well as products which can be “digitised” and delivered online such as computer software’. Jonathan Coppel, ‘E-commerce: Impacts and Policy Challenges’ (2000) OECD Economics Department Working Paper No 252 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2000/06/e-commerce_g17a1414/801315684632.pdf> accessed 3 February 2020.

⁴² This example is a modified hypothetical borrowed from Danh Thao Bui Doan, ‘Liability of Multimodal Transport Carriers for Delay in Delivery of Goods: The Impact of Suez Canal Blockage’ (2023) 37(1) *Australian and New Zealand Maritime Law Journal* 17. Sea and air transport will usually be used for distance delivery between countries. However, air transport cannot be used for containers. Therefore, in this case, only sea transport can be used for transport between countries.

the inland carriage within Korea, while sea transport will be used for the carriage between Korea and Vietnam.

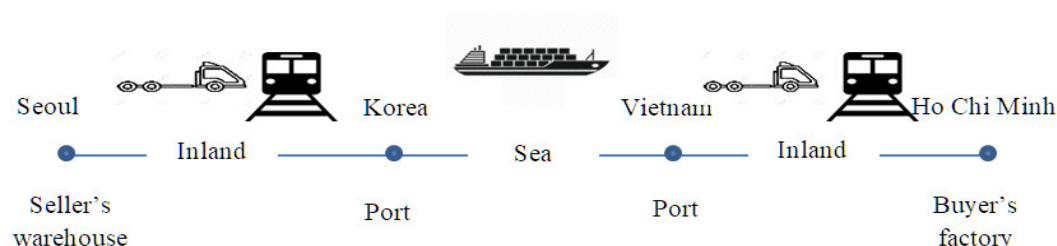


Figure 1. Hypothetical MT carriage between Korea and Vietnam

If merchants in the international merchandise trade do not have recourse to MT, they will have to make separate contractual arrangements for each separate mode of transport involved—whether these are made by the merchants themselves or through a freight forwarder⁴³—over the entirety of the carriage of cargo. As a result, the merchants will end up with several contracts and therefore with several different carriers and several different modes of transport for the entire movement-of-goods voyage. In other words, the transport operation will be what is known as a ‘unimodal’ one.⁴⁴ In addition to the time spent arranging transport, unimodal transport involves merchants facing the burden of time spent managing a multitude of transport documents, as well as any difficulties in tracking the movement of cargo. Furthermore, if there occurs a delay in delivery of cargo with any mode of transport in the unimodal voyage, this delay may cause another delay—one in the delivery of the goods at the final destination. Consequently, merchants in charge of arranging the delivery at the final destination will generally be responsible for the delay in delivery of goods.

With MT, on the other hand, no such problems arise. In particular, merchants enter into only one contract, with MTCs. MTCs act as the main carriers. They will be liable towards

⁴³ Even though freight forwarders will arrange a combination of different modes of transport modes, they work on behalf of consignors only. Therefore, consignors will still be a party to a contract for the carriage of goods.

⁴⁴ In unimodal transport, goods are carried by one single mode of transport, namely by road, rail, sea or air. See A Rossolov and others, ‘Research of Effectiveness of Unimodal and Multimodal Transportation Involving Land Modes of Transport’ (2017) 89 *Eastern European Journal of Enterprise Technologies* 60, 61.

consignors for the entire carriage, from the time they take over the cargo until the time that they deliver it.⁴⁵ In the case of MT, merchants have only a single contract to manage and only a single transport document for the entire distance traversed by the cargo, from one country to another. Moreover, as merchants will not have to pay extra money for freight forwarders to arrange transportation, the transport costs weighing upon merchants will tend to be 20% lower for the entire carriage operation than they otherwise would have been.⁴⁶ Furthermore, if there is a delay in delivery of goods between two MTO legs, MTCs will have alternatives open to them (such as re-arranging the carriage or minimising transit time), thereby better ensuring just-in-time delivery at the final destination.⁴⁷ Therefore, MT is justifiably acknowledged to be a systematic, cost-effective, secure, and timely form of transportation offering much more potential for the growth of the international merchandise trade than does unimodal transport.⁴⁸

Of all the modes of transport available, it is road transport which has the most negative impact on the environment, with congestion—a negative impact in its own right—worsening pollution, particularly in the form CO₂ emissions.⁴⁹ By multiplying modes of transport within the same carriage operation, MT reduces the road-transport footprint over the entire chain of movement of the cargo, reducing CO₂ emissions.⁵⁰ Particularly desirable are combinations of road and rail transport for inland and short-distance carriage between countries,⁵¹ as they could help reduce CO₂ emissions by 46% per year.⁵² Therefore, for the international community to achieve the UN SDG of reducing greenhouse-gas emissions by 2030 and therefore prevent excessive climate change, it would be highly beneficial for it to support the global development

⁴⁵ MT Convention, art 14(1).

⁴⁶ Xiaoping Fang and others, 'Synergy Degree Evaluation of Container Multimodal Transport System' 12(4) (2020) Sustainability 1.

⁴⁷ Association of Southeast Asian Nations (ASEAN), 'Chapter 1: Operations Management in Transportation' (2014) <https://www.asean.org/wp-content/uploads/images/2015/september/transport-facilitation/batch-1/Transport-Operations-Management/AFFA%20chapter%20file.rev2_ASEAN%20disclaimer.pdf> accessed 31 December 2020.

⁴⁸ Sunanda Majumder and others, 'Multimodal Transportation and International Trade Facilitation: Bangladesh Perspective' (Paper presented at the International Conference on Business and Management, Dhaka, April 2019).

⁴⁹ Swedish Environmental Protection Agency, 'Environmental Impact from Different Modes of Transport – Method of Comparison' (2001) <<https://www.naturvardsverket.se/Documents/publikationer/620-5183-0.pdf?pid=2861>> accessed 1 January 2021.

⁵⁰ European Commission, '2018 – Year of Multimodality' (n 36).

⁵¹ Short-distance international carriage refers to the transportation of goods between neighbouring countries.

⁵² Anthony J Craig, Edgar E Blanco, and Yossi Sheffi, 'Estimating the CO₂ Intensity of Intermodal Freight Transportation' (2013) 22 Transport Research Part 53.

of MT.⁵³ Regional institutions such as the EU and UNESCAP have encouraged their members to issue policies and plans to promote MT precisely for the purposes of reducing greenhouse gas emissions.⁵⁴

In brief, MT (which by definition involves using a combination of different modes of transport to move cargo across borders) is a timely, secure, and cost-effective approach to transport. It is an approach that helps reduce the negative impacts of transport on the environment. Accordingly, developing MT would not only have a positive impact on the growth of international trade, but also help states achieve the SDGs. In other words, there is particularly good cause to facilitate the development of this type of transport. However, UN organs have noticed that MT services are still limited, especially in developing countries.⁵⁵ One of the obstacles to MT is the lack of appropriate international legal frameworks.⁵⁶ In order to promote the development of MT, it would be highly desirable to remove obstacles to the emergence of such legal frameworks.⁵⁷

3. Difficulties encountered by the multimodal-transport industry due specifically to the lack of an international uniform instrument

The previous section explained why there is a need to develop MTOs, showing that they provide a timely, secure, cost-effective and environmentally friendly approach to transport. Doing so would not only support the growth of the international merchandise trade but also contribute to the achievement of the UN SDGs.

It is unfortunate, then, that at no point in the lengthy history of MT (which, as we have seen, dates back to the 17th century) have any attempts to create an international legal instrument to govern MTOs ever achieved much success. In May 1980, in Geneva, UNCTAD

⁵³ UNCTAD, 'Trade and Development Report 2019: Financing a Global Green Deal' (2019) <https://unctad.org/en/PublicationsLibrary/tdr2019_en.pdf> accessed 1 January 2021

⁵⁴ European Commission, '2018 – Year of Multimodality' (n 36); and UNESCAP, 'Development of Intermodal Transport Corridors' (n 5).

⁵⁵ UNCTAD, 'Development of Multimodal Transport' (n 40) paras 4–5.

⁵⁶ UNESCAP, 'Virtual Expert Group Meeting' (n 4).

⁵⁷ UNESCAP, 'Development of Intermodal Transport Corridors' (n 5).

adopted the very first directly relevant international legal instrument, the MT Convention. UNCTAD did this with the purpose of facilitating the development of MT.⁵⁸ Unfortunately, the MT Convention never came into force, as it never gained sufficient support from member states, as discussed below in Section 1 of Chapter 2 below.⁵⁹ After the failure of the MT Convention to be ratified, in 1991 the joint UNCTAD and International Chamber of Commerce (ICC) working group introduced the UNCTAD/ICC Rules for Multimodal Transport Documents (UNCTAD/ICC Rules). Those rules went into effect in January 1992,⁶⁰ but they ‘lack[ed] the stature of the mandatory international legislation’⁶¹ necessary to create uniformity in the international law of multimodal transport. The most recent attempt at creating such legislation was the 2008 UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules.⁶² The Rotterdam Rules were the result of an ambition to produce a uniform regime for sea carriage, providing for ‘modern industry needs in terms of door-to-door carriage’.⁶³ Like the MT Convention, however, the Rotterdam Rules never came into effect.⁶⁴

In the absence of an international legal instrument on MTOs, such operations have found themselves governed by regional instruments, national instruments, and unimodal conventions, such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, as amended by the Protocol of 1968 (Hague-Visby Rules); United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules); Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention); Convention concerning International Carriage by Rail 1980 (COTIF), Appendix

⁵⁸ John A Boyd, ‘UNCTAD Convention on International Multimodal Transport’ (1979) 73(3) American Journal of International Law 523–25.

⁵⁹ See Sub-section 4.1.

⁶⁰ UNCTAD, ‘Implementation of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/S, 2001).

⁶¹ Marian Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (Kluwer Law International 2009) 19.

⁶² Jose Angelo Estrella Faria, ‘Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules’ (2008–09) 44 Texas International Law Journal 277, 312.

⁶³ Ling Zhu, M Deniz Guner-Ozbek, and Hong Yan, ‘Carrier’s Liability in Multimodal Carriage Contracts in China and Its Comparison with US and EU’ (Paper presented at IFSPA 2010 – Integrated Transportation Logistics: From Low Cost to High Responsibility, China, 15–18 October 2010).

⁶⁴ See Section 2 of Chapter 2 for some of the reasons.

B (Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)); and the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR Convention).⁶⁵ Each particular instrument—regional instrument, national instrument, or unimodal-transport convention—features its own provisions as to the period of time over which carriers are liable for the carriage of goods, the principles for determining MTC liability, the extent of MTC liability, and time bars on bringing proceedings. This ‘patchwork’ of regional instruments, national instruments, and unimodal conventions gives rise to numerous legal difficulties in the determination of MTC liability more broadly. Section 2 examines these difficulties in detail. Based on these difficulties, this section considers whether the absence of a unified legal instrument governing MTOs may lead to uncertainty, unpredictability, and unfairness in determining MTC liability. In this thesis, ‘unpredictability’ refers to the MTCs and cargo owners being unable to predict which legal regime will apply for the purposes of determining MTC liability, while ‘uncertainty’ refers to any confusion or ambiguity caused by the wording of the language of the regime that applies.⁶⁶ ‘Unfairness’, for its part, means that either MTCs or cargo owners are treated unfairly by the regime.⁶⁷ Unpredictability, uncertainty, and unfairness increase the overall cost of MTOs, including freight rates, insurance premiums, and dispute-resolution expenses.

Accordingly, there are several major problems that arise. The first concerns MTC liability (including as it relates to the period of responsibility, the limitation of liability, and time bars). The existing rules vary according to the mode of transport used. For example, if a single contract of carriage is governed by unimodal conventions, MTCs will enjoy a limitation of

⁶⁵ In international trade, disputes related to the content of international contracts are usually determined by the national instrument of the state where ‘most’ of the contract is performed. International conventions and regional instruments do not apply to parties in international contracts directly. However, if a state ratifies international conventions or regional instruments, the state’s national instrument will reproduce or make a direct reference to the contents of the relevant international conventions or regional instruments. Therefore, reference in this thesis to the applicability of unimodal conventions are to the applicability of national instruments reproducing or making a direct reference to international unimodal conventions; references to the applicability of regional instruments are to the applicability of national instrument reproducing or making a direct reference to regional instruments governing MTOs; and references to the applicability of national instruments are to the applicability of national instruments making provision specifically enacted to govern MTOs. See Paula Backman, *The Contract of Carriage: Multimodal Transport and Unimodal Regulation* (Informa Law from Routledge 2019) 20.

⁶⁶ See Section 1 of Chapter 3.

⁶⁷ *ibid.*

liability of 2 Special Drawing Rights (SDRs) per kg in any sea leg,⁶⁸ 8.33 SDRs per kg in any road leg,⁶⁹ and different limits for legs by other modes of transport.⁷⁰ In other words, there will be uncertainty as to MTC liability for the duration of the carriage operation. For Devia, having different unimodal conventions apply to MTOs ‘creates a complex situation because different liability requirements, exclusion clauses, limits of liability and time bars for suit could be applicable’.⁷¹ Given this situation, parties to an MT contract will have difficulty predicting (1) to what extent MTCs will be liable for damage and loss and (2) how long cargo owners will have to bring proceedings against MTCs.⁷²

The second major problem is that unimodal conventions apply only if the location where the damage or loss occurs is known, namely, if the damage or loss is localised. Therefore, if—as may well be the case if the goods are containerised—the location is unlocalised, the fact of the different unimodal conventions applying to MTOs prevents MTC liability being determined clearly. In the case where unimodal conventions are not applicable to MTOs, MTC liability will be determined by national law. However, there are a few states whose national law sets forth special rules for MT.⁷³ In Europe, there are two only states whose national law does so: Germany and the Netherlands.⁷⁴

The third major problem is that unimodal conventions may not apply in transshipment, namely, the act of temporarily unloading goods from one conveyance and loading them onto another. For example, the Hague-Visby Rules cover only the period from the loading of the goods until their complete offloading from the ship.⁷⁵ As a result, where damage to or loss of goods occurs during periods of transit or is unlocalised, MTCs may be at risk. In *Exportadora*

⁶⁸ Hague-Visby Rules, art 4(5)(a).

⁶⁹ CMR Convention, art 23(1).

⁷⁰ See Table 3.

⁷¹ Nicolas Martinez Devia, ‘The Multimodal Transport System in the Andean Community: An Analysis from Legal Perspective’ (MA thesis, University Erasmus of Rotterdam 2008) 9.

⁷² In MTOs, the person with title to the goods can take action against MTCs. This includes consignors, consignees, or anyone who lawfully holds an MT document. Accordingly, in the context of disputes among MTOs, this thesis will use the term ‘cargo owners’ to refer to such persons.

⁷³ Hoeks (n 61) 17.

⁷⁴ *ibid* 17.

⁷⁵ Hague-Visby Rules, art 1.

Santa Elena v Maersk Line,⁷⁶ for example, the carrier was liable for the entire carriage, and no limitation of liability applied, because the damage was unlocalised, meaning that no unimodal convention was applicable. The carrier was unable to rely on the limitations of liability provided by the unimodal convention. Consequently, MTCs will incur liability for the entirety of the damage or loss, a result that they may consider as unfair to them.

The fourth major problem lies in shipping costs, including freight rates, insurance premiums, and dispute-resolution expenses.⁷⁷ The combined application of unimodal conventions to MTOs causes unpredictability as to the question of liability for damage to and loss of goods. The reason is that the provisions apply for the purposes of determining MTC liability change with the movement of the goods from one mode of transport to another. The general cost of transport is increasing as a result of higher insurance premiums,⁷⁸ and this unpredictability may be a contributing factor. It may also lead to higher litigation costs, as it may draw out and complicate legal proceedings.⁷⁹ Although carriers that boast large shipping volumes have the negotiating power to impose conditions on actual-carrier sub-contractors for different modes of transport and thereby reduce uncertainty, such carriers would still ‘prefer a uniform, simple and cost-effective liability regime on global scale’.⁸⁰

The fifth major problem is conflict in the scope of application of unimodal conventions, such as the CMR Convention and the Warsaw Convention.⁸¹ Article 2 of the CMR Convention provides that the Convention governs the entirety of the carriage operation if the goods are transported by means other than road—if the goods are carried by sea, rail, inland waterways, or air without being unloaded from the road vehicle.⁸² This provision led to confusion as to

⁷⁶ [2010] EWHC 3224 (Comm).

⁷⁷ Hoeks (n 61) 13.

⁷⁸ UNECE, ‘Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport: Results of Two Expert Group Meetings (“Hearings”) on Civil Liability Regimes for Multimodal Transport’ (TRANS/WP.24/2000/3, 2000) para 14.

⁷⁹ Hoeks (n 61) 13.

⁸⁰ UNECE, ‘Possibilities for Reconciliation’ (n 78) para 15.

⁸¹ Samir Mankabady, ‘The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions’ (1983) 32(1) International and Comparative Law Quarterly 120, 135–37.

⁸² This kind of transport is known as a ‘roll-on/roll-off carriage’.

whether the CMR Convention governed the entirety of a carriage operation from Singapore to Dublin in *Quantum Corp Inc v Plane Trucking Ltd*.⁸³ In this case, the English Court of Appeal had to decide whether the CMR Convention was indeed applicable to the facts of the case. If the affirmative, there would be two unimodal conventions applicable to damage to and loss of goods occurring during the air leg of the carriage operation: the Warsaw Convention and the CMR Convention. If the negative, only the Warsaw Convention would apply. In the end, the court decided that the CMR Convention did apply. The English High Court also encountered similar difficulties in *Thermo Engineers Ltd and Anhydro A/S v Ferrymasters Ltd*.⁸⁴

The sixth major problem is related to the protection of the actual-carrier sub-contractor in extra-contractual liability in tort or delict. Although not a party to the contract with cargo owners, actual carriers may generally be sued on the basis that they are in physical possession of the goods carried under the bill of lading—as in *Réunion européenne SA and Others v Spliethoffs Bevrachtungskantoor BV*,⁸⁵ for example. However, if sued by cargo owners, actual carriers may potentially be unable to invoke the limitations of liability available to MTCs. For example, article 4bis (2) of the Hague-Visby Rules provides that only a servant or agent of the carrier (and not an independent contracting party) is entitled to invoke the limitations of liability available to the carrier under the Rules.

To protect actual-carrier sub-contractors, MTCs may include a so-called Himalaya clause—in a clause conferring rights upon third parties, such as actual-carrier sub-contractors here—in

⁸³ [2001] WL 272987. Here, the English High Court disagreed with the argument that the CMR Convention applies to MT if the carriage partly involves carriage by road and partly involves carriage by sea, rail, air, or inland waterway. In the Court's opinion, the CMR Convention applies in the case where the first segment of the carriage operation is by road. In other words, the CMR Convention would have applied if the goods had been carried by road from Singapore to Paris and then by air from Paris to Dublin.

There is a difficulty not only in that courts have adopted different approaches regarding whether the CMR Convention applies to MT contracts, but also in that courts in Austria, Denmark, Finland, the Netherlands, Spain, Sweden, and Switzerland have failed to provide a "clear-cut answer" to this issue. (See Tobias Eckardt, Alma Steger, Jakob Rosing, George W. Dawson, Timo Ylikantola, Jan Eckoldt, Luis Alberto Garcia, Matthias Schmitt & Regula Hinderling, 'Multimodal Transport including Cross-Border Road Haulage - Will the CMR Apply?' (2010) 2 EJCL 153, 154)

⁸⁴ [1981] 1 WLR 1470. The Queen's Bench Division of the English High Court held that liability for the damage to the goods, a trailer, was not determined by the CMR, even though article 2 of the Convention extends the applicability of the Convention to carriage by other means other than road in the case of a roll-on/roll-off carriage operation. The Court held that the sea-carriage segment began when the trailer passed across the outboard ramp and the line of the stern of the Ferrymasters Ltd vessel. Therefore, the Hague-Visby Rules applied for the purposes of determining the liability of Ferrymasters Ltd for the damage.

⁸⁵ [1999] ILPr 613.

MT documents, as is recommended in the practice of sea carriage. Lord Goff of Chieveley in *The Mahkutai*⁸⁶ noted that including a Himalaya clause in a bill of lading⁸⁷ would be useful for the purposes of making the limitations of liability (which are generally available only to sea carriers under the Hague-Visby Rules) available to their actual-carrier sub-contractors.⁸⁸ Also, many actual-carrier sub-contractors in sea carriage, such as the one in *Port Jackson Stevedoring Pty Limited v Salmond & Spraggon (Australia) Pty Limited (the 'New York Star')*,⁸⁹ find that thanks to a Himalaya clause, they will indeed be entitled to avail themselves of the defences (such as time bars) that are set forth by the Hague-Visby Rules, although these defences are generally available only to head carriers. However, including a Himalaya clause in MT contracts requires the consent of both parties: the MTC and the cargo owner. Therefore, the ability of actual-carrier sub-contractors to benefit from the unimodal provisions of law on liability remains uncertain, because cargo owners may not accept MTCs including a Himalaya clause in the contract.

In summary, both the existence of multiple unimodal conventions operating in combination and the applicability of regional and national instruments on MT cause uncertainty, unpredictability, unfairness, and high costs in the determination of MTC liability.⁹⁰ Therefore, it would foster the development of MTOs to address the problems with the existing instruments on MT, as these problems contribute to uncertainty, unpredictability, and high cost. As discussed above, this results in high freight costs in MT, as well as many disputes between MTCs and cargo owners. Any MT-law solution meeting the requirements of certainty, predictability, and fairness would be welcome.

⁸⁶ [1996] 3 All ER.

⁸⁷ A Himalaya clause is a contractual clause assigning a contracting party's benefit to a third party.

⁸⁸ [1996] 3 All ER 514.

⁸⁹ [1981] 1 WLR 138.

⁹⁰ Theodora Nikaki, 'Bringing Multimodal Transport Law into the New Century: Is the Uniform Liability System the Way Forward' (2013) 78(1) Journal of Air Law and Commerce 69, 72.

4. The appropriateness of a mandatory international legal instrument on multimodal transport at the global level as a possible solution

As discussed in Section 3, the absence of a mandatory instrument on MT at the international level creates difficulties in determining MTC liability, such as uncertainty, unpredictability, and unfairness. Of special concern is the case where it is impossible to identify the location of the damage to or loss of goods.

The aforementioned UNCTAD/ICC Rules 1992 were an effort to resolve these problems.⁹¹ These Rules have seen widespread use as model contractual terms for MTC liability.⁹² However, they do not manage the risks of uncertainty, unpredictability, and unfairness in determining MTC liability as well as they might. Rule 1, for example, limits the application of the Rules to determining MTC liability only when the Rules are incorporated in the MT contract.⁹³ In addition, the Rules do not override mandatory provisions of national instruments governing MTC liability.⁹⁴ Indeed, the Rules have ‘effect [only] as contract terms which may be displaced by the operation of mandatory law’.⁹⁵ As a result, they do not even come close to ensuring that all countries take the same approach to determining MTC liability. Given these limitations, the transport industry would benefit from a better solution than the Rules for the purposes of resolving the problems of uncertainty, unpredictability, and unfairness in determining MTC liability.

One possible solution that has gained the support of the majority of UNCTAD experts is a mandatory uniform legal instrument governing MTOs at the international level.⁹⁶ Against this background, this section discusses how such an instrument could meet the requirements of certainty, predictability, and fairness in the determination of MTC liability. Since such an

⁹¹ UNCTAD, ‘Implementation of Multimodal Transport Rules’ (n 60).

⁹² UNCITRAL, ‘Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Relation with Other Conventions’ (A/CN.9/WG.III/WP.78, 2006) para 15.

⁹³ UNCTAD/ICC Rules 1992, r 1.

⁹⁴ *ibid* r 13.

⁹⁵ David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, Informa Law from Routledge 2013).

⁹⁶ UNCTAD, ‘Multimodal Transport’ (n 6) para 79.

instrument would provide a single set of rules specially designed to address the issue of MTC liability and would require member states to incorporate those rules into national law, such an instrument could theoretically allow for much greater consistency in how courts determine MTC liability across jurisdictions. The greater the number of countries taking the same approach (or at least highly similar approaches) to determining MTC liability, the more easily MTCs and cargo owners would be able to predict how MTC liability would be assessed in a given case. It is for this reason that a mandatory legal instrument governing MTC liability could help minimise unpredictability in determining MTC liability. However, as certainty (as opposed to predictability) would mainly depend on the clarity, precision, and quality of the language used in the regime, this section concludes that a mandatory legal instrument would not, in itself, minimise the problem of uncertainty in determining MTC liability.

While it is relatively easy to address unpredictability and uncertainty in the language of an instrument, unfairness is more difficult to resolve. Assessing unfairness in the negative sense—that is, in the sense of a rule disproportionately favouring one party to the MT contract over another—is relatively straightforward. In contrast, identifying positive fairness is more complex, as it requires establishing an understanding of what constitutes a fair allocation of rights and obligations between the parties. The question of how to resolve unfairness, including by defining positive fairness, will therefore be discussed in more detail in Chapter 3.

As discussed, MTC liability is predictable when participants in MTOs know which legal regime applies and, therefore, how MTC liability will be determined if a dispute arises between them.⁹⁷ Accordingly, to ensure predictability, it is necessary (1) that national instruments take the same approach to determining MTC liability and (2) that the approach be simple, enabling both MTCs and cargo owners to know how and to what extent MTCs will be liable. There are four different approaches to determining MTC liability, including uniform, modified uniform,

⁹⁷ Nikaki (n 90) 77.

network, and limited network approaches to liability.⁹⁸ Chapter 3 will discuss in detail which approach would provide the simplest solution, enabling both MTCs and cargo owners to easily predict how and to what extent MTCs will be liable.⁹⁹ This section focuses on the first requirement—exploring whether a mandatory uniform international instrument would ensure national instruments take the same approach in determining MTC liability.

At present, there are at least two legal systems that may assert themselves in the international setting for the purposes of determining MTC liability.¹⁰⁰ These legal systems are those of the countries where the seller and the last buyer's businesses are located, depending on which party holds a bill of lading to bring a legal claim against the goods. Each legal system will have its own rules for the purposes of resolving disputes relating to MTC liability. Therefore, MTC liability in a given MTO will be determined in one way in one country, and MTC liability in another MTO will be determined in another way in the other country, even if the outcomes produced by the two sets of reasoning are identical. As a result, parties to MT transactions may not know whether—and, if so, on what basis—the MTC will be liable for damage to, loss of, or delay in delivery of goods until which instrument is applicable has been determined. Therefore, to meet the requirement of predictability, there would need to be unified or, even better, uniform rules on MTC liability applying the world over (or near enough). The main purpose of an international instrument is ostensibly to create a global order in which each and every state takes the same approach to dealing with a specific issue or issues.¹⁰¹ For the purposes of ratifying any such instrument, dualist states must enact national legislation, as distinct from the international instrument, to incorporate the contents of the instrument into national law. Even though it would almost certainly be impossible to have all the states in the

⁹⁸ See Section 1 of Chapter 3.

⁹⁹ *ibid.*

¹⁰⁰ Michael Joachim Bonel, 'The Law Governing International Commercial Contracts and the Actual Role of the Unidroit Principles' (2018) 23 *Uniform Law Review* 15, 17.

¹⁰¹ Mortimer NS Sellers, 'The Purpose of International Law is to Advance Justice – and International Law Has No Value Unless It Does So' (2017) 111 *Proceedings of the ASIL Annual Meeting* 301.

world (including the monist ones) take the necessary steps to ratify the instrument, the more states that did so, the more states there would be adopting the same approach to determining MTC liability. Parties to MT transactions would then, in many cases, be able to predict the legal regime operating for the purposes of determining MTC liability and have some understanding, at the very least, as to what the outcome would be under the international instrument. In other words, an international legal instrument on MTC liability would go a considerable way to reducing unpredictability in the existing law on MTC liability.

As far as the requirement of certainty in the determination of MTC liability is concerned, this thesis holds that there is legal certainty when the language of the in-regime rules governing MTOs is clear and therefore easy to interpret, so as to avoid differing interpretations.¹⁰² Of course, there are different understandings of what ‘legal certainty’ means and how to achieve it. In particular, there are scholars who define legal certainty as ‘predictability of outcome’, regardless of the clarity of the language used by the relevant legal provision or provisions.¹⁰³ Such scholars argue that legal certainty is achieved when those subject to the instrument know on what basis they will be liable for their acts or omissions. For example, these scholars may consider a rule relating to the period of responsibility to be certain when both MTCs and cargo owners know from the outset whether the MTCs will be liable for damage, loss, or delay in delivery occurring during that specific period. In other words, a rule relating to the period of responsibility will, on this understanding of certainty, be certain if it clearly provides, for example, that potential MTC liability starts with MTCs receiving the goods for the delivery and ends with MTCs successfully delivering them.

Other scholars argue that legal certainty consists of *both* predictability of outcome (as opposed to mere predictability of legal regime applicable) *and* clarity of rules.¹⁰⁴ These

¹⁰² Nikaki (n 90) 81.

¹⁰³ Mark Fenwick, Mathias Siems, and Stefan Wrba, *The Shifting Meaning of Legal Certainty in Comparative and Transnational Law* (Bloomsbury 2017) 6.

¹⁰⁴ Kelly Casey Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’ (2010) 43 *Loyola of Los Angeles Law Review* 1109, 1120.

scholars tend to consider that legal certainty is achieved in relation to an issue where (1) there is a set of rules governing the relevant social relationships and (2) these rules are clear enough to avoid difficulty in interpreting them. For example, these scholars may consider a legal instrument to be certain when it not only specifies the period of responsibility, but also clearly defines when this period starts and ends, enabling the parties to the relevant transaction to interpret the instrument consistently and with minimal ambiguity.

This thesis has identified legal uncertainty as a problem with the current law governing MTOs.¹⁰⁵ Legal uncertainty (in the determination of MTC liability) arises specifically where there is legal language that gives rise to two or more interpretations, leading to confusion.¹⁰⁶

Consequently, this thesis understands certainty in an instrument governing MTOs as being achieved if the instrument contains a set of rules whose language satisfies two requirements. The first requirement is that the language of the rules must create uniformity in understanding. The second requirement is that the language of the rules must be clear enough to avoid any risk of unpredictability, namely, of confusion as to which instrument applies when there is a possibility of one or more other instruments applying. For example, the rules must avoid wording similar to that of the CMR Convention, which, in *Quantum*, led to different interpretations regarding whether the Convention applied.¹⁰⁷

Articles 1 and 2 of the CMR Convention state that the Convention applies to (1) the carriage of goods by road and (2) roll-on/roll-off carriage by a combination of different modes of transport. Some courts may interpret these two provisions to mean that it does not apply where road carriage constitutes only one of the legs within an MTO—for example, where cargo is carried by air from A to B and then by road from B to C. At the same time, other courts may interpret the provisions as having the Convention apply in such situations. In *Quantum*, the

¹⁰⁵ See Section 3.

¹⁰⁶ Nikaki (n 90) 81.

¹⁰⁷ EWCA Civ 350.

goods were carried by air from Singapore to Paris and then by a combination of road and roll-on/roll-off inland-waterway transport from Paris to Dublin, and it was during the Paris-Dublin leg that the damage occurred.¹⁰⁸ The English High Court held that the Convention did not apply to the Paris-Dublin (road) leg.¹⁰⁹ In the view of the Court, articles 1 and 2 provide that the Convention applies only where (1) there is a contract for the carriage of goods by road and (2) at the point of the goods being taken over, they were loaded onto a road vehicle.¹¹⁰ An example of the type of MT carriage governed by the Convention, according to the English High Court, is when cargo is first loaded onto a road vehicle and then transported to a port. At the port, the road vehicle is rolled onto a roll-on/roll-off vessel. Upon arriving at the destination port, the road vehicle then rolls off that vessel and continues by road to the final destination, under a single road-carriage contract. In contrast, the goods in *Quantum* were initially carried by aircraft, rather than by road vehicle, from Singapore to Paris. This road vehicle was the one that was rolled on and rolled off the aircraft. Accordingly, the court held that the Convention did not apply.

However, the English Court of Appeal disagreed, and held that article 1 of the CMR Convention ‘was capable of being read as meaning that the application of the CMR Convention depended simply on the occurrence of international carriage of goods by road pursuant to a contract’.¹¹¹ On this reasoning, the Convention applies to a road segment included within an MTO provided that the road carriage is international. It is unnecessary to require the goods to remain on a road vehicle from departure to delivery. Accordingly, because the goods in *Quantum* were carried by road only from France to Dublin (namely, by international road carriage), the Court of Appeal held that the Convention did apply to that leg.¹¹²

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *Quantum Corp Inc v Plane Trucking Ltd* [2001] WL 272987 [21–26].

¹¹¹ EWCA Civ 350 para 20.

¹¹² *ibid.*

Before 2008, the courts of Germany and the Netherlands took a similar approach to that taken by the English Court of Appeal in interpreting articles 1 and 2 of the CMR Convention.¹¹³ In particular, the courts of Germany and the Netherlands held the Convention to operate—for the purposes of determining MTC liability—during any road segment included within an MTO. However, since 2008, the German and Dutch courts have held the language of articles 1 and 2 of the Convention to mean that the Convention applies to a contract of carriage of goods by road and only by road *door-to-door*.¹¹⁴ The courts of these two EU jurisdictions now refuse to apply the provisions of the Convention to any road leg included within an MTO. They refuse to do so on the grounds that, in their view, the CMR Protocol of Signature expressed an intention on the part of the drafters of the Convention to have MTOs involving road transport governed by some instrument other than the Convention.

The first requirement for certainty, namely, a unified understanding of rules governing MTC liability, is not satisfied *unless* the language of the rules is sufficiently clear and *unless* judges around the world apply the rules consistently. Resolving the issue of whether the language of the rules is clear enough to create a unified understanding of rules will depend on the resources available to the organisation drafting the instrument, including the skills of individuals involved in the drafting. However, it would be extremely difficult to ensure that judges around the world apply the rules consistently.¹¹⁵ Even if the language of rules is clear, judges may take different approaches in interpreting provisions as, for example, in *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* and *Hatia Shipping & Agencies PVT Ltd v*

¹¹³ *ibid.*

¹¹⁴ Nikaki (n 90) 83.

¹¹⁵ It may be argued that the Vienna Convention on the Law of Treaties helps promote consistency in the interpretation of international conventions by establishing general principles of treaty interpretation under articles 31–33. These principles are intended to guide national courts in interpreting international legal instruments, including unimodal-transport conventions. Nevertheless, the extent to which courts apply such conventions consistently may still depend on how individual judges understand and apply these interpretative principles in practice. Judicial approaches may differ across jurisdictions due to variations in legal traditions, methods of interpretation, and domestic judicial reasoning. Moreover, the Vienna Convention formally applies only to states parties to it, meaning that some non-party states, such as France, may not directly rely upon its interpretative framework. Accordingly, although the Vienna Convention may contribute to greater consistency in treaty interpretation, ensuring that courts around the world apply international conventions uniformly in practice would remain extremely difficult.

*Alcobex Metals Ltd.*¹¹⁶ Therefore, perfect uniformity in the application of the rules governing MT is impossible to achieve.

The second requirement for certainty may be satisfied through negotiation processes. In particular, stakeholders participating in the process of drafting the instrument may decide whether there is any risk that users could confuse it with other transport-related instruments, and how such risks should be managed. If there is support among the stakeholders, the second requirement for certainty is easily achieved, through a provision on ‘conflicts’. Thus, the form of the legal instrument governing MTOs (whether mandatory or not) will never guarantee either uniformity in the understanding of MTC liability rules or the absence of any confusion as to whether that instrument or one or more other transport-related instruments should apply.

In summary, a mandatory international instrument governing MTOs could help solve one of the main problems with the existing international law on MTOs: unpredictability in the determination of MTC liability. However, no legal instrument could, in itself, guarantee certainty. Certainty in the determination of MTC liability, for its part, depends on the clarity of wording, which can largely be addressed through careful drafting. Although a mandatory international instrument could never completely exclude the possibility of any such uncertainty, such an instrument would be the best solution for managing unpredictability. Therefore, this thesis proceeds on the basis that a mandatory international instrument governing MTC liability is the best possible solution for the MT industry.

5. The level of support sufficient for an international legal instrument on multimodal transport to come into force

As discussed in Section 4, there is no perfect solution to the problems of uncertainty, predictability, and unfairness in determining MTC liability, but a mandatory international

¹¹⁶ [1993] 113 ALR 677; [2004] EWHC 2323 (Comm). The Federal Court of Australia applied the Hague-Visby Rules for the purposes of determining MTC liability during the sea leg of an MT operation. Unlike the Federal Court of Australia, the English High Court refused to apply the Hague-Visby Rules to an MT operation. The English Court interpreted the Hague-Visby Rules as applying to sea carriage under a sea bill of lading.

instrument would help minimise these three problems. Such an instrument would govern MTC liability for the entirety of the period of carriage, from the time when MTCs receive the goods (from the consignors) until the time when MTCs deliver the goods to the consignees. With such an instrument, MTCs and cargo owners (whether consignors or consignees) would more or less know, at the time of contracting, which MTC liability regime is applicable and therefore which regime a court would in all likelihood apply in a dispute. In addition, because this instrument would be mandatory, each of its member states would have to have its national law determine MTC liability in compliance with the principles set out by the instrument. Therefore, if the instrument became near-universally binding, there would be much more consistency in how states determined MTC liability.

Since a mandatory international instrument could address one of the existing legal issues in MTOs (namely, unpredictability), it would represent a solution of the type that the industry would support. However, even if the instrument had the potential to reduce unpredictability in determining MTC liability, these benefits would be no guarantee of the instrument gaining sufficient support from states to actually come into force. Indeed, the ‘decision to ratify a treaty exposes states to various pressures’.¹¹⁷ The potential of an international legal instrument to resolve existing legal difficulties may not be sufficient in itself to persuade a state to ratify it.

Take, for example, the MT Convention. The MT Convention was drafted to produce uniformity in determining MTC liability. If the Convention were to receive the necessary number of ratifications (30) to come into force,¹¹⁸ further states would potentially follow suit, ratifying the Convention and therefore its rules determining MTC liability. Therefore, there would almost certainly be a worldwide reduction in uncertainty and unpredictability in determining MTC liability. Despite UN organisations having publicly emphasised the potential

¹¹⁷ Uta Oberdorster, ‘Why Ratify? Lessons from Treaty Ratification Campaigns’ (2008) 61(2) *Vanderbilt Law Review* 681, 684.

¹¹⁸ MT Convention, art 36.

benefits of the MT Convention to the transport industry, the Convention has so far received only 11 ratifications—far too few to come into force.¹¹⁹

The example of the Rotterdam Rules is similar. UNCITRAL has stressed that the Rotterdam Rules ‘provide a modern successor to earlier international conventions in the field, namely, the so-called Hague Rules 1924, the Hague-Visby Rule 1968 and the Hamburg Rules 1978’.¹²⁰ UNCITRAL has also published many documents highlighting key benefits of the Rotterdam Rules. In particular, they would help resolve current legal issues arising in relation not only to the carriage of goods by sea (more generally), but also to MTOs, including such carriage (more specifically).¹²¹ If the Rotterdam Rules came into force, they would provide a partial solution to the problems of uncertainty and unpredictability in determining MTC liability. However, to date, the Rotterdam Rules have received only five ratifications,¹²² 15 short of the 20 necessary for them to come into force.¹²³ To increase the chances of an international legal instrument on MTOs receiving sufficient ratifications to actually come into force, it would be of assistance to explore what would motivate states to ratify such an instrument.

First and foremost, a state is a political organisation whose decisions are made collectively by individuals (in the sense of natural persons) operating within the state.¹²⁴ States and individuals differ in that it is relatively easy to know what motivates individuals,¹²⁵ but relatively difficult to know what motivates states generally—and what would motivate states to sign an international legal instrument on MTOs. A state will make its opinions known

¹¹⁹ United Nations Treaty Collection, ‘Chapter XI Transport and Communications: E. Multimodal Transport’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en> accessed 15 February 2024.

¹²⁰ UNCITRAL, ‘Prosperity for All: The Rotterdam Rules’ <<https://unctad.org/topic/transport-and-trade-logistics/policy-and-legislation/international-maritime-transport-law/rotterdam-rules>> accessed 15 February 2024.

¹²¹ See UNCTAD, ‘Review of Maritime Transport 2009’ (2009) ch 6 <https://unctad.org/system/files/official-document/rmt2009ch6_en.pdf#page=2> accessed 12 December 2025; UNCTAD, ‘Review of Maritime Transport 2010’ (2010) ch 6 <https://unctad.org/system/files/official-document/rmt2010ch6_en.pdf#page=3> accessed 12 December 2025.

¹²² UNCITRAL, ‘Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the “Rotterdam Rules”)’ <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> accessed 18 February 2024.

¹²³ Rotterdam Rules, art 94.

¹²⁴ Howard H Lentner, ‘The Concept of the State: A Response to Stephen Krasner’ (1984) 16(3) Comparative Politics 368.

¹²⁵ When individuals comment on a matter, their comments mostly reflect their own opinions, because individuals use their own language to express their opinions.

through a number of official channels (such as diplomatic meetings and international forums) and unofficial ones (such as interviews with the press), explaining its reasons for ratifying or not ratifying any international legal instrument. When, for example, a state issues a press release or answers questions in an international survey or an interview, it will typically be through an individual representative of the state (such as a minister or another official with delegated authority to do so). The European Commission provides an example. In a 2009 report, the European Commission revealed that after it had prepared a consultation questionnaire relating to MT and released it for comment, most EU member states went on to request comment from the representatives of the national transport industry.¹²⁶

In addition, the necessity of protecting state interests means that when an official provides information in a press release or interview on behalf of a state, the official typically does so having received confidential advice from the state. As a result, it is impossible to know whether any such information reflects what those making decisions for the state actually considered in coming to any major decision, including any decision to ratify or not to ratify an international legal instrument—such as one on MTOs. Unless an actor is a participant in state discussions taking place behind closed doors, the only possibility is to infer the preferences of the state as to the decision. Such inferences may be based on either how the state *promises* to act or *actually* acts.

To identify the preferences that influence state decision-making (including as to whether the state should ratify an international legal instrument or not), it is possible to draw upon the different theories of state behaviour proposed by scholars in international relations—theories that are then considered by experts in the politics surrounding international legal instruments. These theories include, but are not limited to, the theories of realism, constructivism, and

¹²⁶ European Commission, 'Study on the Details and Added Value' (n 6).

liberalism.¹²⁷ This section focuses on the assumptions underlying these three theories to help determine what would motivate a state to ratify an international legal instrument on MTOs. Drawing on insights from these theories, the section explores whether the support of the transport industry will invariably be a decisive factor. In other words, it examines whether, if an international legal instrument on MTOs is to (1) gain sufficient support from a state, (2) be ratified by it, and (3) potentially come into force, the instrument must first be endorsed by the state's transport industry. The section further considers whether, if the transport industry finds that the instrument is attractive and would be beneficial, the industry is likely to lobby the government to ratify the instrument, thereby increasing the prospects of the state doing so.

5.1 Realism

Realists, such as Morgenthau, posit that power and self-interest are priority preferences—matters which a state tends to consider before it decides to enter into any international relationship.¹²⁸ There are three main functions a state should perform within its territory, namely (1) maintaining and protecting its subjects, (2) governing its subjects, and (3) enriching its subjects.¹²⁹ As a sovereign entity, the state will intend to show that it is independent in performing these functions.¹³⁰

To show such independence, the state needs power, including the power to decide internal and external matters independently and to protect itself from external interference.¹³¹ In this sense, power is essential. The state needs power to exercise its functions.¹³² Without power, the state cannot be independent in making decisions as to governance or in developing the

¹²⁷ Realism, liberalism, and constructivism each have their variants. This part of the chapter uses these three terms to refer to the varieties of the relevant schools of thought as a whole.

¹²⁸ Waldemar Gurian, 'Review of *Politics among Nations; International Politics*, by H. J. Morgenthau & F. L. Schuman' (1949) 11(2) *Review of Politics* 255.

¹²⁹ Karl W Deutsch, 'State Functions and the Future of the State' (1986) 7(2) *International Political Science Review* 209, 211.

¹³⁰ Raghuvir Singh and Raghuvir Singh, 'The Concept of Sovereignty' (1964) 25 *Indian Journal of Political Science* 1–4.

¹³¹ Lewis W Snider, 'Identifying the Elements of State Power: Where Do We Begin?' (1987) 20 *Comparative Political Study* 314, 344.

¹³² George H Sabine, 'The Concept of the State as Power' (1920) 29(4) *Philosophical Review* 302.

society that exists within its territory.¹³³ So important is power that it is the primary matter with which the state will be concerned before making any decision.¹³⁴

A state should also promote the flourishing of the society existing within its territory—in particular from an economic perspective. On the assumption that the state is a ‘rational actor’,¹³⁵ the state will act rationally, establishing a strategy and tactics to ensure that it achieves its socio-economic goals. Therefore, it is expected that before entering into an international relationship, the state will assess (1) whether the relationship would threaten its sovereignty and (2) what benefits the relationship would bring to it and its citizens. These benefits potentially include national security and, in international relations, the power of the state is also reflected in its capacity to protect its interests in the area.¹³⁶ In particular, the state will always intend to show how independent it is and that it can protect its national-security interests in any international relationship.¹³⁷

According to realism, one of the goals which the state wishes to achieve when entering into any international relationship is to ‘maintain and increase its power and reduce other nations’ power’.¹³⁸ Therefore, if an international relationship is unlikely to help the state increase its power, the state will at least expect the relationship to help balance power between it and the other state. The states are unlikely to enter into any international relationship if they are concerned that doing so will negatively impact their independence in making decisions. For example, the United States refused to ratify the Rome Statute of the International Criminal Court because its government believed that ratification would infringe upon US sovereignty.¹³⁹

¹³³ Singh and Singh (n 130) 1–4.

¹³⁴ Mark Kauppi and Paul Viotti, *International Relation Theory* (7th edn, Rowman and Littlefield 2023) 200.

¹³⁵ *ibid.*

¹³⁶ Snider (n 131) 319.

¹³⁷ Danny Singh, *The Tripartite Realist War: Analysing Russia’s Invasion of Ukraine* (Palgrave Macmillan 2023) 7–24.

¹³⁸ Mazen Faris Rasheed, ‘The Concept of Power in International Relations’ (1995) 48(1) *Pakistan Horizon* 95.

¹³⁹ John F Murphy, ‘The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court’ (2000) 34(1) *International Lawyer* 45.

Importantly, the Rome Statute would have granted the International Criminal Court jurisdiction to try US citizens having committed a crime within US territory.¹⁴⁰

If, on the other hand, entering into an international relationship would pose no particular threat to state sovereignty, the state will—before entering into the relationship—assess what benefits it could receive from doing so. As mentioned above, the state is presumed to act rationally.¹⁴¹ Therefore, it will generally attempt to make the optimal decision, taking account of the evidence as to the consequences of entering into the relationship—positive and negative.¹⁴² The state will tend to enter into an international relationship when it sees the relationship as one that could help it (1) achieve specific goals or (2) or otherwise offer it benefits of any kind. For example, Vietnam has become party to human rights conventions as a method of demonstrating Vietnamese sovereignty.¹⁴³ Also, there is the case of the New Zealand deciding to join the World Trade Organization (WTO) Government Procurement Agreement (GPA) in 2012. After engaging in a cost-benefit analysis as to the possibility of joining the GPA, the New Zealand Government concluded that joining the GPA would be beneficial to New Zealand society.¹⁴⁴ In particular, the government believed that doing so would create ‘new opportunities for Aotearoa/New Zealand businesses to export more products and services to more destinations’.¹⁴⁵

Based on the tenets of realism, an international legal instrument would be well placed to gain support from its potential member states if the instrument fulfilled two requirements. The first requirement would be that the instrument contained no rules which undermined the power

¹⁴⁰ Diane Marie Amann and MNS Sellers, ‘The United States of America and the International Criminal Court’ (2002) 50 *American Journal of Comparative Law* 381.

¹⁴¹ Kauppi and Viotti (n 134) 200.

¹⁴² Robert O Keohane, ‘Rational Choice Theory and International Law: Insights and Limitations’ (2002) 31(supp 1) *Journal of Legal Studies* 307, 307–10.

¹⁴³ Huan Tuong Vo, ‘The Role of External Dynamics on Vietnam’s Ratification of the Convention against Torture’ (2023) 24 *Asia-Pacific Journal on Human Rights and the Law* 22–42.

¹⁴⁴ Beehive.govt.nz (the official website of the New Zealand Government), ‘NZ to Join WTO’s Govt Procurement Agreement’ (16 August 2012) <<https://www.beehive.govt.nz/release/nz-join-wto%E2%80%99s-govt-procurement-agreement>> accessed 18 February 2024.

¹⁴⁵ *ibid.*

of states. The second requirement would be the prospect of ratification offering benefits to the transport industry within the states.

Of course, an international legal instrument on MT would be an instrument of private international law, namely, of the area of law which deals with relationships across borders between citizens of different jurisdictions, not between jurisdictions themselves.¹⁴⁶ One of the main purposes of private international law is to create a uniform legal framework so that courts in different jurisdictions may easily resolve disputes across borders between citizens of different states.¹⁴⁷ Private international law does not deal with state obligations as a matter of *public* international law.¹⁴⁸ Therefore, instruments of private international law rarely infringe upon the state sovereignty or undermine state power. Indeed, instead of undermining state power, private international law uses uniform sets of rules to create certainty and predictability in resolving disputes as they arise across borders between citizens of different jurisdictions. Hence, private international law is seen as ‘an important tool of international economic development and progress’.¹⁴⁹ As an instrument of private international law, an international legal instrument on MT would have little scope to threaten the sovereignty of any state because, by definition, the instrument would not be dealing with the obligations of any state as a matter of public international law.

Furthermore, according to realism, a state would be likely to ratify an international legal instrument on MT for reasons of a positive nature. Such an instrument could contribute to the development of MT within the state by creating a set of uniform rules governing MTC liability and, therefore, help reduce uncertainty and unpredictability in determining MTC liability. Recall, however, that the MT Convention and Rotterdam Rules (both being international legal

¹⁴⁶ A Claire Cutler, ‘Artifice, Ideology and Paradox: The Public/Private Distinction in International Law’ (1997) 4(2) *Review of International Political Economy* 261–85.

¹⁴⁷ Jacek Gołaczyński, *Private International Law in Poland* (Wydawnictwo CH Beck 2019) 1–2.

¹⁴⁸ HG Maier, ‘Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law’ (1982) 76(2) *American Journal of International Law* 280–320.

¹⁴⁹ David P Stewart, ‘New Directions in Private International Law’ (2009) 27 *Agenda Internacional* 255, 256.

instruments on MT) failed to come into force because they never received a sufficient number of ratifications. Consequently, simply relying on the assumptions of realism would make it impossible to answer the question of what factors would affect the decision by a state to ratify or not to ratify an international legal instrument on MT.

5.2 Constructivism

Realists rely on the material identity of the state (such as geographical position, economic strength, or military power) and the interests of the state (such as a desire for power and egotism) to explain state behaviour in international relations. Constructivists, however, explain such behaviour from a different angle. In particular, they assume that the so-called ideational identity and the interests of the state usually influence how the state conducts itself in international relations.¹⁵⁰ From the perspective of constructivists, the state's ideational identity will shape the state's interests, while the state's interests will shape its conduct.¹⁵¹

The state's ideational identity reflects 'who' the state is and how the state differs from other states.¹⁵² To express who it is and how it differs from other states, the state will establish its core values, beliefs, ideas, and principles, with these informing how it conducts itself.¹⁵³ These core values and so forth are the constantly changing result of social factors such as culture, history, and interaction with other states.¹⁵⁴

For example, Vietnam in 1986 had known more than 1,000 years of war and therefore understood only too well the loss and pain war can cause.¹⁵⁵ For this reason, the country did its best to avoid any high-risk incidents—namely, any incidents having the potential to lead to armed conflict with other countries. The history of the country and the culture developed by it,

¹⁵⁰ Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Routledge 2012) 35–52.

¹⁵¹ Alexander Wendt, 'Collective Identity Formation and the International State' (1994) 88(2) *American Political Science Review* 384, 386.

¹⁵² James D Fearon, 'What Is Identity (as We Now Use the Word)?' (3 November 1999) <<https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>> accessed 10 March 2024.

¹⁵³ Kuniko Ashizawa, 'When Identity Matters: State Identity, Regional Institution-building, and Japanese Foreign Policy' (2008) 10(3) *International Studies Review* 571, 574.

¹⁵⁴ Maxym Alexandrov, 'The Concept of State Identity in International Relations: A Theoretical Analysis' (2003) *Journal of International Development and Cooperation* 34–35.

¹⁵⁵ Consulate of the Socialist Republic of Vietnam in New York, 'Brief History of Vietnam' <<https://www.vietnamconsulate-ny.org/about/2/brief-history-of-vietnam.html>> accessed 10 March 2024.

against the backdrop of war, resulted in it adopting one of the most important of its core values at the time: national security.¹⁵⁶ However, in 1986, the Đổi Mới economic reforms were initiated by the Communist Party of Vietnam, and since then the country has focused much more on economic development than on national security.¹⁵⁷ As a result, Vietnam has aimed to present itself as a friendly and reliable partner in international relations.¹⁵⁸

Another example of how social factors (such as history and culture) initially formed and change over time is the ideational identity of New Zealand. The consensus among historians is that New Zealand's self-perception as a distinct nation, separate from the United Kingdom, did not crystallise until well into the 1960s.¹⁵⁹ This perception persisted despite New Zealand officially adopting the Statute of Westminster in 1947, which formally marked the legal achievement of full sovereignty and removed the UK Parliament's power to legislate for the country.¹⁶⁰ In addition, New Zealand is today characterised by a high degree of cultural diversity. For this reason, New Zealand identifies as a multicultural state, with close links to its neighbours in the Asia-Pacific region.¹⁶¹

Besides believing that state identity is affected by history and culture within the borders of the state, constructivists also hold that state identity is shaped by the state belonging to similar 'groups' and its interactions with these states.¹⁶² For constructivists, states located within the same region or associating with similar states tend to have similar worldviews and values. For example, most EU member states 'identify themselves with the so-called Western values, consisting of parliamentarism and democracy as well as the rule of law'.¹⁶³ There is also the

¹⁵⁶ Nam Duong Nguyen, 'Vietnamese Foreign Policy since Doi Moi: The Dialectic of Power and Identity' (PhD thesis, University of New South Wales 2010) 227–231.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ Te Ara – the Encyclopedia of New Zealand, 'Story: New Zealand Identity' (17 April 2012) <<https://teara.govt.nz/en/new-zealand-identity/page-1>> accessed 10 March 2024.

¹⁶⁰ New Zealand Parliament, 'New Zealand Sovereignty: 1857, 1907, 1947, or 1987?' (28 August 2007) <<https://www.parliament.nz/en/pb/research-papers/document/00PLLawRP07041/new-zealand-sovereignty-1857-1907-1947-or-1987>> accessed 30 April 2024.

¹⁶¹ Te Ara – the Encyclopedia of New Zealand (n 159).

¹⁶² Vaughn P Shannon and Paul A Kowert, *Psychology and Constructivism in International Relations: An Ideational Alliance* (University of Michigan Press 2012) 57–75.

¹⁶³ Katarina Koivumaa, 'Europe: Several Identities, or One Single Identity?' (1998) 10 *Perspectives* 21, 28.

example of the Association of Southeast Asian Nations (ASEAN) and its member states. Because most of these states had for so long been at war and been colonies of Western countries such as France and the United Kingdom, they now wish to focus on co-existence, economic development, and (in particular) the avoidance of armed conflict with other states.¹⁶⁴

Constructivists believe that the state's ideational identity plays a vital role in shaping its perspectives on international matters.¹⁶⁵ Therefore, by understanding state identity, constructivists attempt to predict what matters the state may consider before it decides how to react to international developments. As mentioned above, the state is presumed to be a rational actor. Therefore, before it acts, it will take account of the consequences of its actions. In keeping with this line of reasoning, constructivists do not tend to look at the more material consequences of states' actions, such as the economic benefits or degree of power that the state may stand to achieve in its conduct. Rather, constructivists argue that the state will act when it believes that it will be able to achieve goals—as evidenced in their policy or other official documents—which reflect its identity.¹⁶⁶ For example, Hathaway argues that a state will tend to ratify a greater-than-usual number of human rights conventions if the state identifies as a democratic one and actually is one, committing few to almost no violations of human rights.¹⁶⁷ New Zealand is such a state. Despite its small size, it wishes to be involved in 'global leadership and make a positive difference on global human rights issues'.¹⁶⁸ As a result, New Zealand has ratified seven of the nine the core UN human rights conventions—more than most other states.¹⁶⁹

¹⁶⁴ Amitav Acharya, 'The Evolution and Limitations of ASEAN Identity' <https://www.eria.org/ASEAN_at_50_4A.2_Acharya_final.pdf> accessed 10 March 2024.

¹⁶⁵ Adel Altorai, 'Understanding the Role of State Identity in Foreign Policy Decision-Making: The Rise and Demise of Saudi-Iranian Rapprochement (1997–2009)' (PhD thesis, London School of Economics and Political Science 2012) 46–56.

¹⁶⁶ Ji Young Choi, 'Rationality, Norms and Identity in International Relations' 52(1) *International Politics* 120.

¹⁶⁷ Oona A Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51(4) *Journal of Conflict Resolution* 588–621.

¹⁶⁸ New Zealand Foreign Affairs and Trade, 'Human Rights' <<https://www.mfat.govt.nz/en/peace-rights-and-security/human-rights>> accessed 20 March 2024.

¹⁶⁹ *ibid.*

As described above, constructivists see state identity and interests in international relations as dynamic—changing over time based on how the state interacts with other states in matters of social policy. Therefore, a state may have different interests from others in relation to the types of international conventions that it is likely to join, depending on its policies as existing at the time. For example, before 1986, Vietnam tended to ratify treaties protecting its sovereignty, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. At that time, Vietnam was party to almost no trade treaties. Since 1986, however, Vietnam has—as discussed above—focused much more on economic development. Therefore, over the last half 40 years, Vietnam has ratified more international instruments on trade and civil relations than it ever had before: 16 free trade agreements, 12 WTO agreements, and more than 83 trade agreements with other states.¹⁷⁰

Furthermore, for constructivists, because state identity and interests may be influenced by the shared identity and interests of groups, organisations, and alliances of which the state is a member, the state's behaviour may be influenced by other states in the same group, organisation, or alliance. In particular, the greater the number of member states ratifying an international legal instrument, the more likely the majority of the other member states will ratify it too. For example, within the first year of the Rome Statute of the International Criminal Court being adopted, only three of the 56 independent members of the Commonwealth had ratified it,¹⁷¹ and it was only after the most powerful states in the Commonwealth, including Canada, New Zealand, and the United Kingdom, had done so—in 2000 and 2001, two years after the Rome Statute was adopted—that other states in the Commonwealth started to do so.¹⁷² To date, 38 of the 56 independent members of the Commonwealth have ratified it.¹⁷³ Starkly

¹⁷⁰ Center for WTO and International Trade Vietnam Chamber of Commerce and Industry, 'FTA' <<https://wtocenter.vn/fta>> accessed 21 March 2024.

¹⁷¹ International Criminal Court, 'The States Parties to the Rome Statute' <<https://asp.icc-cpi.int/states-parties>> accessed 21 March 2024.

¹⁷² *ibid.*

¹⁷³ *ibid.*

contrasting with the case of the Rome Statute is that of the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. Within the first five years (from 1931 to 1936) of the Convention being adopted, only five of the 56 independent members of the Commonwealth had ratified it.¹⁷⁴ To date, fewer than 10 of the 56 independent members of the Commonwealth have done so.

The theory that a state's behaviour may be influenced by other states in the same groups, organisations, or alliances helps explain why the state will play 'the waiting game' before deciding whether to ratify an international instrument or not. In particular, some states, especially the less powerful ones, will 'wait and see' what the more powerful states in the same group, organisation, or alliance decide to do and make their decision only then.¹⁷⁵ For example, Denmark and Norway—which, despite the high standard of living that their citizens enjoy,¹⁷⁶ are not particularly influential on the world stage. Both countries 'have taken the decision to ratify the Rotterdam Rules, and have completed the necessary legislation to implement the new convention in their domestic legal systems, but have postponed final action until other countries ratify'.¹⁷⁷

Based on constructivism, then, it becomes apparent that the state would ratify an international legal instrument on MT in two specific cases. The first would be where the state has an identity associated with and an interest in sustainable development. As mentioned above, various UN organisations have encouraged states to develop MT it because would go some way towards reducing CO₂ emissions. Therefore, if a given state values sustainable development, the state will likely ratify an international legal instrument on MT because doing

¹⁷⁴ United Nations Treaty Collection, 'Chapter VI Narcotic Drugs and Psychotropic Substances: 8a. Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-8-a&chapter=6&clang=_en> accessed 21 March 2024.

¹⁷⁵ Johanna Hoekstra, 'Political Barriers in the Ratification of International Commercial Law Conventions' (2021) *Uniform Law Review* 59–60.

¹⁷⁶ OECD, 'OECD Well-being Data Monitor' <<https://www.oecd.org/en/data/tools/well-being-data-monitor/better-life-index.html>> accessed 27 November 2025.

¹⁷⁷ Michael F Sturley, 'Bringing Carriage of Goods into the Twenty-First Century' (2018) *Centre for Maritime Law Working Paper Series* 18/01 <https://law.nus.edu.sg/wp-content/uploads/2020/04/007_2018_Michael-Sturley.pdf> accessed 13 December 2025.

so will help develop MT within its own territory. In other words, ratifying such an instrument would help the state achieve its goals in relation to sustainable development.

The second case would be when a great number of key partner states—or simply powerful states—in the same group, organisation, or alliance ratify the international legal instrument on MT. Given its interactions with these other states, the state would be likely to ratify the instrument, too.

The key assumptions of constructivism may, therefore, help predict what factors would affect a state's decision to ratify an international legal instrument on MT. However, these assumptions may potentially fail to explain why states that should have ratified the MT Convention or Rotterdam Rules (at least on constructivist reasoning) in fact never ratified either. Indeed, the EU has declared (on behalf of its member states) that sustainable development is a core aspect of the EU's identity and one that will guide the entity's future.¹⁷⁸ Therefore, it would be reasonable to presume that EU member states share this view, basing their identity in (and seeing their interests as inextricable from) their goals in relation to sustainable development. For constructivists, EU member states would be highly likely to ratify the MT Convention or the Rotterdam Rules, as these instruments would likely help the states achieve their goals in relation to sustainable development. However, almost none of the EU members have ratified the MT Convention and Rotterdam Rules—only Spain has.¹⁷⁹

5.3 Liberalism

As will now be apparent, both realism and constructivism explain a state's behaviour as being 'top-down'. Liberalism, on the other hand, is a theory that explains the state's behaviour

¹⁷⁸ European Union Office in Kosovo, 'Sustainable Development Is a Part of Our Identity and It Will Guide Our Future' <https://www.eeas.europa.eu/delegations/kosovo/sustainable-development-part-our-identity-and-it-will-guide-our-future_en?s=321> accessed 30 March 2024.

¹⁷⁹ United Nations Treaty Collection, 'Chapter XI Transport and Communications: E' (n 119); and United Nations Treaty Collection, 'Chapter XI Transport and Communications: D. Water Transport' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&clang=_en> accessed 30 March 2024.

as being ‘bottom-up’.¹⁸⁰ Realists and constructivists believe that the state is a unitary actor in law- and policy-making and in any participation in international relations.¹⁸¹ The state will make its decisions on a given matter based on its preferences, but not on its citizens’. The state’s preferences derive from its interests, such as a desire for power (as observed by realists) or an ideational identity (as observed by constructivists). For realism and constructivism, the state is the one that decides which issues it wishes to resolve and what it wishes to achieve. The state will make law or policy—or enter into an international relationship—when it believes that making the law or policy or entering into the international relationship could help it resolve issues or, more positively, achieve its goals.

As a corollary, the realist or constructivist perspective is this: before making any decision, the state will rarely consider what its citizens wish or expect from it. While it is state power and security (for realists) or state ideational identity (for constructivists) that will act as the main factors influencing the state’s conduct, liberalists argue that the state behaviour is influenced more by the necessity of cooperation and, therefore, by lobbies, in the form of groups and even of individuals operating within the state’s territory.¹⁸²

According to liberalism, society is ‘comprised of individual human agents with autonomous interests and identities, who seek to form private groups, organisations and arrangements to advance their social and political goals’.¹⁸³ When individuals interact with one other, they may face issues and conflict due to differences in their respective interests and identities. Such issues and conflict arise not only between individuals residing within the same state but also between individuals residing in different countries from each another, especially in times of rapid development of international trade.

¹⁸⁰ Qudus Z Snyder, ‘Taking the System Seriously: Another Liberal Theory of International Politics’ (2013) 15(4) *International Studies Review* 539–61.

¹⁸¹ Kauppi and Viotti (n 134) 199.

¹⁸² Anne Marie Slaughter and Jose E Alvarez, ‘A Liberal Theory of International Law’ (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 240–53.

¹⁸³ Andrew Moravcsik, ‘Liberalism and International Relations Theory’ (1992) Harvard University Center for International Affairs Working Paper No 92-6 <https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf> accessed 7 April 2024.

For example, suppose that two individuals residing in different states conclude a contract for the sale of goods. If either of the individuals fails to comply with any of their promises as recorded in the contract, a dispute will arise with the other. To protect their interests and identities and to help themselves in achieving their goals, individuals who have contemplated the risk of any such disputes will create groups, organisations, and alliances, especially at the level of the state. From the perspective of liberalists, the state is simply a representative of its citizens, and its citizens are the key actors in national and international society.¹⁸⁴ In other words, the actors that face issues and need solutions to them are first and foremost individuals and private groups in society. Therefore, instead of seeing the state as an actor that uses its power to force individuals and private groups in society to do as it wishes, liberalists see the state as acting for the benefit of its citizens.¹⁸⁵ Accordingly, the state will make law or policy or enter into an international relationship to resolve issues arising *in society for society*.¹⁸⁶

For instance, the state will make rules commonly known as the rules of contract law to help its citizens deal with conflicts that arise between them and other individuals they have entered into a contract for, say, the sale of goods. These rules will guide the citizens as to (1) what they should do to perform their contractual obligations in the eyes of the law and (2) what consequences they may face if they fail to do so. It is theoretically for this reason that the state will ratify an international legal instrument such as the UN Convention on Contracts for the International Sale of Goods (CISG)—for the purposes of ensuring that disputes between citizens of the state, on the one hand, and the citizens of other CISG member states, on the other, are resolved consistently. Therefore, liberalists argue, it is possible to look to the interests of citizens and the private groups formed by citizens to determine the state's preferences in

¹⁸⁴ Michael W Doyle, 'Liberalism and World Politics' (1986) 80(4) American Political Science Review 1151.

¹⁸⁵ Edwin Van De Haar, 'Classical Liberalism and International Relations: Classical Liberal Ideas Apply between States as Well as Within States, Explains Edwin Van De Haar' <<https://economicthinking.org/wp-content/uploads/2018/10/VanderHaarCL-IR.pdf>> accessed 7 April 2024.

¹⁸⁶ Slaughter and Alvarez (n 182).

making law or policy or entering into any international relationship.¹⁸⁷ In other words, the state will do so as a method of reflecting and taking account of the needs expressed by these citizens and private groups. It is in this way, for example, that liberalists would explain the United States ratifying the Warsaw Convention: it did so because US airline operators ‘strongly favour adherence to the Convention by the United States’.¹⁸⁸

At the same time, while the state may theoretically allow citizens and private groups in society ‘to exert different pressures on national governments’¹⁸⁹ (as a method of giving effect to the interests of citizens and private groups), it is a democratic state that is most likely to do so—and much more so than a non-democratic state. In theory, democracy allows citizens to ‘have ultimate control over what issues are decided through the decision-making process’.¹⁹⁰ A democratic state such as the United States will treat its citizens and private groups as key stakeholders who have ‘their say in policy making’.¹⁹¹ Citizens and private groups in any such state will have a greater opportunity to express their expectations, and the state will theoretically be receptive to these expectations to some extent. A non-democratic state (such as many of the states in the Middle East), on the other hand, ‘will not hesitate to quell political opposition by whatever means necessary’.¹⁹² Such a state will tend to repress its citizens in order to implement law and policy, giving much less consideration to what its citizens expect from the law and policy it makes. Therefore, it will be more difficult to predict the behaviour of a non-democratic state, by the reasoning of the liberalist.

Based on this reasoning, it is possible to assume that a democratic state such as the United States would ratify an international legal instrument on MT if citizens or private groups in

¹⁸⁷ Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) 51(4) *International Organization* 513, 517–21.

¹⁸⁸ Andreas F Lowenfeld and Allan I Mendelsohn, ‘The United States and the Warsaw Convention’ (1967) 80 *Harvard Law Review* 497, 502.

¹⁸⁹ Anne-Marie Slaughter, ‘Liberal International Relations Theory and International Economic Law’ (1995) 10 *American University Journal of International Law and Policy* 717, 728.

¹⁹⁰ GL Munck, ‘What Is Democracy? A Reconceptualization of the Quality of Democracy’ (2016) 23(1) *Democratization* 1, 12.

¹⁹¹ Udaya Wagle, ‘The Policy Science of Democracy: The Issues of Methodology and Citizen Participation’ (2000) 33(2) *Policy Sciences* 207, 211.

¹⁹² Mehran Kamrava, ‘Non-democratic States and Political Liberalisation in the Middle East: A Structural Analysis’ (1998) 19(1) *Third World Quarterly* 63, 66.

society expressed a need for the state to do so, for the purposes of helping resolve issues arising in relation to MTOs. Therefore, to have the democratic state ratify such an instrument, it will be necessary to make the content of the instrument attractive to the transport industry within the state. If it is not, the state will be unlikely to ratify it. The risk here is one that is demonstrated by the case of the MT Convention. The Convention is one that many democratic states, such as the United States, have not ratified. One of the main reasons for this is that the Convention ‘has not generated much support within the transport industry’.¹⁹³

However, transport-industry support is not a panacea. Indeed, there have been cases of democratic states not ratifying an international legal instrument on MT *despite* strong transport industry support. For example, the European Community Shipowners Association (ECSA), known as ‘the voice of the European shipping industry’,¹⁹⁴ strongly supported the ratification of the Rotterdam Rules.¹⁹⁵ However, to date, almost none of the EU member states have ratified them.¹⁹⁶ On a liberalist account, the reason would be that these member states perceive no strategic need to do so.¹⁹⁷

5.4 Influences on a state’s decision to ratify or not to ratify an international legal instrument on multimodal transport

Taking account of the three key theories of international relations—realism, constructivism, and liberalism—and applying them to the international instrument on MT is helpful for predicting what factors could influence a state’s decision to ratify an international legal instrument on MT. Realism posits that power, national security, and self-interest will be the main factors. According to realism, in other words, it is power and security that are priorities for the state. Constructivism, on the other hand, argues that the state’s ideational identity and

¹⁹³ UNCTAD, ‘Multimodal Transport’ (n 6) para 114.

¹⁹⁴ European Community Shipowners’ Associations, ‘About Us’ <<https://www.ecsa.eu/about-us/organisations>> accessed 12 April 2024.

¹⁹⁵ Regina Asariotis, ‘The Rotterdam Rules: A Brief Overview of Some of Their Key Features’ (2009) 1 *European Journal of Commercial Contract Law* 111–25.

¹⁹⁶ United Nations Treaty Collections, ‘Chapter XI Transport and Communications: D’ (n 179).

¹⁹⁷ Ann Marie Bugeja, ‘An Act to Implement the 2009 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules)’ (MA thesis, IMO International Maritime Law Institution 2009) 23.

interests are the main factors. Unlike both realism and constructivism, liberalism considers that the state's behaviour depends on factors originating from the society existing within its borders. Under liberalism, it is the interests of citizens and the private groups that they form in society that will determine whether a state ratifies an international legal instrument on MT.

However, the behaviour of the state is obviously never determined by any single factor in isolation from however many others there may be. In 1965, for example, the United States submitted notice to denounce the Warsaw Convention, 31 years after ratifying it as a member state of the Convention.¹⁹⁸ The United States stated that its reason for denouncing the Convention related to the limitations on carrier liability it provided: that these limits were unfavourable to passengers in the case of death or bodily injury.¹⁹⁹ Therefore, US participation in the Warsaw Convention did not depend solely on the transport industry supporting it.²⁰⁰

As a rational actor, the United States would have made its decision taking account not only of the interests of its airline industry, but also many other factors—such as security, national identity, and strategy. Therefore, it would be imprudent and, indeed, impossible to rely on any single theory of international regulations to predict whether the United States (or any other state) would ratify any other international legal instrument on MT. None of the three theories is able in itself to provide a comprehensive explanation as to why any of the near-200 states around the world would (or would not) ratify such an instrument. It would take a combination of the three theories to provide such an explanation.

Oberdorster²⁰¹ legitimately rejects all three theories to some extent, finding that the success of any such instrument (measured in the number of ratifications that it receives) is determined not by any single factor, but by a combination of three.²⁰² The first factor is support from

¹⁹⁸ Lee S Kreindler, 'The Denunciation of the Warsaw Convention' (1965) 31 *Journal of Air Law and Commerce* 291–303.

¹⁹⁹ Lowenfeld and Mendelsohn (n 186).

²⁰⁰ Although the United States submitted a notice of denunciation of the Warsaw Convention in 1965, it withdrew the notice before the denunciation took effect. Consequently, the United States remains a party to the Warsaw Convention today. See 'US Withdrawal of Notice of Denunciation of Warsaw Convention (Liability for Air Transport Injury)' (1966) 5(4) *International Legal Materials* 767.

²⁰¹ Oberdorster (n 117).

²⁰² *ibid* 681, 712.

society at large, including international organisations and industries that have a stake in the outcome of the campaign. The second is state identity: if ratifying the instrument is what state identity would require, then ratifying it is what the state will do. The third is the benefit that ratifying the instrument would offer the state.

However, for the state to actually consider ratifying an international legal instrument, it is just as necessary that the instrument be on the state's agenda for consideration.²⁰³ For such an instrument on MT to capture the state's attention, it would of course be important to ensure support, as discussed above, from the transport industry. If the industry finds any such instrument attractive, it will likely request the decision-makers in the relevant state to ratify it. If the state indeed ratifies the instrument, either the groups, organisations, or alliances to which the state belongs itself or its closest partners may ratify the instrument, too. Therefore, to create sufficient momentum for such an instrument to come into force, the instrument will first need to gain support from the transport industry, as explored further below.²⁰⁴

6. Conclusion to the chapter

MTOs—which include intermodal and combined transport as well as co-modal and synchro-modal operations—are transport services where goods are carried by more than one mode of transport from one place to another under a single contract. MTOs offer an effective and timely solution for moving goods across borders, meaning that the development of MTOs would contribute significantly to the development of international trade. However, for now, the use of MTOs is limited, especially in developing countries. One of the key obstacles to the development of MTOs is the absence of any international legal instrument governing MTC liability. Given the lack of such an instrument, the transport industry risks facing high costs in engaging in MTOs—particularly in the form of costs relating to litigation and insurance. The

²⁰³ Hoekstra (n 175) 49–54.

²⁰⁴ See Chapter 2.

reasons for the industry facing these costs include uncertainty and unpredictability (of which legal regime is applicable). Consequently, carriers tend to be hesitant to provide MT services. To further the development of MTOs, it would be beneficial if there were an international legal instrument fostering certainty and predictability in the determination of MTC liability across jurisdictions. One of the possible solutions to the problem of unpredictability is a mandatory international instrument on MT that would best serve these ends. Certainty, on the other hand, ultimately depends on the quality of drafting, the willingness of judges, and the effort of stakeholders present at the pre-adoption negotiation tables. Therefore, there is no guarantee that a mandatory international legal instrument on MT—or even a soft-law one—would solve the problems of uncertainty in determining MTC liability.

Even so, a mandatory international legal instrument would have the potential to make the law as applicable to MTOs much more predictable than it is at present. However, such an instrument could only be successful (and therefore come into force) if it gained sufficient support from states around the world. The three main theories of international relations—realism, constructivism, and liberalism—highlight the different factors that would influence states in deciding whether or not to support an international legal instrument on MT. These factors include (1) support from society at large, (2) state identity, and (3) the benefits that ratifying the instrument would offer the state. As a key component of society, the transport industry would also play a decisive role in any state decision to ratify the instrument. The instrument would have to address the needs of the industry as they arise in practice. Indeed, if the instrument succeeded in addressing these needs, the industry would likely lobby government at the state level for the ratification of the instrument. Chapter 2 examines in more detail what the transport industry would need from such an instrument.

CHAPTER 2

ATTEMPTS AT CREATING RULES GOVERNING THE LIABILITY OF MULTIMODAL-TRANSPORT CARRIERS

Chapter 1 discussed the development of MTOs, the main legal issues arising in relation to them, and the need for a mandatory international legal instrument on MTC liability, as well as the factors that would influence states deciding whether to ratify or not to ratify such an instrument. As discussed, the term ‘multimodal transport’ (MT) has a broad meaning and is used throughout this thesis. Promoting the development of such operations is a vital endeavour because better-developed MTOs would support growth in the international merchandise trade and contribute to the achievement of the UN SDGs. Unfortunately, the absence of an international legal instrument on MT creates uncertainty, unpredictability, and unfairness in determining MTC liability, which in turn increases the total cost of MTOs. Therefore, there is a need for a mandatory international legal instrument on the matter. Because an instrument of this type would provide a single set of rules specific to MT across jurisdictions, the instrument would serve to increase predictability in determining MTC liability. However, for the instrument to come into force, it would need to gain sufficient support from states around the world. Since the transport industry would play a crucial role in influencing states in any decision to ratify or not to ratify the instrument, Chapter 1 concluded that the instrument would need to be attractive to this industry in order to come into force. In particular, the instrument would need to satisfy the practical needs of the transport industry, whatever they may be.

Building on the conclusion of Chapter 1, this chapter explores what it is that the transport industry would in practice need from an international legal instrument governing MTC liability. The chapter first provides a brief overview of which international organisations, regional organisations, states, and transport industry bodies have attempted to create such an instrument

in the past. This chapter then undertakes a detailed analysis of the liability rules (namely, the rules relating to the basis of liability, the limitation of liability, and time bars on bringing proceedings against MTCs) appearing in draft UN conventions, widely used soft-law instruments, regional legal instruments, and national law. This chapter, in particular, compares the rules relating to MTC liability in legal instruments that are either worded in English or available in English translation and that have been critiqued in English. The instruments analysed are shown below.

Level	Instruments
International level	1. The MT Conventions 2. The Rotterdam Rules 3. The UNCTAD/ICC Rules 1992
Regional level	1. Andean Community Decision 331 on Multimodal Transport 2. The ALADI Partial Scope Agreement for the Facilitation of Multimodal Transport of Goods 3. The ASEAN Framework Agreement on Multimodal Transport 4. The MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport of Goods 5. The Agreement on the Development of Multimodal Transport TRACECA
National level	All national instruments that are available in English ²⁰⁵
Widely used model contractual terms	1. The FIATA MT documents 2. BIMCO Multidoc 2016

This chapter also considers stakeholder commentary on the rules making up the respective regimes. Having done so, this chapter examines what the transport industry would need from

²⁰⁵ See Table 6.

an international legal instrument governing MTC liability, particularly whether such an instrument would need to promote certainty, predictability, and fairness.

1. Historical attempts to create international legal instruments on MTC liability

This section provides an overview of the various historical attempts to establish a legal instrument to govern MTC liability at all levels—not only international, but also regional and national—and the related initiatives undertaken by the transport industry. The section highlights the fact that although multiple attempts have been made to create such an instrument, none of the attempts at the international level has succeeded in the sense of actually resulting in the entry into force of the relevant instrument. At the regional and national levels, on the other hand, there has been progress, albeit limited. Only four regional organisations—the Latin American Integration Association (ALADI), Association of Southeast Asian Nations (ASEAN), Southern Common Market (MERCOSUR), and the Andean Community—have adopted their own legal instrument governing MTC liability. Finally, at the national level, only 20 states worldwide have enacted their own such instrument.

At the international level, the International Institute for the Unification of Private Law (UNIDROIT) was the first organisation to attempt to create a uniform set of rules to govern MTOs, in the 1930s.²⁰⁶ However, the rules did not have much of an impact until the 1960s. In 1963, UNIDROIT introduced ‘a draft Convention on the International Combined Transport of Goods, which was later revised by an ad hoc committee of experts’.²⁰⁷ In 1969, Comité Maritime International (CMI) prepared its draft Convention on Combined Transport, known as the Tokyo Rules.²⁰⁸ The main difference between these instruments was (and is) their scope.

²⁰⁶ UNCTAD, ‘The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention’ (TD/B/C.4/315/Rev.1, 1991) para 39.

²⁰⁷ UNCTAD, ‘Implementation of Multimodal Transport Rules’ (n 60) para 16.

²⁰⁸ *ibid.*

The UNIDROIT draft focused on rules relating to MTC liability, while the CMI draft focused on MT documents.²⁰⁹

Then, in 1970, these two drafts were combined into a single draft by the Inland Transport Committee (ITC) within the United Nations Economic Commission for Europe (UNECE): the ‘Tokyo-Rome Rules, also known as the Rome Draft’.²¹⁰ In 1971, the Rome Draft was modified by the ITC and Intergovernmental Maritime Consultative Organization (IMCO).²¹¹ This modified draft was referred to as the Draft Convention on the International Combined Transport of Goods, or the TCM Draft. However, the TCM Draft did not gain sufficient support from developing countries to go further than the draft stage. Indeed, developing countries expressed concern that the draft would promote ‘the capitalist menace which containerisation was felt to represent’.²¹²

In 1970 and 1971, a powerful global lobby of commercial shippers, vessel operators, and logistics companies, represented in particular by the International Federation of Freight Forwarders Associations (FIATA) and Baltic and International Maritime Council (BIMCO), reiterated the urgent need for a set of uniform rules for MTOs, and accordingly developed its own model contractual terms for transport documents.²¹³ Two years later, in 1973, the ICC published a set of Uniform Rules for a Combined Transport Document.²¹⁴ Subsequently, FIATA and BIMCO changed various terms in their transport documents to reflect the ICC Uniform Rules.²¹⁵ Then, with the ambition of creating a uniform law governing MTOs, UNCTAD attempted yet again to introduce a convention on international MT. The process of drafting the convention lasted six years.²¹⁶

²⁰⁹ Mankabady (n 81) 121.

²¹⁰ Olena Bokareva, *Uniform of Transport Law through International Regimes* (Edward Elgar Publishing 2019) 36–39.

²¹¹ UNCTAD, ‘The Economic and Commercial Implications’ (n 206) para 42. The IMCO is now the International Maritime Organization (IMO).

²¹² OC Giles, ‘Combined Transport’ (1975) 24 the International and Comparative Law Quarterly 379, 380.

²¹³ Glass (n 95) 17–19.

²¹⁴ UNCTAD, ‘Implementation of Multimodal Transport Rules’ (n 60) para 16.

²¹⁵ Glass (n 95) 26–28.

²¹⁶ Boyd (n 58).

The 1980s would bring further attempts. In 1980, UNCTAD adopted the first Convention on International Multimodal Transport of Goods (MT Convention).²¹⁷ This convention is not only one that ‘is to a large extent based on the Hamburg Rules’, but also one that ‘draws heavily on the TCM Draft and the ICC Uniform Rules for a Combined Transport Document’.²¹⁸ More than 40 years after the MT Convention was adopted, however, only 11 states have ratified it,²¹⁹ 19 states shy of the number of states that must do so for the Convention to come into force (30).²²⁰

With no previous efforts to create a uniform law on MTOs having met with success, in 1992 the ICC and UNCTAD jointly created a new set of rules (for MT documents) replacing the ICC Uniform Rules.²²¹ This new set of rules would become known as the UNCTAD/ICC Rules 1992. The UNCTAD/ICC Rules 1992 have now been widely adopted by the transport industry as a set of contractual terms and have been incorporated in the FIATA and BIMCO MT documents.²²²

In 2008, UNCITRAL introduced another draft instrument to govern MTOs, known as the Rotterdam Rules.²²³ So far, the Rules have met a fate similar to that of the MT Convention: the Rules still need to be ratified by 15 more states to meet the requirement of 20 ratifications for the rules to become binding on its member states.²²⁴

Despite these many attempts over the years to create a uniform law (or a similar instrument) governing MTOs having failed, stakeholders have continued to insist on UN organisations such as UNCITRAL, UNECE, and UNESCAP engaging in projects to resolve the legal difficulties arising in relation to MTOs. In 1998, UNECE considered a suggestion to harmonise civil-

²¹⁷ Samir Mankabady, ‘The Multimodal Transport of Goods Convention: A Challenge to Unimodal Transport Conventions’ (1983) 32 *International and Comparative Law Quarterly* 120, 124.

²¹⁸ UNCTAD, ‘The Economic and Commercial Implications’ (n 206) para 43.

²¹⁹ United Nations Treaty Collection, ‘Chapter XI Transport and Communications: E’ (n 119).

²²⁰ MT Convention, art 36.

²²¹ UNCTAD, ‘The Economic and Commercial Implications’ (n 206) para 50.

²²² Proshanto K Mukherjee, Maximo Q Mejia Jr and Jingjing Xu (eds), *Maritime Law in Motion* (Springer 2020) 157.

²²³ Estrella Faria (n 62).

²²⁴ UNCITRAL, ‘Status: United Nations Convention (n 122).

liability regimes for MTOs²²⁵ and spent two years investigating the possibility of creating its own such regime. However, in 2000, UNECE suspended the project, noting that most representatives of the transport industry and states ‘did not favour the preparation of a new mandatory legal regime covering civil liability in multimodal transport operations’.²²⁶

In 2018, the member states of UNESCAP requested that the organisation launch a project to harmonise legal frameworks for MTOs in Asia and the Pacific.²²⁷ As part of this project, UNESCAP proposed a set of options for member states to consider with a view to developing such a framework.²²⁸ The first option was for member states to negotiate a new legal instrument on MTOs, to take the form of a regional or sub-regional instrument—or even of an instrument to apply only between member states home to actors participating in international MTOs. The second option was to develop guidelines or a model national law on MT. The third option, meanwhile, was to ensure a uniform application of existing soft-law rules on MT, such as the UNCTAD/ICC Rules 1992 or the terms and conditions applicable to the FIATA Multimodal Bill of Lading. The fourth option was to develop a legal instrument to address the ‘gaps’ observed in the current legal framework.

In August 2020, UNESCAP hosted the first virtual meeting to seek advice from experts—representing various states and the transport industry—on the options proposed for the harmonisation of legal frameworks on MTOs.²²⁹ At this first meeting, the experts agreed to consider all the options.²³⁰ However, to assist them in any further discussion, the experts requested that UNESCAP identify the advantages and disadvantages of each of the options

²²⁵ UNCTAD, ‘Implementation of Multimodal Transport Rules: Comparative Table’ (27 June 2001) <<https://unctad.org/system/files/official-document/posdtetlbd2.en.pdf>> accessed 26 June 2021.

²²⁶ UNECE, ‘Possibilities for Reconciliation’ (n 78) 61.

²²⁷ UNCITRAL, ‘Work Programme: Results of the Preparatory Work by the UNCITRAL Secretariat towards the Development of a New International Instrument on Negotiable Multimodal Transport Documents’ (A/CN.9/1061, 2021).

²²⁸ UNESCAP (ESCAP/DP/WG/2019/3, 2019).

²²⁹ UNESCAP, ‘Virtual Expert Group Meeting’ (n 4).

²³⁰ UNESCAP, ‘Second Virtual Expert Group Meeting on Legal Frameworks for Multimodal Transport Operations in Asia and the Pacific’ <<https://www.unescap.org/events/2021/second-virtual-expert-meeting-legal-frameworks-multimodal-transport-operations-asia-and>> accessed 6 July 2021.

proposed. In March 2021, therefore, UNESCAP arranged a second meeting.²³¹ Most of the experts who attended expressed a preference for a new legal instrument on MTOs to apply at the regional level.²³² They also requested that UNESCAP develop guidelines for national legal frameworks governing MTOs in Asia and the Pacific. Considering both (1) the feedback provided by the experts in the second meeting and (2) the results of surveys conducted after the second meeting, UNESCAP subsequently produced such guidelines, in the hope of helping its member states create their own national legal instrument on MT.²³³

Another recent project relevant to MT law has been spearheaded by UNCITRAL. In 2019, representatives of the People's Republic of China (PRC) submitted a request to UNCITRAL's 52nd session that the organisation develop negotiable transport documents covering MTOs, including a rail-carriage leg.²³⁴ In its proposal, the PRC pointed out that the railway consignment notes currently used in rail carriage—whether under a contract of single-mode carriage by rail or under a contract of carriage by a combination of rail and other inland modes of transport—were not (and are not) treated as a document of title.²³⁵ Because the notes are not treated as such, it is impossible to use them as evidence of rights in collateral, meaning that importers and exporters who carry on business in the Eurasia region face difficulties obtaining financing (such as letters of credit) from banks. At its 53rd session in July 2020, therefore, UNCITRAL agreed to launch a programme to develop a new legal instrument for negotiable MT documents for non-maritime MTOs.²³⁶ At the end of that session, UNCITRAL concluded that the programme should focus on electronic documents intended for use with different modes of transport.

²³¹ *ibid.*

²³² *ibid.*

²³³ UNESCAP, 'Proposed Structure for Guidelines on Harmonization' (n 7).

²³⁴ UNCITRAL, 'Work Programme: Results of the Preparatory Work' (n 227).

²³⁵ UNCITRAL, 'Work Programme: Possible Future Work' (n 5) 3.

²³⁶ UNCITRAL, 'UNCITRAL Webinar on "International Experiences with the Dematerialisation of Negotiable Transport Documents"' (13–14 April 2021) <<https://uncitral.un.org/en/webinar-dematerialization-negotiable-transport-documents>> accessed 7 July 2021.

In April 2021, UNCITRAL hosted a virtual meeting with various experts—not only from the transport industry, but also from the finance industry and academia—to discuss its work on electronic negotiable transport documents. The deliberations covered forms of electronic negotiable transport documents recognised in the Rotterdam Rules and the UNCITRAL Model Law on Electronic Transferable Records.²³⁷ At the end of this meeting, UNCITRAL stated that it expected to have the first draft of this instrument on MT documents on the agenda for its 55th session, in 2022.²³⁸

Table 1 below summarises the work which UN organisations have carried out over the years to investigate possible solutions for national and supranational legal frameworks on MT.

Table 1. Projects of UN organisations relevant to the MT legal instruments

Year	Organisation hosting the project	Title of the project	Scope of the project	Status of the project
1998	UNECE	Possibilities for reconciliation and harmonisation of civil liability regimes governing combined transport ²³⁹	To create an international legal instrument which supplements the existing law to govern MTC liability in the case of unlocalised damage and loss	Cancelled in 2000
2018	UNESCAP	Enhancing integration and sustainability of transport networks in Asia and the Pacific through development of legal frameworks for multimodal-transport operations ²⁴⁰	To develop a concept/guideline for the harmonisation or unification of rules covering MTOs	Completed in 2023

²³⁷ UNCITRAL, 'Possible Future Work on Railway Consignment Notes' (A/CN.9/1034).

²³⁸ UNCITRAL, 'Work Programme: Results of the Preparatory Work' (n 227) 59.

²³⁹ UNECE, 'Possibilities for Reconciliation' (n 78).

²⁴⁰ UNESCAP, 'Development of Intermodal Transport Corridors' (n 5).

Year	Organisation hosting the project	Title of the project	Scope of the project	Status of the project
2019	UNCITRAL	Possible future work on railway consignment notes ²⁴¹	To find a solution for the purposes of developing negotiable transport documents facilitating MTOs, including a rail-carriage leg	In progress

At the regional level, there are four organisations—ALADI, ASEAN, MERCOSUR, and the Andean Community—that have produced soft law on MTOs. Emulating the MT Convention and UNCTAD/ICC Rules 1992, each of the four organisations adopted what is known as a ‘modified liability approach’²⁴² to create its soft law on MTC liability. This soft law relates to a number of questions: to what extent the rules apply to MTOs; from when and until when MTCs will be liable for damage to or loss of goods; on what basis MTCs will be liable for this damage or loss; to what extent MTCs will be liable for the damage or loss; and how long cargo owners will have to bring proceedings for the damage or loss.²⁴³

Although neither Europe nor Asia has any continent-wide soft (or hard) law governing MTOs, in 2009 the TRACECA Programme²⁴⁴ created the mandatory multilateral agreement known as the Agreement on the Development of Multimodal Transport TRACECA (hereafter TRACECA Agreement) to govern MTOs along the Europe and Asia corridor. Instead of adopting a modified liability approach (like ALADI, ASEAN, MERCOSUR, and the Andean Community), the TRACECA Programme adopted what is known as a ‘uniform approach’²⁴⁵ to liability for MTCs.²⁴⁶

²⁴¹ UNCITRAL, ‘Work Programme: Possible Future Work’ (n 5).

²⁴² See Section 1 of Chapter 3.

²⁴³ See Section 3.

²⁴⁴ Europe–the Caucasus–Asia Corridor Programme.

²⁴⁵ See Section 1 of Chapter 3.

²⁴⁶ UNESCAP, ‘Virtual Expert Group Meeting’ (n 4).

At the national level, there are relatively few countries—only 20—that have set forth provisions of law governing MTOs. These countries are listed in Table 2 below. The majority of these countries are members of ALADI, ASEAN, MERCOSUR, or the Andean Community. Therefore, the liability-related provisions of law in each of these countries, being member countries, are similar from one country to the next. At the same time, there are some countries that have adopted a so-called network-liability approach,²⁴⁷ such as Germany and the Netherlands. Indonesia and Mexico, on the other hand, are the only two countries of the 20 to have adopted a so-called uniform-liability approach, namely, an approach to MTC liability using uniform rules.

Table 2. List of countries having MT-specific provisions of law

No.	Region	Countries	Model legal instrument(s) on MT			
			Andean Community	MERCOSUR	ALADI	ASEAN
1	Asia	Cambodia				X
2		China				
3		India				X
4		Indonesia				X
5		Laos				X
6		Myanmar				X
7		Philippines				X
8		Thailand				X
9		Singapore				
10		Vietnam				X
11	Europe	Germany				
12		Netherland				
13	Africa	Egypt				

²⁴⁷ See Section 1 of Chapter 3.

No.	Region	Countries	Model legal instrument(s) on MT			
			Andean Community	MERCOSUR	ALADI	ASEAN
14	America	Ethiopia				
15		Argentina		X	X	
16		Brazil		X	X	
17		Columbia	X			
18		Ecuador	X			
19		Mexico				
20		Paraguay		X		

In summary, there have since the 1930s been several attempts—at the international, regional, and national levels—to create an international legal instrument governing MTC liability and thereby promote the development of MTOs. However, at the international level, none ever gained widespread support from the transport industry. At the regional level, there are only four (region-specific) instruments. At the national level, there are only 20 regimes specific to MTOs.

2. MTC liability under international legal instruments

Section 1 highlighted the numerous attempts made over time to establish a legal instrument on MTC liability at the international, regional, and national levels, as well as the relevant initiatives undertaken by the transport industry. At the international level, notable legal instruments include the Rome Draft (or TCM Draft), the MT Convention, the UNCTAD/ICC Rules 1992, and the Rotterdam Rules. At the regional level, four regional organisations—ALADI, ASEAN, MERCOSUR, and the Andean Community—have adopted their own legal instrument governing MTC liability. At the national level, there are only 20 instruments. While every legal instrument ever proposed at the international level has failed to come into force,

legal instruments at the regional and national levels have had some success, however limited in scope some of the instruments may be.

Building on the overview provided in Section 1, this section examines the possible reasons for the MT Convention and Rotterdam Rules having failed to attract the support necessary to bring about sufficient ratifications and, therefore, come into force—as well as for the UNCTAD/ICC Rules 1992 remaining non-mandatory. The other draft instruments mentioned above—such as the Rome Draft and the TCM Draft—never achieved the status of legal instruments adopted as such by the UN. However, stakeholder commentary on these draft instruments is relevant here where the draft instruments have features similar to those of the MT Convention, Rotterdam Rules, and the UNCTAD/ICC Rules 1992.

Importantly, this section compares the rules under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. This comparison will focus on five aspects of the three instruments, namely, (1) the scope of their application, (2) the period of responsibility under them, (3) the basis of liability under them, (4) the limitations of liability under them, and (5) the time bars on bringing proceedings under them. Moreover, this section considers whether the three legal instruments sufficiently account for current business practices in MT which may have an impact on MTC liability, in particular container transport, the use of electronic contracts, and sub-contracting relationships between MTCs and actual carriers. The extent to which a legal instrument is fit for purpose in addressing these practices will determine how effective it is in gaining support from the transport industry.²⁴⁸ Having examined these matters, this section considers whether the three international legal instruments failed to gain support from the industry because of their rules relating to the basis of liability, the limitation of

²⁴⁸ Victoria E Aitken, 'An Exposition of Legislative Quality and Its Relevance for Effective Development' (July 2013) <<https://www.luc.edu/media/lucedu/prolaw/documents/AITKEN%20FINAL%20ARTICLE.pdf>> accessed 25 April 2021.

liability, and the time bar—whether the relevant rules are perceived as uncertain, unpredictable (as to the legal regime applicable), and unfair.

2.1 Scope of application

This sub-section compares the rules relating to the scope of application of the MT Convention, Rotterdam Rules, and UNCTAD/ICC Rules 1992. As these three legal instruments aim to cover international transactions, the instruments are worded so as to apply to international MTOs. However, the extent to which each of the legal instruments covers MTOs specifically (as opposed to other types of operation) differs significantly from instrument to instrument. Of the three, it is the MT Convention that has the broadest scope of application and is therefore applicable to the widest range of MTOs, with the sole exception of consumer MTOs, namely, those under which the cargo owner is an individual and buys the relevant goods for the purposes of personal consumption. In contrast, the Rotterdam Rules apply only to MTOs that include a sea-carriage leg, and the UNCTAD/ICC Rules 1992—being contractual in nature—apply only if the parties expressly incorporate them in the MT contract. Against this background, this sub-section considers whether these three legal instruments—which have a limited scope of application in that none of them applies to *all* MTOs—result in unpredictability.

Article 2 of the MT Convention states that the Convention applies to international MT contracts as long as either the place where the goods are taken in charge or the place where they are delivered is in a state which has ratified the Convention.²⁴⁹ Therefore, any international MTO with either its point of receipt or its point of delivery in a member state falls within the scope of the Convention. At the same time, the language appearing in article 1(7) of the

²⁴⁹ MT Convention, art 2 regulates as follows:

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 multi modal 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.

Convention confirms that the Convention does not cover all types of international MT. The Convention applies only to the MT of unit loads, in that, on its wording, it applies to goods carried by MTO only where the goods come in the form of ‘any container, pallet or similar article of transport or packaging’.²⁵⁰ In practice, the relevant provision of the Convention means that, typically, the Convention covers MTOs under which cargo owners are business entities rather than individuals as consumers. The reason is that, generally, it is only business entities that require the transport of entire containers or unit loads of any other type between locations. Individuals tend to seek out transport services for the carriage of smaller items and non-unitised items (capable of being stored within a unit load), rather than entire unit loads. Because transactions for the carriage of such items fall outside the scope of the Convention, it will have little impact on the carriage of such items.

Given article 2 of the Convention and the evolution of internet-based transactions, it is prudent to consider the question whether the MT Convention applies to electronic contracts, namely, contracts formed at a distance over the internet, as opposed to contracts formed in person. The Convention does not provide an explicit answer to this question. However, article 1(10) specifies that, under the Convention, “[w]riting” means, *inter alia*, telegram or telex’. Furthermore, article 5(3) clarifies that MT documents do not have to be signed by hand to serve as evidence of MT contracts; they may be signed by any mechanical or electronic means. This wording implies that the Convention applies to MT contracts concluded by earlier forms of electronic communication, such as telegram or telex. Although there is an electronic component to the telegram and the telex, MT contracts recorded by these means are still paper-based.²⁵¹ Therefore, it is possible to argue that the MT Convention does not recognise

²⁵⁰ MT Convention, art 1(7).

²⁵¹ Judith Y Gliniecki and Ceda G Ogada, ‘The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce’ (1992) 13 *Northwestern Journal of International Law & Business* 117, 125.

contemporary internet-based MT transactions.²⁵² However, this less-than-desirable feature of the MT Convention is not one of reasons contributing to the failure of the Convention. Indeed, there were never any internet-based transactions until the internet started to be used by the public, in 1991,²⁵³ 11 years after the MT Convention was adopted.

Here, there is a point of difference between the MT Convention and the UNCTAD/ICC Rules 1992. Alive to the new business practices emerging in the age of the internet, the UNCTAD/ICC Rules 1992 were designed to apply to all MT contracts, including those formed via the internet. More specifically, rule 1(1) provides that ‘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”, ... whether a document has been issued or not’. Furthermore, rule 2(6) affirms that the Rules recognise MT documents as valid where recorded in electronic data-interchange messages. Instead of emulating the MT Convention (which treats electronic documents in the same way as written documents), the Rules use the phrase ‘electronic data interchange messages’,²⁵⁴ ensuring that the Rules are applicable to most MT business practices, including where communications are electronic. In addition to e-contracts for MT, the Rules also govern all types of MT involving any carriage of property or live animals.²⁵⁵ Given the language of rules 1 and 2, it is arguable that the UNCTAD/ICC Rules 1992 would provide a better model for any instrument to govern MTOs than the MT Convention would, with the Rules being suited as they are to current business practices.

²⁵² It may be argued that the interpretative principles contained in the Vienna Convention on the Law of Treaties support a functional approach to treaty interpretation, thereby allowing courts to take account of technological developments that were not contemplated at the time a treaty was drafted. On this basis, courts may interpret terms such as “documents”, “writing”, or contractual communications under the MT Convention as encompassing electronic forms of communication. However, whether such an approach is adopted depends largely on how national courts apply the interpretative principles of the Vienna Convention in practice. Different jurisdictions may adopt different approaches to digital transactions, potentially resulting in inconsistent interpretations of the MT Convention. Furthermore, the Vienna Convention formally applies only to states that are parties to it, meaning that some non-party states, such as France, may not directly rely upon its interpretative framework when interpreting the Convention. Against this background, it remains arguable that the language of the MT Convention does not clearly recognise contemporary internet-based MT transactions.

²⁵³ Vladimir Zwass, ‘E-commerce’ (Britannica Money) <<https://www.britannica.com/technology/e-commerce>> accessed 21 April 2021.

²⁵⁴ UNCTAD/ICC Rules 1992, r 2(6).

²⁵⁵ *ibid* r 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 MTC, irrespective of whether such property is to be or is carried on or under deck.’

Unfortunately, as clearly stated in rule 1(1), the Rules are only contractual. In other words, MTCs and cargo owners must expressly incorporate the Rules by contract if they wish them to apply in the resolution of any dispute arising. If the Rules are reproduced or referred to in the contract, their wording prevails over that of the other provisions of the contract (with which the Rules conflict), to the extent the wording of the Rules does not increase the burden on MTCs.²⁵⁶ However, the Rules obviously do not prevail over any mandatory law applicable to MT contracts with which the Rules conflict.²⁵⁷ As a result, the rules are ‘not suitable to [achieving] international uniformity’.²⁵⁸ The Rules lack the mandatory character that would enable them to serve as a uniform legal instrument governing MT. The joint UNCTAD/ICC working group created the rules as a *temporary* instrument pending the entry into force of the MT Convention.²⁵⁹ Therefore, being ‘temporary’, the Rules would in the end consist only of model terms and conditions for MT contracts, not of binding rules of international law.

Like the UNCTAD/ICC Rules 1992, the Rotterdam Rules were drafted in the early days of the internet era. More specifically, the Rotterdam Rules were drafted in 1996, when it was becoming common for businesses to transact via the internet.²⁶⁰ Articles 1(17) and (18) of the Rotterdam Rules recognise ‘electronic communication’ and ‘electronic transport record’, making the Rules applicable to current and any future forms of electronic contracting. In other words, the Rules apply to any contract formed via any electronic means of communication, including the internet, and to any electronic transport record, such as an electronic bill of lading.

Unlike the UNCTAD/ICC Rules 1992 (which apply to contracts of carriage irrespective of the kind of goods carried), the Rotterdam Rules apply only to the carriage of goods in the form of ‘wares, merchandise and articles’.²⁶¹ However, and paradoxically, comparing the Rotterdam

²⁵⁶ UNCTAD, ‘Implementation of Multimodal Transport Rules: Comparative Table’ (n 225).

²⁵⁷ UNCTAD/ICC Rules 1992, r 13.

²⁵⁸ Faghfour (n 12) 100.

²⁵⁹ UNCTAD, ‘Adoption of the UNCTAD/ICC Rules on Multimodal Transport Documents’ (7 January 1992) <https://unctad.org/system/files/official-document/tradewp4inf.117_corr.1_en.pdf> accessed 23 April 2021.

²⁶⁰ Malcolm A Clarke, ‘Multimodal Transport in the New Millennium’ (2002) 1 WMU Journal of Maritime Affairs 71, 75.

²⁶¹ Rotterdam Rules, art 1 (24).

Rules with the MT Convention (which applies only to the carriage of containers) reveals that the former have a wider scope of application in terms of the kind of goods covered, in that they apply to the carriage of a wider range of goods, not just containers. Yet because the Rules are by nature for sea carriage, they apply only to MTOs (including those governed by electronic contracts) that include a sea-carriage leg.²⁶² Additionally, for the Rules to be applicable, the point of receipt or delivery or the port of loading or discharge must be located in a state having ratified them.²⁶³

Unlike earlier international legal instruments on sea carriage, the Rotterdam Rules align with business practices in maritime transport, in that they apply to door-to-door carriage under a single contract.²⁶⁴ Also, compared to the MT Convention, the Rules have a particularly wide scope of application in space. The reason is that the Rules apply not only in the case where the place of receipt or delivery of the goods is located in one of the Rules' member states, but also in the case where the port of loading or discharge of goods is located in such a state. However, this 'maritime plus' approach—also known as the 'unimodal plus' approach²⁶⁵—as adopted by the Rotterdam Rules has not gained much support from the industry.²⁶⁶ Indeed, the Rules do not offer any better a solution for MT than do any of the existing unimodal legal instruments—such as the Warsaw Convention and the COTIF-CIM Convention, which both adopt the 'unimodal plus' approach too.²⁶⁷ Since these existing unimodal conventions attempt to extend the scope of their application to the carriage of goods by other modes of transport, the

²⁶² *ibid* art 1 (1): 'Contract of carriage means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.'

²⁶³ *ibid* art 5 (1).

²⁶⁴ Ella Derkach and Sergii Pavliuk, 'International Law on the Multimodal Carriage of Goods: Recent Trends and Perspectives' (2017) 2 *International Journal of Legal Studies* 269, 275.

²⁶⁵ See Section 1 of Chapter 3.

²⁶⁶ Lijun Zhao conducted a survey to examine the differences in how maritime professionals in China and Europe understand the Rotterdam Rules and found that only 39% of respondents were favourable to the maritime-plus approach adopted in the Rotterdam Rules. Lijun Zhao, 'Survey on the Uniformity of Seaborne Cargo Conventions: Need to Limit the Scope of Uniformity' (2014) 81 *Journal of Transportation Law, Logistics and Policy* 111, 120.

²⁶⁷ Gertjan van der Ziel, 'Multimodal Aspect of the Rotterdam Rules' (2009) 14 *Revue de droit uniforme* 994–95.

Rotterdam Rules applying would be likely in many cases to cause confusion as to which legal instrument applies.

To synthesise, none of the legal instruments at the international level, namely, the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992—applies to every type of MTOs. The MT Convention applies neither to MT contracts concluded via the internet nor to those concluded by consumer cargo owners. The Rotterdam Rules apply only to MTOs including a sea-carriage leg. The UNCTAD/ICC Rules 1992 apply only to MT contracts that incorporate the Rules. Furthermore, because each of these three legal instruments has a limited scope of application, neither MTCs nor cargo owners may reliably anticipate which legal instrument will apply to what MTOs. Accordingly, the three instruments contribute to ongoing unpredictability in determining MTC liability.

2.2 Period of responsibility

Sub-section 2.1 examined the types of MTOs covered by the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. In the process, it demonstrated that none of the three instruments applies to all types of MTOs. As a result, both MTCs and cargo owners remain unable to predict which legal instrument will apply in the case of a given MT transaction. In other words, there persists a state of unpredictability in determining MTC liability.

This sub-section turns to the rules relating to the period of responsibility under the same three legal instruments. Although the instruments provide that MTCs are liable for damage to, loss of, and delay in delivery of goods from the time that they receive the goods until the time that they deliver the goods, there are significant differences in how each instrument contributes to unpredictability in determining MTC liability. This section examines whether the Rotterdam

Rules create greater unpredictability in determining MTC liability than do the MT Convention and the UNCTAD/ICC Rules 1992.

Unlike the Rotterdam Rules, the MT Convention and UNCTAD/ICC Rules 1992 apply exclusively to operations for the carriage of goods that combine different modes of transport under a single contract.²⁶⁸ In addition, the MT Convention and UNCTAD/ICC Rules 1992 provide that MTCs are responsible for the entirety of the carriage operation, including any segment of it performed by any representatives of MTCs, such as any servants, agents, or sub-contractors of theirs.²⁶⁹ In other words, it is from the time that MTCs or their representatives take charge of the goods until the time that they deliver the goods that they are liable for any damage to, loss of, or delay in delivery.

The MT Convention states that the time that the goods are under the charge of MTCs starts when MTCs have ‘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’.²⁷⁰ Meanwhile, the UNCTAD/ICC Rules 1992 simply state that ‘taken in charge means that the goods have been handed over to and accepted for carriage by the multimodal transport operator’.²⁷¹ Although the two instruments use different language to define ‘the time of taking the goods in charge’, the time referred to may be understood—under whichever instrument—as the moment when MTCs receive the goods. Neither instrument requires the goods to have been loaded onto any MTC vehicle for liability to attach. Therefore, the period of potential MTC liability includes the period prior to the loading of the goods onto the MTC vehicle. This

²⁶⁸ MT Convention, art 1(3); UNCTAD/ICC Rules 1992 r 2(1).

²⁶⁹ MT Convention, art 14(1) and (5); UNCTAD/ICC Rules 1992 r 4(1)–(2).

²⁷⁰ MT Convention, art 14(2).

²⁷¹ UNCTAD/ICC Rules 1992 r 2(7).

definition of this period includes any period in which the goods have been handed over to MTCs and accepted for carriage. For this reason, the definition includes any warehousing.²⁷²

For there to be delivery of goods under the MT Convention and the UNCTAD/ICC Rules 1992, MTCs must physically hand over the goods to the consignees.²⁷³ Consignees include both those who are entitled to receive the goods at the destination and those to whom the goods must be handed over under local law at the destination.²⁷⁴ MTCs may also fulfil their obligation to delivery by leaving the goods at the agreed point of delivery.²⁷⁵

This approach, known as the ‘uniform-liability approach’, as adopted by the MT Convention and the UNCTAD/ICC Rules 1992, gives rise to a greater risk of MTC liability than does the so-called network-liability approach.²⁷⁶ When an instrument adopts a network-liability approach, MTC liability for damage to, loss of, or delay in delivery of goods will be determined by the combined application of unimodal conventions. As each unimodal convention applies to carriage by a specific mode of transport, there may be one or more periods of MT carriage that are not governed by any unimodal convention.²⁷⁷ If the goods are damaged, or lost, or delayed in delivery during any such period, MTCs may not have any liability. As a result, MTCs tend to opt for the network-liability approach, as it is more favourable to them.²⁷⁸ In contrast, cargo owners prefer the regimes established by the MT Convention and the UNCTAD/ICC Rules 1992, because these two regimes enable cargo owners to predict on contracting who will be liable for any damage to, loss of, or delay in delivery of the goods occurring over the carriage operation.²⁷⁹

²⁷² Jan Ramberg, *The Law of Freight Forwarding* (International Federation of Freight Forwarders Association 2002) 49.

²⁷³ MT Convention, art 14(2); UNCTAD/ICC Rules 1992 r 2(8).

²⁷⁴ See Chapter 1.

²⁷⁵ MT Convention, art 14(2); UNCTAD/ICC Rules 1992, r 2(8).

²⁷⁶ Kurosh Nasser, ‘The Multimodal Convention’ (1988) 19 *Journal of Maritime Law and Commerce* 231, 236.

²⁷⁷ Sub-section 4.2 will discuss further which periods in MT will not be covered by unimodal conventions.

²⁷⁸ One of the groups joining the negotiation of the MT Convention, Group B, expressed that they wanted to limit the coverage of the convention to ensure applicability of national law and unimodal conventions, and minimise obligations of the carrier with respect to ‘buy developing country’ rules. See Nasser (n 277) 236–37.

²⁷⁹ William Driscoll and Paul B Larsen, ‘The Convention on International Multimodal Transport of Goods’ (1982) 57 *Tulane Law Review* 193, 203.

Much like the MT Convention and the UNCTAD/ICC Rules 1992, the Rotterdam Rules state that ‘the period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered’.²⁸⁰ Furthermore, the Rotterdam Rules hold carriers liable for any damage to, loss of, or delay in delivery by sub-contractors, the masters or crew of any ship, the carriers’ employees, or any other persons performing the carriage.²⁸¹ For the purposes of the period of potential liability, the Rules specify what the time of receipt or delivery of goods is in the situation where the applicable law or regulations²⁸² require the goods to be handed over to an authority or a third party—rather than to carriers or consignees as contract,²⁸³ which in this situation may take possession of the goods only later, if at all. In such situations, carriers are deemed to receive or deliver the goods only when they either collect the goods from that authority or third party or hand the goods to that authority or third party.²⁸⁴ In this respect, the Rules are favourable to MTCs. The reason is related to the Rules (although primarily intended to apply to sea carriage) extending the period of potential liability of sea carriers beyond the sea leg. Under the Rules, sea carriers are liable not only for incidents occurring at sea, but also for incidents occurring within periods of carriage by other modes of transport. In contrast, the existing conventions on sea carriage—of which two of the best-known examples are the Hague-Visby Rules and the Hamburg Rules—restrict carrier liability to the period of port-to-port carriage,²⁸⁵ meaning that these two conventions apply only to sea carriage and not to carriage performed by other modes of transport. The Rotterdam Rules, therefore, represent a more modern and genuinely multimodal approach aligning with current transport industry practice.

²⁸⁰ Rotterdam Rules, art 12(1).

²⁸¹ Rotterdam Rules, art 18.

²⁸² The applicable law and regulations mean the law or regulations at the place of delivery or receipt of goods.

²⁸³ In this context, consignees mean those who are entitled to receive the goods under the carriage of goods contracts.

²⁸⁴ Rotterdam Rules, art 12(2).

²⁸⁵ Van der Ziel (n 267) 981.

Despite theoretically increasing the risk of sea carriers being held liable, this feature of the Rules is not one that such carriers oppose.²⁸⁶ It is possible that the reason for sea carriers finding this period of potential liability less of a concern is that the Rules allow them to shorten the period. Article 12(3) provides that ‘the parties can agree on the time and location of receipt and delivery of the goods’, provided that the time is (1) not later than the time of loading and (2) earlier than the time of discharging. Furthermore, article 13(2) states that ‘the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee’, meaning that carriers (as well as cargo owners) may modify the period of responsibility contractually. These provisions of the Rules distinguish them from the MT Convention and UNCTAD/ICC Rules 1992, under both of which MTCs always bear liability starting from the time that they accept the goods for delivery. This is a point in time that may fall before the goods are initially loaded onto an MTC’s vessel. If, on the other hand, the Rotterdam Rules apply, the period of responsibility may be limited to ‘tackle-to-tackle’, namely, the period starting when the goods are loaded onto the vessel and ending when the goods are discharged from it), even if MTCs take custody of the goods before the loading time and after the discharging time.²⁸⁷ The Rotterdam Rules also allow operational tasks that would ordinarily fall be the responsibility of MTCs to become that of the shipper or consignee by contract. The provisions of articles 12(3) and article 13(2) mean that the Rules depart somewhat from their aim of establishing a uniform regime for the entirety of the multimodal carriage operation.²⁸⁸ Since the Rules allow the parties to modify the period of responsibility by contract and reassign responsibility for the performance of tasks ordinarily performed by MTCs, both MTCs and cargo owners are unable to predict on

²⁸⁶ Lijun Zhao found that 71% of respondents believed that the period of liability was not over-onerous for the carriers. See Zhao (n 266) 119.

²⁸⁷ ‘Tackle-to-tackle’ is a term borrowed from the existing conventions on sea carriage. It means carriers’ responsibility to goods initiates only when the goods are loaded on the carriers’ vessel and ends when the goods are discharged from the carriers’ vessel. In this context, ‘tackle-to-tackle’ means when the goods are initially loaded on carriers’ transport mean to when the goods are finally discharged from carrier’s transport mean because inland carriage is usually the mode of transport subsequent or preceding to sea carriage in multimodal practice. See Lachmi Singh, *The Law of Carriage of Goods by Sea* (Bloomsbury Professional 2011), 21.

²⁸⁸ Faghfoury (n 12) 113.

contracting whether the Rules will apply. In this respect, the Rules indeed do create unpredictability in determining MTC liability.

In conclusion, all three of these legal instruments hold MTCs liable from the time that they receive the goods for delivery until the time that they hand the goods over to cargo owners. However, unlike the fixed, uniform period of responsibility imposed by the MT Convention and the UNCTAD/ICC Rules 1992, the period of responsibility ‘imposed’ by the Rotterdam Rules is not, strictly speaking, imposed. Under the Rules, MTCs may narrow the scope of their liability in temporal terms, with the consent of cargo owners. This contractual flexibility is a feature of the Rotterdam Rules that contributes to unpredictability in a manner that nothing in the MT Convention and the UNCTAD/ICC Rules 1992 does.

2.3 Basis of liability and exoneration from liability

Sub-section 2.2 examined the rules relating to the period of responsibility under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. Each of these instruments set forth a period of responsibility starting at the time that MTCs receive the goods for delivery and ending at the time that MTCs hand the goods over to the consignee. However, while the MT Convention and the UNCTAD/ICC Rules 1992 impose a fixed period of responsibility, the Rotterdam Rules allow the parties to modify the period contractually and to reallocate responsibility for the performance of tasks ordinarily performed by MTCs to the shipper or consignee. Because of the flexibility of the Rules on this issue, neither MTCs nor cargo owners who are party to a contract governed by the Rules will be able to make informed generalisations as to when the period of responsibility starts and ends on the facts. In this regard, the Rules engender greater unpredictability in the determination of MTC liability than do the MT Convention and the UNCTAD/ICC Rules 1992.

This sub-section turns to the rules regarding the related substantive question of the basis of liability under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. Although the three instruments adopt what is known as a ‘presumed-fault approach’, questions remain as to whether the relevant rules provide a sufficiently predictable and fair framework for both MTCs and cargo owners. The nature of these concerns varies from instrument to instrument. The MT Convention does not provide a list of cases where MTCs may escape liability. As a result, questions arise as to whether MTCs may be liable even for cases of ‘uncontrollable risk’, namely, where MTCs do not control the risk causing damage to, or loss of, or the delay in delivery of goods carried.²⁸⁹ At the same time, the UNCTAD/ICC Rules 1992 require MTCs to prove that they are not ‘at fault’ in causing or contributing to any such damage, loss, or delay. This requirement raises the issue whether the burden imposed upon MTCs is more difficult to discharge than standards requiring proof that all reasonable steps were taken to prevent the damage, loss, or delay. Moreover, the UNCTAD/ICC Rules 1992 provide for two cases where MTCs may escape liability, with one of these being criticised by the transport industry. Like the UNCTAD/ICC Rules 1992, the Rotterdam Rules require MTCs to prove that they are not at fault in causing or contributing to the risk or its consequences. However, the Rotterdam Rules shift the burden of proof, which would ordinarily weigh upon MTCs, to cargo owners and provide a lengthy list of defences. In these respects, the Rules are over-favourable to MTCs. What is more, the language of article 17 of the Rules causes confusion as to who bears the burden of proof in establishing MTC liability. Accordingly, the extent to which the Rotterdam Rules provide certainty and fairness in determining MTC liability requires closer examination.

²⁸⁹ The term ‘uncontrollable risks’ is used in this thesis as an umbrella term to describe risks whose occurrence could not reasonably be controlled, prevented, or avoided by the carrier, and for which the imposition of liability may therefore be unfair. It encompasses situations that may fall outside the traditional scope of the common-law doctrine of ‘Act of God’ and the civil-law doctrine of ‘Force Majeure’, such as damage caused by hidden defects in the goods.

As if to simulate the liability-related provisions of the Hamburg Rules, the MT Convention adopts presumed-fault liability in determining MTC liability. This approach involves MTCs being presumed to be at fault for any damage to, loss of, or delay in delivery of goods that occurs during the period of potential MTC liability. To escape liability here, MTCs must prove that they or their employees ‘took all measures that could reasonably be required to avoid the occurrence and its consequences’.²⁹⁰

The problem here is that in the practice of MTOs, sea carriage plays an essential role, because globally more than 80% of goods are carried by sea.²⁹¹ For many reasons, including the fact that it tends to take longer to transport goods by sea than by other modes of transport, goods tend to be at greater risk of damage, loss, or delay in delivery when carried by sea. MTCs and their employees will not always be able to prove that they took all reasonable measures to prevent any such damage, loss, or delay in delivery, especially when cargo owners claim that it was in the navigation or the management of vessel that there was fault. When, for example, the *Ever Given* obstructed the Suez Canal in 2021, the problem was that the vessel had deviated from its course as a consequence of a sudden sandstorm, resulting in the vessel blocking the canal for six days.²⁹² Many other vessels that had initially planned to use the canal changed course to avoid traffic.

In cases of MTCs similarly changing course to avoid traffic, they will not bear liability for delay in delivery if they (1) had to change course to prevent unnecessary delay in delivery and (2) make delivery within six days of the initially agreed date of delivery. If, however, they do not meet these two conditions, it will be difficult for MTCs to make a persuasive argument that they are not liable. However, in the case of MTCs changing course to avoid traffic, it will be

²⁹⁰ MT Convention, art 16(1).

²⁹¹ UNCTAD, ‘Review of Maritime Transport 2010’ (n 121).

²⁹² BBC, ‘Egypt’s Suez Canal Blocked by Huge Container Ship’ (25 March 2021) <<https://www.bbc.com/news/world-middle-east-56505413>> accessed 26 November 2025.

difficult for MTCs to predict whether changing route or waiting for the traffic to ease will lessen the delay. Therefore, in such cases, it would be unfair for MTCs to bear liability for it.

This presumed-fault approach to liability—which the MT Convention derived from the Hamburg Rules and for which there is no proviso in the form of a list of defences MTCs—has not gained support from sea carriers.²⁹³ Nor, therefore, has the MT Convention, which is also unattractive to the transport industry as whole.²⁹⁴

Similarly to the MT Convention, the UNCTAD/ICC Rules 1992 presume MTCs to be at fault for damage to, loss of, and delay in delivering the goods under their charge.²⁹⁵ Furthermore, to escape liability under these Rules, MTCs must prove that they and their representatives were not at fault—rather than affirmatively prove that they exercised due diligence to prevent risks, as they must do under the MT Convention.²⁹⁶ In other words, the basis of MTC liability is stricter under the Rules than under the convention; it is more difficult to prove a negative (that there was no fault) than a positive (that due diligence was exercised).

However, like the Hague-Visby Rules, the UNCTAD/ICC Rules 1992 set forth two cases where MTCs escape liability for damage to, loss of, or delay in delivery of goods. Indeed, MTCs will escape such liability if risks to goods occurs in the course of carriage by sea or inland waterway and owing to either (1) innocent error in the navigation or management of the vessel or (2) fire caused other than by fault on the part of the carrier.²⁹⁷ In both cases, MTCs must also—if they are to escape liability—prove that they had exercised due diligence to make their vessel seaworthy at the beginning of the voyage.²⁹⁸

²⁹³ The Hamburg Rules have been ratified by a small number of states, and they are all states that have relatively little influence in international shipping. In fact, they are mostly landlocked. See Anezka Grobarcikova and Jarmila Sosedova, 'Carrier's Liability under the International Conventions for the Carriage of Goods by Sea' (2014) 9 *Transport Problems* 75, 76.

²⁹⁴ UNCTAD, 'Implementation of Multimodal Transport Rules: Comparative Table' (n 225).

²⁹⁵ UNCTAD/ICC Rules 1992, r 5(1).

²⁹⁶ *ibid.*

²⁹⁷ *ibid* r 5(4).

²⁹⁸ *ibid.*

Many freight forwarders believe that ‘the defence for “negligence in the navigation and management of the ship” on which a carrier may currently rely under the Hague Rules and Hague-Visby Rules should be eliminated’ where the defence is available under any legal instrument on MT.²⁹⁹ Therefore, eliminating this defence under UNCTAD/ICC Rules 1992 would be helpful to the transport industry.

As regards delay in delivery, MTCs will bear liability under the UNCTAD/ICC Rules 1992 if they accept any shippers’ request for timely delivery.³⁰⁰ Unlike under the MT Convention,³⁰¹ under the Rules the burden of proof is on shippers—to prove that the defence does not apply—rather than on MTCs—to prove that it does. This rule is favoured by the industry because, according to the industry, MTCs should bear liability for delay in delivery only if ‘delivery by a specific day was expressly agreed in a transport document’.³⁰²

Also, similarly to the MT Convention, the UNCTAD/ICC Rules 1992 treat a delay in delivery of goods of more than 90 days as a loss of goods and as a delay for which MTCs will bear liability, although this liability is capped at 8.33 Special Drawing Rights (SDR) per kg of gross weight of the goods.³⁰³ Therefore, under the Rules, the test for liability is less onerous for MTCs than under the MT Convention. As a result, the Rules are widely used by the transport industry, including by FIATA and BIMCO.³⁰⁴

Under the Rotterdam Rules, MTCs are presumed to be at fault for damage to, loss of, or delay in delivery of goods that occurs during the period of potential MTC liability.³⁰⁵ In effect, if cargo owners prove any such damage, loss, or delay in delivery, MTCs will be *prima facie*

²⁹⁹ UNCTAD, ‘Multimodal Transport’ (n 6).

³⁰⁰ UNCTAD/ICC Rules, r 5(1).

³⁰¹ Under MT Convention, art 16, MTCs will bear liability for delay in delivery irrespective of whether shippers request a timely delivery. Therefore, to escape liability, MTCs must prove that they took all reasonable measures to prevent the delay in delivery. In other words, the burden of proof is on MTCs.

³⁰² UNCTAD, ‘Multimodal Transport’ (n 6).

³⁰³ UNCTAD/ICC Rules 1992, r 5(4); MT Convention, art 16(3).

³⁰⁴ UNCTAD, ‘Implementation of Multimodal Transport Rules: Comparative Table’ (n 225).

³⁰⁵ Rotterdam Rules, art 17.

liable for it.³⁰⁶ The burden then shifts to MTCs wishing to escape liability. They must prove either that they were not at fault in causing the damage, loss, or delay in delivery, or that it was caused by one of the 15 exonerating events listed in article 17(3) (such as an act of God or a fire on the ship).³⁰⁷ If an MTC raises a defence relying on one of these 15 events, the cargo owner may counter it by proving that the MTC was at fault in causing one of 15 events—in which case the MTC will remain liable.³⁰⁸ In the case where the damage, loss, or delay in delivery is caused by a combination of one or more of the 15 events *as well as* some other event, MTCs will be liable unless they prove that they are not at fault in causing this other event.³⁰⁹

Also, in the case where cargo owners prove that the risk of damage to, loss of, or delay in delivery of goods was caused by the unseaworthiness of the ship, MTCs will be liable unless they provide proof in support of one or both of the two defences.³¹⁰ The first defence would be unseaworthiness not having caused the damage, loss, or delay.³¹¹ The second would be having exercised due diligence to ensure that the ship was seaworthy throughout the voyage.³¹²

Essentially, article 17 of the Rotterdam Rules sets out the order in which MTC liability must be proved.³¹³ However, its language also creates confusion and controversy, particularly regarding who bears the burden of proof in establishing MTC liability. Notably, articles 17(1) and 17(2) of the Rules state that MTCs are presumed to be at fault for damage, loss, and delay in delivery occurring while they are responsible for the goods. As a result, MTCs are the ones who bear the burden of proving that they are not at fault. If they fail to discharge this burden,

³⁰⁶ *ibid* art 17(1).

³⁰⁷ Rotterdam Rules, art 17(2)–(3).

³⁰⁸ *ibid* art 17(4).

³⁰⁹ *ibid*.

³¹⁰ *ibid* art 17(5).

³¹¹ *ibid*.

³¹² *ibid*.

³¹³ For a detailed discussion of the order, see Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Hilton Staniland, Michael Tsimplis, *The Rotterdam Rules: A Practical Annotation* (Informa Law from Routledge 2009) 47-50.

they will be liable. It is in this respect that the Rules adopt a so-called presumed-fault approach to liability.

At the same time, under article 17(4)(a) of the Rules, the burden of proof shifts to cargo owners. Consequently, MTCs bear liability for the damage, loss, or delay in delivery only if cargo owners succeed in proving that MTCs contributed to the event that ultimately caused the damage, loss, or delay in delivery. Because of the confusion caused by this rule, some scholars characterise the Rotterdam Rules as adopting an ordinary fault-based approach to liability, rather than a presumed-fault one.³¹⁴

Furthermore, under article 17(4)(b) of the Rules, MTCs are liable for the damage, loss, or delay in delivery—regardless of the provisions of article 17(3)—if ‘the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18’. However, articles 17(1) to 17(3) already require MTCs wishing to avoid liability for damage, loss, or delay in delivery to prove either (1) that they were not at fault or (2) that one of the exonerating events listed in article 17(3) occurred. In other words, article 17(4)(b) unnecessarily repeats what the Rules provide elsewhere, in articles 17(1) to 17(3).

When it comes to liability for unseaworthiness, the Rotterdam Rules are more favourable to cargo owners than other international legal instruments on sea carriage, the best example being the Hague-Visby Rules. Under the Rotterdam Rules, MTCs must exercise due diligence to make their ship seaworthy before the journey, so that it remains seaworthy throughout. This rule is unproblematic for MTCs in that they bear liability only if cargo owners prove

³¹⁴ Kyriaki Noussia, ‘Carrier Liability under the Rotterdam Rules’ (2017) <https://ore.exeter.ac.uk/repository/bitstream/handle/10871/31347/K_NOUSSIA_CONTRIBUTION_FESTSCHRIFT_I.K.ROKAS.pdf?sequence=1&isAllowed=y> accessed 7 May 2021.

unseaworthiness.³¹⁵ In practice, it is difficult for cargo owners to prove unseaworthiness because they are not the ones directly managing the ship. Although the Rotterdam Rules extend MTC liability for unseaworthiness, Katsivela still argues that the Rules ‘favour ocean carriers [over] cargo claimants’.³¹⁶ However, the provisions relating to the basis of liability as set forth by article 17 hold MTCs liable during sea carriage *only* if there is at least one segment of the transport operation governed by a unimodal convention.³¹⁷

In sum, all three of the instruments presume MTCs to be liable for any damage to, loss of, or delay in delivery of the goods that occurs during MTCs’ period of potential liability. However, the three instruments provide an unfair solution for the purposes of determining MTC liability. Under the MT Convention, MTCs bear a greater risk of liability than they do under the Rotterdam Rules and the UNCTAD/ICC Rules 1992. In particular, the MT Convention provides no list of exonerating events that would otherwise enable MTCs to escape liability. If MTCs wish to do so, they must prove that they took all reasonable measures to prevent the risk and the consequences of the risk.

While the Rotterdam Rules and the UNCTAD/ICC Rules 1992, on other hand, do provide a list of defences, these two instruments require MTCs to prove that they were not at fault in causing any event that in turn caused damage to, loss of, or delay in delivery of goods. However, as discussed above, it is more difficult for MTCs to prove that they were not at fault than to prove that they took all reasonable measures to prevent the risk and its consequences. Furthermore, the language of article 17 of the Rotterdam Rules, for its part, gives rise to uncertainty in determining MTC liability, in that the provision enables the parties to reassign responsibility for the tasks which are ordinarily the responsibility of MTCs.

³¹⁵ Rotterdam Rules, art 17(5).

³¹⁶ Marel Katsivela, ‘Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules’ (2010) 40 *Revue générale de droit* 413, 426.

³¹⁷ Rotterdam Rules, art 26.

2.4 Limitation of liability

Sub-section 2.3 discussed the rules relating to the basis of liability under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. These three instruments all provide an unfair solution in determining MTC liability. In particular, the MT Convention exposes MTCs to a greater risk of liability by failing to provide a list of defences that MTCs may use to escape liability. At the same time, the UNCTAD/ICC Rules 1992 and the Rotterdam Rules create difficulties for MTCs in that they require them to prove a negative—that they were not at fault in causing or contributing to any damage, loss, or delay in delivery. Moreover, the Rotterdam Rules create uncertainty in determining MTC liability because of the language of article 17, which is both confusing and controversial.

This sub-section turns to the rules relating to the limitation of MTC liability. In particular, it considers the possibility of MTCs regarding the MT Convention and the Rotterdam Rules as unattractive, because of how favourable the limitations established under these instruments are to cargo owners. The sub-section also examines whether the limitation under the UNCTAD/ICC Rules 1992—which is based on the Hague-Visby Rules, as discussed in this section—is a limitation that is more favourable to MTCs.

Furthermore, the sub-section explores whether the three instruments create unpredictability in determining to what extent MTCs will be liable for damage or loss of the goods that is localised, given that the instruments largely repurpose limitations of liability existing under the unimodal conventions for such damage or loss.

Although the question where MTCs are liable under the MT Convention does not depend on the point in the carriage operation where the damage or loss occurs, the question as to level of limitation of liability does. Suppose that it is possible to identify this point and therefore the mode of transport that was being used at the time. This type of damage or loss is known as

‘localised’ damage or loss. In the case of localised damage or loss, the MT Convention has the provisions of the relevant unimodal convention (namely, the one applicable to the mode of transport that was being used at the time) or mandatory national law determine any limitation of MTC liability.³¹⁸ As stated by article 19 of the Convention, this rule (relating to the law applicable) applies only if the provisions of the unimodal convention or mandatory national law provide a limitation of liability that is more favourable to MTCs than do the provisions of the MT Convention. If, of the possible limitations of MTC liability, the one under the MT Convention is more favourable to MTCs than any under the relevant unimodal convention or mandatory national law, it is the limitation under the MT Convention that will prevail. Consequently, in the case where there is a sea or inland-waterway segment to the MTO, cargo owners may receive compensation of up to *either* 920 SDR per package or shipping unit *or* 2.75 SDR per kg of gross weight, *whichever is higher*.³¹⁹ In contrast, in the case where the damage or loss occurs during an air- or rail-carriage segment, MTCs may rely upon the limitation under the relevant unimodal convention.

Table 3 below shows that when it comes to the limitation of liability, only the Warsaw Convention (on air carriage) and the COTIF-CIM Convention (on rail carriage) are more onerous on MTCs than is the MT Convention. For carriers, the limitation of MTC liability under the MT Convention is less favourable to MTCs than is the limitation of MTC liability under certain unimodal conventions.³²⁰ The limitation under the MT Convention is roughly 10% less favourable to MTCs than that under the Hamburg Rules and roughly 20% less favourable to MTCs than that under the Hague-Visby Rules.³²¹ Moreover, the situation where a unimodal convention and national law apply to a single contract of carriage is one that creates

³¹⁸ MT Convention, art 19.

³¹⁹ *ibid* art 18(1).

³²⁰ KF Haak, ‘The Harmonisation of Intermodal Liability Arrangements’ (2005) 40(1) *European Transport Law* 38–71.

³²¹ Adeline M Briant, ‘A Critical Look at the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980)’ (MA thesis, McGill University 1996) 129–30.

uncertainty and unpredictability in determining MTC liability.³²² It is impossible for cargo owners to predict the amount of any entitlement that they may have to compensation in the event of damage to or loss of goods because the limitation of MTC liability differs from unimodal convention to unimodal convention.

Table 3. Limitations of liability under unimodal conventions

Sea		Road	Air	Inland waterway	Rail
Hague-Visby Rules ³²³	Hamburg Rules ³²⁴	CMR Convention ³²⁵	Warsaw Convention/Montreal Convention 1975 ³²⁶	CMNI Convention ³²⁷	COTIF-CIM Convention ³²⁸
Either 2 SDR/kg or 666.67 SDR/unit whichever is the higher	Either 2.5 SDR/kg or 835 SDR/unit whichever is higher	8.33 DR/kg	17 SDR/kg	Either 2 SDR/kg or 666.67 SDR/unit or 25,000 SDR/container with goods or 1,500 SDR/container without goods	17 SDR/kg

In the case of unlocalised damage to and loss of goods (which is a type of damage or loss that is especially common in the case of containerised goods), MTC liability will be limited to 8.33 SDR per kg of gross weight.³²⁹

³²² Driscoll and Larsen (n 276) 236.

³²³ Hague-Visby Rules, art 3 r 5(a)

³²⁴ Hamburg Rules, art 6.

³²⁵ CMR Convention, art 23(3).

³²⁶ Warsaw Convention, art 22.

³²⁷ CMNI Convention, art 20. 'CMNI' stands for the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway 2000.

³²⁸ COTIF-CIM Convention, art 21.

³²⁹ MT Convention, art 18(3).

In the case of a delay in delivery of goods, MTC liability will be limited to *either* 2.5 times the payable freight for the delayed goods *or* the total freight payable for the entirety of the carriage operation, *whichever is lower*.³³⁰ Also, in the case of any such delay, cargo owners may sustain ‘indirect losses’—also referred to as ‘consequential losses’, in that they are losses that are consequential upon physical damage to or loss of goods.³³¹ In the case of any such loss, the questions arise as to whether and to what extent MTCs are liable for it. Unfortunately for MTCs, the MT Convention does not limit liability for consequential loss. Therefore, MTCs risk having to compensate cargo owners for consequential loss without any limitation of the amount specific to the case.³³² However, MTCs’ total liability—for any damage to, loss of, and delay in delivery of goods—is capped at the amount of the total loss of goods.³³³ This overall cap reflects the desire on the part of the MT Convention working groups to balance the interests of UNCTAD member states.³³⁴

Similarly to the MT Convention, the UNCTAD/ICC Rules 1992 set forth one limitation of MTC liability for localised damage and loss and another for unlocalised damage and loss. In the case of localised damage and loss, the rule is that if each of the segments of the carriage operation is governed by a separate contract, the limitation of liability will be determined by the relevant unimodal convention or mandatory national law.³³⁵ However, on the wording of the Rules concerning ‘separate contracts’, it is unclear (1) whether, for the limitation to apply, it matters who the parties to the each of the separate contracts are and (2) if it indeed does

³³⁰ *ibid* art 18(4).

³³¹ For example, a cargo owner expected their goods to arrive at the destination on 5 May 2021, with a view to it delivering them to a third party. However, for several reasons, the goods did not arrive on 5 May 2021, which in turn caused the cargo owner to fail to honour its agreement with the third party. As a result, it had to compensate the third party. This compensation paid was the cargo owner’s consequential loss.

³³² Hugh M Kindred and Mary R Brooks, ‘New and Improved? The UNCTAD/ICC Multimodal Rules Reviewed’ (1994) 33 *Transportation Journal* 5, 12.

³³³ MT Convention, art 18(5).

³³⁴ The Group of 77 wanted a liability regime maximising the protection to cargo owners while Group B wished maintaining applicability of unimodal conventions and national laws. See more details in Nasseri (n 277) 236–37.

³³⁵ UNCTAD/ICC Rules 1992 r 6(4).

matter, who the parties must be (or could be). Therefore, the question is whether the contract must be between the cargo owner and the MTC or between the shipper and the actual carrier.³³⁶

For unlocalised damage and loss, the rule is that unless the cargo owners declare the value of the goods on contracting, the Rules limit liability depending on whether or not there is a leg of the transport operation that involves sea or inland-waterway carriage.³³⁷ Where there is a leg by sea or inland waterway, MTC liability is limited to a maximum of *either* 666.67 SDR per package or shipping unit *or* 2 SDR per kg, *whichever is higher*.³³⁸ This limitation of liability is not original. The Rules borrowed the relevant provisions of law from the Hague-Visby Rules—which are widely accepted around the world, having been ratified by 89 countries.³³⁹ Because the Rules adopt the Hague-Visby limitation—a limitation that is more favourable to MTCs than the one adopted by the MT Convention³⁴⁰—the Rules are more attractive than the MT Convention to the industry and widely used by it. Where the carriage does not involve a sea or inland-waterway segment, MTC liability will be limited to 8.33 SDR per kg of the gross weight of the goods.³⁴¹

For non-physical loss resulting from a delay in delivery of goods and consequential loss upon physical damage to, or loss of goods, the Rules prevent cargo owners from bringing proceedings for more than the total freight payable for the entirety of the carriage operation.³⁴² This rule helps prevent MTCs having to pay compensation for the full amount of any consequential loss—which *is* an amount that they would have to pay under the MT Convention. Also, the more-specific limitations of liability under the Rules are subject to a more general

³³⁶ Glass (n 95) 290–97.

³³⁷ UNCTAD/ICC Rules 1992 r 6.

³³⁸ *ibid* r 6(1).

³³⁹ Abhinayan Basu Bal, 'Multimodal Aspect of the Rotterdam Rules: A Critical Analysis of the Liability of the MTC' (MA thesis, Lund University 2011) 39.

³⁴⁰ Hoeks (n 61) 20.

³⁴¹ UNCTAD/ICC Rules 1992 r 6(3).

³⁴² *ibid* r 6(5).

one: the total amount of compensation payable by MTCs (for any damage and loss attributable to them) is limited to the total value of the goods carried.³⁴³

The limitation of liability under the Rotterdam Rules is more ‘limited’. Since the Rules give precedence to unimodal conventions on non-maritime carriage,³⁴⁴ the limitation of liability under the Rules applies only in the case of (1) any unlocalised damage or loss or (2) localised damage or loss that occurs specifically in the course of sea carriage. To the extent that the Rules apply, they give the parties the freedom to agree any limitation of MTC liability by contract, a freedom which favours cargo owners.³⁴⁵ If the parties do agree any such limitation, any MTC liability will be limited to the highest of three amounts. The first amount is the value of the goods, if this value is declared in the contract.³⁴⁶ The second is 875 SDR per unit.³⁴⁷ The third amount is 3 SDR per kg of the gross weight of the goods.³⁴⁸

In the case of a delay in delivery of goods, the Rotterdam Rules limit MTC liability to 2.5 times the payable freight.³⁴⁹ The total liability under the Rules is limited to the highest of three amounts, if and as known. The first amount is the amount of limitation agreed contractually.³⁵⁰ The second is the value of the goods as declared in the contract.³⁵¹ The third is the total value of the damage or loss.³⁵² Through these provisions, the Rules demonstrate a desire to resolve certain legal difficulties which the existing international legal instruments fail to resolve, namely, difficulties arising in relation to unlocalised goods. However, the limitation of liability is more favourable to cargo owners under the Rotterdam Rules than the limitation of liability under the UNCTAD/ICC Rules 1992 and the MT Convention. Since the MT Convention provides a limitation of liability less favourable to MTCs than that under the unimodal

³⁴³ *ibid* r 6(6).

³⁴⁴ Rotterdam Rules arts 26 and 82.

³⁴⁵ *ibid* art 59(1).

³⁴⁶ *ibid*.

³⁴⁷ *ibid*.

³⁴⁸ *ibid*.

³⁴⁹ *ibid* art 60.

³⁵⁰ *ibid*.

³⁵¹ *ibid*.

³⁵² *ibid*.

conventions and is therefore opposed by the industry, it is unlikely that the limitation under the Rotterdam Rules would find more favour with it than the limitation under the MT Convention. Also, unlike the UNCTAD/ICC Rules 1992, the Rotterdam Rules do not explicitly refer to consequential loss (and, therefore, do not prevent MTCs from having to pay compensation for it). Consequently, under the Rotterdam Rules, MTCs may face liability to pay cargo owners full compensation for consequential loss, as MTCs also may under the MT Convention.

In the case of localised damage or loss occurring other than at sea, the Rules have the limitation of MTC liability determined by the provisions of the relevant (non-maritime) unimodal convention—whether the period of carriage falls prior or subsequent to any sea-carriage segment of the MTO as a whole.³⁵³ However, to benefit from this non-maritime limitation of liability, cargo owners must first prove that the damage or loss occurred during the non-maritime segment of the operation.³⁵⁴ For cargo owners, ‘this burden will be extremely difficult ... to discharge, in view of their lack of access to the facts surrounding a loss and the relevant evidence in respect of a claim’.³⁵⁵

Moreover, this burden will be accompanied by another: MTCs and cargo owners will still be unable (on contracting) to predict on what basis MTCs will be liable for damage to or loss of goods. The reason is that in the case of localised damage or loss, the Rotterdam Rules are non-committal as to the question of which instrument will determine the limitation of MTC liability: under the Rules, the instrument is simply whichever one applies to the (non-maritime) mode of transport. Therefore, the Rules do little to nothing to resolving unpredictability in determining MT liability. In other words, the Rules are similar to the MT Convention and the UNCTAD/ICC Rules 1992 in that they answer a question with question: to determine what the

³⁵³ *ibid* art 26.

³⁵⁴ *ibid*.

³⁵⁵ Faghfour (n 12) 111.

relevant limitation of MTC liability is, the parties must determine during which non-maritime segment of the MTO as a whole it was that the damage to or loss of goods occurred.

In summary, all three instruments subject MTCs and cargo owners to uncertainty, unpredictability, and unfairness as to the limitation of MTC liability. In particular, the provisions of the MT Convention and the Rotterdam Rules on the matter are highly favourable to cargo owners. In contrast, the equivalent provisions of the UNCTAD/ICC Rules 1992 are more favourable to MTCs.

Particularly undesirable is the unpredictability that each of the three instruments creates in determining the extent of MTC liability. In the case of localised damage or loss, the parties must look beyond the instrument to determine what limitation of MTC liability will apply, because each instrument ‘incorporates’ the limitation under the relevant unimodal convention. The result is that it is extremely difficult for MTCs and cargo owners, when contracting, to predict the extent of MTCs’ potential liability.

2.5 Time bars

Sub-section 2.4 considered the rules relating to the limitation of liability under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. The relevant rules are largely unpredictable and unfair. The limitations under the MT Convention and the Rotterdam Rules are more favourable to cargo owners, whereas those under the UNCTAD/ICC Rules are more favourable to MTCs. Furthermore, each of the three instruments relies on the limitation under the relevant unimodal convention in the case of localised damage to or loss. It is mainly by relying on this limitation *aliunde* that each of the three instruments gives rise to unpredictability, in effect requiring MTCs and cargo owners to wait for damage, loss, or delay in delivery to occur before they are able to predict the extent of MTCs’ liability.

This sub-section relates to a limitation of another type: the time bar on bringing proceedings against MTCs. In particular, the sub-section considers which of the three instruments is or are the most unfair to MTCs of this type. Against this background, the sub-section further examines a considerable risk that MTCs may face under the instruments: the risk of cargo owners bringing proceedings against them at a time close to time bar on proceedings brought by MTCs (under the Convention or the Rules) and the court then ordering them to pay compensation. In such circumstances, MTCs may lose the chance to recover the amount by bringing proceedings against their actual-carrier sub-contractors.³⁵⁶

Under the MT Convention, cargo owners will have a maximum of 24 months—from the day after the day that the goods are delivered or are to be delivered—to bring proceedings against MTCs.³⁵⁷ However, cargo owners have nine months under the UNCTAD/ICC Rules 1992.³⁵⁸ As a legal framework for sea carriage, the Rotterdam Rules provide for a time bar applying only to proceedings for (1) unlocalised damage or loss or (2) localised damage or loss specifically at sea. When the Rotterdam Rules apply, they give cargo owners 24 months—starting from the day after the day that the goods are delivered or are to be delivered—to bring proceedings.³⁵⁹

Because certain unimodal conventions, including the Hague-Visby Rules and the CMR, CMNI, and COTIF-CIM Conventions, give MTCs only 12 months to bring proceedings to recover the amount of the award from their actual-carrier sub-contractors (as set out in Table 4 below), MTCs consider the time bars under the MT Convention and Rotterdam Rules to be unreasonably long.³⁶⁰ MTCs will be at risk if cargo owners bring proceedings against them

³⁵⁶ Recourse actions between MTCs and actual carriers may, in some circumstances, be governed by unimodal conventions, including the Rotterdam Rules. For example, where an MTC contracts with an actual sea carrier for the carriage of goods by sea, the MTC may effectively act as a cargo interest in that contractual relationship. In such cases, the relationship may fall within the scope of the Rotterdam Rules (Articles 5-7), depending on the relevant contractual and jurisdictional framework. National law is therefore likely to govern recourse actions only where no applicable unimodal convention applies or where the relevant state is not a party to the convention. See Nasseri (n 277), 237.

³⁵⁷ MT Convention, art 25.

³⁵⁸ UNCTAD/ICC Rules 1992, r 10.

³⁵⁹ Rotterdam Rules, art 62.

³⁶⁰ Hague-Visby Rules, art 3(6).

after one of the unimodal time bars of 12 months, because the right of MTCs to bring proceedings against their actual-carrier sub-contractors will be time-barred. UNCTAD³⁶¹ and Hoek³⁶² believe that the unimodal time bars of 12 months, being of only 12 months, contributed to the failure of the MT Convention.

Like the time bar under the MT Convention, the time bar under the Rotterdam Rules may have been a cause of the instrument failing to gain support from the industry. Commenting on the time bar of nine months as set forth in the UNCTAD/ICC Rules, Tuckey J in *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd*³⁶³ stated that the time limit of nine months was a reasonable one for bringing proceedings to recover damage to or loss of the goods, especially given the necessity of freight forwarders to bring proceedings against actual-carrier sub-contractors to recover the amount of the award within the time bar of 12 months.³⁶⁴

Table 4. Time bars under unimodal conventions

Sea		Road	Air	Inland waterway	Rail
Hague-Visby Rules	Hamburg Rules	CMR Convention	Warsaw Convention/ Montreal Convention 1975	CMNI Convention	COTIF-CIM Convention
12 months	24 months	12 months	24 months	12 months	12 months

The 24-month time bars under the MT Convention and the Rotterdam Rules are much longer than the time bars under the unimodal conventions. This lengthy time bar is unfavourable to MTCs, reduces their chances of being able to bring proceedings against their

³⁶¹ UNCTAD, 'Multimodal Transport' (n 6) para 25.

³⁶² Hoeks (n 61) 17.

³⁶³ [2003] EWCA Civ 570.

³⁶⁴ *ibid* [30].

actual-carrier sub-contractors to recover the amount of any award made to cargo owners who had brought proceedings near the end of the 24-month period.

2.6 Conclusion to the section

In the end, the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992 all failed. The MT Convention failed for several reasons. In particular, it does not apply to all the types of goods that MTCs may carry, and it adopts a presumed-fault approach to liability without providing for exonerating events in the case of sea carriage. Furthermore, the limitation of liability that it sets forth is over-favourable to cargo owners, and the time bar that it sets forth is unreasonable in length when compared with the time bars under the unimodal conventions.

The Rotterdam Rules failed for different reasons. The provisions of the Rules are too complex and unsuited to MTOs. More specifically, although they apply door-to-door, it is only in the case of unlocalised damage to and loss of the goods that they apply to the entirety of the carriage operation. In the case of localised damage and loss, it is generally some other instrument, in the form of a non-maritime unimodal convention, that will apply for the purposes of limiting MTC liability. In cases where the Rules *do* apply, they apply both too much and too little. They create unpredictability by allowing MTCs to shorten their period of potential liability, all the while placing too onerous a burden of proof on cargo owners bringing proceedings against MTCs. At the same time, they disadvantage MTCs by setting forth a limitation of liability that is more favourable to cargo owners than does any other international legal instrument on MT. What is more, the Rules impose too lengthy a time bar, like the one under the MT Convention.

The UNCTAD/ICC Rules 1992 have proved to be less of a failure than the MT Convention and Rotterdam Rules, but they have still failed. Unlike the MT Convention and Rotterdam Rules, the UNCTAD/ICC Rules 1992 have had some success, by providing contract terms that

the MT industry supports. However, the UNCTAD/ICC Rules 1992 do not override unimodal conventions or national law. Therefore, the Rules are not the solution that they could be.

From the failure of the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992, it becomes apparent that the transport industry will oppose any legal instrument that (1) fails to address the problems created by the existing unimodal conventions and national law, (2) over-protects cargo owners' interests to the detriment of MTCs, and (3) under-protects MTCs using actual-carrier sub-contractors. Also, the industry will have no interest in an instrument that adopts a 'unimodal plus' approach. In other words, the industry will oppose uncertainty, unpredictability, and unfairness in determining MTC liability.

3. MTC liability under regional legal instruments

Section 2 discussed the position of the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992 on MTC liability and, more specifically, (1) the scope of the instruments' application, as well as (2) the period of potential liability, (3) the basis of liability, (4) the limitation of liability, (5) the time bars under them. Overall, none of these instruments sets forth rules that are sufficiently certain, predictable, and fair for the industry to support them. They do not apply to all types of MTOs, and it is also impossible to disentangle the rules under the instruments from the rules on the limitation of liability under the unimodal conventions in the case where damage to, loss of, or delay in delivery of goods is localised. Also, the instruments provide rules relating to the basis of liability, the limitation of liability, and time bars that are over-favourable to either cargo owners or MTCs. Furthermore, there is language in the Rotterdam Rules in particular that is both confusing and controversial.

This section now turns to the equivalent rules under the regional legal instruments for ALADI, ASEAN, MERCOSUR, and the Andean Community, as well as under the TRACECA Agreement. This section considers whether like the three international legal instruments on

MT, the regional legal instruments (and the TRACECA Agreement) represent solutions that are uncertain, unpredictable, and unfair in determining MTC liability. The section also explores how similar the regional instruments for ALADI, ASEAN, MERCOSUR, and the Andean Community are to the MT Convention and the UNCTAD/ICC Rules 1992, in particular in the rules on MTC liability (including on the period of responsibility, the basis of liability, the limitation of liability, and time bars) set forth under them. If there are similarities, the regional instruments will raise the same issues as the Convention and the Rules. This section builds upon Section 2, which analysed the detail of the substantive rules under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992. Because the rules on MTC liability in the four regional instruments are almost identical to those in the three international ones, this section provides only a high-level overview of the equivalent rules under the regional instruments and the TRACECA Agreement and highlight the relevant specificities of the five regional instruments. Also, certain countries have borrowed from these regional instruments in their own national law, as will be discussed in Section 4.

These regional instruments on MTOs are specific to ALADI, ASEAN, MERCOSUR, and the Andean Community, respectively. In imitating the MT Convention and UNCTAD/ICC Rules 1992, these four regional instruments adopt a modified liability approach. As a result, the provisions set forth by each of the instruments are similar to those set forth by the other instruments on several questions: the scope of the instrument's application, the period of potential MTC liability, the basis of liability, the limitation of liability, and the time bar.

The rules relating to the scope of the instruments' application mean that the provisions of all four are applicable to MT contracts for the carriage of any kind of goods provided that either the point where the goods are taken under charge or the point where they are delivered is in a

member state.³⁶⁵ However, while the provisions applicable within ASEAN and the Andean Community are mandatory,³⁶⁶ the provisions applicable within MERCOSUR and ALADI are merely contractual.³⁶⁷ For the MERCOSUR and ALADI instruments to apply to an MT contract, the parties must include wording in the contract to the effect that the ‘International Multimodal Transport Agreement – MERCOSUR’ applies.³⁶⁸ The contractual nature of the MERCOSUR and ALADI instruments results in unpredictability in determining MTC liability, as is the case with the UNCTAD/ICC Rules 1992, which are also contractual.

In cases where the four regional instruments apply, their rules as to the period of responsibility hold MTCs liable for damage to, loss of, and delay in delivery of goods from the time that MTCs take charge of the goods until the time MTCs deliver them.³⁶⁹ Also, MTCs bear liability for the conduct of their employees, agents, and actual-carrier sub-contractors—namely, for the conduct of those who are involved in the actual performance of the MT contract.³⁷⁰ However, MTCs will be liable for delay in delivery of goods only where MTCs and cargo owners have agreed that timely delivery is of the essence.³⁷¹ This regional approach to defining the period of responsibility is similar to the approach under the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992, and therefore goes some way to minimising unpredictability in determining MTC liability.

For damage to, loss of, or delay in delivery of goods, the regional rules relating to the basis of MTC liability similarly presume MTCs to be at fault. However, each of the regional instruments differs as to the question of what exactly MTCs must prove to escape liability. In

³⁶⁵ Andean Community, Decision 331 of 4 March 1993 as Modified by Decision 393 of 9 July 1996: ‘International Multimodal Transport’ (hereafter Andean Community Decision), arts 1 and 2; MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport of Goods 1995 (hereafter MERCOSUR Partial Agreement), arts 1 and 2; ALADI International Agreement on Multimodal Transport 1996 (hereafter ALADI Agreement), arts 1 and 2; ASEAN Framework Agreement on Multimodal Transport 2005 (hereafter AFAMT), arts 1 and 2.

³⁶⁶ The Andean Community Decision and AFAMT do not contain provisions similar to article 4 in the MERCOSUR Partial Agreement and ALADI Agreement. Therefore, these instruments are compulsory.

³⁶⁷ MERCOSUR Partial Agreement, art 4; ALADI Agreement, art 4.

³⁶⁸ MERCOSUR Partial Agreement, art 4; ALADI Agreement, art 4.

³⁶⁹ Andean Community Decision, art 6; MERCOSUR Partial Agreement, art 6; ALADI Agreement, art 6; AFAMT, art 7.

³⁷⁰ Andean Community Decision, art 7; MERCOSUR Partial Agreement, art 7; ALADI Agreement, art 7; AFAMT, art 8.

³⁷¹ Andean Community Decision, art 9; MERCOSUR Partial Agreement, art 9; ALADI Agreement, art 9; AFAMT, art 10.

particular, the Andean Community and ASEAN instruments provide that MTCs will bear no liability if they prove that they took all reasonable measures to avoid any damage, loss, or delay in delivery.³⁷² MTCs will also escape liability if they prove that one of the exonerating events listed in either of the two instruments—such as an act of God or a fire on the ship—occurred.³⁷³ In comparison, the MERCOSUR and ALADI instruments give MTCs limited opportunities to avoid liability: MTCs do so only in the circumstances set forth in article 10 of each instrument, such as damage, loss, or delay in delivery resulting from an inherent defect or the nature of the goods.³⁷⁴ In other words, the two instruments are less favourable to MTCs than to cargo owners.

If MTCs do bear liability, the regional rules relating to the limitation of any such liability vary according to the type of damage or loss. There are three: (1) localised damage to or loss of goods, (2) unlocalised damage to or loss of goods, and (3) any loss resulting from delay in delivery. For localised damage to or loss of goods, the four regional instruments have the relevant unimodal convention or national law limit any MTC liability.³⁷⁵ However, for the unimodal or national provisions to apply, the Andean and ASEAN instruments additionally require that the MTO be governed by separate contracts, one for each mode of transport used in the operation.³⁷⁶ However, despite this requirement appearing in the two instruments, they do not make any requirements as to who the parties to each contract are. Therefore, on the wording of the two instruments, the contract would be with consignors or actual-carrier sub-contractors. However, it is difficult to see how the separate MTC contracts could be contracts other than with their actual-carrier sub-contractors. If MTCs and consignors made a separate contract for each leg of the operation, the operation would not be an MTO: by definition, the

³⁷² Andean Community Decision, art 9; AFAMT, art 10.

³⁷³ Andean Community Decision, art 11; AFAMT, art 12.

³⁷⁴ MERCOSUR Partial Agreement, art 10; ALADI Agreement, art 10.

³⁷⁵ Andean Community Decision, art 16; MERCOSUR Partial Agreement, art 15; ALADI Agreement, art 15; AFAMT, art 17.

³⁷⁶ Andean Community Decision, art 16; MERCOSUR Partial Agreement, art 15; ALADI Agreement, art 15; AFAMT, art 17.

MTO is an operation governed by a *single* contract.³⁷⁷ Furthermore, for a legal instrument to adopt a modified liability approach is to ensure that MTCs ordered to compensate cargo owners for damage and loss may then recover the amount from actual-carrier sub-contractors. The effect of the provisions of the two regional instruments is that if (1) MTCs sub-contract one or more segments of the carriage operation and (2) there is localised damage or loss, the limitation of liability will be calculated according to the relevant unimodal conventions or national law. Therefore, the two regional instruments make the extent of MTC liability less predictable.

In the case of unlocalised damage to or loss of goods, the Andean Community and ASEAN instruments limit MTC liability to the value of goods in the case where the value is declared contractually.³⁷⁸ In any other case, the two regional instruments limit any such liability to *either* 666.67 SDR per packing or shipping unit *or* 2 SDR per kg, *whichever is higher*.³⁷⁹ However, in the case of non-maritime carriage, MTC liability is limited to 8.33 SDR per kg.³⁸⁰ The MERCOSUR and ALADI instruments, on the other hand, leave it to their member states to determine the amount of any limitation of MTC liability.³⁸¹ In this regard, these instruments cause unpredictability.

Although there are differences across the five regional instruments in how they limit MTC liability for damage to and loss of goods, there are no such differences as regards delay in delivery and ‘indirect’ loss, namely, loss resulting from physical damage to or loss of goods.³⁸² More specifically, MTC liability for delay in delivery and indirect loss is limited to the total freight payable for the entirety of the carriage operation.³⁸³

³⁷⁷ Andean Community Decision, art 1; AFAMT, art 1.

³⁷⁸ Andean Community Decision, art 13; AFAMT, art 14.

³⁷⁹ Andean Community Decision, arts 14 and 15; AFAMT, arts 14 and 16.

³⁸⁰ Andean Community Decision, arts 14 and 15; AFAMT, arts 14 and 16.

³⁸¹ MERCOSUR Partial Agreement, art 13; ALADI Agreement, art 13.

³⁸² See n 331.

³⁸³ Andean Community Decision, art 17; MERCOSUR Partial Agreement, art 16; ALADI Agreement, art 16; AFAMT, art 18.

However, there is much less similarity across the instruments when it comes to the question of time bars. In particular, it is at the point falling nine months from the agreed date of delivery that the Andean Community and ASEAN instruments time-bar cargo owners from bringing proceedings against MTCs for damage to, loss of, or delay in delivery of goods.³⁸⁴ The MERCOSUR and ALADI instruments, on the other hand, provide a lengthier time bar: 12 months from the agreed delivery date.³⁸⁵ This time bar, being lengthier, has the potential to prevent MTCs from recovering from their actual-carrier sub-contractors, because of the possibility of cargo owners proceeding against MTCs too close to the end of the 12-month period. Indeed, some of the unimodal conventions that may apply—such as the CMR Convention or the CMNI Convention—also provide a time bar of 12 months.³⁸⁶

Table 5 below summarises the provisions on MTC liability set forth by the four regional organisations.

Table 5. Regional provisions on MTC liability

	Andean Community	MERCOSUR	ALADI	ASEAN
Scope of application	The liability-related provisions apply to MT contracts which fulfil the following requirement: At least the origin or the destination is in a member state.	The liability-related provisions apply to MT contracts which fulfil the following requirements: At least the origin or the destination is in a member state, and The MT documents refer to the instrument	The liability-related provisions apply to MT contracts which fulfil the following requirements: At least the origin or the destination is in a member state, and The MT documents refer to the instrument	The liability-related provisions apply to MT contracts which fulfil the following requirement: At least the origin or the destination is in a member state.

³⁸⁴ Andean Community Decision, art 22; AFAMT, art 23.

³⁸⁵ MERCOSUR Partial Agreement, art 22; ALADI Agreement, art 22.

³⁸⁶ See Table 4.

		as being applicable, and The MTC is domiciled in a member state.	as being applicable, and The MTC is domiciled in a member state.	
Period of responsibility	MTCs are liable from the moment that they take possession of goods until the moment that they deliver the goods, and For the conduct of their employees, agents and actual-carrier sub-contractors	MTCs are liable from the moment that they take possession of goods until the moment that they deliver the goods, and For the conduct of their employees, agents and actual-carrier sub-contractors	MTCs are liable from the moment that they take possession of goods until the moment that they deliver the goods, and For the conduct of their employees, agents and actual-carrier sub-contractors	MTCs are liable from the moment that they take possession of goods until the moment that they deliver the goods, and For the conduct of their employees, agents and actual-carrier sub-contractors
Basis of liability	MTCs are at fault (presumptively) unless they prove that: they took all reasonable measures to avoid damage or loss, or the damage or loss occurred in one or more of the circumstances provided in article 11	MTCs are at fault (presumptively) unless they prove that: the damage or loss occurred in one or more of the circumstances provided in article 10	MTCs are at fault (presumptively) unless they prove that: the damage or loss occurred in one or more of the circumstances provided in article 10	MTCs are at fault (presumptively) unless they prove that: they took all reasonable measures to avoid damage or loss, or the damage or loss occurred in one or more of the circumstances provided in article 12
	For delay in delivery, MTCs will be liable for delay in delivery only if it is agreed that timely delivery is of the essence	For delay in delivery, MTCs will be liable for delay in delivery only if it is agreed that timely delivery is of the essence	For delay in delivery, MTCs will be liable for delay in delivery only if it is agreed that timely delivery is of the essence	For delay in delivery, MTCs will be liable for delay in delivery only if it is agreed that timely delivery is of the essence
Limitation of liability	Relevant unimodal	Relevant unimodal	Relevant unimodal	Relevant unimodal

	conventions or national law will determine the amount of limitation of MTC liability in the case where: There occurs damage or loss in a leg of the transport operation, and There is a separate contract made for each leg.	conventions or national law will determine the amount of limitation of MTC liability in the case where: There occurs damage or loss in a leg of the transport operation.	conventions or national law will determine the amount of limitation of MTC liability in the case where: There occurs damage or loss in a leg of the transport operation.	conventions or national law will determine the amount of limitation of MTC liability in the case where: There occurs damage or loss in a leg of the transport operation, and There is a separate contract made for each leg.
	In the case where no unimodal convention or national law is applicable, Unless the value of goods is declared contractually, MTC liability will be limited to 666.67 SDR/package or 2 SDR/kg, whichever is higher. However, if the MTO does not involve any sea carriage, MTC liability will be limited to 8.33 SDR/kg.	In the case where no unimodal convention or national law is applicable, Unless the value of goods is declared contractually, The amount of limitation of MTC liability will be determined by member states.	In the case where no unimodal convention or national law is applicable, Unless the value of goods is declared contractually, the amount of limitation of MTC liability will be determined by member states.	In the case where no unimodal convention or national law is applicable, Unless the value of goods is declared contractually, MTC liability will be limited to 666.67 SDR/package or 2 SDR/kg, whichever is higher. However, if the MTO does not involve any sea carriage, MTC liability will be limited to 8.33 SDR/kg.
	For delay in delivery and indirect loss, MTC liability will be limited to the total freight payable for the entirety of the carriage operation.	For delay in delivery and indirect loss, MTC liability will be limited to the total freight payable for the entirety of the carriage operation.	For delay in delivery and indirect loss, MTC liability will be limited to the total freight payable for the entirety of the carriage operation.	For delay in delivery and indirect loss, MTC liability will be limited to the total freight payable for the entirety of the carriage operation.

Time bars	Nine months from the agreed date of delivery, unless otherwise agreed	Twelve months from the agreed date of delivery, unless otherwise agreed	Twelve months from the agreed date of delivery, unless otherwise agreed	Nine months from the agreed date of delivery, unless otherwise agreed
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From the above analysis, it becomes apparent that all four of the instruments establish rules on MTC liability which are uncertain, unpredictable, and unfair.

This section now turns to another instrument: the TRACECA Agreement, which is specific to Europe and Asia. Although in neither of these two regions is there any region-specific legal instrument on MTOs, this Agreement comes relatively close to being one, as a mandatory multilateral agreement created in 2009 to govern MTOs along the Europe and Asia corridor. Instead of adopting a modified liability approach (like the four regional instruments above), the TRACECA Agreement adopts a uniformed-liability approach.³⁸⁷ Notably, the Agreement holds MTCs liable for damage to, loss of, and delay in delivery of goods—including where attributable to the conduct of their agents, employees, or actual-carrier sub-contractors—from the moment that they take charge of the goods until the moment that they hand the goods over.³⁸⁸

To escape liability for any such damage, loss, or delay in delivery, MTCs must prove that MTCs and their employees, agents, or actual-carrier sub-contractors were not at fault.³⁸⁹

The TRACECA Agreement sets forth a single provision relating to the limitation of any such liability. This provision applies to any damage to or loss of goods, whether localised or unlocalised. Unless the value of goods is declared contractually, the Agreement limits any

³⁸⁷ UNESCAP, ‘Virtual Expert Group Meeting’ (n 4).

³⁸⁸ TRACECA Agreement, art 6.

³⁸⁹ *ibid* art 7.

MTC liability to 8.33 SDR per kg, irrespective of where in the MTO the damage or loss occurred.³⁹⁰ Otherwise, the Agreement limits any MTC liability to the value of the goods.

In the case of delay in delivery and consequential (or, in other words, indirect) loss,³⁹¹ the TRACECA Agreement limits MTC liability to 5% of the agreed price for every day of delay.³⁹² However, no MTC liability may exceed 30% of the total freight payable.³⁹³

Under the TRACECA Agreement, MTCs will (unless agreed otherwise) bear no liability unless cargo owners bring proceedings against them within 12 months of the date of delivery.³⁹⁴ In this respect, the provisions of the TRACECA Agreement mirror those of the CMR convention. In other words, the relevant provisions of the TRACECA Agreement are onerous to the relevant MTCs (namely, those providing transport services including sea carriage), especially if the provisions are compared to those of the four regional instruments. Such MTCs prefer the law to provide a variety exonerating events, in particular because sea carriage involves much more risk than non-maritime carriage.³⁹⁵ Consequently, the Agreement represents an option that is unattractive to its own member states whose territory borders the sea. Only five of the 13 member states ever ratified the Agreement,³⁹⁶ and none of these member states—Armenia, Azerbaijan, Georgia, Kyrgyzstan, and Tajikistan—has territory bordering the sea.

As a general observation, none of the four regional instruments or the TRACECA Agreement provides a certain, predictable, and fair solution for the determination of MTC liability. The four regional instruments provide different limitations of liability according to whether any damage to or loss of goods is localised and unlocalised. These differences create

³⁹⁰ *ibid* art 8(2).

³⁹¹ See n 331.

³⁹² TRACECA Agreement, art 8(3).

³⁹³ *ibid* art 8(3).

³⁹⁴ *ibid* art 11.

³⁹⁵ See Sub-section 2.4.

³⁹⁶ TRACECA, 'History of TRACECA' <<http://www.traceca-org.org/en/about-traceca/history-of-traceca/>> accessed 23 July 2021.

unpredictability. In addition, the four regional instruments and the Agreement contain rules relating to the basis of liability, the limitation of liability, and the time bar that are over-favourable to either cargo owners or MTCs.

4. MTC liability under national legal instruments

Section 3 discussed the rules relating to MTC liability in ALADI, ASEAN, MERCOSUR, and the Andean Community instruments, as well as the TRACECA Agreement. That section concluded that the four regional instruments and the Agreement provide a solution which is uncertain, unpredictable, and unfair for the purposes of determining MTC liability. Indeed, on the question of the extent of MTC liability, each of the four regional instruments defers to the relevant unimodal convention in the case where damage to, loss of, or delay in delivery of goods is localised. In this respect, the instruments are unpredictable. In addition, many of the rules relating to the basis of liability, the limitation of liability, and the time bar under the four regional instruments and the TRACECA Agreement are over-favourable to either cargo owners or MTCs, meaning that they are unfair in how they determine MTC liability.

This section now moves to the national level, considering all national legal instruments available in English, as listed in Table 6 below. In particular, it examines whether any unpredictability that arises at the national level does so for the same reasons as at the international and regional levels—as discussed in Sections 2 and 3, respectively.

Accordingly, this section focuses on whether the rules relating to liability under the national instruments surveyed are unfair. For these purposes, this section uses a hypothetical to analyse the rules.

Consider Young Dong Vina Company (hereafter Vina). It is based in one country (hereafter ‘Destination Country’), and it buys a container of polyester yarn from Young Dong Webbing

Company (hereafter Webbing), which is in another country (hereafter ‘Origin Country’).³⁹⁷

Vina enters a contract with U&G Logistics Company (hereafter UG) to have the container of polyester yarn transported from Webbing’s warehouse in the Origin Country to a port in Destination Country. For the purposes of performing the contract with Vina, UG arranges road transport for the inland carriage between the warehouse and the seaport in the Origin Country and sea transport for the carriage between the seaport in Origin Country and the Destination Country.

The container of polyester yarn is found damaged by Vina when taking delivery of it in the Destination Country. For the purposes of determining UG’s liability, either the national law of the Origin Country or that of the Destination Country provides a solution that is uncertain, unpredictable, and unfair. Also, some of the instruments that may potentially apply cause unpredictability by deferring to the relevant unimodal convention for purposes of determining MTC liability. Furthermore, each of the two national regimes is too favourable either to cargo owners or to MTCs.

Table 6. National instruments governing MTOs

No.	Countries	National legal instruments on multimodal transport
1	Argentina	Law No 24.921: Multimodal Transport of Goods
2	Brazil	Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods
3	Cambodia	Law Adopting AFAMT
4	Columbia	Andean Community Decisions 331 and 393
5	China	Maritime Code 1993 and Civil Code 2020, Chapter 19 of Transport Contract
6	Ecuador	Andean Community Decisions 331 and 393
7	Ethiopia	Multimodal Transport of Goods Proclamation No 548/2007
8	Germany	Commercial Code (HGB) (last amended in 2024), Book 4, Subdivision 1-3
9	India	Multimodal Transportation of Goods Act 1993

³⁹⁷ This example is modified based on the hypothetical case in Bui Doan (n 42).

10	Indonesia	Regulation No 8 of 2011 on Multimodal transport
11	Mexico	Regulation on International Multimodal Transport 1989
12	Myanmar	The Multimodal Transport Law, 2014
13	Netherland	Civil Code, Book 8, Section 8.2.2
14	Laos	Law on Multiple Transport No 28/NA
15	Paraguay	MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport
16	Singapore	Multimodal Transport Act 2021
17	Thailand	The Multimodal Transport Act, BE 2548
18	Vietnam	The Decree 87/2009/ND-CP on Multimodal Transport

4.1. Scope of application

Before examining the basis on which the MTC will be liable in the hypothetical, this subsection identifies the legal regime that is applicable. It first considers whether the national regimes—each represented in the hypothetical by a single instrument—are applicable to the hypothetical and would be even if the contract were formed online.

Here, there arises the question whether—regardless of any differences between the two national instruments in the language used by them—one of the two national instruments in principle applies to the hypothetical if either the place of receipt of goods or the place of delivery of goods is national territory. However, like many national instruments around the world, each of the two national instruments is unclear as to whether it applies to internet-based transactions, meaning that the instrument creates unpredictability in determining MTC liability. Indeed, in such a case, answering the question of whether an internet-based MT transaction falls within the scope of a given legal regime is highly dependent on how the national courts interpret whatever relevant law there may *actually* be. To illustrate what the possibilities are in practice, it will be helpful to examine a sample of national instruments (as interpreted by the national courts) and how they define the scope of their own application.

The national instruments listed in Table 6 make provision in relation to the scope of their application in various ways. Though the wording differs from instrument to instrument, almost every one of the instruments provides that it governs the carriage of goods by a combination of different modes of transport under a single contract and defines this type of carriage as an MTO.³⁹⁸

However, the definition is particularly narrow under the German instrument, which imposes two additional conditions. First, there must (paradoxically) be a separate contract for each mode of transport.³⁹⁹ However, the operation is nevertheless an MTO because, as discussed below, the law effectively treats the separate contracts as a single one by treating any *sub*-contracts as ‘different contracts’. Second, ‘at least two of these contracts would have been subject to different legal rules’.⁴⁰⁰ The effect of these additional conditions is to make an MTO one that necessarily involves (1) sea carriage and (2) MTCs performing only a single segment of the carriage operation, delegating the other segments to actual-carrier sub-contractors.⁴⁰¹ The reason is that in Germany, the carriage of goods by road, rail, inland waterway, and air is governed by sections 407 to 449 of the German Commercial Code (one set of the ‘different’ sets of ‘legal rules’), while carriage by sea is governed separately, by sections 481 to 512 (the other of the ‘different’ sets of ‘legal rules’). If the only modes of transport combined within a transport operation are modes of transport governed by sections 407 to 449 (namely, road, rail, inland-waterway, and air), the operation is not an MTO within the meaning of the law and, therefore, simply falls within the scope of general commercial law, under sections 407 to 449 of the German Civil Code. It is for this reason that, for the German instrument to apply, the

³⁹⁸ For example, India’s MT instrument states that ‘multimodal transportation means carriage of goods, by at least two different modes of transport under a multimodal transport contract’. In China, the Maritime Code states that ‘a multimodal transport contract as referred to in this Code means a contract under which the multimodal transport operator undertakes to transport the goods, against the payment of freight for the entire transport’. See Multimodal Transportation Act No 28 of 1993 of India, s 2(k); Maritime Code 1993 of China, art 102.

³⁹⁹ German Commercial, Code bk 4, s 452.

⁴⁰⁰ *ibid.*

⁴⁰¹ See Section 3.

(would-be) MTO must combine (1) a sea-carriage segment and (2) at least one other segment of carriage involving another mode of transport, be it road, rail, inland-waterway, or air.⁴⁰²

In the hypothetical, Vina and UG conclude a single contract for the carriage of the container from the Origin Country to the Destination Country. If UG acts as a principal carrier—namely, as a contracting carrier that concludes an MT contract with a cargo owner—under this contract, it is UG that will be responsible vis-à-vis Vina for transporting the container. In any case such as this, the contract satisfies the criteria (for the contract to be classified as an MT contract) set forth by almost every one of the national instruments. Therefore, almost every one of the national instruments would *prima facie* apply to the hypothetical MTO.

However, the case of Germany again requires special consideration here. As discussed above, the German instrument imposes two additional requirements, the second—and less problematic here—effectively being that the MTO must involve at least two modes of transport, one of them maritime and one of them non-maritime. This requirement is satisfied in the hypothetical: there is carriage first by road, then by sea, meaning that ‘different legal rules’ would apply. However, the second requirement is that MTCs must have a separate contract for each mode of transport used. To satisfy this second requirement, UG (as MTC) must employ a road carrier (as first actual-carrier sub-contractor) to have the container of polyester yarn transported by road within the Origin Country and a sea carrier (as second actual-carrier sub-contractor) to have the container transported from the seaport in the Origin Country to the seaport in the Destination Country. If UG were to perform the entirety of the carriage operation ‘on its own’, namely, using its own conveyances and without sub-contracting any portion of the operation, then the German instrument would not apply. It is not unusual in practice for larger carriers to perform carriage operations on their own. For example,

⁴⁰² Hoeks (n 61) 372–73.

DHL has its own aircraft and trucks for the purposes of transporting goods across borders.⁴⁰³ Therefore, in many cases, DHL will not need to use any actual-carrier sub-contractors.

Common, too, is one of the types of MTO that this section has considered so far: traditional *paper*-based ones. However, in practice, MT contracts may be concluded via the internet—as the one in the hypothetical could well have been.⁴⁰⁴ This is a modern-day practice that raises the question whether the relevant national instrument actually applies to the relevant MTO. This question is important for the specific purposes of this thesis because the answer is relevant to the matter of unpredictability in determining MTC liability. Also, the answer may be key in practice, for the purposes of knowing whether or not the national instrument applies to a given MTO. Therefore, it becomes necessary to examine how the different instruments treat electronic contracts and signatures.

Although the relevant wording differs from national instrument to national instrument, almost every one of the national instruments is clearly intended to apply to internet-based MT transactions.⁴⁰⁵ However, those of German, Chinese, Indian, Dutch and Mexican law are not. These five instruments do not explicitly define ‘writing’. Therefore, it becomes necessary to look outside the ‘four corners’ of the instruments—and, for example, to consider other legal instruments related to them and customs as prevailing in the carriage of goods. Ultimately, it is of course the national courts that will decide whether the relevant national instrument applies to internet-based MT contracts.

⁴⁰³ See DHL Group, ‘2023 Annual Report’ (2023), 22 and 25 <<https://reporting-hub.group.dhl.com/ecomaXL/files/DHL-Group-2023-Annual-Report.pdf>> accessed 12 December 2023.

⁴⁰⁴ See Section 2 of Chapter 1.

⁴⁰⁵ For example, Ethiopian law on MT does not state clearly if the law governs internet-based MT transactions, the law regulates that ‘the signature on the multimodal transport document may be in handwriting, printed in facsimile, stamped, in symbol or made by any other mechanical or electronic means’. Furthermore, Singaporean law on MT regulates that ‘writing — (a) means a mode of representing or reproducing words, figures or symbols in a visible form; and (b) includes telegram, telex, fax or any other means which prints, records, repeats or transmits messages by mechanical or electronic means, or by any other kind of instrument or apparatus intended for such purposes’. See Multimodal Transport of Goods Proclamation No 548/2007 of Ethiopia, s 4(3); Multimodal Transport Act 2021 of Singapore, s 2.

The development of internet-based transactions has seen most states come to recognise internet-based MT transactions as enforceable.⁴⁰⁶ So, too, do the national instruments governing MTOs in Germany, China, India, Netherlands and Mexico, although it was not clear from the outset that these instruments did so. In particular, Germany and the Netherlands are bound, as EU member states, by EU Regulation No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market.⁴⁰⁷ By virtue of this regulation, the German and Dutch Civil Codes recognise electronic signatures as enforceable.⁴⁰⁸ The Dutch Civil Code states that ‘an electronic signature has the same legal effect as a handwritten signature’.⁴⁰⁹ Using different language, the German Civil Code provides that ‘the written form may be replaced by electronic form, unless the statute leads to a different conclusion’.⁴¹⁰ Likewise, the German Civil Code also specifies that ‘if electronic form is to replace the written form prescribed by statute, the issuer of the declaration must add their name to it and provide the electronic document with a qualified electronic signature’.⁴¹¹

Despite not being EU member states, China, India, and Mexico also recognise contracts concluded by electronic signature as enforceable. China’s Electronic Signature Law states that ‘the legal effect of a document, with regard to which the parties concerned have agreed to use electronic signature or data message, shall not be denied only because the form of electronic signature or data message is adopted’.⁴¹² Similarly, the Indian Information Technology Act 2000 provides that documents which are required by law to be made ‘in writing or in typewritten or printed form’⁴¹³ may instead be made ‘in an electronic form’.⁴¹⁴ Section 5 of the Act also states that any electronic signature is as enforceable at law as a traditional handwritten

⁴⁰⁶ Minyan Wang, ‘Electronic Signatures: Do the Regulations on Electronic Signatures Facilitate International Electronic Commerce? A Critical Review’ (2007) 23 Computer Law & Security Report 40–47.

⁴⁰⁷ EU Regulation No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market, art 52.

⁴⁰⁸ Yansen Rosenov Petkov, ‘Impugnment of Electronic Signatures: Reflection of Regulation 910/2014 in the Civil Procedures of Bulgaria and the Netherlands’ (MA thesis, Tilburg University 2020) <<http://arno.uvt.nl/show.cgi?fid=152397>> accessed 9 July 2024.

⁴⁰⁹ Dutch Civil Code, art 3.15a.

⁴¹⁰ German Civil Code, s 126.

⁴¹¹ *ibid* s 126(a).

⁴¹² Electronic Signature Law of the People’s Republic of China, art 3.

⁴¹³ Information Technology Act of India 2000 (No 21 of 2000), s 4.

⁴¹⁴ *ibid*.

one.⁴¹⁵ In Mexico, article 96 of the Commercial Code grants ‘both transactions executed through electronic means and electronic signatures the same degree of reliability, enforceability, and validity in the legal realm as that given to a signed document’.⁴¹⁶

Therefore, like the courts in other legal systems that specifically regulate MT,⁴¹⁷ the courts of Germany, the Netherlands, China, India, and Mexico consider their national MT regulation to apply to internet-based MTOs. Accordingly, if the MT transaction in the hypothetical were an internet-based one (namely, one signed by UG and Vina online), then every one of the national instruments would *prima facie* apply to the MTO. However, there is room for greater predictability in Germany, the Netherlands, China, and Mexico. In these four countries, cargo owners (such as Vina) and MTCs (such as UG) would have to look beyond MT law to the *general law* in order to determine whether *MT law* in fact governed the hypothetical transport operation.

To summarise, every one of the national instruments listed in Table 6 makes provision for the carriage of goods by a combination of different modes of transport. Therefore, each such instrument will *prima facie* apply to the hypothetical MTO if either the place of receipt of goods or the place of delivery of goods is national territory and even if the MT contract is internet-based.

However, while almost every one of the national instruments imposes a single condition for the instruments to apply, five of national instruments—those of German, Chinese, Indian, Dutch, and Mexican law—that impose two additional conditions. Because of these additional conditions, none of the five instruments applies to all types of MTO. Furthermore, the German, Chinese, Mexican, and Dutch instruments are at first glance silent as to whether they apply to

⁴¹⁵ Shashirekha Malagi, ‘Laws Governing Digital Signature in India: An Overview’ (2023) 12(7) International Journal of Humanities and Social Science Invention 22, 25.

⁴¹⁶ Paola Jimenez Pons-Madriral, ‘Mexican Law’ (2004) 38 (3) International Legal Developments in Review 691, 692.

⁴¹⁷ MT countries are countries which have legal instruments governing MTOs.

internet-based MT contracts, thereby requiring MTCs and cargo owners less familiar with national law to look beyond the four corners of the instruments for an answer. This silence and the additional conditions make for comparatively less predictability in determining MTC liability nationally.

4.2 Scope of liability

Sub-section 4.1 examined whether the national instruments listed in Table 6 above apply to the hypothetical MTO. That section concluded that each of the national instruments will tend to apply to the MTO as defined in this thesis, even if internet-based, because either in theory or in practice, any such MTO will satisfy the definitional requirements for the instrument to apply. However, the instruments differ in the scope of their application. Almost every one of them provides a relatively practice-compliant definition of the MTO and explicitly states that it applies to the internet-based MTO. However, certain national instruments, namely, those of German, Dutch, Chinese, Indian, and Mexican law, impose additional conditions and are not explicit as to whether they apply to the internet-based MTO. For these reasons, these five instruments are characterised by a degree of comparative unpredictability in determining MTC liability.

This sub-section turns to the separate but logically subsequent issues of the period of potential MTC liability and the types of damage and loss covered by the national instruments. At a high level, each national instrument makes MTCs liable for damage to, loss of, or delay in delivery of goods from the time that they receive the goods for delivery until the time they hand the goods over to consignees. Some of the instruments, however, impose liability on MTCs in the case of delay in delivery where only where the parties have agreed that timely delivery is of the essence. For this reason, the question arises whether the law aligns with industry practice. Because the period of MTC liability will generally be both consistent with common practice and co-extensive with the duration of the MTO itself, this sub-section also

examines whether each of the national instruments generally ensures predictability and certainty in determining MTC—as well as no obvious unfairness.

4.2.1 The period for which MTCs will be liable for goods

This paragraph examines the period of time for which MTCs will be liable and does so using the hypothetical. Under each of the national instruments, MTCs are liable for the entirety of the MTO. The period of responsibility generally starts at the time that MTC receive the goods for delivery and ends when they hand the goods over to consignees. However, the national instruments differ in how they define the moment when MTCs ‘receive’ the goods for delivery and the moment when they ‘hand over’ the goods to consignees. In this case, the instruments may create unpredictability in determining when the period starts and ends. Certain national instruments also adopt a particularly narrow definition of the period of time for which MTCs are regarded as having handed the goods over. As result, it becomes necessary to examine whether the relevant national instruments produce unfairness to MTCs by failing to protect them in cases where it would be reasonable to regard them as having fulfilled their obligations in terms of ‘delivery’.

Despite certain differences in wording as to the determination of MTC liability,⁴¹⁸ each of the national instruments holds MTCs liable for damage to, loss of, or delay in delivery of goods occurring within the period from the moment that they receive the goods until the moment that they hand the goods over to consignees. For example, although adopting a network approach to liability (namely, one that relies primarily on the relevant unimodal convention to determine MTC liability),⁴¹⁹ the Dutch Civil Code provides that ‘the carrier must deliver the goods he has received for transport at the place of destination and in the condition in which he has received

⁴¹⁸ See Section 1.

⁴¹⁹ See Sub-section 1.2 of Chapter 3.

them for transport’.⁴²⁰ This provision of Dutch law imposes an obligation on MTCs to ensure that the goods remain undamaged from the time that the goods are received until the time that they are delivered at the destination. Failing to do so results in liability. In other words, the Dutch Civil Code holds MTCs liable for any damage or loss occurring between these two points in time.

Similarly to the Dutch instrument, there are also other national instruments—instead adopting either a modified approach to liability (such as the Indian instrument) or a uniform one (such as the Mexican instrument)—that also make the period of MTC liability co-extensive with the period of time starting when the goods are received for delivery and ending when they are handed over to consignees.⁴²¹ In particular, the Indian instrument provides that ‘the responsibility of the multimodal transport operator for the goods under this Act shall cover the period from the time he has taken the goods in his charge to the time of their delivery’.⁴²² Although slightly different in wording from the Indian instrument, the Mexican instrument similarly states:

The international multimodal transport operator is responsible for the merchandise or goods from the moment he or any of his representative or agents receive the merchandise from the user of its representatives until the moment of delivery of the same to the recipient in the terms established by the laws applicable to each of mode of transportation.⁴²³

The provisions on the period of responsibility under these and the other national instruments appear in Table 7 below.

⁴²⁰ Dutch Civil Code, art 8.221. This provision is in the section of the Code governing the carriage of goods in general rather than in the section specific to MTOs (art 8.22). However, article 8.22 of Code does not determine the period from when until when MTCs will be liable for damage to or loss of goods. According to article 8.32 of the Code, the general provisions of the Code governing the carriage of goods apply to contracts of carriage that are not specified elsewhere in the relevant book, namely bk 8. As a result, art 8.21 of the Code does apply to MTOs.

⁴²¹ For different approaches to the determination of MTC liability, see Section 1 of Chapter 3.

⁴²² Indian Multimodal Transport Act 1993, s 20A.

⁴²³ Mexican Regulation for International Multimodal Transport, art 10.

Table 7. Provisions on the period of responsibility under national law on MTOs

No.	Country	Approach to liability	Period of responsibility	Source
1	Argentina	Modified	From the moment that MTCs receive the goods under their custody until the moment that the goods are delivered to the person entitled to receive them	Law No. 24.921: Multimodal Transport of Goods, art 15
2	Brazil	Modified	Between the moment of receipt of the goods and the moment of delivery	Law No. 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 13
3	Cambodia	Modified	From the time that MTCs take charge of the goods until the time that the goods are delivered	Law adopting AFAMT, art 10
4	China	Network	Throughout the entirety of the transport operation, from the time that MTCs take charge of the goods until the time that the goods are delivered	Maritime Code, art 103 Civil Code, art 838
5	Columbia	Modified	From the moment that MTCs take possession of the goods until the moment that the goods are delivered	Andean Community Decisions 331 and 393, art 6
6	Ecuador	Modified	From the moment that MTCs take possession of the goods until the moment that the goods are delivered	Andean Community Decisions 331 and 393, art 6
7	Ethiopia	Modified	From the time that MTCs take charge of the goods until the time that they are delivered	Multimodal Transport of Goods Proclamation no. 548/2007, s15

No.	Country	Approach to liability	Period of responsibility	Source
8	Germany	Network	Within the period of time between the taking over of the goods and their delivery	Commercial Code, Book 4, s 425 ⁴²⁴
9	India	Modified	From the time that MTCs take the goods under their charge until the time that they deliver the goods	Multimodal Transport Act 1993, s 20A
10	Indonesia	Uniform	From the time that the goods are received from the user until the time that they are delivered to consignees	Regulation no.8 of 2011 on Multimodal transport, art 14
11	Laos	Modified	From the time of receiving the goods from the sender until the time of handing over of the goods to recipients	Law on Multiple Transport no. 28/NA, art 16
12	Mexico	Uniform	From the moment that MTCs or any of their representatives or agents receive the merchandise from the user until the moment of delivery of the same to recipients	Regulation for International Multimodal Transport, art 10
13	Myanmar	Modified	From the time that MTCs take charge of the goods until the time that the goods are delivered	The Multimodal Transport Law 2014, s16
14	Netherlands	Network	Within the period of time between the taking over of the goods and their delivery	The Dutch Civil Code (BW), art 8.21 ⁴²⁵

⁴²⁴ In Germany, it is, much as in Netherlands, the case that since MTOs are a type of freight business as regulated by the German Commercial Code, the general provisions of sub-division 1 of the freight-business division apply to MTOs if these general provisions do not conflict with the provisions of sub-division 3 of the freight-business division, which are specific to MTOs. Sub-division 3 contains no provisions regarding the period of MTC liability. Therefore, section 425 of sub-division 1, which governs the period of carrier liability in general, is the provision of law that determines the period of MTC liability.

⁴²⁵ See n 420.

No.	Country	Approach to liability	Period of responsibility	Source
15	Paraguay	Modified	From the moment that MTCs receive the goods in their custody until time that the goods are delivered to their recipients	MERCOSUR Partial Agreement for the Facilitation of Multimodal Transport, art 6
16	Singapore	Modified	Starting at the time that MTCs take charge of the goods and ending at the time that the goods are delivered	Multimodal Transport Act 2021, s12
17	Thailand	Modified	From the time that MTCs take charge of goods until the time that the goods are delivered	The Multimodal Transport Act B.E 2548, s 20
18	Vietnam	Modified	From the time that MTCs take charge of the goods until the time that they deliver the goods to consignee	The Decree 87/2009/ND-CP on Multimodal Transport, art 17

Table 7 demonstrates that when any national instrument applies to the hypothetical, UG (as MTC) will be liable for the damage to the container of polyester yarn if the damage occurs during the period for which UG is in charge of the container. This period begins when UG receives the container from Webbing (as consignor) and ends when UG hands the goods over to Vina (as consignee). If the container is damaged or lost at any point over this period, UG will be liable to either Webbing or Vina, who is the cargo owner—namely, the person holding the document of title to the goods. Under typical CIF (cost, insurance, and freight) and FOB (free on board) contracts for the sale of goods, the risk in the goods transfers from seller (Webbing) to buyer (Vina) once the goods arrive onboard the vessel.⁴²⁶ Consequently, if the

⁴²⁶ Incoterms 2020.

container is damaged or lost at any time before arriving onboard the vessel, it is Webbing that will be able to bring proceedings against UG. If the container is damaged or lost at any time after arriving onboard the vessel and before the period of potential UG liability under the MT contract comes to an end, it is Vina will be able to bring proceedings against UG.

At the same time, while it is the case that every one of the national instruments would hold UG liable for the period starting with UG receipt of the container until ending with its delivery, there are two other questions that arise, as to when the container is (1) ‘received’ by UG and (2) then ‘delivered’.

While almost all the national instruments contain provisions specifying what it means for the goods to be (1) received by MTCs and (2) delivered, those of the Netherlands, China, Germany, Brazil, and Indonesia do not. Interestingly, the Myanmar and Laos instruments do not specify what it means for goods to be received by MTCs but do specify what it means for goods to be delivered.

On the matter of the start to the period of MTC liability, the wording of the various national instruments differs in form but not much in effect, with almost every one of the national instruments adopting the same substantive rule: MTCs are regarded as having received the goods for delivery once MTCs physically take possession of the goods.⁴²⁷ Under these national instruments, it is irrelevant what type of actor hands the goods over to MTCs. From the moment that the goods are in the possession of MTCs, they will bear liability for them. Therefore, in the hypothetical, it will have no particular effect on when exactly the period of UG’s potential liability begins if, for example, it is a person other than Webbing that hands the goods over to

⁴²⁷ For example, the Argentinean instrument defines the term ‘taking into custody’ as ‘the act of physically placing the goods in the possession of the multimodal transport operator, with his acceptance to transport them in accordance with the multimodal transport document, the laws, uses and customs of trade at the place of receipt’. The Thai instrument defines the term ‘taken in charge’ as ‘mean[ing] that the multimodal transport operator has accepted the goods for carriage according to the multimodal transport contract’. See Argentinean Law No 24.921: Multimodal Transport of Goods, art 2(o); Thai Multimodal Transport Act BE 2548, s 4. For other instruments, see for example Cambodian Law Adopting AFAMT, art 1; Singaporean Multimodal Transport Act 2021, s 2; Indian Multimodal Transport Act 1993, s 2; Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 2(13); Mexican Regulation on International Multimodal Transport 1989, art 10; Vietnamese Decree 87/2009/NĐ-CP on Multimodal Transport, art 2(11).

UG, despite Webbing being party to the MT contract with UG. However, UG will become liable for the container only when UG or its representative in fact takes possession of the container at the agreed location. The mere fact of the container being placed in that location does not mean that UG is regarded as having taken possession of the container then and there. UG or its representative must be present at the agreed location to take physical possession of the container from Webbing or its representative. From the moment that UG or its representative takes physical possession of the container, UG is regarded as being in charge of the container. From that point onwards, UG becomes liable for any damage to, loss of, or delay in delivery of the goods that occurs.

On the matter of the end to the period of MTC liability, however, there is considerable variable in the respective positions adopted by the national instruments. Each of the national instruments falls within three broad groups. The first comprises national instruments that contemplate three scenarios in which the goods are regarded as delivered: those of Thailand, Myanmar, Cambodia, Singapore, Ecuador, and Colombia (hereafter referred to as Group 3S).⁴²⁸ The second group comprises national instruments that contemplate two such scenarios: those of India and Laos (hereafter referred to as Group 2S).⁴²⁹ The third group comprises national instruments that contemplate only one such scenario: those of Paraguay and Argentina (hereafter referred to as Group 1S).⁴³⁰

As mentioned above, under Group 3S, MTCs are regarded as having fulfilled their duty to deliver the goods in any of three scenarios. The first is where the goods have been physically handed over to consignees.⁴³¹ This is a scenario that is typical in practice—one in which consignees physically show MTCs that MTCs are entitled to take delivery. MTCs then pass

⁴²⁸ Thai Multimodal Transport Act BE 2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

⁴²⁹ Lao Law on Multiple Transport No 28/NA, art 3(7); Indian Multimodal Transport of Goods Act (Act No 28 of 1993), s 2(f)

⁴³⁰ Argentinian Law No 24.921: Multimodal Transport of Goods, art 2(p); MERCOSUR Partial Agreement, art 1(k).

⁴³¹ Thai Multimodal Transport Act BE 2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

possession of the goods on to consignees.⁴³² Certain national instruments within Group 3S additionally regard goods as having been delivered when (in the same scenario) consignees also sign a document acknowledging that they have taken possession of the goods.⁴³³

The second scenario is where the goods have been placed ‘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’.⁴³⁴ This is a scenario that arises when consignees fail to take delivery within a reasonable time, as exemplified in *JB Cocoa Sdn Bhd v Maersk Line AS*.⁴³⁵ In practice, it may also be that consignees refuse to take delivery of goods because they are in a dispute with the consignors in relation to the relevant contract for the sale of goods; because they are having financial difficulties; or for any number of other reasons. If consignees fail to take delivery of the goods on time but do so with good reason, MTCs will bear any additional costs for storing the goods until delivery. However, it would be unfair to MTCs to remain liable for the goods at the place of delivery for months or years simply because of the consignee’s failure to take delivery. It may be under the national instrument that any such failure will give rise to a right on the part of MTCs storing such goods either to destroy or sell them, as it wishes.⁴³⁶ Having exercised this right, MTCs will have fulfilled their obligation to deliver the goods and will therefore no longer be liable for them.⁴³⁷

The third scenario is where the goods are (1) required by law to be physically handed over to an official and (2) actually physically handed over.⁴³⁸ In practice, this scenario arises in the

⁴³² In the case of a negotiable MT document, consignees must surrender the original MT document in order to receive the goods. In the case of a non-negotiable MT document, consignees must establish that they are indeed the persons named in the MT documents as rightful recipients of the goods. See UNESCAP, ‘Training Manual on Operational Aspects of Multimodal Transport’ (27 April 2022) <<https://unttc.org/sites/unttc/files/2022-06/Training%20Manual%20on%20Operational%20Aspects%20of%20Multimodal%20Transport.pdf>> accessed 25 August 2024.

⁴³³ Indonesian Regulation no 8 of 2011 on Multimodal transport, art 21 provides that consignees must ‘receive the goods and sign the acknowledgement [of] receipt in accordance with the multimodal transport document’.

⁴³⁴ Thai Multimodal Transport Act BE 2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

⁴³⁵ [2023] EWHC 2203.

⁴³⁶ Thai Multimodal Transport Act BE 2548, s 23.

⁴³⁷ UNESCAP, ‘Training Manual’ (n 432).

⁴³⁸ Thai Multimodal Transport Act BE 2548, s4; Myanmar Multimodal Transport Law, s2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

case of goods that are prohibited under the law of the destination. By way of example, the law of New Zealand—a country well known for its strict biosecurity and import-control regime—provides that customs officers or constables may seize any forfeited goods that are prohibited.⁴³⁹ In any such case of customs officers or constables ordering the seizure of goods, MTCs hand the goods over. At this point, MTCs cease to be in possession of the goods.

In the case of any of the Group 3S instruments applying to the hypothetical, there will be an end to the period of UG liability for the container of polyester yarn in one of three situations. The first is where Vina signs a document acknowledging receipt of the container.⁴⁴⁰ The second situation is where Vina fails to take delivery of the container at the agreed time, meaning that UG may start storing the container (in a safe place).⁴⁴¹ Neither the container nor its content (the polyester yarn) is perishable, meaning that it could be more appropriate to store the container than sell or destroy it, although UG will be free to do as it wishes. It is when UG ceases storing the container that its liability for the container will come to an end. The third situation is where the container is seized by an official, with UG's liability for the container coming to an end on handing it over to the official.⁴⁴²

Although the Group 2S instruments, on the other hand, contemplate two situations where MTCs are regarded as having delivered the goods, the instruments belonging to the group differ in how they define the two situations. The Lao instrument provides that MTCs deliver the goods once the goods are physically handed over either (1) to the consignees or (2) to an official or other third party, by special requirement of law.⁴⁴³ The Indian instrument, on the other hand,

⁴³⁹ New Zealand Custom and Excise Act 2018, s 178.

⁴⁴⁰ Thai Multimodal Transport Act BE 2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

⁴⁴¹ Thai Multimodal Transport Act BE 2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

⁴⁴² Thai Multimodal Transport Act BE.2548, s 4; Myanmar Multimodal Transport Law, s 2(i); Cambodian Law Adopting AFAMT, art 2; Singaporean Multimodal Transport Act, s 2; Andean Community Decisions 331 and 393, art 1.

⁴⁴³ The Lao instrument defines 'goods handover' as 'the goods handover from the multimodal transport operator to the goods receiver or the third party or relevant authority at the destination or designated location in the contract or at the handover place in accordance with the relevant law or officially practised traditions'. See Lao Law on Multiple Transport No 28/NA, art 3(7).

provides that the goods are delivered once they are (1) handed over to consignees or (2) placed at the disposal of consignees.⁴⁴⁴

In the case of the Lao instrument applying to the hypothetical, UG will be regarded as having delivered the container of polyester yarn once the container is physically handed over either to Vina (as consignee) or to an official or other third party, by special requirement of law.⁴⁴⁵ However, as discussed above, there will in practice be cases of consignees refusing to take delivery. In the hypothetical, this consignee would be Vina. In this case, the Lao instrument would allow UG to place the container in storage or sell it, as it wished.⁴⁴⁶ Post-storage, UG would no longer be regarded as having possession of the container. However, if UG placed the container in storage only for the container to be damaged or lost, it would be difficult to determine the exact timing of UG's liability coming to an end—and whether it would do so at the moment of the container being placed in storage. The reason is that the Lao instrument does not define the situation where goods have been placed in storage (for collection by consignees) as one where the goods are regarded as having been delivered.⁴⁴⁷

What *is* clear, on the other hand, is that article 16 of the Lao instrument provides that MTCs are responsible for managing and 'looking after the goods from the time of receiving the goods from the sender up to the time of handing over the goods to the receiver'.⁴⁴⁸ Article 3(8) defines 'receiver' as a person who has the right to receive goods from an MTC. Articles 3(8), 3(7), and 16 read together suggest that a 'receiver' is a person who either holds the MT documents for the goods or is designated by the consignee to receive the goods.⁴⁴⁹ The definition of 'receiver'

⁴⁴⁴ The Indian Multimodal Transport of Goods Act (Act No 28 of 1993), s 2(f) defines 'delivery' as it arises in two cases, including the cases where the MT documents issued are negotiable and where they are non-negotiable. However, in these cases, the goods are regarded as having been delivered once they have been (1) handed over to the consignee or another person assigned to receive the goods or (2) placed at the disposal of the consignee or this other person. Under the Act, the consignee is the person named as consignee in the MT contract (see s 2(d)). Therefore, s 2(f) distinguishes the consignee and the person assigned to receive the goods. However, for the purposes of this thesis, this 'consignee' includes a person assigned to receive the goods.

⁴⁴⁵ Lao Law on Multimodal Transport No 28/NA, art 3(7).

⁴⁴⁶ *ibid* art 15.

⁴⁴⁷ *ibid* art 3(7).

⁴⁴⁸ *ibid* art 16.

⁴⁴⁹ The reason is that art 3(7) of Lao Law on Multiple Transport No 28/NA provides that goods are handed over when they are handed over to the receiver, the specified third party or the authorities. Therefore, it is arguable that neither the specified third party nor the authorities are a receiver under the instrument.

does not include the operator of any storage facility in which goods are placed because of consignee failure to take delivery. On this interpretation, UG's liability would end with UG placing the goods in storage for collection by Vina, as consignee. If the Lao courts interpreted the relevant provision of law strictly (thereby holding UG's liability to come to an end only with UG physically handing the goods over to Vina or to an official or other third party, by special requirement of law), the outcome produced would be one that is unfair to UG. *Prima facie*, UG would be liable for the goods despite no longer having control over them, much as it would be if it had to place them in storage because of failure on the part of Vina to take delivery on time.

As mentioned above, the Lao instrument is not exhaustive as to the situations where it would regard MTCs as having fulfilled their obligation to deliver the goods. In this connection, the Lao instrument therefore causes unpredictability or unfairness in determining MTC liability. To manage this unpredictability and unfairness, MTCs must ensure that the MT contract includes exonerating clauses—clauses identifying further situations where MTCs are (1) required to place goods in storage because of cargo- owner failure to take delivery on time and (2) then relieved of liability.

There is a slight difference between the Lao instrument and another, the Indian one, would become apparent if the Indian instrument applied to the hypothetical: under the Indian instrument, the container of polyester yarn is regarded as delivered once (1) handed over to Vina (as consignee) or (2) placed at the disposal of Vina (as consignee again). The Indian instrument does not make any reference to the situation where the container is handed to an official or other third party by special requirement of law. Therefore, it is possible that under the Indian instrument, the container would not be regarded as having been delivered if UG were required to hand the goods over to an official or other third party. If UG were required to do so, it would—much as under the Lao instrument as discussed above—be unfair to UG if it

were also to be liable for the goods, given the goods were no longer in UG's control. It would be especially unfair if it were not misconduct on the part UG that triggered the requirement to have the goods over.

If, on the other hand, the Group 1S instruments apply to the hypothetical, UG will be relieved of liability once it has placed the container of polyester yarn at the disposal of Vina (as consignee).⁴⁵⁰ However, the wording of the Group 1S instruments raises two questions. The first is whether the phrase 'placing the goods at the disposal of the consignee' includes the situation where UG physically hands the goods over to the consignee. The second question is whether UG's liability ends once it has handed the container over to an official by special requirement of law.

As regards the first question, the phrase 'placing the goods at the disposal of the consignee' likely includes the situation where UG physically hands the container of polyester yarn over to Vina. Indeed, once it has arrived at the place of delivery, the container will be unloaded from the conveyance and readied for collection. Immediately after UG has readied the container for collection, Vina will in principle collect the container directly from UG, signing a document acknowledging receipt. In the case of Vina failing to collect the container on time, UG may place it in secure storage at the place of delivery for collection by Vina (whenever Vina wishes). Whether it has been (1) collected or (2) placed in secure storage, the container is regarded—under the Group 1S instruments—as having been placed at the disposal of the Vina (as consignee) or made available for collection by Vina (as consignee again). Therefore, the container is regarded as having been delivered. Thus, although the Group 1S instruments technically identify only one situation in which delivery is regarded as having occurred, the

⁴⁵⁰ Argentinian Law No 24.921: Multimodal Transport of Goods, art 2(p); MERCOSUR Partial Agreement, art 1(k).

wording of the instruments is broad enough to cover both collection and placement in secure storage.

As far as the second question is concerned, it is possible that the container of polyester yarn will not be regarded as having been delivered in the situation where UG must, by special requirement law, hand the goods over to an official. The reason is that this situation involves no ‘placing [of] the goods at the disposal of the consignee’. Since the Group 1S instruments do not make provision for this situation, they potentially create unfairness in determining MTC liability.

Therefore, although many of the national instruments contain provisions defining the start and end to the period of MTC liability, the provisions themselves do vary. Moreover, some of the national instruments simply fail to specify the start and end comprehensively. These differences across the instruments lead to unpredictability and unfairness in determining MTC liability.

Even more problematic is the case where a national instrument contains no provisions that specify the start and end to the period—especially the end. It is less problematic if the instrument does not specify the start, because it is typically straightforward to identify this moment in practice, referring to the relevant MT document. Indeed, MTCs tend to issue an MT document acknowledging receipt of the goods for delivery,⁴⁵¹ and under almost every one of the national instruments, MT documents are evidence of MTCs having taken charge of the goods.⁴⁵² It is therefore possible for the courts to rely on MT documents for the purposes of determining the moment when the period of MTC liability begins. In other words, the absence of a statutory definition tends not to create any major practical difficulties.

⁴⁵¹ UNESCAP, ‘Training Manual’ (n 432).

⁴⁵² Singaporean Multimodal Transport Act 2021, s 2; Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 2(4).

Silence as to when the goods are regarded as delivered, on the other hand, is far more problematic. It results in unpredictability and unfairness in determining MTC liability: there are in practice many scenarios where MTCs will legitimately expect to be able to prove that they have ceased to be liable. The first scenario is more similar to the one that came before the English High Court in *Sucden Middle-East v Yagci Denizcilik Ve Ticaret Ltd Sirketi*.⁴⁵³ In this case, a cargo of sugar was being transported to Algeria. However, at the port of discharge, it was seized by the Algerian authorities. The second scenario is more similar to the one that presented itself in proceedings before the same Court in *JB Cocoa Sdn Bhd v Maersk Line AS*.⁴⁵⁴ In this case, a cargo of cocoa beans was damaged after the agreed date of delivery, not having been collected on time in Malaysia.

If the court takes the same approach as in the latter case, it will hold carriers to have delivered the goods once they have transferred possession to consignees.⁴⁵⁵ Under such an approach, MTCs may potentially remain liable for damage or loss occurring in the cases where the goods (1) have been seized by an official (and are still under the control of the official) or (2) are waiting for late collection by consignees. It would be unfair to MTCs if they were to be liable for any such damage or loss, namely, damage or loss occurring in circumstances where MTCs have little to no control over the goods or how they are treated.

To summarise, every one of the national instruments specific to MTOs makes MTCs liable and, in cases such as the hypothetical above, liable from the moment of receiving the goods for delivery until the moment of delivering them to consignees. However, the various instruments differ in how they define the moment when the goods start to be regarded as received or delivered. These differences lead to unpredictability and potential unfairness in determining MTC liability.

⁴⁵³ [2018] EWHC 3873.

⁴⁵⁴ [2023] EWHC 2203.

⁴⁵⁵ *ibid* [65].

4.2.2 The types of damage for which MTCs will be liable

Paragraph 4.2.1 considered how national rules relating to the period of MTC liability would apply to the hypothetical above. Every one of the national instruments hold MTCs liable for the period starting when the goods are received for delivery and ending when the goods are delivered. However, the instruments differ in how they identify the point in time from which goods are regarded as received for delivery and as delivered and in doing so create unpredictability and unfairness in determining MTC liability.

This paragraph uses the hypothetical above to focus on the types of damage for which MTCs may become liable in over the period of time discussed in Paragraph 4.2.1 above. Two questions in particular will be relevant. The first is whether any of the national instruments on MT expressly state that MTCs will be liable for ‘damage’ to, ‘loss’ of or ‘delay’ in delivery of goods, while others simply imply that MTCs will be liable for it, without using these specific terms. The second question is whether any of the instruments simply provide that MTCs will be liable for delay in delivery only if timely delivery is contractually of the essence.

Almost every one of the national instruments that explicitly hold MTCs liable for both damage or loss and delay in delivery adopts either a uniform or modified approach to liability. For example, the Indian instrument, which adopts a modified approach, states:

The multimodal transport operator shall be liable for loss resulting from (a) any loss of, or damage to, the consignment; (b) delay in delivery of the consignment and any consequential loss or damage arising from such delay, where such loss, damage or delay in delivery took place while the consignment was in his charge.⁴⁵⁶

⁴⁵⁶ Indian Multimodal Transport Act 1993, s 13.

The Indonesian instrument, which adopts a uniform approach, similarly provides that MTCs are liable for ‘partial or total damage or loss of goods, and/or the delay in delivery of goods to the consignee’.⁴⁵⁷

The relatively few national instruments that go only so far as to *imply* that MTCs will be liable for both damage and loss and delay in delivery adopt a network approach. The instruments adopting such an approach include those of Chinese, German, and Dutch law. The Chinese instrument simply provides that MTCs will be liable for the entirety of the transport operation.⁴⁵⁸ The instrument does not use the language of ‘damage’, ‘loss’, or ‘delay in delivery’. However, the Chinese Maritime Code contains unimodal rules that limit MTC liability for damage, loss, and delay in delivery.⁴⁵⁹ It is by having these unimodal rules apply to the MTO that Chinese law holds MTCs liable for damage, loss, and delay in delivery for the entirety of the operation.⁴⁶⁰

Like the Chinese Civil and Maritime Codes, the German Commercial Code and the Dutch Civil Code are silent as to the question whether MTCs will be liable for damage to, loss of, or delay in delivery of goods.⁴⁶¹ However, the silence of these Codes on the matter is not particularly problematic, because MT contracts are contracts for the carriage of goods. It so happens that the German Commercial Code and the Dutch Civil Code set forth rules specifically applying to contracts for the carriage of goods and, by extension, to MT contracts. Section 452 of the German Commercial Code states:

If carriage of the goods is performed by various modes of transport on the basis of a single contract of carriage, and if, had separate contracts been concluded between the

⁴⁵⁷ Indonesian Regulation No 8 of 2011 on Multimodal Transport, art 14.

⁴⁵⁸ Maritime Code of China, art 104; Civil Code of China, art 317. In China, the Maritime Code applies to MTOs involving sea carriage and the Civil Code applies to MTOs not involving sea carriage.

⁴⁵⁹ Maritime Code of China, arts 56, 57 and 106.

⁴⁶⁰ Ling Zhu, M Deniz Guner-Ozbek, and Hong Yan, ‘A Study of Liability of Multimodal Transport Operators in China’ (2012) 35 Research in Transportation Economics 58, 60–61.

⁴⁶¹ See German Commercial Code bk 4, div 4, subdiv 3; Dutch Civil Code, bk 8, art 8.22.

parties for each part of the carriage that involved one mode of transport (leg of carriage), at least two of these contracts would have been subject to different legal rules, the provisions of Subdivision 1 apply to the contract, unless the following special provisions or applicable international convention provide otherwise. This also applies if part of the carriage is performed by sea.

Article 8.32 of the Dutch Civil Code similarly affirms that it is the general provisions of law governing contracts for the carriage of goods that apply only if the contract of carriage is of a type for which no special provision is made elsewhere in book 8 of the Civil Code. Because no such provision is made there for MT contracts, MT contracts are, for the purposes of article 8.32 of the Dutch Civil Code, contracts for the carriage of goods. Therefore, in Germany and the Netherlands, general provisions of law governing contracts for the carriage of goods apply to MT contracts.⁴⁶²

It is, then, general provisions of the German and Dutch law of the carriage of goods that would apply in the hypothetical. According to section 425 of the German Commercial Code, ‘the carrier is liable for any damage resulting from loss of or damage to the goods occurring during the time between the taking over of the goods and their delivery, or resulting from delay in delivery’. In the same vein, article 8(21) of book 8 in the Dutch Civil Code provides that ‘the carrier must deliver the goods he has received for transport at the place of destination, and in the condition in which he has received them for transport’. Therefore, like almost every other national instrument on MT, the German and Dutch ones hold MTCs liable for both damage to or loss of goods and delay in delivery if it occurs while MTCs are in charge of the goods.

Accordingly, the ‘international’ position—whichever national instrument applies to the MTO in the hypothetical above—is that UG will be liable not only for damage to or loss of

⁴⁶² Marek Kovac, ‘MTO’s Right to Redress: Is an Unlocalised Loss Really an Insurmountable Obstacle?’ (2023) *Transformacje Prawa Prywatnego* 87, 94–95.

goods but also for delay in delivery. However, some of the instruments also provide that MTCs will be liable for delay in delivery if the parties have agreed that timely delivery is of the essence.⁴⁶³ Therefore, if these instruments apply to the hypothetical, UG will not be liable for any delay in delivery of the container of polyester yarn unless the parties agreed, on contracting, that UG would be liable. Generally, Vina (as cargo owner) would be the party proposing that UG agree to be liable, although theoretically, it could instead be UG, if, for example, UG wished to prevent Vina contracting with a competitor and therefore decided to manifest 'its' intent that timely delivery should be of the essence. Whichever the case, UG will be liable for any delay.

Unsurprisingly, this approach to MTC liability for delay in delivery of goods is one that is supported by the transport industry much more than the alternative, since the alternative would involve MTCs being liable for delay even without cargo owners proposing that they should be.⁴⁶⁴ The approach is a customary one that is less onerous on the transport industry. The international carriage of goods is a business involving many risks that could interfere with the timely delivery of goods, such as delay in customs clearing goods and sea perils and accidents.⁴⁶⁵ As a result, carriers normally avoid having their bills of lading providing for a specific date of delivery,⁴⁶⁶ and consignors and consignees in the manufacturing business ordinarily ensure that they are prepared for delay in delivery.⁴⁶⁷ In the international carriage of goods, some delay is understandable and therefore acceptable. If, on the other hand, timely

⁴⁶³ For example, the Singaporean instrument provides that 'the multimodal transport operator is not liable ... for loss resulting from delay in delivery of the goods unless the consignor has made a declaration of interest in timely delivery which has been accepted by the multimodal transport operator' (Singaporean Multimodal Transport Act 2021, s 15). The Indian instrument similarly provides that 'provided further that the multimodal transport operator shall not be liable for loss or damage arising out of delay in delivery including any consequential loss or damage arising from such delay unless the consignor had made a declaration of interest in timely delivery which has been accepted by the multimodal transport operator' (Indian Multimodal Transport of Goods Act 1993, s 13).

⁴⁶⁴ In 2003, a UNCTAD report revealed that the industry believed that MTCs should be liable for delay in delivery in the case of a request for timely delivery. See UNCTAD, 'Multimodal Transport' (n 6). In the most current efforts to bring about a legal framework for MTOs (2021), UNESCAP—having examined the similarities in different solutions offered by different legal regimes on MT—repeated its recommendation that MTCs should be liable for delay in delivery only in the case of consignors declaring their interest in timely delivery, and MTCs accepted this recommendation. See UNESCAP, 'Proposed Structure of Guidelines on Harmonization' (n 7). The result is that the industry continues to favour a legal framework which would hold MTCs liable for delay in delivery only in the case of a request for timely delivery (accepted by MTCs).

⁴⁶⁵ Sea perils or accidents are unforeseen events that occur during maritime transport.

⁴⁶⁶ FIATA Bills of Lading for Multimodal Transport and BIMCO Multidoc 2016, which are available for use by more than 7000 companies in the transport industry, contain no information on the delivery date.

⁴⁶⁷ Bui Doan (n 42) 25.

delivery is of the essence. In such cases, consignors and consignees will tend to bring this fact to the attention of MTCs. This is a tendency reflected in the fact that widely used MT bills of lading, such as the FIATA MT bill of lading or BIMCO Multidoc 2016, include a box for MTCs to tick if timely delivery is indeed of the essence.⁴⁶⁸

In summary, every one of the national instruments on MT makes provision for MTC liability for damage to, loss of, and delay in delivery of goods. However, some of these instruments impose liability for delay in delivery only if the parties have agreed that timely delivery is of the essence. This is an approach to MTC liability for delay in delivery of goods that balances the interests of the parties—so that the burden on MTCs is a reasonable one—and that is consistent with common practice.

4.3 Basis of liability

Sub-section 4.2 discussed what provision is made by the national instruments on MT in relation to the period of MTC liability and the types of damage and loss for which MTCs may be liable. That sub-section explained the relevant provisions of law by applying them to a hypothetical. The conclusion is this: every one of the instruments would hold the hypothetical MTC liable for any damage to, loss of, and delay in delivery of goods that occurred in the period of time between the MTC receiving the goods and the MTC delivering them. However, the instruments differ in the detail. In particular, they differ in (1) how exactly they impose liability for delay in delivery and (2) when exactly they fix the start and end to the period of MTC liability. These differences create unpredictability and potential unfairness in determining MTC liability.

This sub-section, on the other hand, relates to the basis of MTC liability under the national instruments on MT. These instruments vary in the general approaches to liability that they

⁴⁶⁸ See FIATA MT bill of lading sample at https://fiata.cdn.prismic.io/fiata/e4eef4c9-9c36-4166-b702-3002fcc36adc_FIATA_Documents_and_Forms_Update.pdf and BIMCO Multidoc 2016 at <https://www.bimco.org/Contracts%20and%20clauses/BIMCO%20Contracts/MULTIDOC%202016>.

adopt. Certain instruments among them adopt a presumed-fault approach, while others adopt a strict-liability approach, and some even go so far in the matter as to defer to the relevant unimodal convention. Also, instruments adopting the same general approach vary in the wording that they use, ultimately causing the otherwise similar instruments to differ in how they determine MTC liability. Notably, some of the instruments adopting a presumed-fault approach require MTCs wishing to escape liability to prove that they took all reasonable measures to prevent the risk and its consequences. Meanwhile, some of the instruments adopting a different approach require such MTCs to prove that they were not at fault in causing the damage, loss, or delay in delivery. Also, there are instruments that provide numerous defences, whereas there are other instruments that provide none. Against this background, this sub-section applies all the national instruments on MT to the hypothetical and considers whether the differences between the instruments create unpredictable and potential unfairness in determining MTC liability.

Most of the national instruments adopt a presumed-fault approach to liability, and every one of the instruments that does so adopts either a uniform or modified approach to liability.⁴⁶⁹ Examples include the instruments applying in Mexico (an instrument adopting a the uniform approach), as well as those applying in Ethiopia, India, and Argentina (instruments adopting a modified approach). Under these four instruments and others like them, MTCs are presumed to be at fault for damage to, loss of, or delay in delivery of goods.⁴⁷⁰ Therefore, if there occurs

⁴⁶⁹ An explanatory note by the UNCITRAL secretariat on the Hamburg Rules 1978 explains that, under the principle of presumed-fault, 'the carrier is liable if the occurrence that caused the loss, damage or delay took place while the goods were in his charge, and he may escape liability only if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'. See UNCITRAL, 'Yearbook of the United Nations Commission on International Trade Law Volume XIX: 1988' (1989) para 8 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1988_e.pdf> accessed 29 October 2024.

⁴⁷⁰ Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, art 17(1); Mexican Regulation on International Multimodal Transport 1989, art 12; Indian Multimodal Transportation of Goods Act 1993, s 13(1); Argentine Law No 24.921: Multimodal Transport of Goods, art 15.

any such damage, loss, or delay in delivery, MTCs are *prima facie* liable.⁴⁷¹ However, these instruments differ in how MTCs escape liability under them.

The Ethiopian instrument provides that ‘the multimodal transport operator shall be liable ... unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in Article 16 took all measures that could reasonably be required to avoid the occurrence and its consequences’.⁴⁷² The instrument also provides that ‘the carrier shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice or the goods or through force majeure’.⁴⁷³ Accordingly, when the instrument applies, MTCs escape liability if they prove that the damage, loss, or delay in delivery occurs in one of the three situations. The first is where MTCs took all necessary measures to prevent the risk and its consequences, namely, any risk-related damage, loss, or delay in delivery.⁴⁷⁴ The second situation is where consignors or consignees are at fault in causing the damage to, loss of, or delay in delivery of goods.⁴⁷⁵ The third situation is where the damage to, loss of, or delay in delivery of the goods was caused by (1) the natural characteristics of the goods or (2) a force majeure event.⁴⁷⁶

While the Ethiopian instrument provides for three situations where MTCs escape liability, the Mexican instrument provides for two. More specifically, the Mexican instrument provides that ‘the multimodal transport operator will not be responsible for losses, damages or breakdowns or delays of merchandise or goods when they are due to hidden defects thereof, or as a consequence of unforeseen events or force majeure’.⁴⁷⁷ Accordingly, when the instrument

⁴⁷¹ Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, art 17(1); Mexican Regulation on International Multimodal Transport 1989, art 12; Indian Multimodal Transportation of Goods Act 1993, s 13(1); Argentine Law No 24.921: Multimodal Transport of Goods, art 15.

⁴⁷² Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, art 17(1).

⁴⁷³ *ibid* art 18.

⁴⁷⁴ *ibid* art 17(1).

⁴⁷⁵ *ibid* art 18.

⁴⁷⁶ Force majeure events are events that cannot be reasonably anticipated or controlled. See Merriam-Webster, ‘Force majeure’ *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/force%20majeure>> accessed 22 November 2025.

⁴⁷⁷ Mexican Regulation on International Multimodal Transport 1989, art 12.

applies, MTCs wishing to escape liability must prove that the damage, loss, or delay in delivery was caused by (1) defects in the goods or (2) unforeseen events.

In contrast, the Indian instrument provides for only one situation where MTCs escape liability. The instrument provides that ‘the multimodal transport operator shall not be liable if he proves that no fault or neglect on his part or that of his servants or agents had caused or contributed to such loss, damage or delay in delivery’.⁴⁷⁸ Accordingly, when the instrument applies, MTCs escape liability only if they prove that they or their employees were not at fault in causing the damage, loss, or delay in delivery. This is an approach similar to the one adopted by the MT Convention; emulating the Hamburg Rules as it does, the MT Convention allows MTCs to escape liability only in a situation such as this one and in no other.⁴⁷⁹

For a national instrument adopting a presumed-fault approach to liability, the Argentine one is unusual, in that it contemplates events that will exonerate MTCs from liability according to whether the damage or loss is localised or unlocalised. If the damage or loss is localised, the exonerating events will be those, if any, set forth by the relevant unimodal convention.⁴⁸⁰ If, on the other hand, the damage or loss is unlocalised, the exonerating events will be those set forth by the Argentine instrument.⁴⁸¹

This approach to the basis of MTC liability gives rise to unpredictability in determining MTC liability. Under it, neither MTCs nor cargo owners will ever know—on contracting—which exonerating events MTCs may be able to use. Therefore, to know how MTC liability will be determined, the parties will have to wait until the time when any damage or loss occurs. It is only at this point that the parties will have the answer to this question.

⁴⁷⁸ Indian Multimodal Transportation of Goods Act 1993, s 13(1).

⁴⁷⁹ Art 15(1) of the MT Convention provides that ‘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’.

⁴⁸⁰ Argentine Law No 24.921: Multimodal Transport of Goods, art 19.

⁴⁸¹ *ibid* art 21.

Again, for damage or loss that is unlocalised, MTCs may escape liability on the basis of the exonerating events set forth by the Argentine instrument. In fact, there are six such events, listed in article 21.⁴⁸² However, these events do not, for example, include fault on the part of MTCs in the navigation or management of the conveyance.⁴⁸³

Otherwise, compared with most of the other instruments adopting uniform or modified approaches to liability, the instruments of Ethiopian, Mexican, Indian and Argentine law offer few situations where MTCs may escape liability. Emulating one of the ALADI, ASEAN, MERCOSUR, and the Andean Community instruments as they do, most of the other national instruments provide at least five to eight exonerating events for MTCs.⁴⁸⁴

However, UNCITRAL argues that for any instrument to adopt the presumed-fault approach and minimise the number of defences—as the MT Convention and the Indian instrument do—would ‘effect(s) a more balanced and equitable allocation of risks and responsibilities between carriers and shippers’.⁴⁸⁵ The reason is the development of radars, sensors, and other shipping technology. Such technology helps carriers navigate more accurately. Therefore, problems in the navigation and management of ships—whether actionable under the law or not—are not as common as they once were. Also, obviously, it is carriers that manage the conveyances used and that have possession of the goods carried. Therefore, even though it is generally difficult to prove a negative, it is much easier for carriers to collect evidence that they were not at fault in causing the damage, loss, or delay in delivery than it is for cargo owners to collect evidence that the carriers were at fault—given the simple

⁴⁸² *ibid.*

⁴⁸³ Under the Argentine instrument, MTCs escape their liability if they prove the damage, loss, or delay was caused by (1) a defect inherent to the goods, (2) packing defects or deficiencies that are not apparent, (3) fault of the shipper, consignee or owner of the goods or their representatives, (4) fortuitous event or force majeure but MTCs have taken all measure to avoid the damage or loss, (5) strikes, riots or lock-out carried out by third parties, or (6) order of a public authority. See Argentine Law No 24.921: Multimodal Transport of Goods, art 21).

⁴⁸⁴ Thai Multimodal Transport Act BE 2548, s27; Myanmar Multimodal Transport Law 2014, art 22; Lao Law on Multiple Transport No 28/NA, s 18; Cambodian Law Adopting AFAMT, s 12; Singaporean Multimodal Transport Act, s 15; MERCOSUR Partial Agreement (Paraguay), art 10; Andean Community Decision (for Ecuador and Columbia), art 11; Brazil Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 16.

⁴⁸⁵ UNCITRAL, ‘Yearbook’ (n 469).

fact that consignors are not present during the carriage operation. Therefore, it is largely unnecessary for MTCs to have multiple defences available to them.

Given that the shipping industry is opposed to rules relating to liability that would —like those set forth by the MT Convention, Hamburg Rules, and Rotterdam Rules—provide them with little scope to escape liability in the event of problems in the navigation and management of ships,⁴⁸⁶ the Indian and Argentine instruments are not of a type that the industry would support. Even though the development of shipping technology made the navigation and management of ships much less difficult, it is of course impossible to guarantee against carrier misconduct in the navigation and management of ships. Indeed, it is possible that the obstruction of the Suez Canal by the *Ever Green* in 2021 was attributable to misconduct of this type.⁴⁸⁷

According to a report published by UNCTAD, the transport industry believes that ‘the main reason[s] why the (MT) Convention failed are because it is largely based on the Hamburg Rules and it follows the principle of uniform liability. Any new Convention containing these elements would not be supported by the shipping industry’.⁴⁸⁸ Also, the most current guidelines on MTC liability published by UNESCAP recommend that the national law of its member states make (unintentional) misconduct in the navigation and management of ships a cause of exoneration from MTC liability.⁴⁸⁹ For many reasons, including the fact that these guidelines were prepared to meet the demands of UNESCAP’s member states, there is cause to believe that the shipping industry would support MTCs being exonerated from liability in the case of such misconduct. Therefore, if transport-industry support for instruments on the basis of MTC liability were divided into three levels (say, low, medium, and high), the level would be low

⁴⁸⁶ UNCTAD, ‘Multimodal Transport’ (n 6).

⁴⁸⁷ Reuters, ‘*Ever Given*, the Ship That Blocked Suez Canal in March, Crosses the Canal Again’ (21 August 2021) <<https://www.reuters.com/world/middle-east/ever-given-ship-that-blocked-suez-canal-march-crosses-canal-again-2021-08-20/>> accessed 15 November 2024.

⁴⁸⁸ UNCTAD, ‘Multimodal Transport’ (n 6).

⁴⁸⁹ UNESCAP, ‘Proposed Structure for Guidelines on Harmonization’ (n 7).

for the approach under the Indian and Argentine instruments; medium for the approach under the Ethiopian and Mexican instruments; and high for the approach under most of the other instruments, given that they adopt uniform or modified approaches.

However, there is a special case: the uniform approach as adopted by the Indonesian instrument. Unlike the other national instruments adopting a uniform approach, the Indonesian instrument also adopts the principle of strict liability for MTCs. Indeed, the instrument provides that if there occurs any damage to, loss of, or delay in delivery of goods, MTCs will be liable for it *even if they are not at fault*.⁴⁹⁰ MTCs escape liability only if they prove that the damage, loss, or delay was caused either by the consignors or by the (dangerous) properties of non-notified dangerous goods.⁴⁹¹ When the principle of strict liability applies, it does not help MTCs to provide evidence that they took all reasonable measures to prevent the risk and its consequences.⁴⁹²

As transport technology develops, and especially as human crews give way to artificial intelligence (AI), the principle of strict liability will become a more appropriate one for the purposes of determining MTC liability than the principle of presumed fault.⁴⁹³ The software used to operate conveyances is written by software developers (which may themselves be AI software developers) rather than by MTCs. In the event of a problem affecting the software and therefore causing damage, loss, or delay in delivery, the responsibility would lie with the developer rather than with the MTC. Under a presumed-fault regime, establishing MTC liability is problematic, because proving that the MTC was at fault would be difficult and time-

⁴⁹⁰ Art 18 of Indonesian Regulation No 8 of 2011 on Multimodal Transport regulates that ‘multimodal transport user has no rights to demand compensation over the actions taken by the multimodal transport operator for opening and/or inspecting, not delivering, or performing any specific actions to dangerous goods or goods that may cause harm to properties, life and the environment if the goods transported by the multimodal transport user to the multimodal transport operator are not reported’.

⁴⁹¹ Indonesian Regulation No 8 of 2011 on Multimodal Transport.

⁴⁹² Stephen Todd, *Todd on Torts* (8th edn, Thomson Reuters 2019) 562.

⁴⁹³ Luci Carey, ‘Contractual and Tortious Maritime Liability Regimes and the Introduction of Autonomous Vessels’ (2023) Centre for Maritime Law Working Paper 23/03 <<https://law.nus.edu.sg/cml/wp-content/uploads/sites/8/2023/03/CML-WPS-2303.pdf>> accessed 4 November 2024.

consuming.⁴⁹⁴ Therefore, a strict-liability regime would potentially help determine MTC liability more efficiently and more fairly,⁴⁹⁵ especially given that (1) MTCs are able to use insurance to manage their risks and (2) cargo owners are rarely present in or on the conveyance at the time of the damage, loss, or delay in delivery occurring, making it difficult for them to obtain evidence to prove MTC fault.⁴⁹⁶ However, it is impossible to know whether (and if so, when) all conveyances will be fully controlled by AI. For the time being, it is overwhelmingly more common for conveyances to be controlled by human crews rather than by AI. Since it opposes rules that would interfere with the ability of MTCs to escape liability, it is unlikely that the industry would be supportive of a principle of strict liability like the one adopted by the Indonesian instrument.

Also, while the national instruments adopting the uniform or modified approach to liability clearly specify which of the two approaches they adopt, those instruments adopting a network approach do not clearly specify which of the principles—presumed fault and strict liability—they adopt. The Chinese instrument serves to exemplify the point. Whether there is MTC liability under this instrument is a relatively complex question. In fact, it is impossible to answer this question without first answering two other, interrelated questions. The first of the interrelated questions is whether the MTO involves sea carriage. The second of the interrelated questions is whether any damage, loss, or delay in delivery either (1) did occur during the sea carriage or (2) appears to have done so (or, in other words, is unlocalised). The answers to these two interrelated questions will determine whether it is the Chinese Maritime Code or the Chinese Civil Code that applies and, in doing so, what the rules relating to MTC liability will apply.

⁴⁹⁴ Barış Soyer and Andrew Tettenborn, *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Informa Law by Routledge 2019) 107–10.

⁴⁹⁵ Carey (n 493).

⁴⁹⁶ *ibid.*

If the MTO involves sea carriage, the Chinese Maritime Code will apply,⁴⁹⁷ but if the damage or loss occurred in a non-maritime segment of the MTO, MTC liability will be determined according to the relevant unimodal rules.⁴⁹⁸ If the damage or loss (1) did occur at sea or (2) is unlocalised, MTC liability will be determined by the Chinese Maritime Code.⁴⁹⁹ The Chinese Maritime Code presumes MTCs to be at fault in the case of *any* damage, loss, or delay in delivery occurring.⁵⁰⁰ If MTCs wish to escape liability, they must prove that the damage, loss, or delay in delivery was caused by one of the 12 exonerating events listed in article 51 of the Code. The exonerating events include unintentional carrier misconduct in the navigation or management of the ship, which—as discussed above—the shipping industry would wish to see in any rules relating to MTC liability.⁵⁰¹

It is the Chinese Civil Code that applies in all other cases—namely, where the MTO does not involve any sea carriage. Under the Chinese Civil Code, what determines the relevant rules is the mode of transport that was carrying the goods when the damage, loss, or delay in delivery occurred. It is the rules under the relevant unimodal convention that will apply.⁵⁰² If there is no unimodal convention applicable, it is the rules of the Chinese Civil Code that will apply.⁵⁰³ This Code presumes MTCs to be liable for damage to, loss, or delay in delivery of goods occurring while the goods are under their charge.⁵⁰⁴ At the same time, however, the Code sets forth four situations where MTCs escape liability.⁵⁰⁵ These are where the goods are damaged, lost or delayed in delivery because of (1) force majeure, (2) the inherent nature of goods, (3) reasonable wear and tear, or (4) cargo-owner negligence.⁵⁰⁶ Accordingly, if they prove that the

⁴⁹⁷ Chinese Maritime Code, art 102.

⁴⁹⁸ *ibid* art 105.

⁴⁹⁹ *ibid* art 106.

⁵⁰⁰ *ibid* art 50.

⁵⁰¹ *ibid* art 51(a).

⁵⁰² Chinese Civil Code, art 842.

⁵⁰³ *ibid*.

⁵⁰⁴ *ibid* art 832.

⁵⁰⁵ *ibid*.

⁵⁰⁶ *ibid*.

damage, loss, or delay in delivery was caused by an event of any of these four types, MTCs escape liability under the Chinese Civil Code.

German law, on the other hand, does not set forth two different liability regimes, one for carriage by sea and one for carriage other than by sea. However, determining MTC liability under German law nevertheless depends on answering the question whether any damage to, loss of, or delay in delivery of goods occurs during sea carriage. If it does occur during sea carriage, the rules relating to liability in sea carriage will apply.⁵⁰⁷ Otherwise, namely, if the damage, loss, or delay in delivery occurs other than in sea carriage or is unlocalised, it is subdivision 1 of division 4 of book 4 of the German Commercial Code that will apply.⁵⁰⁸ Under the provisions of this subdivision, MTCs are presumed to be at fault for any damage, loss, or delay in delivery that occurs while the goods are under their charge.⁵⁰⁹ To escape liability, MTCs must successfully raise not only one of the six defences set forth in section 427 of book 4 of the German Commercial Code, but also prove that they exercised due diligence to prevent the risk and its consequences.⁵¹⁰

Like the German instrument, the Dutch instrument sets forth only one set of rules governing MTOs, but unlike the German rules, the Dutch rules do not differentiate MTOs according to whether they involve sea carriage or not. It is also the case under the Dutch rules that if the damage, loss, or delay in delivery is localised, it is the relevant unimodal rules that will apply.⁵¹¹ If the damage, loss, or delay in delivery is unlocalised, it is article 8(42) of the Dutch Civil Code that will apply. This provision of the Dutch Civil Code adopts the principle

⁵⁰⁷ German Commercial Code, s 452(a) provides that 'if it has been established that the loss, damage or event causing a delay in delivery occurred on a specific leg of the carriage, then, contrary to the provisions of Subdivision 1, the liability of the carrier will be determined in accordance with the legal provisions that would apply to a contract of carriage covering this leg of carriage. The burden of proof as to the loss, damage or event causing a delay in delivery having occurred on a particular leg of carriage is on the person making the corresponding allegation'. Under German law, the only type of carriage governed by a different rule in the German Commercial Code is carriage by sea. Carriage by sea is governed by ch 2 of bk 5 of the German Commercial Code. Meanwhile, other types of carriage, such as by road, rail and inland waterway, are governed by div 4 of bk 4 of the German Commercial Code.

⁵⁰⁸ *ibid* s 452.

⁵⁰⁹ *ibid* s 424.

⁵¹⁰ *ibid* s 423.

⁵¹¹ Dutch Civil Code, art 8.41.

of strict liability rather than that of presumed fault. Under the provision, MTCs are liable for any damage, loss, or delay in delivery occurring while the goods are under their responsibility,⁵¹² and there are no specific exonerating events. For MTCs to escape liability, it is necessary that the MT contract state that they are not liable for any damage, loss, or delay in delivery.⁵¹³

To synthesise, if there is any damage to, loss of, or delay in delivery of goods such as the hypothetical container of polyester yarn, the basis for determining MTC liability will depend entirely on which national instrument is applicable. The national instruments on MT differ significantly in how they define MTC liability. Some adopt a presumed-fault liability, while others adopt a strict liability. Some provide a lengthy list of exonerating events, while others provide no such list at all. Moreover, some of the instruments simply defer to the liability rules under the relevant unimodal convention. Given these differences, it would be impossible for UG (as MTC) to predict—on contracting—whether and on what basis it could be held liable for any damage, loss, or delay in delivery occurring. What is more, the rules relating to MTC liability under some of the instruments are simply unfair.

4.4 Limitation of liability

Sub-section 4.3 discussed the rules relating to the basis of liability under the national instruments on MT. Using the hypothetical above, this discussion reveals that the instruments differ significantly in how they determine MTC liability. In particular, they differ in the approaches to liability (presumed-fault or strict-liability) and exonerating events adopted them. These differences create unpredictability and potential unfairness in determining MTC liability.

⁵¹² *ibid* art 8.42.

⁵¹³ *ibid*.

This sub-section examines the closely related question of the extent to which MTCs will be liable under the same national instruments. Again, this section uses the hypothetical above to explain how the instruments answer the legal questions that arise. Almost every one of these instruments expressly provides that if MTCs intentionally cause damage to, loss of, or delay in delivery of goods, they will be liable for it.⁵¹⁴ Therefore, the question of the extent to which MTCs are liable arises only when MTCs cause damage, loss, or delay in delivery unintentionally. In practice, there are two main scenarios that may arise. Under the hypothetical, the first would be where UG (as MTC) and Vina (as cargo owner) agree a limitation of any UG liability. In such a scenario, the limitation agreed will tend to prevail if it is more favourable to Vina (as cargo owner, again) than any limitation under national law.⁵¹⁵ The second scenario would be where UG and Vina do not agree any limitation. In this scenario, the extent of UG's liability will depend on the answers to two further questions. The first of these is which of the national instruments applies. The second is whether the damage to or loss of the container of polyester yarn results from delay in delivery. This sub-section examines whether the various national instruments treat these two questions differently and, if so, whether the differences also cause unpredictability and potential unfairness in determining MTC liability.

On the matter of the extent to which the MTC is liable for damage to or loss of goods, every one of the national instruments—except Indonesia's—differs according to whether the damage or loss is localised or unlocalised. More specifically, the different instruments provide different limitations of liability for localised and unlocalised damage and loss, respectively.

⁵¹⁴ Thai Multimodal Transport Act BE 2548, s 32(2); Myanmar Multimodal Transport Law 2014, s 32; Cambodian Law Adopting AFAMT, art 20; Singaporean Multimodal Transport Act, s 23; Indian Multimodal Transportation of Goods Act 1993, s 18; Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 27; Brazilian Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 20; Argentinean Law No 24.921: Multimodal Transport of Goods, art 28.

⁵¹⁵ Almost every one of the national instruments on MT allows MTCs and cargo owners to agree a higher amount of limitation than the amount of limitation provided by the instrument. However, at the same time, almost every one of the instruments prohibits any contractual limitation that is more favourable to MTCs than the one under the instrument. German law on MT, on the other hand, allows MTCs and cargo owners to use standard terms of contract or to negotiate in detail, in effect allowing MTC liability for damage to or loss of goods to be limited to an amount less favourable to cargo owners than the amount of 8.33 SDR/kg. See German Commercial Code, s 466.

For localised damage or loss, most of the instruments provide that the extent of MTC liability will be determined by the relevant unimodal convention.⁵¹⁶ However, the Argentine instrument differs slightly in approach. Under this instrument, the unimodal limitation applies only when the damage or loss occurs in the sea or air leg of the MTO.⁵¹⁷ If, on the other hand, the damage or loss occurred in carriage by any other mode of transport, MTC liability is limited to 400 Argentine gold pesos per package.⁵¹⁸

For unlocalised damage or loss, the national instruments diverge much more. Some of them set forth different limitation regimes according to the criterion of whether the MTO involves sea carriage. Others set forth a single limitation regime that applies regardless of whether the MTO involves sea carriage. Moreover, even within the subsets of instruments adopting exactly the same number of regimes (either a single regime or multiple regimes), these instruments differ in the detail of how they determine the extent of the liability.

The national instruments on MT that provide for a single limitation regime are those of Germany, the Netherlands, Ethiopia, Paraguay, Brazil, and Argentina. Under these six instruments, it is irrelevant whether the MTO involves sea carriage, and there is a mandatory minimum on liability, namely, a ‘floor’. However, the instruments differ in how they define this floor. Table 8 below sets out the differences in the instruments on the matter of the floor.

Table 8. The floor on MT liability for unlocalised damage or loss in Germany, the Netherlands, Ethiopia, Paraguay, Brazil, and Argentina

No.	Jurisdiction	Floor
1	Argentina	400 Argentine gold pesos per package ⁵¹⁹

⁵¹⁶ Chinese Maritime Code, art 105; Chinese Civil Code, art 842; German Commercial Code, s 452(a); Dutch Civil Code, art 8.41; Thai Multimodal Transport Act BE 2548, s 31; Myanmar Multimodal Transport Law 2014, s 29; Lao Law on Multiple Transport No 28/NA, art 17(2); Cambodian Law Adopting AFAMT, art 17; Singaporean Multimodal Transport Act, s 19; Indian Multimodal Transportation of Goods Act 1993, s 15; Andean Community Decision (for Ecuador and Columbia), art 16; Brazilian Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 32(1); MERCOSUR Partial Agreement (for Paraguay), annex I; Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 20(1); Argentinean Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 24.

⁵¹⁷ Argentinean Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 24.

⁵¹⁸ *ibid.*

⁵¹⁹ *ibid.*

No.	Jurisdiction	Floor
2	Brazil	666.67 SDR/package or 2 SDR/kg, whichever is higher ⁵²⁰
3	Ethiopia	835 SDR/package or 2.5 SDR/kg, whichever is higher ⁵²¹
4	Germany	8.33 SDR/kg ⁵²²
5	Netherlands	The relevant unimodal limitation most favourable to cargo owners ⁵²³
6	Paraguay	666.67 SDR/package or 2 SDR/kg, whichever is higher ⁵²⁴

The national instruments that provide for multiple regimes, on the other hand, differ in the floors under the instruments according to the criterion of whether the MTO involves sea carriage. In the case where the MTO does involve sea carriage, most of these national instruments limit MTC liability to a minimum of 666.67 SDR per package or 2 SDR per kg, whichever is higher.⁵²⁵ In the other cases, the instruments limit MTC liability to a minimum of 8.33 SDR per kg, with China's being the only exception.⁵²⁶ In China, if there is no sea carriage in the MTO, MTCs are potentially liable for the full amount of the damage or loss sustained by cargo owners. Chinese law does not limit MTC liability in any other case.⁵²⁷

Unlike most of the national instruments on MT, the Indonesian instrument does not differentiate localised and unlocalised damage or loss, although it does differentiate MTOs that involve sea carriage and those that do not. More specifically, in the case where MTOs involve sea carriage, the instrument limits MTC liability to a minimum of 666.67 SDR per package or

⁵²⁰ Brazilian Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 32(1).

⁵²¹ Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 20(1).

⁵²² German Commercial Code, s 431.

⁵²³ Dutch Civil Code, art 8.43.

⁵²⁴ MERCOSUR Partial Agreement (for Paraguay), annex I.

⁵²⁵ Chinese Maritime Code, art 105; Thai Multimodal Transport Act BE 2548, s 31; Myanmar Multimodal Transport Law 2014, s 29; Lao Law on Multiple Transport No 28/NA, art 17(2); Cambodian Law Adopting AFAMT, art 17; Singaporean Multimodal Transport Act, s 19; Indian Multimodal Transportation of Goods Act 1993, s 15; Andean Community Decision (for Ecuador and Colombia), art 16;

⁵²⁶ Chinese Maritime Code, art 105; Thai Multimodal Transport Act BE 2548, s 31; Myanmar Multimodal Transport Law 2014, s 29; Lao Law on Multiple Transport No 28/NA, art 17(2); Cambodian Law Adopting AFAMT, art 17; Singaporean Multimodal Transport Act, s 19; Indian Multimodal Transportation of Goods Act 1993, s 15; Andean Community Decision (for Ecuador and Colombia), art 16;

⁵²⁷ UNCTAD, 'Implementation of Multimodal Transport Rules: Comparative Table' (n 225).

2 SDR per kg, whichever is higher.⁵²⁸ Otherwise, it limits such liability to a minimum of 8.33 SDR per kg.⁵²⁹

Of the national instruments on MT, there are only four that provide for a floor more favourable to cargo owners than to MTCs, specifically in the case of an MTO involving sea carriage: those of Germany, the Netherlands, Ethiopia, and Argentina. For this reason, it is a floor that will be unattractive to the industry. This floor is particularly problematic because in any MTO involving sea carriage, MTCs have, since 1924, enjoyed the protection offered by the Hague-Visby Rules. The Rules limit MTC liability to a minimum of 666.67 SDR per package or 2 SDR per kg, whichever is higher.⁵³⁰ Of course, MTCs have every interest in minimising their liability—including their minimum liability—for damage to or loss of goods that they carry. In fact, MTCs already complain that the limitations of liability under the MT Convention, the Rotterdam Rules, and the Hamburg Rules are excessively onerous on them.⁵³¹

In the case of delay in delivery, on the other hand, almost every one of the national instruments limits MTC liability to the amount of freight payable under the MT contract.⁵³² However, some of the instruments set forth limitations more favourable to cargo owners than to MTCs, while others either set forth no limitation at all or one that applies according to whether the delay is localised or unlocalised. These other instruments include those in force in Laos, Germany, China, the Netherlands, Ethiopia, and Mexico.

The Lao and Mexican instruments do not limit MTC liability for delay in delivery at all.⁵³³ Therefore, under these two instruments, MTCs are liable for the full amount of the loss

⁵²⁸ Indonesian Regulation No 8 of 2011 on Multimodal Transport, art 23(2).

⁵²⁹ *ibid.*

⁵³⁰ Hague-Visby Rules, art 4(5).

⁵³¹ See Paragraph 2.1.4.

⁵³² Thai Multimodal Transport Act BE 2548, s 28; Myanmar Multimodal Transport Law 2014, s 30; Cambodian Law Adopting AFAMT, art 18; Singaporean Multimodal Transport Act 2021, s 20; Indian Multimodal Transportation of Goods Act 1993, s 16; MERCOSUR Partial Agreement (Paraguay), art 16; Andean Community Decision (for Ecuador and Columbia), art 17; Brazilian Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 17(2); Argentinean Law No 24.921: Multimodal Transport of Goods, art 22; Indonesian Regulation No 8 of 2011 on Multimodal Transport, art 25.

⁵³³ Lao Law on Multiple Transport No 28/NA.

sustained by cargo owners as a result of the delay. Consequently, in Laos and Mexico, MTCs may have much more compensation to pay cargo owners than they would elsewhere.

There are two national instruments providing a limitation more favourable to cargo owners than to MTCs: Ethiopia's and Germany's. The Ethiopian instrument limits MTC liability to a minimum of 2.5 times the freight payable and to a maximum of the total freight payable.⁵³⁴ Therefore, under Ethiopian law, determining the extent of MTC liability involves two steps. The first step is to multiply the freight payable by 2.5. The second step is to compare the product of this calculation and the total freight payable. If the product is lower, then it will also be the amount of any MTC liability. If, on the other hand, the product is higher, then the amount will be the total freight payable. For example, in the hypothetical above, the total freight payable is \$3,000.⁵³⁵ If the container of polyester yarn is delayed in its delivery, the amount of UG's liability (as MTC) will be the same: \$3,000. Indeed, multiplying the total freight payable (\$3,000) by 2.5 produces a figure of \$7,500. Because this figure is greater than the total freight payable (\$3,000), UG's liability is capped at \$7,500. The Ethiopian limitation of MTC liability is problematic for two reasons: it is not only more favourable to cargo owners than to MTCs, but also difficult for both parties to predict. The reason for this difficulty is the relative complexity produced by the two-step process.

Unlike the Ethiopian instrument, the German instrument provides for two different limitations of liability on a qualitative basis. Indeed, the German instrument distinguishes the case where the delay is 'attributable' to the sea-carriage segment and the case where it is not. Where it is not, the instrument limits MTC liability to an amount equivalent to three times the

⁵³⁴ Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, art 21.

⁵³⁵ Dollar amounts are expressed in US dollars unless otherwise noted.

freight payable.⁵³⁶ Where the delay is attributable to the sea-carriage segment,⁵³⁷ it is the unimodal rules governing sea carriage that will determine the extent of MTC liability.⁵³⁸

The only national instruments on MT that take account of whether the delay in delivery of goods is localised or unlocalised are those of China and the Netherlands. Both instruments limit MTC liability to the amount provided by the relevant unimodal convention if the delay is localised,⁵³⁹ as it would be (in the Origin Country) in the hypothetical if UG (1) were delayed at the Origin Country seaport because of congestion and (2) therefore delivered the goods late in the Destination Country. If the delay is unlocalised, there arises another question: whether the MTO involves sea carriage or not. If it does, the instrument limits MTC liability to an amount equivalent to the total freight payable for the goods.⁵⁴⁰ If, on the other hand, the MTO does not involve sea carriage, the instrument does not limit MTC liability,⁵⁴¹ meaning that MTCs must compensate the cargo owners for the full amount of any loss resulting from the delay. Under the Dutch instrument, however, the question whether the MTO involves sea carriage or not is not of concern. The reason is that in the case of a delay that is localised, this instrument limits MTC liability to the amount provided by the relevant unimodal convention if more favourable to cargo owners than to MTCs, irrespective of whether the MTO involves sea carriage.⁵⁴²

In other words, in the case where cargo owners suffer not only damage to or loss of goods but also loss resulting specifically from delay in delivery, almost every one of the national instruments limits MTC liability to an amount equivalent to the total value of the goods.⁵⁴³ However, the Thai instrument is an exception, limiting MTC liability to 666.67 SDR per

⁵³⁶ German Commercial Code, s 431.

⁵³⁷ For example, in the hypothetical, if the involved sea carriage takes longer than expected and causes a delay in delivering the container to the destination on time, the delay can be attributed specifically to the sea carriage.

⁵³⁸ German Commercial Code, s 452(a).

⁵³⁹ Chinese Maritime Code, art 105; Chinese Civil Code, art 842; Dutch Civil Code, art 8.41.

⁵⁴⁰ Chinese Maritime Code, arts 57 and 106.

⁵⁴¹ Chinese Civil Code.

⁵⁴² Dutch Civil Code, art 8.42–43.

⁵⁴³ These national instruments on MT include those of Argentina, Brazil, Columbia, Ecuador, Paraguay, Ethiopia, India, Singapore, Cambodia, and Myanmar.

package or 2 SDR per kg, whichever is higher.⁵⁴⁴ Meanwhile, the instruments in six of the jurisdictions—Laos, Indonesia, Mexico, China, Germany, and the Netherlands—do not limit MTC liability in cases that combine damage to or loss of goods, on the one hand, and loss resulting from delay in delivery, on the other.⁵⁴⁵

The pattern that emerges is this: each national instrument on MT has its own approach to determining the extent of MTC liability for damage to, loss of, or delay in delivery of goods. Therefore, in practice—and in any case, such as the hypothetical—the extent of MTC liability for any such damage, loss, or delay will be difficult to predict. For example, UG’s liability would be as set out in Table 9 below, depending on the national instrument applicable.

Table 9. Limitation of MTC liability in the case of damage to, loss of, or delay in delivery under national instruments

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
Argentina	1. In the case of damage or loss occurring in sea or air carriage: the amount provided by the relevant unimodal convention 2. In any other case: 400 Argentine gold per package or unit	400 Argentine gold per package or unit	The freight payable under the MT contract	The value of the goods as damaged or lost
Brazil	The amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value of the goods, the freight payable and the insurance premium 2. If the value of the goods is not declared:	The freight payable under the MT contract	The value of the goods as damaged or lost

⁵⁴⁴ Thai the Multimodal Transport Act, BE 2548, art 28.

⁵⁴⁵ Lao Law on Multiple Transport No 28/NA; Indonesian Regulation No. 8 of 2011 on Multimodal Transport; Chinese Maritime Code; Chinese Civil Code; German Commercial Code; Dutch Civil Code; Mexican Regulation on International Multimodal Transport 1989.

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
		666.67 SDR/package or unit or 2 SDR/kg, whichever is higher		
Cambodia	The amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value of goods 2. If the value of the goods is not declared: a. <i>If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
Columbia	The amount provided by the relevant unimodal convention	3. If the value of the goods is declared: the value of the goods 4. If the value of the goods is not declared: a. <i>If the MTO involves in sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
China	The amount provided by the relevant unimodal convention	1. If the MTO involves sea carriage: a. <i>If the value of the goods is declared:</i> the value of the goods b. <i>If the value of the goods is not declared:</i> 666.67 SDR/package, 2 SDR/kg, whichever is higher 2. In any other case: N/A	1. If the MTO involves sea carriage: the freight payable under the MT contract 2. In any other case: N/A	N/A

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
Ecuador	The amount provided by the relevant unimodal convention	5. If the value of the goods is declared: the value of the goods 6. If the value of the goods is not declared: a. <i>If the MTO involves in sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
Ethiopia	1. If the value of goods is declared: the value of the goods 2. If the value of goods is not declared: a. <i>If the maximum limit provided by the applicable unimodal rules is lower than the maximum limit provided by the MT instrument:</i> The maximum limit provided by the MT instrument, namely, 835 SDR/package or unit or 2.5 SDR/kg, whichever is higher a. <i>If the maximum limit provided by the applicable unimodal rules is higher than the maximum limit</i>	1. If the value of the goods is declared: the value of the goods 2. If the value of the goods is not declared: 835 SDR/package or unit, or 2.5 SDR/kg, whichever is higher	2,5 times the freight payable for the goods delayed up to a maximum of the total freight payable	The value of the goods as damaged or lost

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
	<i>provided by the MT instrument:</i> The maximum limit provided by the relevant unimodal contention			
Germany	1. In the case of damage occurring during the sea leg: the amount provided by the relevant unimodal convention (namely, the relevant convention governing sea carriage) 2. In any other case: 8.33 SDR/kg	8.33 SDR/kg	Three times the freight payable under the MT contract	N/A
India	1. If the value of goods is declared: the value of goods 2. If the value of goods is not declared: the amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value of the goods 2. If the value of the goods is not declared: a. <i>If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
Indonesia	1. If the value of goods is declared: the value of the goods 2. If the value of goods is not declared: a. <i>If the MTO involves in sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg		The freight payable under the MT contract	N/A

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
Laos	The amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value of the goods 2. If the value of the goods is not declared: a. <i>If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	N/A	N/A
Mexico	N/A	N/A	N/A	N/A
Myanmar	The amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value the of goods 2. If the value of the goods is not declared: a. <i>If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
Netherlands	The amount provided by the relevant unimodal convention	The amount provided by the relevant unimodal rules governing the part of carriage where the damage may occur and from which results in the highest amount of damage	1. In the case of localised delay: the amount provided by the relevant unimodal convention 2. In the case of unlocalised delay: the amount provided by the relevant unimodal convention governing whichever	N/A

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
			segment of carriage it is (from among all the segments in the carriage operation) under which the compensation due to the cargo owner would be the highest	
Paraguay	The amount provided by the relevant unimodal rules	1. If the value of the goods is declared: the value of the goods 2. If the value of the goods is not declared: 666.67 SDR/package or unit, or 2 SDR/kg, whichever is higher	The freight payable under the MT contract	The value of the goods as damaged or lost
Singapore	The amount provided by the relevant unimodal convention	1. If the value of the goods is declared: the value of the goods 2. If the value of the goods is not declared: <i>a. If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher <i>b. In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost
Thailand	The amount provided by the relevant unimodal convention	1. If the MTO involves sea carriage: 666.67 SDR/package or 2 SDR/kg, whichever is higher 2. In any other case: 8.33 SDR/kg	The freight payable under the MT contract	666.67 SDR/package or 2 SDR/kg, whichever is higher

Jurisdiction	Damage to or loss of goods		Delay	The total liability
	Localised damage	Unlocalised damage		
Vietnam	The amount provided by the relevant unimodal convention	3. If the value of the goods is declared: the value of the goods 4. If the value of the goods is not declared: a. <i>If the MTO involves sea carriage:</i> 666.67 SDR/package or 2 SDR/kg, whichever is higher b. <i>In any other case:</i> 8.33 SDR/kg	The freight payable under the MT contract	The value of the goods as damaged or lost

4.5 Time bars

Sub-section 4.4 examined the extent of MTC liability for damage to, loss of, or delay in delivery of goods, and did so using the hypothetical above. Since the national instruments on MT differ in their approaches to the limitation of liability and in the specifics of the relevant rules set forth by them, the exact extent of the MTC liability is almost impossible to predict.

This sub-section examines the time bars on cargo owners bringing proceedings against MTCs. The questions arise as to how much the national instruments on MT differ on this matter, whether any provide a time bar more favourable to cargo owners than to MTCs, and whether any provide one more favourable to MTCs. Furthermore, there arises the question whether any such differences give rise to unpredictability and potential unfairness in determining MTC liability.

Almost every one of the national instruments provides for a single time bar—a single timeframe within which Vina (as cargo owner) would be able to bring proceedings against UG (as MTC)—regardless of whether the damage, loss, or delay in delivery is localised or unlocalised. However, under some of the instruments, Vina (as cargo owner) has only nine

months from the (agreed) date of delivery of goods to bring any such proceedings.⁵⁴⁶ On the other hand, there are other instruments that would give Vina 12 months to do so.⁵⁴⁷ The Ethiopian instrument, for its part, would give Vina 24 months.⁵⁴⁸ The majority of the national time bars are between 9 and 12 months in length and would be more favourable to UG than to Vina. The majority of the unimodal time bars, some of them reproduced in national law, are 12 months in length.⁵⁴⁹ Therefore, if Vina brought proceedings against UG within nine or 12 months of the agreed date of delivery, UG would generally have sufficient time to bring proceedings against its actual-carrier sub-contractors to recover the amount of any compensation awarded by order of the court to cargo owners.

Unlike almost all the other national instruments, the instruments of Chinese and Dutch law distinguish the case where the damage, loss, or delay in delivery is localised and the case where it is unlocalised. In the case of localised damage, loss, or delay in delivery, these two instruments provide that the time bar will be the relevant unimodal one.⁵⁵⁰ In the case of unlocalised damage, loss, or delay in delivery, they produce different outcomes. The Chinese instrument provides that if the MTO involves sea carriage, cargo owners will have 12 months from the date of delivery to bring proceedings against MTCs.⁵⁵¹ If the MTO does not involve any sea carriage, there is no MT-specific time bar,⁵⁵² and it is general Chinese law that applies—meaning that the time bar will generally be 36 months in length (and a maximum of 240 months, namely, 20 years).⁵⁵³ However, if (1) there is no sea carriage but (2) there is carriage of containers, it is the Chinese Regulations Governing International Multimodal Transport of Goods by Container that will apply, meaning that cargo owners will have 24

⁵⁴⁶ Thai Multimodal Transport Act BE 2548, s 38; Lao Law on Multiple Transport No 28/NA, art 42; Cambodian Law Adopting AFAMT, art 23; Singaporean Multimodal Transport Act, s 26; Indian Multimodal Transportation of Goods Act 1993, s 24; Andean Community Decision (for Ecuador and Columbia), art 22.

⁵⁴⁷ MERCOSUR Partial Agreement (for Paraguay), art 22; Brazilian Law No 9.61 of 19 February 1998 on Multimodal Transport of Goods, art 22; Argentinean Law No 24.921: Multimodal Transport of Goods, art 43.

⁵⁴⁸ Ethiopian Multimodal Transport of Goods Proclamation No 548/2007, s 40(1); German Commercial Code, art 452(b) and 439.

⁵⁴⁹ See Table 4.

⁵⁵⁰ Dutch Civil Code, art 8.41; Chinese Maritime Code, art 105; Chinese Civil Code, art 842.

⁵⁵¹ Chinese Maritime Code, art 257.

⁵⁵² Chinese Civil Code.

⁵⁵³ *ibid* art 188.

months to bring proceedings against MTCs.⁵⁵⁴ Therefore, the Chinese instrument applies to the MTO in the hypothetical, and therefore, under Chinese law, Vina will have 12 months to bring proceedings, because of the carriage of the container of polyester yarn including carriage by sea.

The Dutch instrument, on the other hand, defers to the relevant unimodal rules determining MTC liability in the case of unlocalised damage, loss, or delay in delivery. In any such case, it is also these rules that will determine the time bar on proceedings by cargo owners.⁵⁵⁵ Accordingly, if the Dutch instrument applies in the hypothetical, the time bar on proceedings by Vina will be the one set forth by one of the unimodal rules governing one or more segments of the MTO and, more specifically, the unimodal rules having the most favourable provisions to Vina.⁵⁵⁶ In other words, the Dutch instrument deems the damage, loss, or delay to have occurred in the segment in which rational cargo owners (namely, cargo owners wishing to maximise the amount of any compensation that they receive) would have wished it to occur. The hypothetical involves only sea and road carriage, and the two relevant unimodal rules provide the same time bar: one year.⁵⁵⁷ Vina, therefore, would have one year to bring proceedings. However, if the hypothetical involved, for example, sea, road, and *air* carriage, Vina would have *two* years. The reason is that under the unimodal convention on air carriage, there is a two-year time bar, namely, one more favourable to Vina than the one-year time bars provided for sea and road carriage.⁵⁵⁸ Under the Dutch instrument, the more favourable time bar—here, two years, for air carriage—prevails.

To summarise, determining the time bar on cargo owners (such as Vina) bringing proceedings against MTCs (such as UG) for damage to, loss of, or delay in delivery of goods

⁵⁵⁴ Chinese Regulations Governing International Multimodal Transport of Goods by Containers, art 34.

⁵⁵⁵ Dutch Civil Code, art 8.42–43.

⁵⁵⁶ *ibid.*

⁵⁵⁷ *ibid* art 8.1711.

⁵⁵⁸ *ibid* art 8.1735.

will depend to a great extent on knowing which of several instruments possibly applicable actually applies. Therefore, it will generally be impossible for the parties to predict, on contracting, how long cargo owners will have to bring proceedings against MTCs.

4.6 Conclusion to the section

Every one of the national instruments on MTC determines MTC liability for damage to, loss of, and delay in delivery of goods differently from the others. The provisions of some of the instruments, such as the instruments of Chinese, German, and Dutch law, are particularly complex. Under these three instruments, it is necessary to determine at the outset which of several different liability regimes applies, and the answer to this question depends on whether the damage, loss, or delay in delivery is localised. Therefore, when any of these three instruments applies, there will be considerable unpredictability as to the determination of MTC liability. Other national instruments, such as those of Indonesian and Mexican law, offer a much simpler approach. These two instruments contain a single, uniform body of rules determining MTC liability that apply regardless (for example) of whether the damage, loss, or delay is localised or unlocalised—and, if it is localised, which segment of the carriage operation was its segment of occurrence. In terms of overall complexity, the remaining national instruments on MT lie somewhere between these two extremes as mentioned—the (higher-complexity) Chinese, German, and Dutch instruments and the (lower-complexity) Indonesian and Mexican instruments.

Furthermore, there are certain national instruments, such as the Dutch one, that expose MTCs to relatively little risk of liability in the case of localised damage, loss, or delay in delivery, deferring—as these instruments do—to the relevant unimodal convention. However, in the case of unlocalised damage, loss, or delay in delivery, the Dutch instrument is far more favourable to cargo owners than to MTCs, deferring—as it does—to whichever unimodal convention produces the outcome most favourable to cargo owners.

5. MTC liability under widely used model contractual terms

Section 4 examined the rules relating to MTC liability in the world's main national legal instruments on MT, concluding that these instruments differ considerably in their approaches to determining MTC liability. Some of the instruments are much more favourable to cargo owners than they are to MTCs, and others less so. These differences—and particularly the general state of imbalance between the interests of cargo owners and the interests of MTCs—create unpredictability and, in many cases, unfairness in determining MTC liability.

This section examines the rules relating to MTC liability in widely used model contractual terms. These include the terms of the FIATA MT documents and BIMCO Multidoc 2016. The FIATA MT documents and BIMCO Multidoc 2016 are used by the majority of transport companies around the world, with the member companies of FIATA numbering more than 5,500 and representing 'an industry of 40,000 freight forwarding and logistics firms'.⁵⁵⁹ The member companies BIMCO are fewer in number, at 1,900, but represent '60% of the world cargo fleet'.⁵⁶⁰ Under the FIATA and BIMCO terms, MTC liability is determined as under the UNCTAD/ICC Rules 1992, meaning that this discussion of the terms need only be brief.

Replicating the UNCTAD/ICC Rules 1992 relating to the basis of MTC liability, FIATA and BIMCO adopted a modified approach to such liability in their MT documents. MTCs using FIATA and BIMCO MT documents will bear liability for damage to, loss of, and delay in delivery of goods from the moment that they take goods under their charge until the moment that they hand the goods over to cargo owners.⁵⁶¹ However, MTCs will bear liability for delay in delivery only if MTCs and consignors agree that timely delivery is of the essence.⁵⁶² In any case of damage, loss, or delay in delivery that occurs during the period of MTC liability, MTCs

⁵⁵⁹ FIATA, 'Who We Are' <<https://fiata.com/who-we-are.html>> accessed 24 July 2021.

⁵⁶⁰ BIMCO, 'About Us and Our Members' <<https://www.bimco.org/about-us-and-our-members>> accessed 24 July 2021.

⁵⁶¹ BIMCO Multidoc 2016, cl 10(a); Negotiable FIATA Multimodal Transport Bill of Lading, cl 6(1); FIATA Multimodal Transport Waybill, cl 7(1).

⁵⁶² BIMCO Multidoc 2016, cl 10(b); Negotiable FIATA Multimodal Transport Bill of Lading, cl 6(2); FIATA Multimodal Transport Waybill, cl 7(2).

must compensate cargo owners, including where the damage, loss, or delay in delivery is caused by their employees, agents, or actual-carrier sub-contractors.⁵⁶³ Therefore, to avoid bearing any such liability, MTCs must prove that neither they nor their employees, agents, or actual-carrier sub-contractors were at fault in causing the damage, loss, or delay in delivery to occur.⁵⁶⁴ In the case where the MTO involves sea carriage, MTCs will not bear liability if they prove that any damage, loss, or delay occurring was caused by (1) some ‘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’⁵⁶⁵ or (2) fire.⁵⁶⁶ Using the BIMCO Multidoc 2016 also enables them to use the exonerating events listed in article 4.2(c)–(p) of the Hague-Visby Rules and, in doing so, escape liability for damage to, loss of, and delay in delivery of goods that are carried by sea or inland waterway.⁵⁶⁷

In relation to the limitation of MTC liability, both the FIATA and BIMCO MT documents distinguish for specific cases: where the damage to, or loss of, goods is localised or unlocalised; where there is non-physical loss resulting from delay in delivery; and where there is consequential loss resulting from physical damage to or loss of goods.⁵⁶⁸

In the case of localised damage to or loss of goods, both the FIATA and BIMCO MT documents defer to the relevant unimodal limitation of liability if each segment of the MTOs is (paradoxically) governed by a separate contract,⁵⁶⁹ with the national law (as the case may be) deeming the separate contracts to constitute a single MT contract.⁵⁷⁰ However, it is also

⁵⁶³ BIMCO Multidoc 2016, cl 10(c); Negotiable FIATA Multimodal Transport Bill of Lading, cl 2(2); FIATA Multimodal Transport Waybill, cl 2(2).

⁵⁶⁴ BIMCO Multidoc 2016, cl 10(b); Negotiable FIATA Multimodal Transport Bill of Lading, cl 6(2); FIATA Multimodal Transport Waybill, cl 7(2).

⁵⁶⁵ BIMCO Multidoc 2016, cl 11; Negotiable FIATA Multimodal Transport Bill of Lading, cl 6(6); FIATA Multimodal Transport Waybill, cl 7(6).

⁵⁶⁶ BIMCO Multidoc 2016, cl 11; Negotiable FIATA Multimodal Transport Bill of Lading, cl 6(6); FIATA Multimodal Transport Waybill, cl 7(6).

⁵⁶⁷ BIMCO Multidoc 2016, cl 11.

⁵⁶⁸ BIMCO Multidoc 2016, cl 12; Negotiable FIATA Multimodal Transport Bill of Lading, cl 8; FIATA Multimodal Transport Waybill, cl 9.

⁵⁶⁹ BIMCO Multidoc 2016, cl 12; Negotiable FIATA Multimodal Transport Bill of Lading, cl 8; FIATA Multimodal Transport Waybill, cl 9.

⁵⁷⁰ German Commercial Code, bk 4, s 452.

possible for the US Carriage of Goods by Sea Act (COGSA) to apply to MT—especially in the case where (1) the MTO involves sea carriage and (2) the ship departs from or arrives at a US port.⁵⁷¹ COGSA limits MTC liability to \$500 per package or unit.⁵⁷²

In the case of unlocalised damage to or loss of goods, both the FIATA and BIMCO MT documents limit MTC liability to the value of the goods carried if the value is declared.⁵⁷³ Otherwise, both the FIATA and BIMCO MT documents limit MTC liability according to whether the MTO involves sea carriage or not. If it does, MTCs' liability will be limited to a maximum of 666.67 SDR per package or unit or 2 SDR per kg, whichever is higher. If the MTO does not involve any sea carriage, MTCs' liability will be limited to a maximum of 8.33 SDR per kg.⁵⁷⁴

In the case of delay in delivery and consequential loss (namely, loss resulting from any such delay), the FIATA MT documents limit MTC liability to an amount equivalent to twice the total freight payable.⁵⁷⁵ The BIMCO Multidoc 2016, on the other hand, is more favourable to MTCs: clause 12 limits MTC liability for delay in delivery and consequential loss to an equivalent to the freight payable under the contract. If they wish to bring proceedings against MTCs for any loss of any such type (or of any other type) under the FIATA and BIMCO MT documents, cargo owners must do so within nine months of the date of delivery. Otherwise, they will be time-barred.⁵⁷⁶

For these reasons, although emulating the UNCTAD/ICC Rules 1992 to a considerable extent, the FIATA and BIMCO MT documents nevertheless differ from each other in how they

⁵⁷¹ COGSA, s 1312.

⁵⁷² BIMCO Multidoc 2016, cl 12; Negotiable FIATA Multimodal Transport Bill of Lading, cl 8(6); FIATA Multimodal Transport Waybill, cl 9(6).

⁵⁷³ BIMCO Multidoc 2016, cl 12; Negotiable FIATA Multimodal Transport Bill of Lading, cl 8(3); FIATA Multimodal Transport Waybill, cl 9(3).

⁵⁷⁴ BIMCO Multidoc 2016, cl 12; Negotiable FIATA Multimodal Transport Bill of Lading, cl 8(5); FIATA Multimodal Transport Waybill, cl 9(5).

⁵⁷⁵ Negotiable FIATA Multimodal Transport Bill of Lading, cl 8(7); FIATA Multimodal Transport Waybill, cl 9(7).

⁵⁷⁶ BIMCO Multidoc 2016, cl 4; Negotiable FIATA Multimodal Transport Bill of Lading, cl 17; FIATA Multimodal Transport Waybill, cl 18.

determine MTC liability. Given these differences, the two instruments give rise to unpredictability on the matter.

6. Conclusion to the chapter

At the international level, there have been two attempts to create a legal instrument governing MTOs, producing the MT Convention and Rotterdam Rules, respectively. However, both attempts largely failed because they never gained much support from the transport industry. Indeed, the transport industry considers that the provisions of the two instruments relating to the basis of liability, the limitation of liability, and time bars are too unfavourable to its members. The industry also considers the Rotterdam Rules to be too complicated a solution for the purposes of determining MTC liability. Where the Rotterdam Rules apply, it is difficult to predict the basis on which MTCs will be liable for damage to, loss of, and delay in delivery of goods carried.

In the absence of an international legal instrument on MT, the transport industry drafted its own: the UNCTAD/ICC Rules 1992. If the parties to an MTO wish these Rules to apply to it, they must incorporate the Rules by contract. The industry considers that, at present, the Rules are the only international legal instrument on MT to offer a solution that strikes a reasonable balance between the interests of cargo owners and the interests of MTCs. Therefore, the Rules have found a place in the world's most widely used standard-form bills of lading, including the FIATA MT documents and BIMCO Multidoc 2016. However, cargo owners argue that the Rules are over-favourable to MTCs in how they limit MTC liability in the case of delay in delivery.

At the regional level, there are only four legal instruments on MT: those established by ALADI, ASEAN, MERCOSUR, and the Andean Communities. These four instruments adopt a modified approach to MTC liability. However, while based to some extent on the MT

Convention and UNCTAD/ICC Rules 1992, they offer a better solution than the two international legal instruments for the purposes of determining MTC liability. For example, in the case of any MTO involving sea carriage and unlocalised damage, or loss, the four regional instruments limit MTC liability to a maximum of 666.67 SDR per package or 2 SDR per kg, whichever is higher. These limitations of MTC liability are favourable to MTCs and reasonably so, because carriage by sea involves greater risk than other types, such as carriage by road, rail, and air. In the absence of any sea carriage, the four instruments limit MTC liability to a maximum of 8.33 SDR per kg. This is a limitation of MTC liability that is more favourable to cargo owners. What is more, determining MTC liability under the four instruments involves unpredictability, because of the many factors to be considered by the court before determining MTC liability. In particular, the court must determine whether the damage to, or loss of goods is localised and, therefore, attributable to any specific leg of the MT. If the damage or loss is indeed localised, then it is the relevant unimodal convention that applies for the purposes of limiting MTC liability. It is only after considering questions such as these that MTCs and cargo owners will be able to predict the extent of any MTC liability for damage or loss. If, on the other hand, the damage or loss is not localised, it is necessary to consider whether the MTO involved any sea carriage. There will be no particular problem if the MT contract itself specifies the modes of transport to be used. However, it is not uncommon for MTCs to exercise their discretion as to which modes of transport they use to ensure timely delivery. Therefore, it is entirely possible for the parties not to know—on contracting—what modes of transport will be used. It would be particularly useful to them to have notice of any carriage by sea.

At the national level, there is relatively little law on MT. Only certain countries around the world have enacted legislation specific to MT, and there are many differences from instrument to instrument. Each of these instruments adopts one of three common approaches to MTC liability: uniform, modified, and network. None of the instruments adopts a limited-network

approach—the approach adopted by the Rotterdam Rules. Based on transport-industry commentary relating to the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992, there is no national instrument that strikes an appropriate balance between the interests of cargo owners and the interests of MTCs. Furthermore, some national instruments—such as those of Germany, China and the Netherlands—are highly complex. The instruments in Indonesia and Mexico are much simpler, but each contains provisions on the limitation of MTC liability that are less favourable to MTCs than they could be. Then there are other national instruments that make provision on the period of potential MTC liability and the basis of any such liability that is over-favourable to cargo owners, while setting forth limitations of liability and time bars that are over-favourable to MTCs or even to cargo owners.

In the final analysis, an international legal instrument on MT will gain support from the transport industry if three requirements are met. The first is certainty in the relevant rules. The second requirement is predictability, enabling MTCs and cargo owners to know in advance what rules—international, regional, or national—will in practice determine MTC liability for damage to, loss of, or delay in delivery of goods carried. The third requirement is fairness. This thesis has until now mainly focused on unfairness, as a ‘negative requirement’. Chapter 3 considers the same requirement from a different perspective—a positive one. In other words, it determines what it would mean for rules on MTC liability to be fair, rather than merely ‘not unfair’.

CHAPTER 3

PROPOSING RULES GOVERNING MTC LIABILITY

As examined in Chapter 2, none of the historical attempts to create an international legal instrument on MTOs has succeeded. None of the relevant instruments offer a satisfactory solution for determining MTC liability. The instruments are not only uncertain, but also unpredictable and unfair, to both MTCs and cargo owners. The provisions that tend to be the most problematic are those relating to the basis of liability, the limitation of liability, and time bars. Both the transport industry and scholars consider that the current system for determining MTC liability is over-complicated and produces outcomes that are difficult to predict. Also, the language used in the relevant instruments (such as the CMR and Warsaw Convention) that have the potential to apply to MTOs causes confusion, leading to uncertainty in the area.

Moreover, it would be unfair for MTCs if an international legal instrument on MT determined MTC liability using a strict-liability approach and made too few defences available to them. In some existing instruments of this type (including the MT Convention and the Rotterdam Rules), the limitations of liability in the cases of negligence and unknown risk do too little to protect MTCs and are therefore insufficient. Furthermore, lengthy time bars, particularly as provided by the MT Convention and the Rotterdam Rules, disadvantage MTCs bringing proceedings against their actual-carrier sub-contractors for the purposes of recovering the cost of court-ordered awards to cargo owners.⁵⁷⁷

What the transport industry *needs* in an international legal instrument on MT is that the instrument be (1) certain, (2) predictable, and (3) fair to both MTCs and cargo owners. If such an instrument meets these three needs, it will have the support of the transport industry,

⁵⁷⁷ See Sub-section 2.5 of Chapter 2.

motivating this industry to lobby governments to ratify the instrument.⁵⁷⁸ This lobbying will mean a greater likelihood of state support sufficient for the instrument to come into force.

While the instrument would need to be certain, certainty is a matter of drafting—namely, a matter that raises no particular issues specific to MTC liability as such.⁵⁷⁹ Therefore, rather than focusing on certainty, this chapter focuses on the substantive questions of how to ensure that the relevant rules are predictable and fair.

For the purposes of answering these questions, the chapter first considers the four main approaches to MTC liability in greater detail. These approaches are the uniform, network, limited network, and modified uniform approaches. On the matter of these approaches, this chapter considers whether it would be desirable for any international legal instrument on MT to adopt a uniform approach, just as the Mexican and Indonesian legal instruments on MT do.⁵⁸⁰ The reason is the simplicity of this approach: a single set of rules relating to the basis of MTC liability, the limitation of MTC liability, and time bars, applicable irrespective of whether the damage to, loss of, or delay in delivery of goods is localised or unlocalised. This approach may be better suited to enabling MTCs and cargo owners to predict the basis of any MTC liability and its extent.

On the matter of fairness, this chapter first examines whether rules relating to MTC liability may be fair even if they do not treat MTCs and cargo owners ‘equally’—even if the rules favour cargo owners over MTCs or vice versa. This chapter then examines what matters most for any inequality to be reasonable and justifiable. Having done so, the chapter then discusses the relevant rules—those relating to the basis of MTC liability, the limitation of MTC liability, and time bars—fair to both MTCs and cargo owners. Since each of the three types of rules has its

⁵⁷⁸ See Section 6 of Chapter 1.

⁵⁷⁹ See Section 4 of Chapter 1.

⁵⁸⁰ *ibid.*

specific subject matter, the chapter further considers whether there is any one theory of fairness that is suited to each of them.⁵⁸¹

To determine what it means for rules relating to the basis of MTC liability to be fair, this chapter discusses the theory of distributive fairness as proposed by Aristotle⁵⁸² and Keating.⁵⁸³ The chapter uses this theory to explore whether fair-minded MTCs may see themselves as owing cargo owners a duty to prevent any damage to, loss of, or delay in delivery of goods. On this basis, it will become apparent whether MTCs should be liable for any such damage, loss, or delay in delivery, whether the risk causing it is controllable or uncontrollable.⁵⁸⁴

Rules relating to the limitation of MTC liability, on the other hand, do not *allocate* liability. Rather, they concern the *extent* of any such liability. In relation to question of how to limit MTC liability fairly, the chapter considers the concepts of negligence and controllable and uncontrollable risk—as well as the concept of corrective justice, as discussed in the work of Aristotle and Weinrib.⁵⁸⁵ Drawing upon these works, this chapter considers whether, in the cases of negligence and uncontrollable risk, an international legal instrument should limit MTC liability using a basic mathematical formula—a weighted average of the existing unimodal limitations of such liability. For these purposes, the chapter investigates two more-specific questions. The first is whether, in the case of so-called contemplatory loss (which will typically be ‘reasonably foreseeable’ at law), a limitation of MTC liability will be fair if equal to the weighted average mentioned above. The second question is whether, in the case of so-called

⁵⁸¹ There are different types of fairness or justice, including fair exchange, distributive justice, procedural justice, retributive justice and corrective justice. Fair exchange is most relevant to arrangements willingly made by members of society, such as contracts. Distributive justice is most relevant to the allocation of rewards, resources, rights and obligations that is made by some allocator. Procedural justice most relevant to the evaluation of the procedure for allocating rewards, resources, rights and obligations (including by exchange). Corrective and retributive justice are most relevant to the allocation of compensation and punishment. See Karen S Cook and Karen A Hegtvædt, ‘Distributive Justice, Equity, and Equality’ (1983) 9 Annual Review of Sociology 217–41.

⁵⁸² Anton-Hermann Chroust and David L Osborn, ‘Aristotle’s Conception of Justice’ (1942) 17 Notre Dame Law Review 129–43.

⁵⁸³ Gregory C Keating, ‘The Idea of Fairness in the Law of Enterprise Liability’ (1997) 95(5) Michigan Law Review 1266–380.

⁵⁸⁴ Here, liability is examined by reference to the carrier’s duty to prevent damage, loss, or delay in delivery, rather than by reference to whether the underlying risk itself is controllable or uncontrollable. Importantly, liability does not arise automatically merely because damage, loss, or delay has occurred. An MTC may still avoid liability by demonstrating that it exercised all reasonable measures to prevent the relevant damage, loss, or delay in delivery and its consequences. Accordingly, the form of liability examined in this chapter remains grounded in a presumed-fault approach rather than in a strict liability one.

⁵⁸⁵ Ernest J Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 University of Toronto Law Journal 349–56.

non-contemplatory loss (which will not typically be reasonably foreseeable at law) resulting from delay in delivery, a limitation of MTC liability will be fair if equal to the total freight payable.

Of course, rules relating to time bars are different again. This chapter considers whether, for any such rules to be fair, they must present equality of opportunity, as theorised by Rawls.⁵⁸⁶ Using this theory, the chapter further examines whether, for the purposes of fairness, proceedings against MTCs must be time-barred once nine months have elapsed since the expected date of delivery.

1. Ensuring that rules governing MTC liability are predictable

As mentioned above, the transport industry would need any international legal instrument governing MTC liability to be certain, predictable, and fair. This section addresses the concern of predictability and how to ensure that the relevant rules are in fact predictable.

There are four main approaches to determining MTC liability that have emerged over the years: the uniform, network, limited network, and modified uniform approaches. This section considers which of the four best meets the requirements for predictability as adopted by this thesis, by reference to the work of Nikaki, as discussed below.

1.1 Uniform approach

As mentioned, there are four different approaches to MTC liability that have been used in historical attempts to create an international legal instrument governing MTC liability. This sub-section focuses on the uniform approach, examining whether this approach provides the most predictability in determining MTC liability.

The uniform approach to MTC liability involves a single body of rules—and typically a single legal instrument—governing the entirety of the MTO, irrespective of whether any

⁵⁸⁶ John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 73–78.

damage, loss, or delay in delivery occurring within it is localised or unlocalised.⁵⁸⁷ Under this approach, the body of rules applicable is seamless. It enables the parties to make early predictions as to the basis of any MTC liability, the limitation of any such liability, and the time bar on any proceedings.⁵⁸⁸ Hoeks agrees,⁵⁸⁹ describing this approach as one that promotes simplicity and transparency, enabling all those involved—including cargo owners as well as MTCs—to know precisely which of the many regimes that could potentially apply in theory will actually apply in practice. Furthermore, the parties are able to make their predictions on contracting, namely, from the outset. Therefore, they will have immediate visibility as to the legal consequences of any damage to, loss of, or delay in delivery of the goods carried.⁵⁹⁰

Another commentator, Nikaki, broadly concurs, arguing that a legal instrument will satisfy the criterion of predictability when MTCs and cargo owners are able to identify (1) the basis of MTC liability for any damage, loss, or delay in delivery and (2) the extent of any such liability.⁵⁹¹ The uniform approach enables the parties to do so, but unfortunately, as mentioned in Chapter 2, the approach is not one that is commonly adopted by legal instruments. The national instruments of Mexico and Indonesia are among the few to set forth a single body of rules determining the basis of MTC liability, the limitation of liability, and the time bar, regardless of whether the damage or loss is localised or unlocalised.⁵⁹²

Despite the advantages of the uniform approach discussed above, Hoeks identifies four main issues that a uniform liability instrument may encounter.⁵⁹³

The first issue is the potential conflict in application between a uniform MT instrument and existing unimodal conventions. In particular, conventions such as the Warsaw Convention and the CMR may apply to an MT contract.⁵⁹⁴ Consequently, where a uniform MT instrument also

⁵⁸⁷ Simon Baughen, *Shipping Law* (4th edn, Cavendish 2009) 183.

⁵⁸⁸ Devia (n 71).

⁵⁸⁹ Hoeks (n 61) 21.

⁵⁹⁰ Nikaki (n 90) 77.

⁵⁹¹ *ibid.*

⁵⁹² See Section 4 of Chapter 2.

⁵⁹³ Hoeks (n 61) 26-27.

⁵⁹⁴ See further discussion in Sub-section 1.2 of Chapter 3.

applies, both the uniform instrument and the relevant unimodal convention simultaneously govern the same MT contact, potentially creating conflicts in their application. However, as proposed by UNCITRAL, this conflict could be solved by ‘an adjustment of the scope of the application provisions of the unimodal conventions’.⁵⁹⁵

The second issue is that MTCs may be exposed to a less favourable liability regime than under the existing unimodal conventions.⁵⁹⁶ For example, if a uniform MT instrument adopts limitation amounts that are more favourable to cargo owners than those under the unimodal conventions, MTCs may face greater liability and consequently be required to pay higher levels of compensation. As a result, it is arguable that MTCs and the transport industry may resist adopting a uniform MT instrument.

The third issue is that in recourse actions, MTCs may recover less from their sub-contractors than the amount that they must pay in compensation to cargo owners.⁵⁹⁷ As shown in Table 3, the existing unimodal conventions establish different amounts for the limitation of MTC liability for each mode of transport. If a uniform MT instrument sets an amount which is more favourable to cargo owners than that under the relevant unimodal convention, MTCs may have to compensate cargo owners more than they can recover from sub-contractors.

However, the adverse consequences of the second and third issues could be minimised by a uniform MT instrument adopting a liability regime that is fair to both MTCs and cargo owners, as discussed in Section 2 of this Chapter.

The final issue discussed by Hoeks is that a uniform MT instrument may be perceived as an illogical solution.⁵⁹⁸ The reason, she argues, is that identical damage occurring during one leg of carriage is subject to different liability regimes depending on whether it arises under a unimodal contract or an MT contract. For example, imagine that a cargo of coffee beans is

⁵⁹⁵ UNCITRAL, ‘Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea]’ (A/CN.9/WG.III/WP.33, 2003) [19].

⁵⁹⁶ Hoeks (n 61) 26.

⁵⁹⁷ *ibid.*

⁵⁹⁸ *ibid.* 27.

damaged during a sea leg. Although the location and the cause of the damage are identical, the carrier's liability is determined differently depending on whether the carriage contract is a unimodal contract or an MT contract. As a result, the same damage may be treated differently solely because it occurs under different contractual arrangements, namely a unimodal contract or an MT contract.

However, as discussed in Chapter 1, the existing unimodal conventions fail to determine MTC liability in the case where damage, loss, or delay cannot be localised to a particular stage of carriage. Consequently, although it is arguable that a uniform approach may be criticised as producing inconsistent outcomes in case of localised damage, loss, or delay, it remains necessary to provide a liability regime for unlocalised damage, loss, or delay. In this respect, the practical need to address legal gaps in MT may outweigh concerns regarding conceptual inconsistency.

1.2 Network approach

Sub-section 1.1 discussed why the uniform approach to liability is capable of resolving issues of unpredictability in determining MTC liability. This approach favours predictability in that it involves a single body of rules determining MTC liability. Moreover, this single body of rules applies regardless of whether the damage, loss, or delay is localised or unlocalised.

Building on Sub-section 1.1, this sub-section turns to another approach to liability: the network approach. Under the network approach, there will be more than one body of rules determining MTC liability. To determine which of the bodies of rules is applicable, it would be necessary to determine the location of the damage to, loss of, or delay in delivery of the goods—namely, its segment of occurrence within the broader MTO. Of course, the parties will never be able to answer this question ahead of time and, therefore, will never know how MTC liability will be determined until the damage, loss, or delay in delivery actually occurs.

The network approach to liability is, however, the approach adopted by national legal instruments on MT in China, Germany, and the Netherlands.⁵⁹⁹ As explored in Chapter 2, these three instruments are complex because, adopting the network approach as they do, they require the court to determine MTC liability through ‘diverse unimodal liability regimes with different rules on incidence and extent of a carrier’s liability’.⁶⁰⁰ Haak notes that, under this approach, ‘different regimes apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them’.⁶⁰¹ Therefore, the approach ‘creates a colourful patchwork in a variety of legal issues’,⁶⁰² requiring the court to consider a combination of different liability instruments potentially operating with respect to a single contract and therefore with respect to a single MTO.⁶⁰³

At the same time, the network approach is not without its advantages. Indeed, by definition, this approach involves having the relevant legal instrument defer to the relevant unimodal convention on certain points of MT law, and, for this reason, the approach eliminates the necessity of a single legal instrument governing every aspect of the MTO. For example, under the network approach, the Hague-Visby Rules apply to any sea carriage, the CMR Convention applies to any road carriage, the COTIF-CIM Convention applies to any rail carriage, the CMNI Convention applies to any inland waterway, and the Warsaw Convention applies to any air carriage. Considered together as a ‘single’ body of rules, the three unimodal conventions will answer many of the questions that may arise in relation to MTO, given that together they may cover every mode of transport used. In this sense, the network approach does have some potential to minimise confusion as to which legal instrument applies to an MTO: a legal instrument specifically relating to MT or one of the unimodal conventions.

⁵⁹⁹ See Section 4 of Chapter 2.

⁶⁰⁰ Haak (n 320) 27.

⁶⁰¹ *ibid* 14.

⁶⁰² Hoeks (n 61) 22.

⁶⁰³ *ibid*.

Then again, there is the situation where different unimodal conventions apply to a single MTO, which tends to give rise to considerable unpredictability. One of the main reasons is that the network approach to liability is effective in resolving MT disputes, specifically in the case where the damage, loss, or delay in delivery is localised. Indeed, to know which of the unimodal conventions applies, it is necessary to know which mode of transport was being used to carry the goods at the time of the damage, loss, or delay in delivery occurring. If, on the other hand, the damage, loss, or delay in delivery is unlocalised, it will be impossible for the parties to determine—on contracting—which of the unimodal conventions is applicable. What is more, there will be also be a major problem for MTCs: they will be unable to rely on the limitations of liability and the defences provided by the unimodal convention that would have otherwise applied, meaning that in the case of unlocalised damage, loss, or delay in delivery, MTCs are exposed to a greater risk of the court finding them liable and to a risk of the court finding them liable for a greater amount.

Furthermore, in the case of a unimodal convention being applicable, the parties may have difficulty predicting how the court would answer questions such as (1) when exactly the unimodal convention started to apply, (2) when exactly it ceased to apply, and (3) whether it applied to any damage and loss that occurred while the goods were being loaded or stored.

Indeed, it is well known that different courts in different jurisdictions adopt different approaches for the purposes of determining when a given unimodal convention applies. For instance, the Hague-Visby Rules state that ‘carriage of goods covers the period from the time when the goods are loaded onto the time they are discharged from the ship’.⁶⁰⁴ The Rules also provide that they govern carrier liability at the times and over the periods when goods are loaded, handled, stowed, carried, taken into and held in custody, cared for, and discharged.⁶⁰⁵

⁶⁰⁴ Hague-Visby Rules, art 1.

⁶⁰⁵ *ibid* art 2.

In *Uncle Ben's Int'l Div of Uncle Ben's, Inc v Hapag-Lloyd Aktiengesellschaft*,⁶⁰⁶ the US Court of Appeal ruled that COGSA (which substantially reproduces the Hague-Visby Rules) does not apply for the purposes of determining whether the carrier is liable for damage to and loss of goods occurring in the pre-loading and post-discharge phases of the MTO. The Court held that it was not COGSA but another instrument relating to the carriage of goods by sea, the Harter Act 1893, that applies to any such damage or loss. Judge Politz explained his decision—that it was not COGSA that applied in *Uncle Ben's*—by noting that, in his opinion, the Hague-Visby Rules apply only to the tackle-to-tackle period.⁶⁰⁷ In other words, he was of the opinion that the Rules start to apply (for the purposes of determining carrier liability) at the point when the goods are loaded on board the vessel and cease to apply at the point when the goods are discharged from the vessel. The English High Court, in *Mayhew Foods v Overseas Containers Ltd*,⁶⁰⁸ took a different approach, finding that the Hague-Visby Rules apply to the period of storage of goods when the goods are in transit, but not to any other period of storage of goods.

These differences in how courts determine the legal instrument applicable serve as evidence that ultimately, there will tend to be considerable differences in how courts determine MTC liability from one jurisdiction to the next. For example, in the United States, MTCs will be unable to raise the defences under COGSA to liability for damage or loss occurring while goods are in storage in transit (1) after a segment of carriage by sea, and (2) before a segment of carriage by some other mode of transport. The situation will be different in England: MTCs will be able to raise the defences. Therefore, the English approach is the more favourable of the two to MTCs.

Moreover, there may be confusion over the unimodal conventions that apply to a given MTO on a leg-by-leg basis. For example, there may be confusion as to whether it is the CMR

⁶⁰⁶ [1988] 855 F 2d 215.

⁶⁰⁷ *ibid* [215–16].

⁶⁰⁸ [1984] 1 Lloyd's Rep 317.

Convention or the Warsaw Convention that applies. Article 2 of the CMR Convention states that the Convention is applicable to any non-road leg of the transport operation if (1) there is a road vehicle carrying the relevant goods and (2) it is this road vehicle *itself* (rather than the actual goods themselves) that is loaded into the conveyance used for the leg, and (3) the conveyance used for the leg is a *non-road* conveyance, such as a barge. However, article 18 of the Warsaw Convention states:

The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Consequently, if, for example, (1) cargo is carried by truck from the pick-up point (at the consignor's premises) to the airport and (2) the truck (with the cargo still inside it) is then rolled onto an aircraft, then *both* the CMR Convention and the Warsaw Convention are applicable to any damage and loss occurring during the MTO—with the CMR Convention (despite specifically relating to carriage by road) *additionally* applying to the air segment and the Warsaw Convention (despite specifically relating to carriage by air) *additionally* applying to the road segment. In other words, *prima facie*, there will be (at least) two causes of action for any damage or loss that occurs: a cause of action under the CMR Convention and a cause of action under the Warsaw Convention.

Therefore, while adopting the network approach may reduce confusion as to whether a carriage operation is governed (1) by a legal instrument on MT or (2) by a unimodal convention (as is may be the case where both the MT Convention and the CMR Conventions could potentially apply), there is no approach to liability that would be able *in itself* to lend greater predictability to the MT law. The reason is that it is currently uncertain how the unimodal

conventions interact with one another when there arises the question of which unimodal convention applies; and, as explored above, it may be more than one.

One possible solution for ensuring greater predictability would be to amend the provisions of one or more of the unimodal conventions to make the conventions clearer as to whether and, if so, how each convention—considered within its own four corners—applies in the event of an MTO. However, there is little evidence that the transport industry has any interest in amending any of the unimodal conventions for reasons of ensuring predictability. Nikaki notes that each of the conventions was reviewed relatively recently (with the result, for example, of the Warsaw Convention being amended in 1999 and becoming the Montreal Convention) and that none of the amendments made was made specifically for the purposes of greater predictability in the law as it relates to MTC liability.⁶⁰⁹

To answer the question whether the network approach could nevertheless offer assistance in achieving greater predictability, it is necessary to answer another: how exactly the legal instrument adopting this approach would determine MTC liability. If a given unimodal convention applies to a given MTO, knowing which instrument or instrument applies (or which instruments apply) will depend on knowing (1) whether the damage, loss, or delay in delivery is localised and (2) what approach the court deciding the dispute will take in answering the question of which instrument applies (or which instruments apply). Because the parties will never know—on contracting—(1) what the location of the damage, loss, or delay in delivery is to be, the parties will never be able to know (2) on what basis MTCs will be liable for the damage, loss, or delay in delivery. Thus, having a legal instrument adopt a network approach to liability would not mean greater predictable than there would other be. Indeed, given that the limited usefulness of the network approach in resolving MT disputes, the UNECE secretariat considers that ‘it is important to reconcile, in the longer term, civil liability rules for

⁶⁰⁹ Nikaki (n 90) 103.

multimodal transport in a single regulation, thereby doing away with the present situation of [unpredictability] and forum shopping'.⁶¹⁰

1.3 Modified uniform approach

Sub-section 1.2 rejected the network approach to liability as one that would maximise the predictability of an international legal instrument on MT. In as much as the approach involves deferring to the relevant unimodal convention on the matter of MTC liability, it is one that would fail to assist MTCs and cargo owners in predicting the basis of any MTC liability. Indeed, the approach would assist the parties only if they knew on contracting exactly what the mode of transport in use at the time of damage, loss, or delay in delivery occurring would be, and this is a question to which neither party will have the answer, unless the party (for example) intends to cause damage, loss, or delay in delivery. Accordingly, Sub-section 1.2 concluded that there is no predictability to be gained in adopting a network approach to MTC liability.

In line with the above discussion, this sub-section also examines the modified uniform approach to liability as a potential solution for achieving greater predictability in MTC liability. The modified uniform approach is a middle-ground solution that combines elements of the uniform approach and the network approach. The modified uniform approach—like the network approach—involves deferring to the relevant unimodal conventions on the matter of the limitation of MTC liability. In other words, the approach prevents MTCs and cargo owners from being able to predict—on contracting—which regime will apply, and knowing the answer to this question depends on knowing what mode of transport will be the one in use at the time of the damage or loss occurring. In this respect, the approach is like the network approach. This sub-section considers whether the modified uniform approach is a desirable one for the purposes of predictability in determining MTC liability.

⁶¹⁰ UNECE (TRANS/WP.24/2000/3, 2000) para 22.

The modified uniform approach is adopted by several international, regional, and national legal instruments, including the MT Convention and the UNCTAD/ICC Rules 1992.⁶¹¹ The respect in which it is a ‘uniform’ approach (as opposed to a network approach) is that under the approach, MTC liability is uniform from the time that MTCs take goods under their charge until the time that they deliver the goods. Neither the basis of liability nor the time bar will vary according to whether the damage or loss is localised. However, if it is unlocalised, any limitation of MT liability will—as discussed above—be according to the relevant unimodal convention. Otherwise, it will be according to the legal instrument on MT.⁶¹²

In providing a single body of rules for the purposes of determining the basis of MTC liability and the time bar, the modified uniform approach has the merit of giving rise to less unpredictability than the network approach does. Nevertheless, Haak identifies several major disadvantages to the modified uniform approach. In particular, he points to the approach being difficult to apply, in that it ‘provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network system’.⁶¹³

In summary, the modified uniform approach to MTC liability is a ‘middle ground’ between the network and uniform approaches. It is like the network approach in that it defers to the relevant unimodal convention for the purposes of limiting liability for localised damage, loss, or delay in delivery. Otherwise, the modified uniform approach is much more of a ‘uniform approach’, in that it involves a uniform body of rules determining the basis of liability, the limitation of liability (for unlocalised damage or loss), and the time bar. However, because the modified uniform approach is not ‘uniformly uniform’, it would not be the best approach for minimising unpredictability in determining MTC liability. In other words, while more

⁶¹¹ See the discussion in Chapter 2.

⁶¹² Devia (n 71).

⁶¹³ Haak (n 320) 43.

predictable than the network approach, the modified uniform remains less predictable than the uniform approach.

1.4 Limited network approach

Sub-section 1.3 considered the modified uniform approach to MTC liability and whether the approach would lend predictability to the determination of MTC liability. To some extent, as we have seen, it would: it involves having a single body of rules determine most of the issues that arise in relation to MTC liability—meaning that the approach would offer more predictability than the network approach. However, in that the approach has the relevant unimodal convention limit liability for damage to, loss of, or delay in delivery of goods that is localised, the approach offers less predictability than it otherwise would.

This sub-section turns to the last of the four approaches to MTC liability: the limited network approach. For Derkach and Pavliuk, the approach is one that is far too complex.⁶¹⁴ They observe that it offers no assistance to the parties to an MTO in predicting—on contracting—whether and to what extent MTCs will be liable for damage, loss, or delay in delivery.⁶¹⁵ This sub-section examines whether this observation is an accurate one. The limited network approach is one that involves the instrument adopting it deferring to the relevant unimodal conventions in the case of damage, loss, or delay in delivery that is localised. Therefore, the question arises as to whether the approach serves the end of predictability.

The limited network approach is the approach used by the Rotterdam Rules.⁶¹⁶ Under this approach, if there occurs damage to, loss of, or delay in delivery of goods that is localised, the instrument adopting the approach will defer to the relevant unimodal convention on the matters of the basis of liability, the limitation of liability, and the time bar. If, on the other hand, there occurs damage, loss, or delay in delivery that is unlocalised, the rules applicable will be those

⁶¹⁴ Derkach and Pavliuk (n 264) 280.

⁶¹⁵ Faghfoury (n 12) 111.

⁶¹⁶ See Section 2 of Chapter 2.

set forth by the instrument adopting the approach.⁶¹⁷ For example, if (1) the instrument is the Rotterdam Rules and (2) there occurs any damage, loss, or delay in delivery in any road-carriage segment of the MTO, it is the rules set forth by the CMR Convention that will determine any MTC liability for it. If, on the other hand, the damage, loss, or delay in delivery is unlocalised, it is the rules set forth by the Rotterdam Rules that will do so.

The limited network approach shares features with the network and modified uniform approaches in that under this approach, the rules relating to MTC liability will vary according to whether the damage, loss, or delay in delivery is localised or unlocalised. Also, because the approach is one that involves the instrument deferring to the relevant unimodal convention for many purposes, it creates considerable unpredictability as to the basis of any MTC liability. There will be a variety of possible answers to the questions of most concern in this thesis: (1) whether MTCs are liable for damage to, loss of, or delay in delivery of goods, (2) to what extent MTCs will be liable, and (3) how long cargo owners will have to bring proceedings against MTCs. The answer to each of these questions will vary according to the mode of transport that was in use when the damage, loss, or delay in delivery occurred. Therefore, no legal instrument adopting a limited network approach will ever eliminate or even minimise unpredictability in the determination of MTC liability.

1.5 Conclusion to the section

As discussed above, there are four different approaches to MTC liability: uniform, liability, modified uniform, and limited network. None of the four approaches is capable of addressing *uncertainty* in the determination of MTC liability. Indeed, certainty mainly requires the language of the relevant instrument to be clear and precise, and clarity and precision are not matters specific to MT. However, there is an approach that would address *unpredictability*, and it is the uniform approach. This approach is one that involves a single body of rules determining

⁶¹⁷ Rotterdam Rules, art 26.

MTC liability, regardless of whether the damage to, loss of, or delay in delivery of goods is localised or unlocalised. Therefore, an international legal instrument on MT adopting this approach would enable MTCs and cargo owners—on contracting—to predict how MTC liability would be determined for any damage to, loss of, and delay in delivery of the goods carried. The instrument would therefore gain the support of the transport industry due to its predictability.

2. Ensuring that rules governing MTC liability are fair

As mentioned above, for an international legal instrument on MT to meet the needs of the transport industry and therefore gain its support, the instrument would have to be certain, predictable, and fair in how it determined MTC liability. Section 1 discussed what it would take for the language of such an instrument to be certain and predictable. That section examined the four main approaches to MTC liability—uniform, network, modified uniform, and limited network—with a view to ascertaining which of the four approaches is the most certain and predictable. Because certainty is mainly a matter of clarity and precision in language used to express rules governing MTC liability, there is no necessary connection between the approach adopted by the instrument and certainty, meaning that none of the four approaches could ever in itself minimise—much less eliminate—uncertainty in determining MTC liability. However, there is an approach that could minimise unpredictability: the uniform approach. The uniform approach involves a single body of rules determining MTC liability—and, in particular, regardless of whether the damage to, loss of, or delay in delivery of the goods carried is localised. This approach ensures that MTCs and cargo are able—on contracting—to predict on what basis MTCs will be liable. Section 1, therefore, concluded that the best approach to MTC liability would be the uniform one. Any international legal instrument adopting it would be well placed to maximise predictability and therefore to gain the support of the transport industry.

This section turns to the question of how to ensure that rules governing MTC liability—in relation to the basis of liability, the limitation of liability, and the time bar—are fair. The section first considers whether fairness requires equal treatment—namely, whether unequal treatment may be fair if reasonable and justifiable. The section goes on to discuss three further questions. The first is whether, for an international legal instrument to be fair in the basis of MTC liability that it adopts, it should adopt a presumed-fault approach and require MTCs prevent *damage* rather than *risks*. The second question is how, for the instrument to be fair in how it limits liability, it should do so in relation to so-called contemplatory loss and non-contemplatory loss. The third question is how long, for the instrument to be fair in how it time-bars proceedings against MTCs, this time bar should be, from the date of delivery.

2.1 Fairness generally

To answer the question of how to ensure that rules governing MTC liability are fair, it is first necessary to clarify what is meant by ‘fair’. However simple it may be to decide whether a rule is fair, it is difficult to explain *what it means for a rule to be fair*.⁶¹⁸ The meaning of fairness varies according to countless factors, such as a person’s culture and circumstances. Dator and colleagues attempt to explain fairness using the example of cutting a cake. Since the answer to the question of how to cut the cake fairly will differ according to a person’s culture or situation,⁶¹⁹ there is an almost infinite number of possible answers. Those in some cultures may consider that it will be fair if a person has the same amount of cake as the others with whom the cake is being shared. Those in other cultures may consider that it will be fair if the person cutting the cake has a larger amount than the others, because the person cutting does more to enable the sharing of the cake than the others do.

⁶¹⁸ Grey Coyle, ‘Fairness’ <<https://nathaniel.org.nz/euthanasia/13-bioethical-issues/what-is-bioethics/471-fairness-by-grey-coyle>> accessed 1 February 2025.

⁶¹⁹ Jim Dator, Dick Pratt, and Yongseok Seo (eds) *Fairness, Globalisation and Public Institutions: East Asia and Beyond* (University of Hawai‘i Press 2006) 19.

Obviously, there will even be differences *within* cultures as to what makes a rule fair from one individual to the next. There is no single understanding of what fairness is. Nor will there ever be one. However, there is considerable commentary on the concept of fairness, and in it there are two main approaches as to the meaning of the term, known respectively as the equality approach and the equity approach.⁶²⁰ Under the equality approach, there is fairness when persons are treated in exactly the same way as one another, without preference.⁶²¹ Under the equity approach, on the other hand, scholars such as Rawls argue that there is fairness when one person is treated more favourably than others, provided that the preferential treatment is reasonable and justifiable in light of all applicable moral considerations.⁶²² On the basis of these two approaches to fairness, it would be possible to regard rules on MTC liability as fair when they treat MTCs, on the one hand, and cargo owners, on the other hand, in exactly the same way as each other, without preference. However, it would also be possible to regard any such rules as fair if they are more favourable to either MTCs or cargo owners, provided that the preferential treatment is reasonable and justifiable in light of all applicable moral considerations.

This sub-section discusses how these two approaches—equality and equity—could apply to the determination of MTC liability. Under the equality approach, fairness requires that both MTCs and cargo owners receive equal treatment, namely, the same treatment as each other. The sub-section examines whether applying this approach achieves a fair outcome—where MTCs and cargo owners operate under different conditions affecting the performance of their contractual obligations. By contrast, the equity approach accepts unequal treatment provided that the inequality is reasonable and justifiable. This sub-section therefore explores whether the

⁶²⁰ Brad Hooker, 'Fairness' (2005) 8 *Ethical Theory and Moral Practice* 329, 329–32.

⁶²¹ Cook and Hegtvædt (n 581) 220.

⁶²² John Rawls, 'Justice as Fairness' (1958) 67 *Philosophical Review* 164–94.

equity approach has greater potential to produce a fair outcome for as many as possible, cancelling out the effects of the differing conditions faced by MTCs and cargo owners.

To adopt the equality approach to fairness, for its part, is to proceed from the assumption that there may be fairness as a matter of *process*—in persons being treated in the same way as one another.⁶²³ This is the assumption that no one should receive preferential treat on the basis, in particular, of their ‘race, gender, or religion’.⁶²⁴ It is arguably unfair to discriminate against individuals on any of these grounds.⁶²⁵

MTCs, on the other hand, do not tend to be individuals. Therefore, if the lawmaker uses the equality approach in providing for rights, obligations, and opportunities to perform obligations as between MTCs and cargo owners, What the lawmaker is committed to doing is this: ensuring that these rights, obligations, and opportunities to perform obligations are distributed equally between the MTCs and cargo owners. As shown in Figure 2, the equality approach requires the lawmaker to ensure that the ‘scale’ of rights, obligations, and opportunities to perform obligations is *perfectly* balanced for MTCs (on the one hand) and cargo owners (on the other).

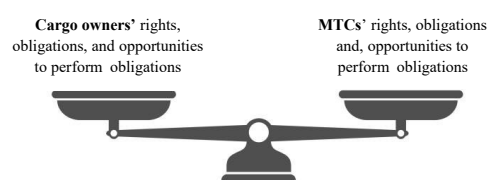


Figure 2. Balanced rights, obligations, and opportunities to perform obligations

In the case where the scale is balanced, MTCs (on one side) and cargo owners (on the other side) are treated equally to each other. Under MTO contracts, cargo owners pay MTCs to

⁶²³ See Jotham Jea Akaka, Maria Aurora García Gallego, and Riccardo Lucchetti, ‘Perceptions of Equality and Fairness: A Contemporary Survey on Erasmus Students in Spain’ (2021) Jaume I University Economics Department Working Paper 2/2021 <https://www.doctreballico.uji.es/wpficheros/Akaka_et_al_02_2021.pdf> accessed 14 February 2025.

⁶²⁴ See Steven Suranovic’s discussion on fairness in Dator, Pratt, and Seo (n 606) 22. In particular, Suranovic argues that ‘to be fair, equals should be treated equally. To be fair, the actions of businesses or the policies of governments should be non-discriminatory among equals. Thus, businesses should not refuse to serve customers because of their race, gender, or religion. Nor should they refuse to hire employees for these same reasons. To do so would be discriminatory, unfair, and in most countries, illegal ... Opponents of globalization who are concerned about labor standards in less developed countries have argued that workers should be treated equally across countries.’

⁶²⁵ Naomi Jones and others, ‘Building Understanding of Fairness, Equality and Good Relations’ (National Centre for Social Research and Scottish Centre for Social Research 2010) <<https://www.equalityhumanrights.com/sites/default/files/research-report-53-building-understanding-of-fairness-equality-and-good-relations.pdf>> accessed 1 March 2025.

transport their goods from one place to another, and MTCs receive payment for doing so. Under the equality approach, there will be equality—or, in other words, balance in the scale as in Figure 2 above—in the case where the lawmaker sets forth any MTC rights and obligations that are of exactly the same ‘weight’ as any cargo-owner rights and obligations. For example, as shown in Figures 3 and 4 below, the lawmaker gives MTCs the right to cargo owners paying in full and on time and—at the same time—cargo owners the right to MTCs delivering the goods (1) in the same condition as when the goods were handed over to them and (2) on time. To summarise, the outcome is the cargo owner having to make the payment and MTCs having to make due delivery.

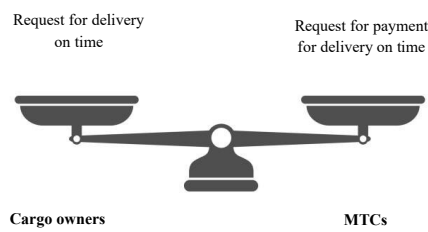


Figure 3. Equal distribution of rights



Figure 4. Equal distribution of obligations

For the scale to be balanced, both MTCs and cargo owners must fulfil their obligations as set forth by the lawmaker. If either MTCs or cargo owners fail to perform their obligations, the scale will be unbalanced. For example, if MTCs fail to make due delivery, the scale will then weigh down on cargo owners, as shown in Figure 5.

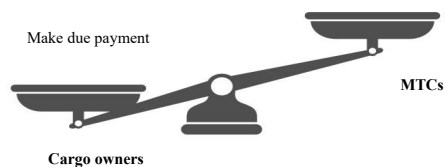


Figure 5. Imbalance in the case of breach by MTCs

By failing to fulfil their obligation to make due delivery, MTCs cause cargo owners loss. Therefore, if the scale is to be rebalanced, the equality approach will have MTCs compensate cargo owners for the loss. If cargo owners suffer a loss of, say, \$100,000, MTCs must compensate them by paying them \$100,000. On an equality approach, it will be unfair to cargo owners if MTCs pay less than \$100,000 because the scale will still be unbalanced.

However, the equality approach fails to take account of the risks inhering to the respective obligations of MTCs and cargo owners under the MTO. Indeed, MTCs face far more risks that are uncontrollable than cargo owners do, namely, risks that MTCs cannot prevent even by exercising due diligence. It is correct that in the performance of the obligation to make due payment, cargo owners face a few uncontrollable risks, such as accidentally providing the incorrect bank account number or the bank accidentally having the bank account of a third party credited with the payment. However, in the operation that is the *carriage of goods*, MTCs are the actors who physically move the goods from one place to another. Therefore, it is MTCs that, over the duration of the operation, face more risks of being unable to perform.⁶²⁶

It is also correct that some of these risks are relatively controllable—risks that cargo owners *can* prevent by exercising due diligence, such as by properly securing cargo to the conveyance used or securing the conveyance itself. However, there are many risks which MTCs *cannot* control, meaning that there is nothing that MTCs can do to prevent the damage to, loss of, or delay in delivery that they cause. For example, in *Skandia Ins Co Ltd v Star Shipping AS*,⁶²⁷ there were risks in the form of a hurricane and the flooding that the hurricane would end up causing, making it impossible to convey a cargo of printing papers to the destination in good condition. Such risks are acts of God (in the broadest sense of the term), namely, events other than an act of humankind. The COVID-19 pandemic, too, drew attention to the risk of states

⁶²⁶ Wen-Jui Tseng, Ji-Feng Ding and Yi-Chun Chen, 'Evaluating Key Risk Factors Affecting Cargo Damages on Export Operations for Container Carriers in Taiwan' (2018) 160(A4) *International Journal of Maritime Engineering*.

⁶²⁷ [2001] 173 F Supp 2d 1228.

around the world closing their borders and therefore preventing cargo from being duly delivered.⁶²⁸ Such risks are known in marine insurance as ‘restraints of princes’, because they are unexpected acts by a government.

In the performance of their MTO obligations, MTCs and cargo owners experience different real-world conditions. Cargo owners generally have more opportunities than MTCs to perform their obligations because the risks that they face are mainly controllable. MTCs have less opportunity because the risks that they face include many uncontrollable ones, and because the uncontrollable risks are much greater in number. Although in practice MTCs incorporate risks into freight pricing,⁶²⁹ it is impossible for them to do so ‘properly’ for uncontrollable risks. Furthermore, while MTCs may have more bargaining power (since cargo owners are particularly reliant on their services), it is not possible for them to account for these uncontrollable risks by setting unreasonably high rates for freight. Therefore, even if the scale ends up unbalanced (as shown in Figure 5 above) because of (1) an uncontrollable risk materialising and (2) MTCs therefore failing to pay compensation, it will nevertheless be ‘unfair’ to MTCs if they have to pay compensation for damage, loss, or delay in delivery that cargo owners suffer due to uncontrollable risks. The equality approach, therefore, is over-abstract. It fails to take account of the differences in the real-world conditions facing MTCs and cargo owners in the performance of their obligations. Here, the equality approach does not offer a fair solution, meaning that if lawmakers use this approach in setting for rules governing MTC liability, there is a risk of these rules being unfair. The equity approach, on the other hand, is focused on whether the *outcome* of the distribution of rights, obligations, and opportunities to perform obligations is fair to every member of society.⁶³⁰ It is not focused on

⁶²⁸ Zhenfu Li and others, ‘Data-driven Research on the Impact of COVID-19 on the Global Container Shipping Network’ (2024) 248 *Ocean and Coastal Management* 1.

⁶²⁹ MAERSK, ‘7 Factors Affecting Shipping Costs (+Checklist)’ (27 February 2024) <<https://www.maersk.com/logistics-explained/transportation-and-freight/2024/02/27/seven-factors-affecting-shipping-costs>> accessed 1 December 2025.

⁶³⁰ Martha Minow, ‘Equality and Equity’ (2021) 1 *American Journal of Law and Equality* 170–78.

whether members of society are treated equally.⁶³¹ Unlike the equality approach to the distribution of rights, obligations, and opportunities to perform obligations, the equity approach accordingly takes account of pre-distribution differences between persons.⁶³² Therefore, it is an approach, as Rawls argues, that may treat people unequally.⁶³³ However, this unequal treatment is reasonable and justifiable because it ensures that every member of the group will benefit from the same outcome as the other members in the end.⁶³⁴

In the context of MTOs, the equity approach may treat MTCs more favourably than cargo owner. In the case of uncontrollable risks, the approach may not require MTCs to pay compensation when they fail to fulfil their obligations, even though the absence of any such requirement may result in an imbalance of the type illustrated in Figure 5 above. To illustrate, it is possible to use the case *Nugent v Smith*.⁶³⁵ In this case, a mare that was being shipped from London to Aberdeen died during the voyage because of a severe storm. In such case, the equity approach will not hold MTCs liable for any such losses, being the result of severe storms, namely, natural events that are uncontrollable from the perspective of MTCs. Although the cargo owner will not be compensated for the failure to deliver the mare to the destination, it is justifiable to exempt the carrier from liability in such circumstances, because imposing liability for uncontrollable risks would place a disproportionate burden on the carrier. When entering into carriage contracts, cargo owners reasonably expect carriers to perform the carriage in good faith, while carriers reasonably expect payment of freight from cargo owners.⁶³⁶ The fact that the goods ultimately fail to arrive at the destination (because of uncontrollable risks) is irrelevant, provided that carriers have nevertheless properly performed their obligations to the

⁶³¹ Jon Magnussen, Karsten Vrangbaek, and Richard B Saltman, *Nordic Health Care Systems: Recent Reforms and Current Policy Challenges* (Open University Press 2009), ch 10.

⁶³² PWC, 'Why Strive for Equity over Equality?' (7 December 2023) <<https://www.pwc.co.nz/services/equity/why-strive-for-equity-over-equality.pdf>> accessed 31 March 2025.

⁶³³ Rawls, 'Justice as Fairness' (n 622) 164–94.

⁶³⁴ James Avoka Asamani and others, 'Balancing Equity and Efficiency in the Allocation of Health Resources-Where Is the Middle Ground?' (2021) 9 *Healthcare (Basel)* 1, 2–4.

⁶³⁵ [1876] 1 CPD 423.

⁶³⁶ See further discussion in Sub-section 2.2 of Chapter 3.

extent reasonably possible in the circumstances. Requiring carriers not only to perform the carriage in good faith but also to pay compensation for losses entirely beyond their control will tend to unfairly shift the balance of benefits toward cargo owners. Although this approach, namely, the equity approach, takes account of differences between members of a group in the distribution of rights, obligations, and opportunities to perform obligations, it would be incorrect to claim that it always treats the members of a group unequally. If the members have no pre-distribution differences from one other, using the equity approach will result in the members being treated equally—in exactly the same way as one other.

At the same time, it is possible, where both MTCs and cargo owners operate under broadly comparable conditions and the relative risks are controllable, for the equity approach to result in the same treatment as the equality approach. One factual matrix that could help explain the point is the one in *Pyrene Co Ltd v Scindia Navigation Co Ltd*.⁶³⁷ In this case, a fire tender was negligently dropped and damaged during loading operations before crossing the ship's rail. In such a case, the equity approach will require MTCs to be liable for the resulting damage. On the fact of the judgment, the carrier had the practical ability to prevent the loss through proper cargo-handling procedures. Likewise, cargo owners are generally capable of performing the obligations that they generally have, such as paying freight on time. Where cargo owners have properly performed their obligations, the equity approach has carriers compensate them for loss, damage, or delay resulting from risks within the carrier's control. In such circumstances, both carriers and cargo owners possess a comparable capacity to perform their respective obligations. If carriers fail to take reasonable measures to avoid the damage, requiring them to compensate cargo owners will fairly restore the balance between the parties' contractual expectations and obligations.

⁶³⁷ [1954] 2 QB 402. In this case law, a fire tender was shipped from England to India. During the loading operation, the cargo was negligently dropped and damaged before crossing the ship's rail. The court held the carrier liable for the damage because the loss resulted from improper cargo handling during loading operations.

Thus, where MTCs and cargo owners operate under broadly comparable conditions and possess a comparable capacity to perform their obligations (for example, both face controllable risks), the equity approach will treat MTCs and cargo owners equally and result in the same practical outcome as the equality approach. Accordingly, where MTCs fail to prevent damage, loss, or delay in delivery arising from risks within their control, the equity approach will require MTCs to bear liability, just as the equality approach does. In such circumstances, both approaches result in an equal and fair distribution of rights, obligations, and opportunities to perform obligations.

As discussed above, there are in fact pre-distribution differences between MTCs and cargo owners: MTCs face a greater number of uncontrollable risks than do cargo owners. Therefore, the equality approach would generally fail to produce a fair outcome. The equity approach, on the other hand, generally would produce a fair outcome—at least in a greater variety of cases. Furthermore, adopting the equity approach may also be consistent with a broader understanding of contract law. As argued by Collins, contract law may be understood as seeking a fair balance of interests rather than identical treatment of parties.⁶³⁸ The reason is that contracts are voluntary agreements between parties, and contract law primarily seeks to give effect to arrangements that are legally justifiable and reflect the parties' intentions. For example, in *Thomas v Thomas*⁶³⁹ Mr Thomas's executors agreed to allow Mrs Thomas, who was living in a house owned by the estate, to remain in the house in exchange for a payment of £1 per year. The agreement might have appeared economically unequal, because this amount was low, even for the time. Nevertheless, the court regarded it as enforceable because it reflected the parties' voluntary intentions (and was supported by valid consideration). The case illustrates that contract law does not necessarily require parties to receive equal benefits under a contract. Rather, it seeks to ensure that the agreement is legally justifiable and voluntarily accepted by

⁶³⁸ Hugh Collins, *The law of Contract* (Cambridge University Press 2003) 1-19.

⁶³⁹ [1842] 2 QB 851.

the parties. Consequently, because it will necessarily affect contracts, a legal instrument governing MT contracts should seek to achieve justifiable unequal treatment between MTCs and cargo owners rather than strict equality of treatment. It is also for this reason that, of the two approaches, the equity approach is the better-suited to the purposes of determining MTC liability.

To synthesise, both the equality approach and the equity approach purport to offer fair solutions for the purposes of distributing rights, obligations, and opportunities to perform obligations. However, the equality approach represents a solution that is over-abstract—that is, one that is fair in the case (and only in the case) where the members of a group are not subject to any pre-distribution differences. If there are any such differences (as there may well be), the equality approach will produce an outcome that is unfair. The equity approach, on the other hand, represents a solution that is not too abstract. This approach takes account of pre-distribution differences in the distribution of rights, obligations, and opportunities to perform obligations. For this reason, it is the fairer solution—and the one this thesis will adopt for the purposes of proposing fair rules to govern MTC liability.

2.2 Fairness in rules governing MTC liability

As discussed in Sub-section 2.1, there are two main approaches to fairness: the equality approach and the equity approach. The equality approach offers a fair process for distributing rights, obligations, and opportunities between MTCs and cargo owners, but not a fair outcome. The reason is that MTCs and cargo owners are subject to pre-distribution differences, with MTCs facing a greater risk of non-performance of their contractual obligations. Therefore, the equality approach will not be of much help to them. The equity approach is arguably unfair in terms of process, namely, in how it distributes rights, obligations, and opportunities to perform obligations. However, scholars such as Rawls argue that inequality in distributing rights,

obligations, and opportunities does not necessarily result in unfairness⁶⁴⁰—that such inequalities will be fair provided that they are reasonable and justifiable.⁶⁴¹ These may be reasonable and justifiable in the case where there are pre-distribution differences between members of a group, such as the uncontrollable risk faced by MTCs in performing their contractual obligations, which is greater than the uncontrollable risk faced by cargo owners in doing so. Given these pre-distribution differences in MT, the equity approach is the one that this thesis will be using.

For rules governing MTOs to be fair, the extent to which they favour MTCs over cargo owners must be reasonable and justifiable. Because there is no universally accepted understanding of what fairness is, this sub-section defines the concept using the work of philosophers, including that of Aristotle, the well-known philosopher of ancient Greece.⁶⁴² More specifically, this sub-section uses philosophy to consider the separate but related questions of the basis of MTC liability, the limitation of liability, and the time bar, and to develop rules that treat MTCs and cargo owners unequally but fairly. The sub-section explores whether for these purposes, it would be more appropriate to adopt the presumed-fault principle in the determination of MTC liability. It also considers whether MTCs should be liable for damage to, loss of, or delay in delivery of goods only in the case where they fail to act as a reasonable carrier would to prevent any such damage, loss, or delay.⁶⁴³ The sub-section then goes on to consider the case where MTCs are in fact liable for any such damage, loss, or delay, as well as the question whether, in this case, MTC liability should be limited—and, more specifically, limited to the weighted average of the amounts of the limitations of liability

⁶⁴⁰ Rawls, 'Justice as Fairness' (n 622) 164–94.

⁶⁴¹ See Section I.

⁶⁴² Aristotle made significant contributions to theories of fairness, particularly the concept of distributive justice. See Christopher Shields, 'Aristotle' (*Stanford Encyclopedia of Philosophy* 25 August 2020) <<https://plato.stanford.edu/entries/aristotle/>> accessed 19 September 2025.

⁶⁴³ In this thesis, the reasonable carrier will be understood through the lens of the concept of reasonableness in tort law. A reasonable carrier will be one that as an ordinary carrier who is fair-minded or moral and does what it would expect others to do in the same position.

provided by the unimodal conventions. The sub-section also discusses what the time bar on cargo owners for bringing proceedings against MTCs should be, from the date of delivery.

2.2.1 Fairness in rules relating to the basis of MTC liability⁶⁴⁴

As mentioned in Sub-section 2.1, rules governing MTC liability may—and generally will—be fair even if they favour MTCs over cargo owners to some extent. However, they will be fair only if this preferential treatment is reasonable and justifiable. This paragraph examines whether such a preference may be reasonable and justifiable, in the context of rules relating to the basis of MTC liability, if the rules adopted were on a presumed-fault basis, rather than on a strict-liability principle. The main reason is that MTCs face greater uncontrollable risk, especially in sea carriage, and that it would be unfair if they were to bear liability for damage, loss, or delay in delivery that they were unable to prevent.

In any case, it would be unfair for any liability born by MTCs to be strict liability. They should bear liability exclusively on a presumed-fault basis—allowing them to escape liability by proving that they had taken reasonable measures to perform their obligations as MTC. Using Kant’s theory of the social contract and drawing on Aristotle’s and Keating’s theories of distributive fairness, this paragraph shows that for there to be fairness in rules relating to the basis of MTC liability, the rules must focus on allocating ‘damage and loss’⁶⁴⁵ rather than on allocating ‘risks’.⁶⁴⁶ More specifically, the rules should require MTCs to *prevent damage* rather than to *control risks*. Requiring MTCs to prevent damage or loss would also have the added benefit of avoiding the possible ‘framing effect’—namely, the effect of turning the transport industry against the legal instrument not because the rules are unfair in their *substance*, but mainly or solely because the (linguistic) *form* of the rules causes the industry to perceive them

⁶⁴⁴ For the purposes of this thesis, (namely, to promote the practical acceptability of a legal instrument governing MTOs), fairness as discussed in this paragraph is assessed from the perspective of participants in the transport industry. It is not used in the sense of any specific doctrinal principle for resolving disputes.

⁶⁴⁵ Damage or loss is a negative change to the value of someone’s assets due to the occurrence of risk. See Alle (n 13) 314–24.

⁶⁴⁶ Risks are events, actions, and hazards that can cause damage or loss to someone’s assets. See Terje Aven, ‘The Risk Concept—Historical and Recent Development Trends’ (2012) 99 Reliability Engineering and System Safety 33–44.

as unfair.⁶⁴⁷ Also, having such a requirement would align more closely with two duties under the current law: (1) the duty to prevent damage or loss under the tort of negligence in the common-law world or its equivalent in the civil-law world, commonly known as *delict*,⁶⁴⁸ and (2) the contract-law duty to act in good faith existing in the civil-law world⁶⁴⁹ and—to a much lesser extent—in the common-law world.⁶⁵⁰ Such rules as these relating to the basis of MTC liability would make the instrument more consistent with what the transport industry already knows and broadly accepts. Consequently, the industry would likely perceive the instrument as fair to them.

2.2.1.1 Presumed-fault principles rather than strict-liability principles

To begin with, this sub-paragraph explains what presumed-fault and strict-liability principles are and why the presumed-fault principle is better suited to the objective of certainty in determining MTC liability.

2.2.1.1.1 Strict-liability principle and fairness

These are the two principles that form the basis rules relating to liability for damage or loss in MT. Indeed, the Montreal Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereafter the Montreal Convention)⁶⁵¹ adopts the strict-liability principle.⁶⁵² Other conventions, on the other hand, adopt the presumed-fault principle—among

⁶⁴⁷ ‘The framing effect is the cognitive bias wherein an individual’s choice from a set of options is influenced more by how the information is worded than by the information itself’. See Ayesh Perera, ‘Framing Effect in Psychology’ (Simply Psychology 7 September 2023) para 2 <<https://www.simplypsychology.org/framing-effect.html>> accessed 28 May 2025.

⁶⁴⁸ The tort of negligence is a cause of action in the common-law tradition. Civil-law legal systems, such as those of China and France, do not even feature an area of the law known as tort or a cause of action known as negligence. However, civil-law legal systems have equivalent areas of law and causes of action. In China, there is fault-based liability (Chinese Civil Code 2020, art 1165). In France, there is delictual civil liability (French Civil Code, arts 1240–341). See Arthur Ripstein, ‘Theories of the Common Law of Torts’ (*Stanford Encyclopedia of Philosophy* 2 June 2022) <<https://plato.stanford.edu/entries/tort-theories/>> accessed 25 September 2025.

⁶⁴⁹ Generally, in civil-law legal systems, such as those of France and Germany, there is a duty on the parties to a contract to act in good faith in the formation, performance, and termination of the contract. See French Civil Code, art 1104; German Civil Code, s 242.

⁶⁵⁰ Generally, there is no duty on the parties to a contract to act in good faith in the common-law world. However, in Canada, there is such a duty to do so in the performance of the contract. See *Bhasin v Hrynew* [2014] 3 SCR 494.

⁶⁵¹ There are two conventions governing carriage of goods by air: the Warsaw Convention 1929 and the Montreal Convention 1999. The Montreal Convention 1999 amended the Warsaw Convention 1929. There are some countries which are a member states of the Warsaw Convention 1929 but not of the Montreal Convention 1999. Therefore, to distinguish between these two legal instruments, I will use the terms ‘Warsaw Convention’ to refer to the Warsaw Convention 1929 and ‘Montreal Convention’ to refer to the Montreal Convention 1999.

⁶⁵² Generally, under the Montreal Convention, art 18, carriers will be liable for any damage and loss occurring in the period of potential liability, even in the absence of fault in causing it.

them the Hague-Visby Rules, the Hamburg Rules, the Warsaw Convention, and the CMNI Convention.⁶⁵³

Generally, when the strict-liability principle applies, carriers are liable for damage or loss irrespective of whether they are at fault or not.⁶⁵⁴ Though there are cases in which carriers may escape any such liability, these cases are limited in number, mainly being cases of cargo-owner fault or inherent vice of the goods carried.⁶⁵⁵ Carriers will be exonerated from liability only if they prove that there was, for example, cargo-owner fault or inherent vice. It will not help carriers to prove they were not at fault or not negligent.⁶⁵⁶

For example, in *Singapore Airlines Cargo Pte Ltd v Principle International Pty Ltd*,⁶⁵⁷ the Court held that the carrier, Singapore Airlines, was liable for the death of 18 cattle carried. However, the Court did not do so on the basis of any fault or negligence on the part of Singapore Airlines. The Court simply reasoned that the Montreal Convention adopts the strict-liability principle.⁶⁵⁸ Therefore, it was irrelevant that there was no evidence of the carrier having been negligent or otherwise at fault in causing the damage or loss. The connection that strict liability requires is not a causal, only a temporal one—that the damage or loss occurs during the carriage operation, in this judgment, an air-carriage one.⁶⁵⁹ Singapore Airlines could have escaped liability only by successfully raising one (or more) of the defences listed in article 18.2 of the Montreal Convention.⁶⁶⁰ However, it failed to do so.⁶⁶¹

⁶⁵³ Generally, under the Hague-Visby Rules, the Hamburg Rules, the Warsaw Convention, the CIM Convention, the CMR Convention and CMNI Convention, carriers will be liable for damage and loss unless they prove that they were not at fault in causing it. See Hague-Visby Rules, art 4; Hamburg Rules, s 1.24; Warsaw Convention, arts 19 and 20; CMNI Convention, art 16; CIM Convention, art 23; CMR Convention, art 17.

⁶⁵⁴ Akram Tajik and others, 'Role of Ethics in Civil Liability Focusing on the Principles of Carrier's Civil Liability (A Philosophical-ethical Study)' (2021) 3 International Journal of Ethics & Society 16, 19.

⁶⁵⁵ Montreal Convention, art 18(2).

⁶⁵⁶ This section focuses on fault and negligence as a possible defence to their carrier liability. The section does not consider the strict-liability principle from the (possible) perspective of absence of *fault*—only of irrelevant of *causation*. In fact, the strict-liability principle still 'contain(s) pockets of fault'. See Eric A Posner, 'Fault in Contract Law' (2009) 107(8) Michigan Law Review 1431.

⁶⁵⁷ [2017] 95 NSWLR 737.

⁶⁵⁸ *ibid* [103].

⁶⁵⁹ *ibid* [68–70].

⁶⁶⁰ *ibid* [92].

⁶⁶¹ *ibid* [129]–[131].

It is also possible to conceive of the strict-liability principle as being focused on the result that the parties expect to obtain on contracting—in the specific case of transport, on the goods arriving at the destination in good condition and on time. If the goods do not do so, it is irrelevant under the strict-liability principle *why* the carrier failed to achieve the expected result.⁶⁶² Carriers are liable for any damage or loss, even if not at fault in causing it.

Under the strict-liability principle, it is the result that cargo owners expect (on contracting) that is in determining carriers' liability. Carriers are liable if cargo owners do not obtain the result expected. Underlying the strict-liability principle is another: the principle of the 'contract as a promise'.⁶⁶³ The strict-liability treats the contract for the carriage of goods as an equal exchange of promises between carriers and cargo owners. On entering the contract, cargo owners promise to pay the freight rate and in exchange, carriers promise to deliver the goods safely and on time to the destination. The strict-liability principle accordingly requires carriers *not only* to make a reasonable effort to transport the goods to the destination *but also* to ensure the goods arrive in good condition and on time.⁶⁶⁴ If there is damage or loss (including by delay in delivery), the very fact of the damage or loss is proof of carriers having failed to perform their duty—the promise made by them. Failing to do so prevents cargo owners from obtain what they—on contracting—were expecting they would obtain: the goods arriving at the destination in good condition and on time.

There is at least one case where carriers failing to do so has the potential to produce outcomes that are fair to cargo owners: the case where cargo owners have already acted on their own promise, namely, on their obligation to pay the freight. For there to be fairness in this case, the strict-liability principle requires the law to hold carriers liable for any damage or loss.

⁶⁶² George M Cohen, 'The Fault That Lies within Our Contract Law' (2009) 107 Michigan Law Review 1446–47.

⁶⁶³ PS Atiyah, 'Review of *Contract as Promise: A Theory of Contractual Obligation* by Charles Fried' (1981) 95 Harvard Law Review 509–27.

⁶⁶⁴ Curtis Bridgeman, 'Reconciling Strict-liability with Corrective Justice in Contract Law' (2007) 75(6) Fordham Law Review 3014.

2.2.1.1.2 Presumed-fault principle—a better solution for certainty

The strict-liability principle is not the only principle of liability. There is also another in the presumed-fault principle. This principle presumes carriers to be at fault for damage to, loss of, or delay in delivery of goods carried.⁶⁶⁵ In other words, the presumed-fault principle has it that if there occurs any such damage, loss, or delay in delivery, carriers will be *prima facie* liable for it. However, the principle enables carriers to escape such liability if they prove that they were not at fault in causing the damage, loss, or delay in delivery.⁶⁶⁶

There is an example in *Albacora S.R.L. v Westcott & Laurance Line Ltd*,⁶⁶⁷ in which there occurred damage to the cargo (of fish). However, the carrier was able to prove that it had carried the goods properly carried—that the damage was not its fault. Despite the presumed-fault principle applying (as it does under the applicable instrument, the Hague-Visby Rules, the carrier was able to rebut the assumption of liability, resulting in the Court holding it not to be liable.

Cases such as these show that it is possible to regard the presumed-fault principle of taking account of two factors, as shown in this thesis: not only of the result that (on contracting) the parties expect to obtain (including cargo owners expecting the goods to arrive at the destination safely and on time); but also any other factor affecting the parties' ability to perform the contract. By definition, if goods do not arrive at the destination safely and on time, cargo owners do not obtain the result expected by them. In the interests of fairness in the general sense of the term, the presumed-fault principle starts by presuming carriers to be liable for cargo owners not obtaining the result expected. However, the principle *all the while* considers

⁶⁶⁵ UNCITRAL, 'Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade' (1994) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ott_e.pdf> accessed at 10 April 2025.

⁶⁶⁶ The Hague-Visby Rules (art 4), Rotterdam Rules (art 17), Hamburg Rules (s 1.24), Warsaw Convention (arts 19 and 20, MT Convention (art 16), and CMNI Convention (art 16) allow carriers to escape their liability if they prove that they are not at fault for causing damage to, loss of, or delay in delivery of goods.

⁶⁶⁷ [1966] 2 Lloyd's Rep 53.

the factors that may have affected carriers' ability to ensure that the goods would arrive at the destination safely and on time. In the carriage of goods, there are situations where carriers are unable to prevent damage or loss—as in *Singapore Airlines Cargo Pte Ltd v Principle International Pty Ltd* as mentioned above, in which 18 cattle died in carriage despite the carrier having made a reasonable effort to ensure the cattle at the destination safely. In such situations, there is absolutely no chance of carriers performing their obligation—of ensuring that cargo owners obtain the result expected. It makes no difference how reasonable (or unreasonable) an effort carriers make—they will not be liable. Such is the effect of the presumed-fault principle.

In taking account of the factors that may affect MTCs' ability to ensure that cargo owners obtain the result expected, the presumed-fault principle treats this expectation—what (on contracting) the parties expect they will obtain (from the contract)—as a 'reasonable rather than [an] absolute [one]'.⁶⁶⁸ Again, what cargo owners (on entering the contract) generally expect for the future—as contemplated by the contract—is for the goods to arrive at the destination safely and on time. If, as expected, the goods do arrive at the destination safely and on time, then the result will be the ideal result. However, as examined above, there are cases (as in *Singapore*) where (1) it is impossible for the goods to arrive as expected and (2) the reasons for this impossibility are unknown to carriers or beyond their control—reasonable effort or no. As businesses, cargo owners, too, face uncontrollable risks when carrying on their business, and for this reason it is reasonable to assume that they will know carriers to face uncontrollable risks as well. In other words, when cargo owners enter into a contract for the carriage of goods, they knowingly face the possibility of a less-than-ideal result, such as the goods failing to arrive at the destination safely and on time. If this assumption is both reasonable and correct, there arises a question when cargo owners enter into the contract: what

⁶⁶⁸ Posner (n 658) 1431.

exactly cargo owners expect in exchange for what they pay not only as a *contractual* matter (namely, the goods arriving at the destination safely and on time), but also as a *factual* matter.

Unless cargo owners and carriers explicitly and accurately inform each other of what they expect, it will be impossible for each party to know what the other ‘actually and factually’ expects. In the case where the parties (1) do not explicit and accurately inform each other as to what they expect and (2) disagree as what the expectations were (on the parties entering into the contract), the court will resolve the disagreement by applying an objective.⁶⁶⁹ More specifically, the court will ask ‘how a “reasonable person” would construe the relevant words or conduct’.⁶⁷⁰ In the same vein, the court could ask what a reasonable cargo owner would expect from a carrier.

To determine what it is reasonable, it is possible to refer to the work of Aristotle, who notes that individuals are morally guided to do the right thing or be a good person so as live contentedly with one another in society.⁶⁷¹ On this reasoning, it is reasonable for one person to expect another to do the right thing or be a good person. For example, if A is a reasonable person, then what A will expect of B, a neighbour, is not to make loud noise at 2 a.m. every day. Similarly, if A is a reasonable *cargo owner*, then what A will expect of a carrier is to make a reasonable effort to perform its contractual obligations as carrier. It is by making such an effort that the carrier shows itself to be of ‘good’ character—or, on other words, ‘reasonable’.

If the person acts as a reasonable person, then the person is not blameworthy and therefore should not be blamed.⁶⁷² Consequently, if carriers make a reasonable effort to deliver the goods to the destination in good condition and in time, they should not be liable for any damage to, loss of, or delay in delivery of the goods—especially if they were completely unable to prevent

⁶⁶⁹ Randy E Barnett, ‘Contracts Is Not Promise; Contract Is Consent’ (2012) 45 Suffolk University Law Review 647, 647–65.

⁶⁷⁰ Nick Sage, ‘Reconciling Contract Law’s Objective and Subjective Standards’ (2023) 86(6) Modern Law Review 1430.

⁶⁷¹ Kathleen V Wilkes, ‘The Good Man and the Good for Man in Aristotle’s Ethics’ (1978) 87 Philosophical Review 553–71.

⁶⁷² Lloyd Fields, ‘Moral Beliefs and Blameworthiness’ (1994) 69(27) Philosophy 397.

it. As reiterated throughout this thesis, MTOs by definition involve the combined use of least two different modes of transport—road, rail, sea, and air—to carry goods from one place to another.⁶⁷³ Sea carriage is typically the longest mode.⁶⁷⁴ Necessarily involving extended exposure to the marine environment, carriage by sea involves a greater number of uncontrollable risks than does carriage by any other mode of transport. Unsurprisingly, there are studies as to the frequent causes of damage to and loss of cargo in carriage by the different modes of transport. The 10 most frequent causes in sea carriage are: bad weather; engine failure; loading defects, namely, human or procedural errors that occur during the loading of goods; grounding; collisions; sinking; flooding; loading/unloading, namely, broad operational risks such as weather; fires; and heeling, namely, temporary tilting of the vessel.⁶⁷⁵ Of the 10 causes, bad weather is the most frequent.⁶⁷⁶ The five most frequent causes in air carriage are: human factors; improper handling; machine or tool failure; weather; and packing-related factors.⁶⁷⁷ Human factors are the most frequent of the five.⁶⁷⁸ The six most frequent causes of damage in road carriage are: human factors; improper cargo-securing techniques; equipment failure; material-related risks; theft; and adverse weather.⁶⁷⁹ As in the case of air carriage, human factors are the most frequent of the causes.⁶⁸⁰

Bad weather is a frequent cause in carriage by road and rail as well as in carriage by air, but a less frequent one than in carriage by sea.⁶⁸¹ One reason is that the risk of bad weather is easier to mitigate in road, rail, and air carriage. Using the land as they do, road and rail carriers are easily able to stop until the weather improves. Similarly, air carriers are able to land if they

⁶⁷³ MT Convention, art 1(1).

⁶⁷⁴ MAERSK, 'Logistics Transport Modes Explained' (1 February 2024) <<https://www.maersk.com/logistics-explained/transportation-and-freight/2024/02/01/logistics-transport-modes-explained>> accessed 11 April 2025.

⁶⁷⁵ Myung-Su Yi, Byung-Keun Lee, and Joo-Shin Park, 'Data-driven Analysis of Causes and Risk Assessment of Marine Container Losses: Development of a Predictive Model Using Machine Learning and Statistical Approaches' (2025) 13 *Journal of Marine Science and Engineering* 1, 23.

⁶⁷⁶ *ibid.*

⁶⁷⁷ Nurul Oktaviani and others, 'How to Reduce Cargo Damage?' (2017) 147 *Advances in Engineering Research* 661, 665–67.

⁶⁷⁸ *ibid.* 668.

⁶⁷⁹ Praiya Panjee, Varunya Kaewchueaknang, and Sitapur Amornsawadwatana, 'A Systematic Literature Review of Cargo Loss Risks in Road Transportation: Impacts and Future Directions' (2025) 11(1) *Safety* 1, 16.

⁶⁸⁰ *ibid.*

⁶⁸¹ Zhipeng Zhang and Chen-Yu Lin, 'Risk Analysis of Weather-related Railroad Accidents in the United States' (2025) 225 *Reliability Engineering and System Safety* 1, 5.

are above or near land. In addition, they are able to deviate from their scheduled route or simply to delay if there is a risk to take-off or landing.⁶⁸² Also, bad weather is less of a problem in air carriage than it used to be, thanks to modern aircraft technology and the skill of pilots.⁶⁸³

However, there is much less flexibility at sea. Sea carriers wishing to prevent or mitigate damage to or loss of cargo are not easily able to fully stabilise their ships. Try as sea carriers may to control their vessels, forces of nature in the form of wind, waves, tides, and currents may still cause the vessel to move. Unfortunately, there is rarely much that sea carriers can do to prevent or mitigate damage to, or loss of, cargo—as in the case *Gard Marine & Energy Ltd v China National Chartering Co Ltd*.⁶⁸⁴ In this case, the crew of the relevant vessel was fighting dangerous waves to navigate the vessel out of port in Kashima, Japan. However, there was at the same time a severe northerly gale preventing safe navigation through the Kashima Fairway, ultimately causing the vessel to run aground. This case illustrates how, despite reasonable efforts by carriers, environmental forces at sea may make it impossible to fully control or stabilise vessels and therefore to avoid damage or loss.

Therefore, in the case of an MTO involving carriage by sea, MTCs may face a variety of uncontrollable risks—and perhaps a greater number of uncontrollable risks than controllable ones. If there is carriage by sea and the law uses the strict-liability principle to determine MTC liability, MTCs will be liable for any damage or loss, even due to risks that are uncontrollable for them—or anyone else.⁶⁸⁵ They will also be liable if they make a reasonable effort to prevent or mitigate the damage or loss.

⁶⁸² Phil Heard, ‘How Airlines Plan for Weather Problems’ (Cathay Pacific, 21 August 2017) <https://www.cathaypacific.com/cx/en_HK/inspiration/cathay-stories/how-airlines-plan-weather-problems.html> accessed 13 July 2025.

⁶⁸³ Rossen Aviation, ‘Flying in Bad Weather’ (17 September 2023) <<https://www.rosenaviation.com/blog/flying-in-bad-weather/>> accessed 13 July 2025.

⁶⁸⁴ [2017] UKSC 35.

⁶⁸⁵ Whenever this thesis discusses MTC liability in cases involving uncontrollable risks, it excludes situations where MTCs directly (actively) aggravate loss initially caused by such risks. The reason is that, where MTCs directly (actively) aggravate the loss, they are at fault for the resulting damage. In such circumstances, fairness requires, regardless of whether liability is determined under a strict-liability principle or a presumed-fault principle, that MTCs be liable to the extent that their conduct contributed to the damage.

One philosopher who would be concerned for MTCs here is Kant, one of the greatest German philosophers.⁶⁸⁶ For Kant, members of society are part to a social contract (with one another), and this requires them to maintain social order.⁶⁸⁷ For society to benefit from order, members of society agree to limit their personal freedom and be respectful of one another's freedom.⁶⁸⁸ When a person is disrespectful of another's freedom, the person will be regarded as a 'bad' person—one who violates the social contract. If a person is a bad person, they should be held accountable for their misconduct.⁶⁸⁹

Suppose, however, that a person's misconduct is not actually misconduct, but simply conduct—conduct that all the same infringes on another's freedom, but justifiably so. In that case, the person is not regarded as a bad person, because it is not any *disrespect* on their part that infringes on the other's freedom. Since the person is not a bad person, they should not be held accountable.⁶⁹⁰

Moralists claim that a person should be blamed for their conduct only because they 'deserve(s) adverse treatment or "negative attitudes" in response to their faulty conduct'.⁶⁹¹ Consistent with this position is corrective justice, which is arguably the basis of the private law and therefore of contractual and extra-contractual obligations, such as tortious (or delictual) ones.⁶⁹² Corrective justice holds that society should impose negative consequences (such in the form of having to pay damages or other penalties) on a person who has committed wrongdoing to correct the wrong⁶⁹³—and, accordingly, that if a person has not committed any wrongdoing (and is therefore not at fault), they should not face any negative consequences.

⁶⁸⁶ Britannica, 'Immanuel Kant' <<https://www.britannica.com/biography/Immanuel-Kant>> accessed 1 December 2025

⁶⁸⁷ Frederick Rauscher, 'Kant's Social and Political Philosophy' (*Stanford Encyclopedia of Philosophy* 11 April 2022) <<https://plato.stanford.edu/entries/kant-social-political/>> accessed 26 July 2025.

⁶⁸⁸ Mary Gregor, 'Kant on Obligation, Rights and Virtue' (1993) 1 *Jahrbuch für Recht und Ethik* 69.

⁶⁸⁹ Fields (n 674).

⁶⁹⁰ *ibid.*

⁶⁹¹ Gary Watson, 'Two Faces of Responsibility' (1996) 24(2) *Philosophical Topics* 227, 230–31.

⁶⁹² Weinrib, 'Corrective Justice in a Nutshell' (n 585) 349.

⁶⁹³ *ibid* 349–56.

Problematically, any such person would face negative consequences under the strict-liability principle. To hold a given MTC liable for damage and loss for which they are not at fault in causing would be to ‘blame’ a good person. Unless MTCs specifically agree to bear strict liability for any damage or loss occurring in the MTO (in consideration, for example, of additional freight payable of an amount that they consider fair), the strict-liability principle conflicts with corrective justice, because a ‘good’ person should not be punished.

Furthermore, if an international legal instrument on MT adopts the strict-liability principle for the purposes of determining MTC liability, the result may be one that is undesirable from a policy perspective, in relation to insurance.⁶⁹⁴ Indeed, having the principle apply could cause MTCs to seek out liability cover not only for conduct involving fault, but also for ‘no-fault’ conduct,⁶⁹⁵ increasing premiums⁶⁹⁶—the greater the frequency with which a risk occurs and the greater the cost when it occurs, the greater the premiums will be.⁶⁹⁷ MTCs would likely offload this increase in premiums onto carriage owners in the freight payable.⁶⁹⁸ Such an increase in freight payable would ‘strain the global supply chains’ and ‘threaten vulnerable economies’.⁶⁹⁹

More positively, if an international legal instrument on MT adopted the presumed-fault principle, it would promote transparency in the sharing of the cost of insurance. It is not only MTCs—wishing to manage the risk of bearing the cost of any damage or loss that they are at

⁶⁹⁴ Insurance premiums are generally affected by the degree of liability risk faced by the insured party. Based on a report published by the General Insurance Group in 1989, the risk of liability is higher under a strict liability regime than under a presumed-fault regime. Under a strict-liability regime, MTCs are generally liable whenever loss, damage, or delay occurs, regardless of fault. As a result, MTCs face a broader risk of liability, which may encourage them to obtain more extensive insurance coverage and may lead to higher insurance premiums. By contrast, under a presumed-fault regime, MTCs avoid liability if they can prove the absence of fault or that they exercised due diligence to prevent the loss, damage, or delay. Therefore, there is less scope for liability, and there are greater opportunities for MTCs to defend claims successfully. Consequently, the level of insurance required, and the corresponding insurance premiums, may differ from those associated with a strict-liability regime. (See General Insurance Study Group, ‘Report of the Liability Insurance Working Party to the 1989 Conference, Brighton’ <<https://www.actuaries.org.uk/system/files/documents/pdf/liability-insurance-working-part-1989.pdf>> accessed 11th May 2026).

⁶⁹⁵ Steven Shavell, ‘On Liability and Insurance’ (1982) 13(1) *Bell Journal of Economics* 120, 121–22.

⁶⁹⁶ Kevin S Dougherty Insurance Agency Ltd, ‘7 Factors That Influence General Liability Insurance Premiums’ <<https://insurewithkevin.com/7-factors-that-influence-general-liability-insurance-premiums/>> accessed 27 July 2025.

⁶⁹⁷ *ibid.*

⁶⁹⁸ Theodoros Theodorou, ‘Economic and Geopolitical Factors Affecting the Shipping Rates’ <<https://dspace.lib.uom.gr/bitstream/2159/30948/4/TheodorouTheodorosMsc2024.pdf>> accessed 27 July 2025.

⁶⁹⁹ UNCTAD, ‘High Freight Rates Strain Global Supply Chains, Threaten Vulnerable Economies’ (22 October 2024) <<https://unctad.org/news/high-freight-rates-strain-global-supply-chains-threaten-vulnerable-economies>> accessed 27 July 2025.

fault in causing—that may contract insurance, in their case including cover for their liability. Likewise, cargo owners may contract insurance that includes cover for damage to or loss of their goods in carriage. It is common practice for both parties to have contracted insurance for these purposes.⁷⁰⁰ The reason is that most of the unimodal conventions governing MTC liability adopt the presumed-fault principle.⁷⁰¹ Cargo owners know that when these conventions apply, MTCs will not be liable for the full amount of any damage or loss that occurs. It is to manage the risk of this damage or loss that ‘both shippers and carriers tend to buy insurance coverage’.⁷⁰²

Therefore, if an international legal instrument on MT adopted the presumed-fault principle, the rules of the instrument determining MTC liability would be consistent with those appearing in most of the unimodal conventions as currently in force. As a result, the instrument would not interfere with the existing practice—with both MTCs and cargo owners obtaining insurance.

Nor is there any reason that any such new rules would increase premiums. The instrument would effectively be reproducing the rules relating to the basis of MTC liability that already apply currently under the unimodal conventions. With premiums remaining unchanged for the most part, so too would freight payable. In other words, there would be no particular negative impacts on the transport industry.

2.2.1.2 Legal issues relating to allocation of risks

Given that for the purposes of determining MTC liability, the question arises as to whether the presumed-fault principle is fairer than the strict-liability principle, it comes as no surprise that in most of the recent attempts to create a legal instrument on MT at the international and

⁷⁰⁰ US Department of Transportation, ‘Cargo Liability Study’ (1998) 27.

⁷⁰¹ See Section 3 of Chapter 1.

⁷⁰² US Department of Transportation (n 702) 27.

national levels, the presumed-fault principle is the one that found favour with the drafters.⁷⁰³ However, at the same time, it is one of two approaches to this principle that these instruments adopted. One is a presumed-fault principle requiring MTCs to prevent both risks and the consequences of risks, with instruments of this type belonging to the ‘consequence group’ (hereafter referred to as the Consequence Group).⁷⁰⁴ The other is a presumed-fault principle requiring MTCs to prevent risks and only risks, with instruments of this type belonging to the ‘pure risk group’ (hereafter referred to as the Pure Risk Group).⁷⁰⁵ Interestingly, however, these two approaches to the principle do not differ in their substance but instead in their language. Indeed, both approaches effectively require MTCs to take reasonable steps to prevent *both* risks *and* the consequences of risks.⁷⁰⁶ It is possible to understand risks as events, actions, and hazards that can cause damage to, loss of, or delay in delivery.⁷⁰⁷

One of the relevant risks, for example, is heavy rain. As a reminder, the Consequence Group instruments explicitly require MTCs to prevent risks and the consequences of risks. Therefore, under these instruments, MTCs must prevent heavy rain (the risk) and prevent any damage, loss, or delay in delivery that may arise because of heavy rain (the consequence of the risk). Here, the risk (heavy rain) is an uncontrollable one. Indeed, there is nothing that MTCs may ever do to prevent heavy rain. However, the instruments do require MTCs to take reasonable measures to prevent any damage, loss, or delay in delivery that may arise because of heavy rain. Therefore, in practice, heavy rain requires MTCs to take measures such as covering the cargo to ensure that it is watertight.

⁷⁰³ For further discussion, see Chapter 2.

⁷⁰⁴ These legal instruments include the MT Convention and most of the respective national legal instruments of the ASEAN member states.

⁷⁰⁵ These legal instruments include the UNCTAD/ICC Rules, the Rotterdam Rules, and most of the other respective national legal instruments on MT in countries that are not member states of ASEAN. The thesis classifies these instruments within the “Pure Risk Group” based primarily on the structure and language of the relevant rules. This classification is used as an analytical framework developed by the author for the purposes of the thesis, rather than as an established category expressly recognised in the existing literature on the instrument.

⁷⁰⁶ See the discussion in Chapter 2.

⁷⁰⁷ Aven (n 647).

On the other hand (and unlike Consequence Group instruments), Pure Risk Group instruments require that MTCs prevent risks and only risks. However, the effect—in practice—of Pure Risk Group instruments is that MTCs *nevertheless* have to prevent the consequences of risks (here, any damage, loss, or delay in delivery arising because of heavy rain). The reason is that it is only if MTCs do not prevent the consequences that cargo owners will bring proceedings against them, creating a risk of the court finding them liable. In other words, there is little difference, in practice, between what is required of MTCs under Pure Risk Group instruments and what is required of them under Consequence Group instruments.

For this reason, it is possible to regard the Pure Risk Group instruments as similar to the Hague-Visby Rules. These Rules also adopt the presumed-fault principle, requiring carriers to prevent risks but not the consequences of risks.⁷⁰⁸ There is an illustration of this approach in *Volcafe Ltd and Others v Compania Sud Americana De Vapores SA*.⁷⁰⁹ In this case, the UK Supreme Court found the carrier liable for damage done to a cargo of bagged Colombian green coffee beans, even though the risk giving rise to the damage was an inherent vice of the beans—more specifically, the beans being of a type that tends to emit moisture if transported from a warm climate to a cooler one. The Court reasoned that to escape liability, the carrier had to prove that it took reasonable care of the goods.⁷¹⁰ On the facts, the inherent vice of the goods was one known to the carrier, meaning that for the Court, the carrier should have lined the container with an appropriate absorbent material, such as kraft paper, to prevent the inherent vice of the goods from causing damage to the cargo.⁷¹¹ Unable to prove that it had done as the Court would have expected, the carrier failed to prove that it had taken reasonable care of the

⁷⁰⁸ Hague-Visby Rules, art 4(2).

⁷⁰⁹ [2018] UKSC 61.

⁷¹⁰ *ibid* [37].

⁷¹¹ *ibid* [3, 37].

goods so as to prevent the consequences of the risk, here the inherent vice of the goods.⁷¹² It was for this reason that the Court found the carrier to be liable.⁷¹³

Even though the Hague-Visby Rules require carriers to prevent risks, the Court in *Volcafe* nevertheless held that the carrier was required to prevent the consequences of the risks, namely, the ‘emission’ of the water the beans would eventually emit. Therefore, despite the Hague-Visby Rules being a *Consequence Group* instrument, it would be perfectly reasonable for the courts to interpret the *Pure Risk Group* instruments as laying down the same rule in the determination of MTC liability: carriers escape liability only if they take reasonable measures to prevent both risks and the consequences of risks.

Nevertheless, the existing international legal instruments on MT have failed to gain industry support. One possible reason is the language of the instruments, as discussed below.⁷¹⁴ Indeed, the focus of this language on allocating *risks* (a Pure Risk Group practice) rather than on simply allocating of *damage or loss* (a Consequence Group practice). As a reminder, in MT, damage or loss is a negative change to the value of cargo owners’ goods due to the occurrence of risk.⁷¹⁵

There is also a causal link between risks, on the one hand, and damage, loss, or delay in delivery, on the other. Indeed, it is impossible for damage or loss to occur unless there occurs a risk. In *Marine Office of America Corp v Lilac Marine Corp*,⁷¹⁶ for example, a cargo of reinforcing bars was damaged because (1) the ship carrying it was unseaworthy, having both a faulty hatch cover and a deteriorated gasket channel, and (2) saltwater therefore was able to enter the hold and come into contact with the cargo. But for the risk (namely, the ship being unseaworthy), the saltwater would not have even entered the hold. Consequently, the cargo

⁷¹² *ibid* [43].

⁷¹³ *ibid* [44].

⁷¹⁴ See Sub-paragraph 2.2.1.3.

⁷¹⁵ *Alle* (n 13) 314–24.

⁷¹⁶ 269 F Supp 2d 91 (SDNY 2003).

would not have been damaged. In cases such as this, it is perfectly fair for MTCs to be required to prevent risks. Taking reasonable measures to do so will tend to prevent damage, loss, or delay in delivery occurring.

However, although damage, loss, or delay in delivery will always be the result of the occurrence of a risk, the occurrence of a risk will not always have the result of damage, loss, or delay in delivery. Historically, there have of course been countless cases of the occurrence of a risk not resulting in damage or loss. One example was when, in March 2025, a FedEx cargo aircraft, while departing from an airport, collided with birds.⁷¹⁷ This collision did not result in any damage to, loss of, or delay in delivery of the cargo onboard the aircraft. In the case where the occurrence of a risk does not cause any damage, loss, or delay in delivery, there is no necessity to prevent the occurrence of the risk. Failing to prevent the occurrence of the risk will not result in any damage, loss, or delay in delivery. If there is no damage, loss, or delay in delivery, it is pointless for cargo owners to bring proceedings against MTCs. They will have nothing to gain in any proceedings against MTCs merely for failing to prevent the occurrence of risks.

Indeed, the interests protected by contract law are, in principle, the expectation interests of parties to the contract.⁷¹⁸ In MT transactions (which happen to be contractual transactions), what cargo owners primarily expect of MTCs is that MTCs perform their obligation to deliver the goods at the destination in good condition and on time. In the case of MT, compensatory damages place cargo owners in the position in which they would have found themselves if their MTC contractual counterparties had performed this obligation.⁷¹⁹ Therefore, in the case of cargo owners suffering no damage, loss, or delay in delivery due to the non-performance of the

⁷¹⁷ Associated Press, 'FedEx Cargo Plane Makes Emergency Landing in New Jersey Following Bird Strike and Engine Fire' (CNBC 1 March 2025) <<https://www.cnbc.com/2025/03/01/fedex-cargo-plane-makes-emergency-landing-following-bird-strike-engine-fire.html>> accessed 1 December 2025.

⁷¹⁸ Djakhongir Saidov and Ralph Cunnington, *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) ch 6.

⁷¹⁹ David McLauchlan, 'Some Damages Dilemmas in Private Law' (2021) 52 Victoria University of Wellington Law Review 875, 876.

obligation, there is no cause for the court to award cargo owners compensatory damages. Here, the cargo owners have enjoyed the benefit of having their expectations satisfied. The position in which they find themselves is the same as the one in which they expected—on contracting—to find themselves in future. If a legal instrument required MTCs to prevent risks in the absence of (1) any damage, loss, or delay in delivery and therefore (2) of any cause for compensation, MTCs could make the simple argument that in the absence of (1) and (2), there is an absence of any requirement on them.

In addition to cases such as these, there are also cases of the occurrence of a risk being impossible to prevent. For example, in September 2018, the cargo ship *Sabuk Nusantara 39* sustained damage off the coast of Indonesia by reason of a tsunami.⁷²⁰ As a natural disaster or act of God (in the broadest sense of the term), the occurrence of a tsunami is one that humans are incapable of preventing. MTCs could argue that in the case of the occurrence of a risk such as tsunami, namely, of a risk that is uncontrollable, it would be unfair to them to be liable for any damage, loss, or delay in delivery, because in such a case, the risk is one that they could do nothing to prevent. Therefore, for a legal instrument on MT to be fair in the eyes of MTCs, the instrument must not be one that requires them to prevent uncontrollable risks.

At the same time, if the instrument enables MTCs to escape liability simply because of the risks being uncontrollable, it is cargo owners that will consider the instrument to be unfair (to them). Indeed, cargo owners are no better placed than MTCs to prevent any such risks. For this reason, it is common practice for cargo owners to expect MTCs to act in good faith and, for this reason, take *some* measures to be able to perform their contractual obligations,⁷²¹ even in the absence of a legal requirement on MTCs to do so. In light of this expectation, it will tend, in practice, to be irrelevant to cargo owners whether a given risk is controllable or not: MTCs

⁷²⁰ Shipwreck Log, 'Sabuk Nusantara 39' (30 September 2018) <<https://shipwrecklog.com/log/2018/09/sabuk-nusantara-39/>> accessed 28 April 2025.

⁷²¹ Saul Litvinoff, 'Good Faith' (1997) 71(6) *Tulane Law Review* 1645–1712.

should in any case take reasonable measures for the purposes of mitigating the consequences of the risk. The case of the *Sabuk Nusantara 39* above helps illustrate this point: despite MTCs being unable to prevent tsunamis, they *are* able to take reasonable measures to prevent damage to, loss of, or delay in delivery of goods *due to* tsunami. The decision of the UK Supreme Court in *Volcafe* was consistent with this expectation such as the expectation is in practice: it is a requirement that MTCs take reasonable care of the goods. Therefore, if cargo owners are to consider any legal instrument on MT to be fair, the instrument must require MTCs to prevent not only risks, but also the consequences of risks. For this reason, any such instrument focusing solely on the allocation of risks will be fair only if it sets forth defences for MTCs and requires them to prevent risks *and* the consequences of risks.

However, if a legal instrument on MT requires them to prevent risks and the consequences of risks, MTCs may potentially argue that the instrument is unfair to them in the sense that it holds them to not one but two duties: one to prevent risks and another to prevent the consequences of risks. Here, MTCs may also argue that the instrument is unfair to them if the defences to MTC liability that it sets forth are insufficient. Indeed, there are too many uncontrollable risks that may occur to list. It would be impossible to identify every single one. Therefore, it is understandable that MTCs would prefer not to be required to prevent any such risks.

By using the language of allocating risks as they do, the current international legal instruments cause readers to focus on the *causes* of damage, loss, or delay in delivery, giving rise to the problems discussed above arise: MTCs considering it (1) unnecessary to manage risks that cause no damage, loss, or delay in delivery (such as an airplane colliding with birds) and unfair for them to be required to prevent both (2) (uncontrollable) risks and (3) the consequences of (uncontrollable) risks for cargo owners. Together, these problems may contribute to the aforementioned framing effect—to the transport industry being opposed to

the current international legal instruments not because the instruments are in fact unfair to them, but (mainly or solely) because the instruments *appear* to be, given the language of ‘double duties’ (to prevent risks and the consequences of risks).⁷²² To ensure both *actual* fairness and perceived fairness (so as to avoid any such framing effect), the lawmaker must enact the presumed-fault principle using an alternative approach.

2.2.1.3 Allocation of damage as an alternative approach

Aristotle is of assistance here. He argues that for there to be fairness in the distribution of resources, members of society must receive what they deserve.⁷²³ He also argues that to ensure that members of society receive what they deserve, society must distribute its resources in a manner that is ‘proportionate’.⁷²⁴ On the basis of Aristotle’s theory of fairness here, what an international legal instrument on MT must do, for there to be fairness as between MTCs and cargo owners, is enact the presumed-fault principle using an alternative approach that distributes rights and obligations in a manner that is *proportionate* as between MTCs and cargo owners. Under this approach, the instrument will be one containing rules relating to the basis to determine MTC liability that are fairer to MTCs and therefore likely to gain support from the transport industry. To distribute rights and obligations in a manner that is proportionate as between MTCs and cargo owners, it is possible to allocate damage rather than risk, as Keating proposes.⁷²⁵

In addition to the concept of corrective justice, Aristotle explored the concept of happiness—that of what members of society ultimately seek in society and from society.⁷²⁶ Members of society will be happy when they feel that they are being treated fairly (and, in the

⁷²² See n 646.

⁷²³ Scott Meikle, ‘Aristotle on Equality and Market Exchange’ (1991) 111 *Journal of Hellenic Studies* 193.

⁷²⁴ Chroust and Osborn (n 582).

⁷²⁵ Keating (n 583) 1327–31.

⁷²⁶ Shields (n 645).

opinion of Aristotle, equitably).⁷²⁷ One method of ensuring that members of society feel that they are being treated fairly—specifically in the distribution of resources—is to make the distribution proportionate.⁷²⁸ To explain himself, Aristotle uses the example of ‘the builder and the shoemaker’.⁷²⁹ In this example, Aristotle argues that while both the builder and the shoemaker contribute to the making of shoes, they have different skills and therefore make contributions that differ in their importance. On this basis, the builder and the shoemaker should not receive shoes in the same number as each other. The number of shoes that each receives should be proportional to their contribution, based on their skills.

At the same time, Aristotle proposes no ratio for the distribution to be made. However, scholars note that he at least emphasises that for a relationship to be fair, there should be a fair exchange, meaning that the parties to the relationship should receive that which they respectively deserve.⁷³⁰ For example, suppose that A offers three different kinds of apples for sale. Green apples cost \$1.5 per kg because they are grown locally and are sour. Red apples cost \$1.89 per kg because they are grown locally but are sweet. Imported apples cost \$2.80 per kg because they are imported, juicy, and sweet. B would like to buy some imported apples because B likes juicy, sweet apples. B agrees to pay \$2.80 per kg for the apples, the highest price for any of the apples offered by A. A should hand the imported apples over to B because B paid \$2.80, the price per kg of the apples. By paying \$2.80 per kg for the apples, he comes to deserve apples (as available) of a value equivalent to the price that he has paid. Therefore, he deserves imported apples.

If adopting Aristotle’s conception of distributive justice to promote fairness in MT transactions, a legal instrument would need to ensure that the rights and obligations set forth

⁷²⁷ Sooraj Kumar Maurya, ‘The Concept of Justice in Reference with Philosophies of Plato and Aristotle: A Critical Study’ (2021) 7(3) *Journal of Liberty and International Affairs* 250, 254–56.

⁷²⁸ Stefan Gosepath, ‘Equality’ (*Stanford Encyclopedia of Philosophy* 26 April 2021) <<https://plato.stanford.edu/entries/equality/#PropEqua>> accessed 25 July 2025.

⁷²⁹ Meikle (n 725).

⁷³⁰ Ronald A. Cordero, ‘Aristotle and Fair Deals’ (1988) 7(9) *Journal of Business Ethics* 681, 681–85.

by it are distributed proportionately between cargo owners, on the one hand, and MTCs, on the other hand. In other words, the instrument would need to ensure that both cargo owners and MTCs receive what they respectively deserve. Focusing as it does on MTC liability, this subparagraph mainly considers what cargo owners deserve in MT transactions—because what cargo owners deserve is, in principle, what they will receive from MTCs.

Of course, there arises the question of how to determine what cargo owners deserve. Aristotle, for his part, does not propose much guidance on this point. However, he does maintain that happiness is ‘the highest of all goods’ sought by members of society.⁷³¹ On this reasoning, cargo owners deserve happiness. In a relationship, parties to the relationship are more likely to be happy if they feel satisfied with whatever it is that they receive in exchange for their respective contributions.⁷³²

Members of society will tend to feel satisfied with whatever it is that they receive when this is what they expected to receive (or more than what they expected to receive) from contributing.⁷³³ Consider a real estate example. The market price for a two-bedroom townhouse in Auckland is roughly NZ\$700,000. Suppose that A offers to buy B’s two-bedroom townhouse for NZ\$550,000. B agrees to sell the house to A for NZ\$550,000 because B urgently needs the money. Here, although B sells the house at a lower-than-market price, she is satisfied with the sale, because what the amount of money that she receives is the amount that she needed and an amount to which she knowingly agreed. In other words, at the time of selling the house, B feels satisfied with what she receives. Similarly, cargo owners will feel satisfied—in the sense of having no particular reason to bring legal proceedings against MTCs—when they obtain the result that they had expected⁷³⁴ on contracting to receive *by* contracting. Therefore, for a legal

⁷³¹ Maurya (n 729) 254.

⁷³² Broome emphasises that fairness includes satisfaction in proportion. For there to be fairness, a claim does not have to be treated equally. There will be cases where it is fair to treat a claim unequally, such as the case of lotteries. Provided that members of society are satisfied with the decision that they have knowingly made, the decision will be fair. John Broome, ‘Fairness’ (1990–91) 91 *Proceedings of the Aristotelian Society* 87.

⁷³³ Joar Vittersø, *Humanistic Wellbeing: Toward a Value-Based Science of the Good Life* (Springer 2025) 147.

⁷³⁴ See Sub-paragraph 2.2.1.1.

instrument on MT to be fair, it must be one that ensures that cargo owners obtain this, namely, the result that they legitimately expect to obtain.

Also, as discussed above in Section 2.1, the result that rational cargo owners will—on contracting—expect to obtain from the MT contract is the goods arriving safely and on time at the destination. For such cargo owners, there is no greater expectation. For them, this is the ideal result of an MTO. However, the result may be less than ideal: the goods may potentially not arrive safely and on time at the destination, and, in this case, rational cargo owners will expect MTCs to have taken reasonable measures to ensure that the goods would do so (although the goods did not do so in the end). Therefore, what rational cargo owners will expect from the MTO is one of two results: (1) the ideal result, namely, the goods arriving safely and on time at the destination; or (2) the less-than-ideal result, namely, the goods not doing so *and* the MTCs having taken reasonable measures to ensure that goods would do so (although the goods did not do so in the end).⁷³⁵

In principle, the question of the risks, if any, that occur during a carriage operation is irrelevant to cargo owners. For example, suppose that A (as cargo owner) contracts B (as carrier) to transport a cargo of rice from one place to another. During the carriage operation, there is severe bad weather. B covers the cargo with heavy-duty waterproof tarpaulin so as to protect the cargo from water damage. Here, if there is a matter that will be front in mind for A on the agreed date of delivery, it will be the matter of obtaining the ideal result, namely, the cargo arriving safely and on time there.

If there is no damage to the cargo, then A will have obtained the ideal result and feel satisfied with it. A will not be interested in the risks, if any, having occurred over the carriage

⁷³⁵ Consequentialists argue that it is on outcomes are that members of society focus. A person's behaviour will be determined by what they believe they will obtain. For example, A will not buy an apple if an apple is not what they would like. Therefore, nor will cargo owners enter into an MT contract if they do not wish goods to arrive (safely and on time) at a destination. For the arguments of consequentialists, see Dallas Card and Noah A Smith, 'On Consequentialism and Fairness' (2020) 3(34) *Frontiers in Artificial Intelligence* 1, 2–4.

operation—in the fact of the vessel having experienced severe bad weather. If, on the other hand, the cargo arrives with water damage, then A, if acting as a reasonable cargo owner, will expect B to have taken reasonable measures to prevent the damage—and will not consider it appropriate to bring proceedings against B. Indeed, a ‘good’ person is not blameworthy and therefore should not be blamed.⁷³⁶

As discussed above, a ‘good’ MTC is one that will seek to ensure that the cargo owner obtains the ideal result and therefore one that will take reasonable measures to prevent or mitigate any damage to, loss of, or delay in delivery of goods. Therefore, A will consider whether B took reasonable measures to prevent water damage to the cargo—for example, by covering it with heavy-duty waterproof tarpaulin. Just as in the ideal case (of no damage to, loss of or delay in delivery of the cargo), it will—in the less-than-ideal case of damage, loss, or delay in delivery—be irrelevant to A that there occurred a risk, here the severe bad weather. The rational cargo owner will not focus on the prevention of risks. In other words, they will not focus on the cause of the result obtained. Again, the reason is that the result expected by the rational cargo owner is the goods arriving safely and on time at the destination. The rational cargo owner is less interested, for example, in whether there are any risks that occurred over the carriage operation or whether the cargo owner took reasonable measures to prevent them occurring.

Therefore, if a legal instrument requires MTCs to prevent ‘risks’, the instrument will be one that does not reflect what is in fact expected by cargo owners. To reflect this expectation better, the instrument needs simply require MTCs to prevent ‘damage to, loss of, or delay in delivery’ of goods. In making this requirement, the instrument will be one that ensures that cargo owners obtain the result that they expect—on contracting—to obtain later, this result being happiness in the form of the absence of any damage, loss, or delay in delivery. Rational

⁷³⁶ See Sub-paragraph 2.2.1.1.

cargo owners will therefore feel satisfied if either (1) the goods arrive safely and on time at the destination or (2) the goods do not do so, provided at the same time that MTCs took reasonable measures to ensure that the goods would do so (although the goods did not do so in the end). Therefore, a legal instrument which requires MTCs to prevent damage, loss, or delay in delivery is one that will ensure a distribution of rights and obligations between cargo owners and MTCs that is proportionate.

2.2.1.4 ‘Perceived’ fairness and the psychological effect of the term ‘damage’ over the term ‘risk’

A legal instrument requiring MTCs to prevent damage to, loss of, or delay in delivery of goods will be even fairer—or at least appear to MTCs to be even fairer—if it avoids uses the language of preventing ‘damage’ in the context of the MTO. The reason is that such language has the potential to draw reader attention away from the matter of the risks, if any, occurring over the carriage operation (namely, away from cause) and towards the matter of the condition in which the goods arrive at the destination (namely, towards to the result).

Using the language of preventing damage could help avoid disputes between cargo owners and MTCs (1) as to whether a given risk is controllable or uncontrollable and even (2) as to whether it could ever be necessary, in practice, to prevent a risk that is uncontrollable. In addition, using such language could help avoid disputes as to whether the instrument using it should make the occurrence of any uncontrollable risk—namely, one that MTCs would by definition never be able to prevent—one of any defences available to MTCs for the purposes of escaping liability.⁷³⁷

⁷³⁷ This thesis proposes the model of ‘prevention of damage’ to avoid two potential disputes relating to the duty to prevent risks. First, if a legal regime is framed primarily in terms of ‘risk prevention’, carriers may be more inclined to demand extensive lists of exempted risks or events for which they should not be held liable. Second, explicitly imposing a duty to prevent both risks and their consequences may be perceived as creating excessively broad liability obligations. However, the proposed model of ‘prevention of damage’ does not entirely exclude the duty to prevent risks. Indeed, damage and risks are closely connected: damage cannot occur without risk, although risks do not necessarily result in damage. Under the proposed model, imposing a duty to prevent damage would still require MTCs to manage and control the risks that may lead to such damage.

For example, consider the risk of bad weather discussed in Sub-paragraph 2.2.1.2 above. If a legal instrument requires MTCs to prevent risks, then, in theory, MTCs will have to focus on proving that they took reasonable measures to prevent the bad weather. However, the risk of bad weather is what this thesis describes as an uncontrollable risk. Recall that if there is a rule that holds MTCs liable for the occurrence of an uncontrollable risk, they will tend to consider the provision to be unfair. If, on the other hand (and as discussed above), there is a requirement that MTCs prevent damage, they will focus on proving that they took reasonable measures to prevent damage, in this case damage caused by the bad weather. Indeed, MTCs will not focus on whether the risk of bad weather was controllable or uncontrollable, because doing so will not help them avoid liability. As a result, MTCs will not perceive the relevant legal instrument as unfair merely because of a defence of bad weather being absent from it.

Moreover, if a legal instrument on MT requires MTCs to prevent damage (rather than risk), the instrument will potentially avoid MTCs feeling that they have ‘too many’ duties. As discussed above in Sub-paragraph 2.2.1.2, there is no occurrence of damage without the occurrence of risk. If a legal instrument requires MTCs to prevent damage, MTCs must prevent not only risks but also the consequences of risks. For example, the unseaworthiness of a vessel could create a risk that causes damage. To prevent any such damage, MTCs must ensure that their vessel is seaworthy, meaning in practice that they must prevent unseaworthiness ‘occurring’. In preventing unseaworthiness occurring, MTCs take reasonable measures to prevent risks (caused by unseaworthiness) occurring.

However, although MTCs typically ensure the seaworthiness of the vessel *before* the voyage, unseaworthiness may become a risk factor *during* the voyage. For example, although MTCs will ensure the seaworthiness before the voyage by conducting maintenance on the vessel and ensuring that its crew is qualified, the vessel may become unseaworthy during the voyage by reason of the vessel’s navigation system failing. If this system fails, the crew may

have to reroute vessel so that it may repair the system. This reroute would have the effect of lengthening the voyage and therefore creating a risk of delay in delivery of the goods. In a situation such as this one, good faith requires MTCs to take reasonable measures to prevent damage caused by risks, whatever they may be, caused by the unseaworthiness of the vessel.

However, using language that explicitly requires MTCs to prevent damage rather than risks will not have the effect of causing MTCs to ‘feel’ as if they *in fact* have two duties to perform—a duty to prevent risk as well as a duty to prevent damage or loss. Instead, MTCs will ‘feel’ as if they have only a single duty to perform, namely, a duty to prevent damage or loss.

For these reasons, requiring MTCs to prevent damage is not only a solution that is fairer than requiring MTCs to prevent risks, but also a solution that avoids the ‘psychological’ problems associated with (explicitly) requiring MTCs to prevent risks.

2.2.1.5 ‘Perceived’ fairness and the allocation of damage consistent with the existing national law

In addition, using the language of prevent damage to, loss of, or delay in delivery of goods will also mean that the instrument is in alignment with certain existing rules of law. Using this language will make any instrument attractive to the transport industry. The industry is familiar with the existing rules of law, meaning that it will likely find the language of the instrument reassuringly unsurprising and fair.

These existing rules of law are two types. First, there are the existing rules of law relating to the basis of liability in the tort of negligence in common-law jurisdictions and the equivalent civil-law cause of action, commonly known as delict.⁷³⁸ Second, there are the existing rules of

⁷³⁸ The tort of negligence and delict are relevant to the discussion here for many reasons. In the MTO, MTCs take possession of property belonging to cargo owners. If they are under no contractual obligation to take care of the goods, MTCs will be under a tortious or delictual one to do so. Therefore, failing to deliver the goods in good condition and on time at the destination could potentially give rise to action in contract or in the tort of negligence or delict.

law relating to the contractual principle of good faith in civil-law jurisdictions and in the common-law jurisdiction of Canada.⁷³⁹

In Canada and other common-law jurisdictions, the tort of negligence is the main cause of action that holds a person liable for committing a wrong—whether by action or omission—and thereby causing another person damage or loss that is ‘reasonably foreseeable’.⁷⁴⁰ The cause of action holds the person committing the wrong liable even in the absence of a contract between this person and the other one.

In MTOs, MTCs take possession of cargo owners’ goods for the purposes of transporting them from one place to another. MTCs have considerable experience of the damage or loss that cargo owners may sustain when risks occur—the damage or loss that cargo owners sustain when MTCs fail to prevent damage or loss. If the damage or loss is reasonably foreseeable, MTCs must prevent it. Consider two examples, first, suppose that a carrier is transporting boxes of papers. It will be reasonably foreseeable to the MTC that if it rains, these boxes of papers will become wet and will most probably be damaged unless they are covered with waterproof material. Second, consider the example of the *Ever Given* blocking the Suez Canal in March 2021.⁷⁴¹ It was reasonably foreseeable to carriers having planned to use the canal that if they did not divert (and, say, simply waited for the canal to be unblocked), cargo owners would sustain damage or loss, including consequential loss due to delay in delivery. Therefore, in the two examples above, it was reasonably foreseeable that there would be damage or loss that cargo owners would be entitled to recover by bringing proceedings in the tort of negligence or delict—be it, depending on the example, (1) water damage to the boxes of paper or (2) damage to and loss of goods, as well as consequential loss, due to the Suez Canal being blocked.

⁷³⁹ The principle of good faith in contract law recognised in some jurisdictions, such as France and Germany, is relevant to the discussion here because MT transactions are contractual in nature. Under the law of any such jurisdictions apply, MTCs are not only under duties set forth by any legal instruments on MT that are applicable, but also under duty of good faith.

⁷⁴⁰ Lord Arkin stated that ‘you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour’. See *Donoghue v Stevenson* [1932] AC 562 at [580].

⁷⁴¹ Reuters (n 487).

The duty to prevent damage that is upheld by the tort of negligence and delict is not an absolute one. The causes of action are not based on a duty to be 100% successful in preventing damage or loss. Rather, they are based on a duty to be reasonable—or, in the case of MT, a duty on MTCs to act as a reasonable carrier.⁷⁴² Laidlaw JA in *Arland and Arland v Taylor* stated that a reasonable person is one who acts ‘in accord with general and approved practice’.⁷⁴³ In other words, a reasonable person is one who does what a person of ordinary intelligence and prudence would do. Accordingly, to be a reasonable carrier, MTCs must act as a carrier of ordinary intelligence and prudence—and therefore take reasonable measures to avoid causing damage or loss. In cases such as that of the vessel carrying the boxes of papers, reasonable MTCs would cover the boxes of paper with heavy-duty watertight material. In cases such as that of the *Ever Given*, reasonable MTCs would divert the vessel and in this way avoid delay in delivery of goods—as many carriers in fact did at the time.⁷⁴⁴

Because in the context of MT, the tort of negligence and delict are based on a duty on MTCs to prevent reasonably foreseeable damage or loss, an international legal instrument requiring MTCs to prevent damage would be one that is consistent with existing law. Therefore, it is likely that court decisions determining MTC liability under such an instrument would also be broadly consistent with the existing case law and jurisprudence.

In addition, a legal instrument governing MTOs would, if specifically requiring MTCs to prevent damage or loss, be consistent with the contract law of many jurisdictions as it relates to good faith. Indeed, the contract law of civil-law jurisdictions, such as France, Germany, and China, traditionally holds parties to a contract, such as MTCs, to a duty of good faith in the

⁷⁴² Alderson B stated, ‘Negligence is the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.’ See *Blyth v Birmingham Waterworks* [1856] 11 Ex 781 at 784 per Alderson B.

⁷⁴³ [1955] OR 131 at 142 per Laidlaw JA.

⁷⁴⁴ New Zealand Foreign Affairs and Trade, ‘The Importance of the Suez Canal to Global Trade’ (Market Report 18 April 2021) <<https://www.mfat.govt.nz/en/trade/mfat-market-reports/the-importance-of-the-suez-canal-to-global-trade-18-april-2021/>> accessed 27 May 2025.

formation, performance, and termination of the contract.⁷⁴⁵ The contract law of common-law jurisdictions does not traditionally do so, but the common law of Canada recently changed position: indeed, the Supreme Court of Canada now recognises a contractual duty of good faith in the *performance* of the contract,⁷⁴⁶ namely, in the phase of the contractual life cycle that is most relevant to this thesis. In the words of the Court, this duty to perform the contract in good faith requires that ‘parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily’.⁷⁴⁷ In order to do so as required by the duty, ‘a contracting party [must] have appropriate regard to the legitimate contractual interests of the contracting partner’.⁷⁴⁸

Several authors have explained the basis of this duty, one of them being Friedmann. Friedmann argues that what is of interest to the parties to a contract *on* contracting is obtaining ‘that which the other party has to offer’.⁷⁴⁹ In other words, that which a contracting party has to offer needs to align with the result that the other party expects to obtain from the contract. As examined above in Sub-paragraph 2.2.1.1, the result that cargo owners expect to obtain from the MT contract is to have their goods transported to the destination safely and on time. If there were no MTCs offering to provide such a service in alignment with the result expected by cargo owners, there would be no reason for MTCs and cargo owners to contract with each other.

The results that cargo owners and MTCs respectively expect—on contracting—to obtain in future are what may be described as their legitimate contractual interests.⁷⁵⁰ In the context of MT, one of the legitimate contractual interests of cargo owners—and perhaps their main such interest—is in the goods arriving safely and on time at the destination. In the case of a

⁷⁴⁵ French Civil 2025, art 1104; German Civil Code, s 242; and Chinese Civil Code, art 7.

⁷⁴⁶ See *Bhasin v Hrynew* [2014] 3 SCR 494.

⁷⁴⁷ *ibid.*

⁷⁴⁸ *ibid.*

⁷⁴⁹ Daniel Friedmann, ‘The Performance Interest in Contract Damages’ (1995) 111 *Law Quarterly Review* 628–54.

⁷⁵⁰ See Sub-paragraph 2.2.1.1.

duty to perform the contract in good faith being applicable, this duty will require MTCs to take account of cargo owners' legitimate contractual interests and, therefore, take reasonable measures to protect those interests, including the main such interest—again, in the goods arriving safely and on time at the destination. In practice, this duty is also one requiring MTCs to take reasonable measures to prevent damage or loss in circumstances of such damage or loss being reasonably foreseeable to them.

At the same time, there are jurisdictions in which taking such measures may be sufficient in itself for the purposes of MTCs proving that have fulfilled the duty to perform the contract in good faith. For example, if a ship is unseaworthy, it will be exposed to risks such as having saltwater enter its hold or colliding with another ship, and therefore to the potential for damage or loss to occur. For MTCs to be regarded by the law as performing the contract in good faith, they must first take reasonable measures to avoid these risks, by ensuring that the ship is seaworthy at the beginning of the voyage. However, if MTCs discover while at sea that the ship has a defect in its hold, they must take further measures—to repair the hold somehow—to prevent goods being damaged or lost. If MTCs fail to take such action, the goods will likely to be damaged or lost. Therefore, holding MTCs to a duty to perform the contract in good faith may require them to take measures not only at the beginning of the voyage but also during it.

As discussed above in Sub-paragraph 2.2.1.3, requiring MTCs to prevent risks and the consequences of risks is effectively equivalent to simply requiring MTCs to prevent damage or loss. Since the duty to perform the contract in good faith is, for MTCs, a duty to take reasonable measures to prevent damage or loss, for a legal instrument to require MTCs to prevent damage or loss would be perfectly consistent with this duty as existing in numerous jurisdictions—and, importantly, giving rise to no particular objection on the part of the transport industry. Therefore, the instrument would be unlikely to attract any particular criticism from the industry.

2.2.1.6 Conclusion to the paragraph

In brief, there is much to consider for lawmakers if they wish to create rules relating to the basis of MTC liability that will be regarded as fair by the transport industry and therefore gain its support. First, lawmakers should make the presumed-fault principle the basis of these rules. However, the relevant presumed fault should be presumed fault in failing to prevent damage to, loss of, or delay in delivery of goods carried, not in failing to prevent risks. On the one hand, holding MTCs to a duty to prevent damage and loss would satisfy the Aristotle's requirement as to the proportionate distribution of rights and obligations—as to this duty reflecting the duty on the part of cargo owners to pay the freight. On the other hand, holding MTCs to a duty to prevent damage or loss is more likely to appear fair to them than holding them to a duty to prevent risks. Although in substance the two duties—to prevent risks and to prevent the consequences of risks in the form of damage or loss—are the same, using the language of preventing damage or loss could help avoid the framing effect. In other words, it could cause MTCs to 'feel' that they have only *one* 'duty to prevent' rather than *two*, increasing their support for any instrument using such language. Similarly, to hold MTCs to a duty to prevent damage or loss is more consistent with the existing law as it relates not only to the (common-law) tort of negligence and (civil-law) delict, but also the (civil-law and Canadian common-law) duty to perform the contract in good faith. Because the transport industry has no special objection to these duties as they are, the industry would likely have no objection to an international legal instrument on MT holding its members to any such duty of good faith.

2.2.2 Fair rules relating to the limitation of MTC liability

Paragraph 2.2.1 demonstrated the rules that an international legal instrument on MT would have to contain to be fair and therefore gain the support of the transport industry. It would need to be an instrument adopting the principle of presumed fault and focusing on allocating damage rather than risks. In other words, it would hold MTCs to a duty to prevent damage to, loss of,

or delay in delivery of goods, requiring MTCs to take reasonable measures to do so. Also, such a duty to prevent damage or loss would hardly be an unwelcome novelty in either the common- or civil-law world. Therefore, the transport industry would be unlikely to regard the institution (or, rather, *reinstitution*) of any such duty as interfering with the status quo.

If this duty were to be breached by MTCs and the fact is proven to the satisfaction of the court, there would then arise the question as to the extent of MTC liability. That is the question that this paragraph explores. For these purposes, the paragraph considers two distinct cases. The first is that of ‘contemplatory loss’, a type of loss that the courts would typically describe as ‘reasonably foreseeable’. The second case is of ‘non-contemplatory loss’, a type of loss that the courts would not typically describe as ‘reasonably foreseeable’. In relation to contemplatory loss, this section examines whether the fairest limitation of liability would be the so-called weighted average of the limitations respectively provided by the unimodal conventions. Also, in the absence of reliable statistics as to the frequency of damage or loss by mode of transport, this paragraph considers a formula enabling this amount to be determined, rather than a numerical value. In relation to MTC liability for non-contemplatory loss, this paragraph uses Aristotle’s concept of corrective justice, as discussed in Sub-paragraph 2.2.1.1. Recall that this concept of corrective justice requires wrongdoers to return their unjust gains to their victims.⁷⁵¹ For this reason, the paragraph explores whether the limitation of liability for non-contemplatory loss should be equal to the total freight payable.

2.2.2.1 Classification of loss

‘Contemplatory’ and ‘non-contemplatory’ are not classes of loss that appear in any of the existing instruments international legal instruments on MT—not in the MT Convention, the Rotterdam Rules, nor the UNCTAD/ICC Rules 1992. These three instruments make provision for the limitation of liability based on other criteria: whether the loss is (1) loss resulting from

⁷⁵¹ Ernest J Weinrib, ‘The Gains and Losses of Corrective Justice’ (1994) 44 Duke Law Journal 277, 280.

damage to or loss of goods, including physical damage to or loss of goods and so-called consequential (or indirect) loss; or (2) non-physical loss resulting from delay in delivery.⁷⁵² This sub-paragraph takes a different approach, distinguishing so-called contemplatory loss and non-contemplatory loss. These two terms are not terms of art. ‘Contemplatory loss’, as defined by this thesis, consists in (1) physical damage to or loss of goods (generally), (2) so-called consequential loss resulting from physical damage to or loss of goods (generally), and (3) non-physical loss resulting from delay in delivery of goods in the (highly) specific case where cargo owners notify MTCs—on contracting—of their potential to sustain such loss. These three types of loss share a common feature: they are likely to be in the *contemplation* of MTCs, from when they contract onwards. MTCs are in possession of the goods throughout the carriage operation. For this reason, it is within the contemplation of MTCs that if they commit a wrong, they could cause loss of types 1 and 2 above to cargo owners. Also, cargo owners may notify MTCs of what they intend to do with the goods once the goods have been delivered, placing it within the contemplation of MTCs that there could be loss of type 3 for cargo owners, such as production being disrupted, labour being wasted, or goods other than those carried being damaged or lost.

Unlike contemplatory loss, ‘non-contemplatory loss’, as defined by this thesis, is a type that (1) involves no physical damage to or loss of goods and (2) will not generally be in the contemplation of cargo owners. For example, assume that A contracts B to transport goods from one place to another, notifying B that it requires the goods to be delivered on time for the purposes of fulfilling an order made by C. Therefore, it will be within B’s contemplation that if it delivers the goods late, it will be exposing A to relatively specific risks. First, the delay in delivery could interrupt production at A’s premises, potentially requiring A to pay workers who are unable to work until production starts again. Second, the delay could cause A to become liable to compensate C for failing to fulfil C’s order on time. Third, A being held liable

⁷⁵² MT Convention, art 18; Rotterdam Rules, arts 59 and 60; UNCTAD/ICC Rules, r 6.

could also adversely affect its goodwill and, as a result, its income in the longer term. Fourth, the delay could cause A to suffer additional loss, including financial loss of some type that is difficult to quantify. Each of these four types of loss is of a type that will not necessarily be in the contemplation of B unless it was notified of them when it contracted with A.

If B has been notified of these four types of loss, then it may be difficult for B to argue against them being recoverable by A. In the common-law world, as established by authority such as *Hadley v Baxendale*,⁷⁵³ a party to a contract who breaches it and thereby causes loss to the other party (or to any of the other parties) is liable for this loss if it was reasonably foreseeable at the time that the parties contracted. It is for this reason that ‘notified loss’ (namely, contemplatory loss of type 3) is better classified as contemplatory, along with types 1 and 2 (namely, physical damage to or loss of goods and consequential loss resulting from physical damage to or loss of goods). A court in the common-law world would (1) likely regard contemplatory loss (as defined in this sub-paragraph) as reasonably foreseeable (and therefore recoverable) but (2) less likely to regard non-contemplatory loss (as defined in this section) as such. The terms ‘contemplatory’ and ‘reasonably foreseeable’ are similar, but *only* similar, and not identical, in meaning.

MTCs will generally not be in a position to estimate the value of any non-contemplatory loss. In fact, they will generally not be in a position to contemplate the loss occurring at all. In many cases, non-contemplatory loss will simply take the form of what is widely referred to as ‘consequential loss’—namely, pure financial loss occurring ‘as a consequence’ of delay in delivery of goods.⁷⁵⁴ In the case of the aforementioned A, an example would be if the court ordered it to pay one or more of the workers unable to work. In other cases, non-contemplatory loss will take the form of what is known (to Anglo-American lawyers and insurers) as ‘pure

⁷⁵³ [1854] 9 Exch 341.

⁷⁵⁴ See Sub-section 2.4 of Chapter 2.

economic loss’, namely, financial loss occurring other than as a consequence of physical damage to property (and, for example, as a consequence of delay in delivery).⁷⁵⁵ For instance, there would be pure economic loss in the form of A being found liable to compensate C and therefore losing goodwill and income.

In some cases, non-contemplatory loss (and the value of it) may be ‘reasonably foreseeable’ to MTCs. However, much of the time, it will not—unless, of course, it is ‘notified’ to them by cargo owners, meaning that the loss would actually be ‘type 3’ contemplatory loss. For these reasons, if a legal instrument has MTCs bear liability for non-contemplatory loss, MTCs are likely to complain of bearing indeterminate liability—liability of a quality and quantity that MTCs are generally unable to determine on contracting.

2.2.2.2 A basis for limiting MTC liability

The question then becomes to what extent MTCs should be liable for damage to, loss of, or delay in delivery of goods, and this is a question that Aristotelian corrective justice helps answer. Aristotle argues that when a person commits a wrong, the person causes another person loss that is equivalent to what the person gains.⁷⁵⁶ Therefore, it becomes necessary to take what wrongdoers gain and restore it to their victims, in order to restore the relationship between wrongdoers and victims.⁷⁵⁷ Weinrib explains that what is gained or lost is not always tangible, or even gained or lost in tangible terms.⁷⁵⁸ Here, ‘gain’ and ‘loss’ refer to wrongdoers going over a baseline which fairly divides rights and obligations between them and their victims. When wrongdoers go over this baseline, they see the scope of their total rights expand, and victims see the scope of their total rights contract.

⁷⁵⁵ Asecul Budgra, *Insurance Law Implications of Delay in Maritime Transport* (Informa Law from Routledge 2018) 43.

⁷⁵⁶ Weinrib, ‘Corrective Justice in a Nutshell’ (n 585) 349–51.

⁷⁵⁷ Thomas C Brickhouse, ‘Aristotle on Corrective Justice’ (2014) 18 *Journal of Ethics* 187, 188.

⁷⁵⁸ Weinrib, ‘Gains and Losses of Corrective Justice’ (n 753).

It is possible to use this theory of corrective justice to justify how the current international legal instruments on MT—such as the MT Convention⁷⁵⁹ or the Rotterdam Rules⁷⁶⁰—impose liability on MTCs that fail to deliver goods in good condition and on time. In practice, it is also corrective justice that the courts apply when determining MTC liability. For example, in *Quantum*, a cargo of hard-disk drives being transported by air from Singapore to Paris and by road from Paris to Dublin was lost during the road leg.⁷⁶¹ The English High Court found the MTC liable and awarded the cargo owner damages to restore the cargo owner to the position in which they would have found themselves if the MTC's actual-carrier sub-contractor had duly performed the contract.⁷⁶² Under corrective justice, MTCs overstep the baseline—the line that fairly divides their rights and obligations and those of cargo owners—when they fail to perform their duty to prevent damage to, loss of, or delay in delivery of goods. Therefore, MTCs must in this case compensate cargo owners, restoring them to their pre-loss position.

According to corrective justice, restoring cargo owners to their pre-loss position means MTCs paying compensation in the form of the full cost of the damage or loss that cargo owners sustain. For example, suppose that A contracts B to carry a cargo valued at NZ\$5,000. B fails to perform its duty to prevent damage, and the entirety of the cargo is damaged. Even though B does not itself receive the goods (valued at NZ\$5,000), B oversteps the baseline and, in doing so, causes A to lose NZ\$5,000 in value. If B had performed its duty, A would have received the cargo at the destination—and, therefore, would have never lost the NZ\$5,000. Therefore, for corrective justice, B must pay NZ\$5,000 in compensation to A, because A would have had NZ\$5,000 (more than it does) if B had performed its duty.

⁷⁵⁹ MT Convention, art 16(1).

⁷⁶⁰ Rotterdam Rules, art 17.

⁷⁶¹ [2001] WL 272987.

⁷⁶² David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2007) 28 Oxford Journal of Legal Studies 73, 74–75.

At the same time, a contract is an *agreement* between parties.⁷⁶³ Under a contract, the parties are free to negotiate any provisions that are not illegal.⁷⁶⁴ In a contract for the international carriage of goods, carriers typically include a clause that limits their liability for damage to, loss of, or delay in delivery of goods, especially in the case of negligence.⁷⁶⁵ Carriers do so to avoid ending up in financial difficulty due to courts requiring them to pay compensation for carrier negligence.⁷⁶⁶ Also, the international carriage of goods will typically involve carriage of goods belonging to several persons as cargo owners.⁷⁶⁷ These goods may include high-value ones such as manufacturing equipment or raw materials,⁷⁶⁸ meaning that without some limitation of their liability, carriers may face liability of an amount so high that they are unable to pay compensation for it. However, at the same time, there are also cases where carriers arguably do not so much *use* their bargaining power as *abuse* it, forcing limitations of liability (over-favourable to them as carriers) on cargo owners. It is relatively easy for carriers to do so: cargo owners need to have goods transported from place to place, and if carriers refuse to provide a transport services, cargo owners will encounter severe difficulties in distributing goods. Therefore, cargo owners may have no choice but to accept a limitation of liability that is unfair to them.

To avoid such abuses of MTC bargaining power, the current international legal instruments on MT—such as the MT Convention and the Rotterdam Rules—establish a minimum amount for any award of compensatory damages: a limitation of liability in the form of a so-called floor.⁷⁶⁹ Legally, it is possible to increase the level of limitation,⁷⁷⁰ but never for the parties to

⁷⁶³ Sidney W DeLong, 'What Is a Contract?' (2015) 67 South Carolina Law Review 99, 101.

⁷⁶⁴ Kenneth J Koford and Jeffrey B Miller, *Social Norms and Economic Institutions* (University of Michigan, 1991) 227.

⁷⁶⁵ See FIATA Multimodal Transport Bill of Lading; BIMCO Multidoc 2016.

⁷⁶⁶ Kenneth H Volk and Nicholas H Cobbs, 'Limitation of Liability' (1976) 51 Tulane Law Review 953, 954.

⁷⁶⁷ Some vessels carry up to 24,000 twenty-foot equivalent units (TEUs). See James Raman, 'The World's Largest Shipping Container Ships' (SCF Containers 11 March 2025) <<https://scfcontainers.co.nz/news-articles/largest-shipping-container-ships/>> accessed 25 September 2025.

⁷⁶⁸ Trans Asia Group, '7 Different Types of Cargo Transported Through Shipping' <<https://tassgroup.com/logistics/types-of-cargo/>> accessed 25 September 2025.

⁷⁶⁹ See Sub-section 4.4 of Chapter 2. Each of the current international legal instruments governing MTC liability sets forth a limitation on MTC liability. However, the instruments also allow MTCs and cargo owners to increase the maximum limitation of MTC liability, namely the 'ceiling'. Therefore, the limitation of MTC liability under the instruments will not necessarily be the ceiling on the facts. See MT Convention, art 28; Rotterdam Rules, art 79.

⁷⁷⁰ MT Convention, art 28(2): 'The multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.'

decrease it.⁷⁷¹ By providing a floor, the instruments attempt to ensure that both MTCs and cargo owners get a fair bargain in terms of limitation of MTC liability.

Importantly for the purposes of the limitation of MTC liability, it is also typical for MTCs to sub-contract with other carriers—as actual carriers—to partake in the performance of the MTO.⁷⁷² Therefore, there may be damage, loss, or delay in delivery that is *factually* attributable to actual-carrier sub-contractors (but not contractually attributable to them for cargo owners). However, in almost all cases, it is against MTCs that cargo owners bring proceedings for any such damage, loss, or delay in delivery. If, in any such proceedings, the courts award cargo owners' compensation (payable by MTCs), MTCs may—as mentioned above—bring proceedings against their actual-carrier sub-contractors to recover the amount of any such award. In determining the liability of actual-carrier sub-contractors here, it is generally the relevant unimodal convention that will be applicable.⁷⁷³

Therefore, any international legal instrument governing MTC liability should take account of the fact that MTCs may bring proceedings under unimodal conventions against actual-carrier sub-contractors. For the purposes of fairness, any limitation of MTC liability provided by any international legal instrument governing MTC liability should be similar to that provided by the relevant unimodal convention.

If the floor on liability is much less favourable to cargo owners under this instrument than under the relevant unimodal convention, cargo owners will find the difference between the two limitations unfair and likely reject MT as a transport solution. They will likely favour the practice of concluding several separate unimodal contracts, allowing them to benefit from the more favourable floors under the respective unimodal conventions.

⁷⁷¹ MT Convention, art 28(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.'

⁷⁷² Hoeks (n 61) 7.

⁷⁷³ *ibid* 8.

For example, assume that an international legal instrument on MT sets a floor of 1 SDR per kg whereas a unimodal convention sets a floor of 2 SDR per kg. Here, cargo owners will find the floor of 2 SDR per kg more favourable to them because it allows them to claim a higher amount of compensation. Rational cargo owners, therefore, will prefer to conclude one or more unimodal contracts over a single MT contract.

Conversely, if the floor under the MT instrument is much more favourable to cargo owners than the floor under the unimodal convention, MTCs will find the difference unfair to them. The reason is that they may not be able to claim the difference between (1) their (greater) liability as limited under the MT instrument and (2) their actual-carrier sub-contractors' (lesser) liability as limited under the unimodal convention.

Now, assume that the MT instrument sets a floor of 4 SDR per kg, one that is more favourable to cargo owners than the floor of 2 SDR per kg as set by a unimodal convention. In the case of damage, loss, or delay in delivery that is attributable to their actual-carrier sub-contractors, MTCs must nevertheless pay cargo owners compensation of a minimum of 4 SDR per kg. However, MTCs will be unable to recover 2 SDR per kg from their actual-carrier sub-contractors if the contract between them limits the sub-contractors' liability to the unimodal floor of 2 SDR per kg.⁷⁷⁴

Of course, the limitations of liability provided by the existing unimodal conventions differ from convention to convention.⁷⁷⁵ Therefore, it becomes necessary, given these differences, to explore what level of limitation would ensure fairness to both MTCs and cargo owners. As discussed above in Sub-section 2.1, unequal treatment can result in fairness if reasonable and

⁷⁷⁴ The limitation of liability in a contract will tend to be a ceiling, because those proposing that there be such a limitation do so to minimise their liability for damage or loss. However, the limitation of liability in an international legal instrument such as the MT Convention or Rotterdam Rules will tend to be a floor, because such an instrument will tend to have the purpose of preventing businesses benefiting from limitations that are under-favourable to their contractual counterparties.

⁷⁷⁵ See Table 3.

justifiable. Therefore, unequal treatment arising in the limitation of MTC liability is fair if reasonable and justifiable.

Here, it becomes necessary to consider the two main types of limitation of MTC liability separately: the limitation of MTC liability for contemplatory loss (on the one hand) and for non-contemplatory loss (on the other hand). As a reminder, contemplatory loss is (1) physical damage to loss of goods (generally), (2) consequential (or indirect) loss resulting from physical damage to or loss of goods (generally), or (3) non-physical loss resulting from delay in delivery of goods in the (highly) specific case where cargo owners notify MTCs—on contracting—of the potential to sustain such loss. Non-contemplatory loss, for its part, is non-physical loss resulting from delay in delivery other than the ‘notified’ type, namely, other than type 3 contemplatory loss. It will become apparent that for there to be fairness, it is best to limit liability for contemplatory loss (on the one hand) using the weighted average of the unimodal limitations; and for non-contemplatory loss (on the other hand) apply the principle of corrective justice.

2.2.2.3 Limitation of liability for contemplatory loss

The concept of a ‘weighted average’, for its part, is obviously not a juridical one. Also known as a ‘weighted mean’, a weighted average is ‘calculated by assigning weights (or measures of relative importance) to the observations (data points) to be averaged’.⁷⁷⁶ The weighted average ‘can be interpreted as a fair-share value and as a balance point’⁷⁷⁷ and, therefore, understood as a fair-share value representing the point at which relevant data points are perfectly balanced with one another, according to their assigned weights (namely, to their relative importance).

⁷⁷⁶ John Croucher, *Introductory Mathematics and Statistics* (rev edn, McGraw-Hill Education 2016) 491.

⁷⁷⁷ Susan A Peters and others, ‘A Fair and Balanced Approach Mean’ (2016) 21(6) *Mathematics Teaching in the Middle School* 364–75.

For example, suppose that a teacher asks A and B to bring some apples to class for an experiment. A brings two apples, and B brings four. If these apples—which, in this example, are the ‘observations’—are weighted (in terms of importance) equally, the number of apples that A and B would have had to contribute *each* (for their respective contributions to be perfectly balanced) is three. In this case, ‘three apples’ represents the weighted average—a fair-share value where A’s and B’s respective contributions would be perfectly balanced. The weighted average here would be a different one if the apples were weighted differently (in terms of importance), but they are not.

Recall that in MT, MTCs typically sub-contract segments of carriage to actual carriers. If MTCs are to have the option of recovering contemplatory loss from their actual-carrier subcontractors (for the purposes of covering the liability that they incur as MTCs to cargo owners), the limitation of liability under the instrument governing MTC liability must be similar to the limitation of liability under the unimodal convention—not too much higher and not too much lower. To ensure that MTC liability is perfectly balanced with cargo-owner contemplatory loss *whichever unimodal convention is applicable*, the MT instrument should adopt a limitation of liability that reflects a fair-share value—one that perfectly balances the respective limitations of liability under the unimodal conventions, whether higher or lower than the MT limitation of liability.

However, by definition, MT involves different modes of transport, and the frequency of loss occurring in the use of each mode of transport varies from mode to mode. As mentioned above in Sub-paragraph 2.2.1.3, the frequency of risks occurring is greater in carriage by sea than in carriage by other modes of transport, because there is more risk at sea than there is anywhere else on Earth. Therefore, in the case of an MTO involving (1) sea carriage and (2) damage to, loss of, or delay in delivery of goods, the damage, loss, or delay in delivery will be most likely to have occurred in the sea-carriage segment. Therefore, MTC proceedings against actual-

carrier sub-contractors are most likely to be MTC proceedings against *sea-carrier* actual-carrier sub-contractors. The more frequently MTCs bring proceedings against sea-carrier actual-carrier sub-contractors, the more frequently it will be the respective limitations of liability provided by the unimodal conventions governing sea carriage that apply. If the floor on MTC liability—the weighted average of the respective limitations of liability under the unimodal conventions—is much higher than the floor on sea-carrier liability, MTCs will likely have to pay cargo owners more in compensation than they are able to recover from sea-carrier actual-carrier sub-contractors. Having to pay more in compensation, MTCs will likely consider the limitation of MTC liability to be unfair. Therefore, for it to be fair, the limitation of MTC liability must be equal to the weighted average of the respective limitations of liability under the unimodal conventions.⁷⁷⁸

For the purposes of calculating this weighted average, it is necessary to take account of the frequency with which the various unimodal limitations of liability will apply. The formula is the following:⁷⁷⁹

$$\text{Weighted average} = \frac{(w_1 x_1 + w_2 x_2 + \dots + w_n x_n)}{w_1 + w_2 + \dots + w_n}$$

Where:

w_i = the weight of each observation, namely, the frequency of the limitation applying (relative to the other limitations)

x_i = the value of each observation, namely, the amount of the limitation applying.

⁷⁷⁸ This thesis proposes a “weighted average” limitation of liability based on an examination of the travaux préparatoires and related materials concerning the limitation amounts adopted in conventions such as the Hague-Visby Rules, the Hamburg Rules, the CMR Convention, the MT Convention, and the Warsaw Convention. The travaux préparatoires do not reveal any clear or consistent methodology used to determine those amounts. In many instances, the amounts appear largely to be the results of negotiation and policy-based compromise between competing commercial interests. For example, the travaux préparatoires for the Hamburg Rules indicate that the drafters considered the Hague-Visby limitation amounts to be insufficient to protect cargo interests and therefore sought to increase the limits in order to achieve a fairer balance between cargo owners and carriers. Nevertheless, the travaux préparatoires do not explain why the specific figure of 835 SDR per package was ultimately selected. In the absence of a clear and consistent methodology, this thesis proposes a “weighted average” limitation of liability as an alternative approach. The proposed model seeks to balance the interests of cargo owners and MTCs by avoiding both excessively low limitation amounts (which may inadequately protect cargo interests) and excessively high limitation amounts (which may impose disproportionate burdens on carriers).

⁷⁷⁹ Croucher (n 778) 491.

For example, suppose that (1) an MTO combines sea, road, and rail carriage; (2) statistics show that (a) 80% of damage to goods occurs during sea carriage, (b) 10% during road carriage, and (c) 10% during rail carriage; and (3) the floors on carrier liability are (a) 2 SDR per kg for sea carriage, (b) 8.33 SDR per kg for road carriage, and (c) 17 SDR per kg for rail carriage. The weighted average of the limitations of carrier liability will be:

$$\text{Weighted average} = \frac{(80 \times 2) + (10 \times 8.33) + (10 \times 17)}{(80 + 10 + 10)} = 4.13 \text{ SDR/kg}$$

Where:

the figures 80, 10, and 10 represent the respective weightings per mode of transport (the frequency of the mode-of-transport limitation of liability applying)

the figures 2, 8.33, and 17 represent the values per mode of transport (the amount of the mode-of-transport limitation of liability applying).

To use this formula to calculate the weighted average, it is necessary to know (1) the weighting of each data point (expressed as a proportion) and (2) the value of each data point. Unfortunately, there are no statistics available as to the frequency of the mode-of-transport limitation of liability applying. In other words, there are no statistics available as to how much risk of damage, loss, or delay in delivery is associated with each mode of transport. Therefore, statisticians would have to collect these statistics for the formula to operate as intended. Because they are not currently collected, it is impossible to calculate an actual, ‘real-world’ numerical weighted average of the unimodal limitations of liability, so this thesis must content itself with proposing the formula necessary to calculate it.

However, unlike the risk associated with each mode of transport, the limitations of liability by mode of transport are (of course) readily available. Indeed, they appear in the unimodal conventions themselves. However, it is necessary to account for the possibility of more than one of the unimodal conventions applying to a given MTO. Sea carriage may, for example, be governed by the Hague Rules, Hague-Visby Rules, or Hamburg Rules, and air carriage may be governed by either the Warsaw Convention or the Montreal Convention. In other words, the

limitation of liability for sea carriage may in practice be one of three, and the limitation of liability for air carriage, one of two.

There therefore arises the question of which of the multiple limitations of liability to use as the sea- and air-carriage values in calculating the weighted average. Because the limitation of liability under the international legal instrument on MT would be a default floor (applying unless MTCs and cargo owners agree a limitation more favourable to cargo owners), the limitation should adjust for inflation (and deflation) over time, so as to reflect the actual value of goods in the economy at the time and therefore protect the legitimate interests of cargo owners.

For these purposes, it would be best to use the unimodal limitations of liability that are the most current and not necessarily those that apply the most widely in practice. Therefore, for sea carriage, it should be the limitation of liability provided by the Hamburg Rules, adopted in 1978—as opposed to those provided by the Hague-Visby Rules, adopted in 1968, and by the Hague Rules, adopted in 1924.⁷⁸⁰ For air carriage, the limitation of liability should be the one provided by the Montreal Convention, as amended in 2019, for the very reason that this amendment was in 2019,⁷⁸¹ whereas the Warsaw Convention was last amended in 1975 and has not been amended since.⁷⁸² For each of the remaining types of carriage, namely, carriage by road, train, and inland waterway, there is only one limitation of liability. For road, it is under the CMR Convention; for train, under the COTIF-CIM Convention; and for inland-waterway, under the CMNI Convention. Table 10 shows the unimodal limitations of liability that should be used in the calculation:

Table 9. Limitations of liability under the unimodal conventions

⁷⁸⁰ Francis Reynolds, ‘The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules’ (1990) 7 Australian and New Zealand Maritime Law Journal 16.

⁷⁸¹ George Leloudas, ‘The Montreal Convention 1999’ (ICAO Air Law Treaty Workshop 23–24 May 2024) <<https://www.icao.int/sites/default/files/EURNAT/MeetingDocs/Air%20Law%20meetings%20and%20workshops/2024%20ICAO%20Air%20Law%20Treaty%20Workshop/Session-2-Montreal-Convention-1999.pdf>> accessed 9 October 2025.

⁷⁸² International Civil Aviation Organization, ‘The Postal History of ICAO: The Warsaw System on Air Carriers Liability’ <https://applications.icao.int/postalhistory/the_warsaw_system_on_air_carriers_liability.htm> accessed 9 October 2025.

Mode of transport	Sea	Road	Train	Air	Inland waterway
Convention applicable	Hamburg Rules (art 6)	CMR Convention (art 23)	COTIF-CIM Convention (art 30)	Montreal Convention (art 22)	CMNI Convention (art 20)
Limitation of liability	2.5 SDR/kg 835 SDR/unit	8.33 SDR/kg	17 SDR/kg	22 SDR/kg	2 SDR/kg 666.67 SDR/unit

In addition to the question of which limitations of liability should apply to any sea or air leg of an MTO, there arises the question whether it would be appropriate to include each of the limitations of liability—one per mode of transport—in the calculation of the weighted average. Indeed, the weighted average is a default. Therefore, it should reflect the most inclusive MTO hypothetical, involving all five modes of transport—sea, road, air, rail, and inland-waterway. For the purposes of this calculation, assume the risk per mode of transport to be as follows:

Mode	Sea	Road	Train	Air	Inland waterway
Percentage of damage	<i>x</i>	<i>y</i>	<i>z</i>	<i>g</i>	<i>h</i>

Applying the weighted-average formula above, the calculation of the weighted average of the limitations of liability under the unimodal conventions is as follows:

$$\text{The weighted average of the limitations of liability (per kg)} = \frac{2.5x + 8.33y + 17z + 22g + 2h}{x + y + z + g + h}$$

$$\text{The weighted average of the limitation of liability (per unit)} = \frac{835x + 666.67h}{x + h}$$

As discussed, this weighted average is the limitation of liability that should be provided by an international legal instrument governing MTOs. This ‘ideal’ limitation of liability should be as above, namely, as follows:

In kg:

$$\frac{2.5x + 8.33y + 17z + 22g + 2h}{x + y + z + g + h} \text{ SDR/kg}$$

In units:

$$\frac{835x + 666.67h}{x + h} \text{ SDR/unit}$$

To illustrate, the limitation of MTC liability would, on the (extremely far-fetched) assumption that x , y , z , g , and h are equal to one another, be 10.37 SDR per kg and 750.83 SDR per unit.⁷⁸³ Compared with the limitations of liability provided by the proposed legal instruments governing MTC liability (namely, the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992), this illustrative limitation of liability (10.37 SDR per kg) is high in terms of limitation by weight (per kg) but low in terms of limitation by unit.

In terms of limitation by weight (per kg), the illustrative limitation (10.37 SDR per kg) is (1) 2.04 SDR per kg higher than the highest limitations (8.33 SDR per kg) provided by the MT Convention⁷⁸⁴ and the UNCTAD/ICC Rules 1992.⁷⁸⁵ The illustrative limitation (10.37 SDR per kg) is also 7.37 SDR per kg higher than the highest of the limitations, namely, 3 SDR per kg, as provided by the Rotterdam Rules.⁷⁸⁶

In terms of limitation by unit, the illustrative limitation (750.83 SDR per unit) is 169.17 SDR per unit lower than the limitation provided by the MT Convention (920 SDR per unit);⁷⁸⁷

⁷⁸³ This result is an illustrative simplification, not a realistic result.

⁷⁸⁴ MT Convention, art 18.

⁷⁸⁵ UNCTAD/ICC Rules 1992, r 6.

⁷⁸⁶ Rotterdam Rules, art 59.

⁷⁸⁷ MT Convention, art 18.

and 124.17 SDR per unit lower than the limitation provided in the Rotterdam Rules (875 SDR per unit).⁷⁸⁸

Although the illustrative limitation by weight (10.37 SDR per kg) is slightly higher than the respective limitations by weight provided by the proposed legal instruments governing MTC liability (namely, the MT Convention, the Rotterdam Rules, and the UNCTAD/ICC Rules 1992), this illustrative limitation would likely be satisfactory to the transport industry. In a survey conducted by UNCTAD, some respondents stated that they would be satisfied with a limitation by weight of 2 SDR per kg to 17 SDR per kg.⁷⁸⁹ The illustrative limitation is roughly halfway between these figures. Furthermore, since the illustrative limitation by unit (750.83 SDR per unit) is lower than the respective limitations by unit provided by both the MT Convention and the Rotterdam Rules (and is therefore comparatively favourable to MTCs), it would likely gain the support of the transport industry.

2.2.2.4 Limitation of liability for non-contemplatory loss

However, it would be much less appropriate in the case of the other type of loss—namely, non-contemplatory loss. Indeed, it would be inappropriate to limit MTC liability by reference to the weighted average of the respective limitations of liability provided by the unimodal conventions. In the case where MTCs have possession of goods, they are the ones who have control over the goods. The rational MTC is able to estimate the (weighted) value of any loss and prepare for the possibility of having to pay compensation. For example, if MTCs acting rationally receive a cargo of one ton of rice for carriage, they will know that in the case of contemplatory loss, what they will be liable to pay in compensation is equal to the value of (1) one ton of rice and (2) the consequential loss. To prepare for the possibility of having to pay compensation, MTCs may seek liability insurance coverage.

⁷⁸⁸ Rotterdam Rules, art 59.

⁷⁸⁹ UNCTAD, 'Multimodal Transport' (n 6) para 73.

However, as discussed above in Sub-paragraph 2.2.2.1, there may be non-contemplatory loss. In theory, the amount of any such loss and, therefore, of any corresponding liability is potentially unlimited. Liability for any loss of this type would be indeterminate. Therefore, the limitation of MTC liability for any non-contemplatory loss should be decorrelated from the amount of any such loss, to avoid (1) any such indeterminacy coming to prevail and (2) MTCs complaining of unfairness. Indeed, MTCs will be unable to estimate the amount of any non-contemplatory loss and, if liable, unable to prepare for the possibility of having to pay compensation.

Suppose that in an MTO, an MTC is exposed to an exceptional risk of being held liable for non-contemplatory loss of up to NZ\$1,000,000. Being non-contemplatory, this loss is of an amount that is unknown to the MTC. Suppose, too, that the MTC's liability is insured up to a limit of NZ\$750,000 and that the MTC's commercial preference is to be insured up to the maximum for which it could be held liable to pay. In this case, there is a problem in that the MTC will be unable to inform its insurer of the maximum (NZ\$1,000,000)—making (1) the insurer unable to calculate the premium that it charges and (2) the MTC unable to calculate the difference, namely, the amount to add to the freight that it charges.⁷⁹⁰ In practice, the MTC would likely charge the cargo owner here the same freight as it does cargo owners generally.

Given the impossibility of calculating MTCs' maximum possible liability for non-contemplatory loss, it would also be inappropriate to limit such liability by reference to the weighted average above in Sub-paragraph 2.2.2.3. However, it *would* be appropriate to return to Aristotle and his conception of corrective justice—the principle requiring wrongdoers to return unjust gains to victims.⁷⁹¹ As mentioned above in Sub-paragraph 2.2.2.2, Aristotle argues that by failing to perform an obligation, a person does a wrong and—thereby making a

⁷⁹⁰ The amount of the loss for which carriers may potentially be held liable is one of the factors affecting the cost of transportation and therefore of freight. See Antriksh Kumar, Jithin Thomas, and VB Khanapuri, 'Loss Reduction and Cost Optimization in Transportation' (Academia 2014) <https://www.academia.edu/71634926/Loss_Reduction_and_Cost_Optimization_in_Transportation> accessed 11 October 2025.

⁷⁹¹ Weinrib, 'Corrective Justice in a Nutshell' (n 585) 349–56.

gain for themselves and causing a loss to the victim—must, for there to be fairness, return the unjust gain to the victim. Also, Weinrib clarifies that an unjust gain is a case of the wrongdoer going over the baseline that fairly divides the rights and obligations as between the wrongdoer and the victim,⁷⁹² meaning that the wrongdoer must return the unjust gain to the victim to restore the victim to their original position.

In MT, cargo owners agree to pay MTCs for the purposes of having the goods delivered at the destination safely and on time. In the case of a delay in delivery, the result of the transaction is not the one that cargo owners (which are now bound to pay) expected—on contracting—it to be. Indeed, the expectation was that the goods would arrive at the destination on time. Accordingly, here, cargo owners suffer (or may suffer) loss in the form of (1) the freight paid to MTCs and (2) consequential loss due to the delay in delivery, such as loss of profit.

In the case of delay in delivery, what MTCs must do—to restore cargo owners to the position in which they would have otherwise found themselves—is pay compensation in an amount equal to (1) the freight paid to MTCs and (2) any consequential loss. However, as discussed above in Sub-paragraph 2.2.2.1, non-contemplatory loss is difficult or impossible to estimate.

To ensure that there is fairness in an international legal instrument on MT (and, in particular, the absence of indeterminate liability), MTCs that cause cargo owners non-contemplatory loss should pay compensation in an amount equal to the freight payable and no more. Unless cargo owners notify MTCs of their potential to sustain such loss because of delay in delivery, MTCs will be unable to estimate the amount of any such loss. At the same time, if MTCs receive the freight payable but do not perform their duty to deliver carry the goods to the destination safely and on time, it would be unjust if they retained the payment. Consequently, it is to this

⁷⁹² Weinrib, 'Gains and Losses of Corrective Justice' (n 753) 280.

amount—the amount of the freight payable—that MTC liability for non-contemplatory loss should be limited.

2.2.2.5 Conclusion to the paragraph

In short, when MTCs (1) fail to perform their obligations and (2) in doing so cause loss, they should, according to Aristotelian corrective justice, bear liability for the loss. In particular, MTCs should restore cargo owners to their original position, namely, the position in which they would have found themselves if the MTCs had performed their obligations. However, because of freedom of contract, MTCs typically use their bargaining power to impose language limiting their liability on cargo owners. To prevent MTCs doing so, a legal instrument on MTC liability should set a floor on liability that is fair to both MTCs and cargo owners. Because contemplatory loss will generally be reasonably foreseeable, any MTC liability for such loss should be limited to the weighted average of the respective limitations of liability provided by the unimodal conventions. In the case of non-contemplatory loss, on the other hand, such a solution will be inappropriate. Generally, the loss will not be reasonably foreseeable, and it will potentially be unlimited. Therefore, in this case, it will not be possible to limit MTC liability by reference to the amount of the loss itself. However, the limitation of liability should be fair and, therefore, equal to the freight payable and no more.

2.2.3 Fair rules relating to the time bar

Paragraph 2.2.2 proposed fair limitations of MTC liability for both contemplatory and non-contemplatory loss. For contemplatory loss, the limitation is the weighted average of the unimodal limitations. For non-contemplatory loss, the limitation is based on Aristotle's principle of corrective justice and is therefore equal to the freight payable and no more.

This section turns to the question of the time bar on cargo owners bringing proceedings for damage to, loss of, or delay in delivery goods. It examines whether a time bar of nine months

from the expected date of delivery would be fair and, therefore, likely to gain the support of the transport industry. This nine-month time bar is based on Rawls's theory of fairness in equal opportunity.⁷⁹³ An international legal instrument on MT should ensure that both MTCs and cargo owners have an equal opportunity to bring proceedings against their contractual counterparties: cargo owners against MTCs and MTCs against their actual-carrier sub-contractors.

2.2.3.1 A time bar on cargo owners bringing proceedings against MTCs

John Rawls (1921–2002) was ‘an American political philosopher in the liberal tradition’.⁷⁹⁴ He advanced a concept of fairness that aligns with the equity approach to fairness, namely, the approach to fairness that underpins this thesis. For Rawls, members of society have equal rights to one another.⁷⁹⁵ Therefore, for there to be fairness, members of society should be treated equally to one another unless it is advantageous to all that there should be unequal treatment.⁷⁹⁶

On this basis, Rawls proposes that for there to be fairness, there must be equal opportunity.⁷⁹⁷ In relating to the distribution of resources through society, he considers that ‘those who are at the same level of talent and ability and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system’.⁷⁹⁸ In other words, he considers that every member of society should have equal opportunity to flourish, irrespective of their social and economic background.⁷⁹⁹ For example, a child from a low-income family should have the same opportunity to study as a child from a high-income family.⁸⁰⁰

⁷⁹³ Rawls, *A Theory of Justice* (n 596) 73–78.

⁷⁹⁴ Leif Wenar, ‘John Rawls’ (*Stanford Encyclopedia of Philosophy* 3 September 2025) <<https://plato.stanford.edu/entries/rawls/>> accessed 19 October 2025.

⁷⁹⁵ Rawls, ‘Justice as Fairness’ (n 622) 165.

⁷⁹⁶ Rawls, ‘Justice as Fairness’ (n 622) 167.

⁷⁹⁷ Rawls, *A Theory of Justice* (n 596) 73–78.

⁷⁹⁸ Rawls, *A Theory of Justice* (n 596) 63.

⁷⁹⁹ Rawls, *A Theory of Justice* (n 596) 63.

⁸⁰⁰ Rawls, *A Theory of Justice* (n 596) 63.

Ensuring that every member of society has equal opportunity does not mean treating every member of society equally.⁸⁰¹ As in the case of education again, equal opportunity is not the result of merely having every student attend the same school. Unequal treatment may be necessary at times. For example, to ensure that children from low-income families have the same opportunity to study as those from high-income families, it will typically be necessary to take additional measures to support children from low-income families—such as providing lunch subsidies, equipment, or technology, helping these children gain the same knowledge and skills as children from high-income families. Indeed, high-income families typically have greater resources to invest in their children’s education, enabling their children to gain greater knowledge and skills.⁸⁰² Therefore, the principle of equal opportunity as advanced by Rawls is not merely a blunt instrument for distributing resources. Rather, the principle is a standard for ensuring that there is fairness in the process of distributing resources.

This principle may ensure such fairness at the macro level, namely, at the level of society. However, the principle may ensure fairness in the process of distributing rights and obligations at the micro level, namely, as between contractual counterparties—including MTCs and cargo owners. In the context of the MTO, applying the principle of equal opportunity will help ensure that MTCs and cargo owners have an equal opportunity to exercise their legal rights—here, the right to seek compensation by bringing proceedings. For this reason, the principle of equal opportunity serves to help determine a time bar on cargo owners bringing proceedings against MTCs that is fair.

In the context of the MTO, the principle of equal opportunity would require an international legal instrument on MT to provide MTCs and cargo owners with an equal opportunity to exercise their rights. The principle of corrective justice, for its part, is what justifies cargo

⁸⁰¹ Rawls, *A Theory of Justice* (n 596) 73–75.

⁸⁰² Larry A Alexander, ‘Fair Equality of Opportunity: John Rawls’ (Best) Forgotten Principle’ (1986) 11 *Philosophy Research Archives* 197, 200–01.

owners bringing proceedings against MTCs to recover the loss that they suffer.⁸⁰³ At the same time, MTCs typically contract with other carriers—actual carriers—to provide carriage over one or more segments of the MTO. In their relationship with these actual-carrier sub-contractors, MTCs effectively assume the position of cargo owners. In the case of damage to, loss of, or delay in delivery of goods occurring for cargo owners, MTCs too will suffer. They will suffer at the level of their relationship with their actual-carrier sub-contractors, just as cargo owners will at the level of their relationship with MTCs. From the perspective of corrective justice, MTCs must be able bring proceedings against their actual-carrier sub-contractors to recover this loss. Therefore, if there occurs damage, loss, or delay in delivery of goods in an MTO, both MTCs and cargo owners must have the right to bring proceedings against their contractual counterparties—cargo owners against MTCs and MTCs against their actual-carrier sub-contractors.

Because there is no reason in principle to favour MTCs over cargo owners or cargo owners over MTCs, fairness requires that MTCs and cargo owners have an equal opportunity to exercise their rights.⁸⁰⁴ If cargo owners with a greater opportunity to bring proceedings against MTCs (because, for example, there is a lengthier time bar on proceedings by cargo owners than on proceedings MTCs), the result will be unfairness, here to MTCs.

For example, suppose that a legal instrument governing carrier liability provides for a time bar of 36 months from the date of delivery on cargo owners bringing proceedings against MTCs; and one of 24 months from the same date on MTCs bringing proceedings against their actual-carrier sub-contractors. There would be a difference of 12 months between the two time bars, and this difference would be unfair to MTCs. Indeed, if cargo owners brought proceedings against MTCs *after* the 24-month time bar on MTCs and—of course—*before* the expiry of the

⁸⁰³ See Sub-section 2.2.

⁸⁰⁴ See more discussion related to the liberty principle in Rawls, 'Justice as Fairness' (n 622) 164–94.

36-month time bar on cargo owners, MTCs would be required to pay compensation to the cargo owners but unable to go on to recover it from those *prima facie* liable to *them* for the damage, loss, or delay in delivery—from their actual-carrier sub-contractors. For there to be fairness, it would therefore be necessary to ensure that MTCs and cargo owners have an equal opportunity to bring proceedings against their contractual counterparties—cargo owners against MTCs and MTCs against their actual-carrier sub-contractors.

To ensure that MTCs and cargo owners have an equal opportunity to do so, the time bar provided by an international legal instrument on MT would have to fulfil two requirements. First, the time bar would have to be long enough to provide cargo owners a realistic opportunity to bring proceedings against MTCs. Second, the time bar would have to be longer than the longest of the time bars provided by the unimodal conventions. Indeed, MTCs would have to have sufficient time to bring corresponding proceedings against their actual-carrier sub-contractors. Under the law as it is, the respective proceedings relative to the segments of the MTO will be time-barred by the relevant unimodal conventions, and these unimodal time bars may differ from convention to convention. For example, under the Hague-Visby Rules (governing sea carriage),⁸⁰⁵ the CMR Convention (governing road carriage),⁸⁰⁶ the CMNI Convention (governing inland-waterway carriage),⁸⁰⁷ and the COTIF-CIM Convention (governing rail carriage),⁸⁰⁸ the time bar is 12 months. Meanwhile, under the Warsaw Convention (governing air carriage), it is 24 months.⁸⁰⁹ Of these two different time bars, the 12-month time bar is (obviously) the shorter.

To ensure that MTCs have a realistic opportunity to bring proceedings against their actual-carrier sub-contractors, the drafters of an international legal instrument on MT would primarily

⁸⁰⁵ Hague-Visby Rules, art 3 r 6.

⁸⁰⁶ CMR Convention, art 32.

⁸⁰⁷ CMNI Convention, art 24.

⁸⁰⁸ COTIF-CIM Convention, art 58.

⁸⁰⁹ Warsaw Convention, art 29.

have to take account of the *shorter* the time bars. Currently, instruments such as the UNCTAD/ICC Rules 1992—which, as mentioned above, have been widely adopted by the transport industry—provide a time bar of nine months from the date of delivery.⁸¹⁰ This time bar is shorter than the shortest possible unimodal time bar applicable, this time bar being 12 months. Therefore, to ensure that the time bar provided by an international legal instrument on MT liability aligned with the existing industry practice established by the UNCTAD/ICC Rules 1992, the instrument would have to adopt a time bar of nine months from the date of delivery.

2.2.3.2 Fairness of the proposed MT time bar to cargo owners

Generally, this nine-month time bar would not be unfair to cargo owners. Indeed, it would be of no concern in the case (1) where the goods arrive on the expected date of or (2) where the goods are delayed and end up being treated as lost.

If the goods do arrive on the expected date of delivery, cargo owners will typically have the containers in which they were transported devanned (namely, offloaded) as soon as possible. Any damage to or loss of the goods that occurred in carriage will typically become apparent to cargo owners during the process of devanning.⁸¹¹ It is typical for cargo owners that discover any such damage or loss to make an immediate start to the process of making a complaint and negotiating compensation.⁸¹² Even if the damage or loss does is not apparent during devanning, cargo owners will typically put the goods to some use—or at the very least unpackage them—within a short time of taking delivery. Indeed, it is industry practice to do so, and cargo owners are already accustomed to it. This practice is one that arises from the UNCTAD/ICC Rules

⁸¹⁰ UNCTAD/ICC Rules 1992, r 10.

⁸¹¹ FreightAmigo, ‘2025 Devanning Process Guide: Overcome Challenges’ <<https://www.freightamigo.com/en/blog/logistics/overcoming-common-challenges-in-the-devanning-process/>> accessed 2 December 2025.

⁸¹² Rule 9(1) of the UNCTAD/ICC Rules, which are widely adopted by the industry in the absence of an international instrument governing MTC liability, requires cargo owners to notify MTCs of any apparent damage to goods immediately when the goods are delivered to cargo owners. It is arguable that cargo owners are used to this existing industry practice. Therefore, they will initiate the process of filing complaints and negotiating compensation as soon as they discover any apparent damage to the goods.

1992—a practice of cargo owners notifying MTCs of any hidden damage within six days of the goods being handed over to them.⁸¹³

If, on the other hand, the goods do not arrive on the expected date of delivery, the cargo owner will likely make an immediate start to the process of making a complaint and negotiating compensation, here for consequential (or indirect) loss resulting from the delay in delivery. In practice, it would be inconceivable for cargo owners to wait for any length of time. Therefore, there would be no unfairness in a nine-month time bar on cargo owners bringing proceedings against MTCs.

In the case of delay in delivery, it will generally be impossible for cargo owners to bring proceedings against MTCs for consequential damage or loss resulting from physical damage to or loss of goods. Indeed, it will generally be impossible for cargo owners to know whether there is any physical damage or loss until the goods have arrived and cargo owners are therefore able to inspect them. If there is no physical damage or loss, there is no action for consequential loss (resulting from physical damage or loss). Indeed, the court will generally not award damages if the plaintiff proves no actual damage or loss, as affirmed by Ackner LJ in *C&P Haulage Co Ltd v Middleton*.⁸¹⁴

The nine-month time bar would even be appropriate in the case of the goods not arriving on time. The UNCTAD/ICC Rules 1992, for example, provide that if the goods do not arrive within three months of the expected date of delivery, they will be deemed lost.⁸¹⁵ This industry practice is one that cargo owners tend to accept, given the UNCTAD/ICC Rules 1992 having been adopted as widely as they have and there being no international legal instrument governing MTC liability.⁸¹⁶ Despite cargo owners potentially having to wait three months

⁸¹³ UNCTAD/ICC Rules 1992, r 9(3).

⁸¹⁴ [1983] EWCA Civ 5, 16.

⁸¹⁵ UNCTAD/ICC Rules, r 5.3.

⁸¹⁶ See Section 1 of Chapter 2.

before discovering any consequential loss due to physical damage or loss, a nine-month time bar would nevertheless be appropriate. Indeed, it would provide cargo owners with sufficient time to decide whether to bring proceedings for the loss. The nine-month time bar would be of little concern to cargo owners even if (1) they agreed to be bound by the UNCTAD/ICC Rules 1992, and (2) the expected date of delivery came and went without delivery, and (3) three months came and went without delivery, but (4) the goods *were* subsequently delivered, and (5) there were no physical damage or loss. Here, the cargo owners would *still* have roughly six months to begin the process of making a claim and negotiating compensation for any consequential loss due to physical damage or loss. This six-month timeframe would be a realistic one for cargo owners intending to attempt negotiation and, if necessary, to bring proceedings.

2.2.3.3 Fairness of the proposed MT time bar to MTCs

The nine-month timeframe provided by the time bar would also be a similarly realistic one for MTCs. It would provide them with a three-month period to bring proceedings against their actual-carrier sub-contractors, especially in the case of a unimodal convention providing for a 12-month time bar. Although a period of three months may not appear particularly long, it will typically be sufficient for MTCs to bring any such proceedings. Indeed, once cargo owners begin the process of making a complaint and negotiating for compensation with MTCs, MTCs typically do the same with their actual-carrier sub-contractors.⁸¹⁷ In certain cases, MTCs may even start sooner. Therefore, in practice, they will effectively have more than three months to begin the process with their actual-carrier subcontractors. Even in the (atypical) case of cargo owners bringing proceedings (roughly) nine months after the expected date of delivery date,

⁸¹⁷ Unimodal conventions require MTCs to notify their actual-carrier sub-contractors (1) of any apparent damage to goods immediately on delivery and (2) of any hidden damage to goods within three to fourteen days of delivery, depending on the mode of transport. See Hague-Visby Rules, art 3(6); CMR Convention, art 30; COTIF-CIM Convention, art 48; CMNI Convention, art 23; Warsaw Convention, art 26. Therefore, MTCs must notify their actual-carrier sub-contractors of any damage as soon as they are notified by cargo owners.

MTCs will still have (roughly) three months to bring legal proceedings against their actual-carrier sub-contractors—with the shortest unimodal time bar being 12 months.

2.2.3.4 Possible counterarguments from cargo owners

Cargo owners may consider a nine-month MT time bar too short in a highly specific case. This is a case where (1) they are not the ones who originally entered into the MT contract with MTCs,⁸¹⁸ and (2) their only option is to bring proceedings in a jurisdiction other than their home jurisdiction—because the defendant is based in a different jurisdiction.⁸¹⁹ In any case such as this, cargo owners may face practical difficulties which take them longer than nine months to resolve, such as identifying MTCs that are potentially liable or having too little information to make an insurance claim.

One example is *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd*.⁸²⁰ In this case, the cargo owner made a claim for damage to goods to its insurer. The insurer denied the claim, but the cargo owner waited more than nine months (from the date of delivery) before taking action. The insurer took as long as it did because it (1) changed its position as to what the cause of the loss was and (2) notified its final decision to the cargo owner only after proceedings had become time-barred under the contract of carriage of goods. The time bar was a contractual one and a nine-month one. Consequently, the cargo owner was unable to bring proceedings against the carrier.

A similar situation occurred in *FIMBank plc v KCH Shipping Co Ltd*.⁸²¹ In this case, the cargo owner's lawyer took more than 12 months (from the date of delivery) to identify a carrier that could have potentially be liable. The reason was twofold: (1) the cargo owner did not have

⁸¹⁸ The persons originally contracting with MTCs could be either the seller or the buyer under a contract for the sale of goods, depending on which of these parties is responsible, according to the terms of the contract, for arranging transport.

⁸¹⁹ In the carriage of goods (and especially in MTOs), it is not always cargo owners who originally enter into the contract for the carriage of goods. The term 'cargo owner' refers anyone that holds a negotiable bill of lading. A negotiable bill of lading is a document of title that enables the goods to be transferred while they are in transit to their destination.

⁸²⁰ EWCA Civ 570.

⁸²¹ [2024] YKSC 38.

the original copy of the bill of lading, and (2) the carrier's identifying information as it appeared in the copy was difficult to ascertain. The lawyer initially had the cargo owner bring proceedings against a carrier that could not have been liable. However, the lawyer discovered the fact (that the carrier could not have been liable) only *during* the proceedings. By this time, any proceedings by the cargo owner against the carrier that *could* have potentially been liable were already time-barred, the time bar in this case being 12 months from the expected delivery date under the Hague-Visby Rules.⁸²²

If an international legal instrument on MT set forth a time bar of more than nine months, cargo owners would potentially have additional time to resolve any practical difficulties such as the ones arising in *Granville Oil* and *FIMBank*, as mentioned above. However, extending this MT time bar from nine to more than 12 months would undermine MTCs' equal opportunity to bring proceedings on the basis of same facts, namely, against their actual-carrier sub-contractors. As discussed above, the shortest unimodal time bar is 12 months from the date of delivery. If, however, (1) a legal instrument governing MTOs set its time bar at a point more than 12 months from this date and (2) cargo owners brought proceedings against MTCs at such a point, MTCs would be unable to bring proceedings against their actual-carrier sub-contractors. Therefore, for the purposes of fairness, unequal treatment would be necessary here. A nine-month MT time bar would strike a fair balance, ensuring that MTCs and cargo owners have an equal opportunity to bring proceedings against their contractual counterparts—cargo owners against MTCs and MTCs against their actual-carrier sub-contractors.

2.2.3.4 Conclusion to the paragraph

To synthesise, a legal instrument on MT will be fair to MTCs and cargo owners if it provides them with an equal opportunity to bring proceedings against their respective contractual

⁸²² art 3 r 6.

counterparties—cargo owners against MTCs and MTCs against their actual-carrier sub-contractors. For MTCs, it would be particularly important for the instrument to take account of industry practice—of the fact that MTCs typically sub-contract segments of MTOs to so-called actual carriers. The shortest time bar provided by any of the unimodal conventions—which in principle apply to the contractual relationships between MTCs and their actual-carrier sub-contractors—is 12 months. For this reason, the legal instrument on MT should provide for a time bar of nine months.

CONCLUSION

There is a consensus that if the global MT industry is to develop, there needs to be a legal instrument governing MTOs at the international level. Although previous attempts have been made to establish such a legal instrument, none of them has been successful—in the sense of ultimately coming into force. The most recent investigation by an international institution into the possibility of establishing a model law governing MTOs was by UNESCAP, specifically relating to the Asia-Pacific region. Accordingly, in 2021, UNESCAP issued guidelines on how to draft rules governing MTOs, for the purposes of addressing the urgent needs of its member states. However, it did not draft a model law.

Nevertheless, a supranational legal instrument governing MTOs would be highly beneficial for development in the long term, not only in the Asia-Pacific region, but also globally. The ambition of this thesis is to help bring such a legal instrument into force at the international level. For this reason, the thesis has examined the standards that such a legal instrument would have to satisfy if it were to gain the support of the transport industry.

Chapter 1 provided an overview of the development of MTOs and examines the main legal issues arising in relation to MTOs, the need for an international legal instrument governing MTC liability, and the factors that would influence a state in deciding whether or not to ratify such an instrument. As explored in the chapter, there are various terms used to describe the carriage of goods involving at least two different modes of transport and governed by a single contract for the carriage of goods. These terms include ‘multimodal transport’ (MT), ‘intermodal transport’, ‘combined transport’, ‘co-modality’, and ‘synchro-modality’. Of these terms, MT was adopted by this thesis to refer to the form of carriage at its core—that is, carriage involving at least two different modes of transport and governed by a single contract. Chapter 1 revealed how crucial the development of such operations is. MT is capable of facilitating the

growth of the international merchandise trade and the achievement of the UN SDGs. However, the development of MTOs has been hindered by the absence of an international legal instrument specific to MTC liability. The absence of such an instrument has created uncertainty, unpredictability, and unfairness in determining MTC liability and, in turn, high costs, especially relating to freight, insurance, and dispute resolution. Accordingly, a mandatory legal instrument governing MTC liability would be more than beneficial. However, even if there were such an instrument and it were one that promoted predictability in determining MTC liability, there would be no guarantee of the instrument gaining sufficient state support to come into force. The transport industry plays a decisive role in influencing states in deciding whether or not to ratify international instruments. Chapter 1 therefore concluded that for an such instrument on MT to gain the state support necessary to come into force, the instrument would first have to be attractive to the transport industry—and therefore satisfy the practical needs of the industry.

Chapter 2 then proceeded to identify these needs. It started by examining the various historical attempts made to create a legal instrument governing MTOs at the international, regional, and national levels, including soft-law instruments used by the transport industry. Chapter 2 found that to gain transport-industry support, an international legal instrument on MT must set forth rules that are certain (in the language of their wording), predictable (as to the question of applicable legal regime), and fair. Of these three criteria, the most important (in this thesis) are predictability and fairness. Though important to the transport industry, the criterion of certainty is essentially a matter of drafting, namely, a matter that does not raise any issues specific to MTC liability. Therefore, this thesis focuses instead on predictability and fairness.

Chapter 3 then explored the substantive questions of how to make the rules predictable and fair. For these purposes, it is necessary that any legal instrument governing MTC liability adopt

a uniform liability approach. In other words, the instrument should contain a single body of rules relating to MTC liability applying irrespective of whether any damage to, loss of, or delay in delivery of goods is localised or unlocalised. Such an approach enables the parties to predict—on contracting—what the legal framework applying will be. Therefore, they will be able to predict on what basis MTCs will be liable for damage, loss, or delay in delivery; to what extent; and how long cargo owners will have to bring proceedings against them. In other words, neither party wishing to have the answer to any of these questions will need to wait for the less-than-ideal eventuality of damage, loss, or delay in delivery actually occurring. Though there are other approaches (including the modified and network approaches and variations on these), they do not offer the same predictability as the uniform liability approach.

Also, it is possible for the relevant rules to be fair (and therefore gain the support of the transport industry) even if they do treat MTCs and cargo owners equally. As Aristotle argues, unequal treatment is fair if it is reasonable and justifiable. Chapter 3 used the work of Aristotle and other philosophers to show that for the purposes of fairness, an international legal instrument on MT should (1) adopt a presumed-fault approach and (2) allocate damage rather than risks. From the perspective of morality, a person should not be punished if they are a ‘good’ person, namely, one who is reasonable and ‘does the right thing’. In addition, adopting a damage-focused approach may help avoid the framing effect that could otherwise prevent the transport industry from perceiving the legal instrument as one that is fair and therefore worthy of its support. Furthermore, adopting this damage-focussed approach is in close alignment with two currently existing duties of law: the duty to perform the contract in good faith, to the extent that it exists locally (as it does in the civil-law world and Canada); and the duty to prevent damage in the main area of the law of extra-contractual obligations, known as tort or delict.

To ensure that its rules relating to any limitation of such liability are fair, an international legal instrument on MT should, as proposed in Chapter 3, place a floor on liability for so-called

contemplatory loss (a type of loss which at law will generally be ‘reasonably foreseeable’), and this floor should be the weighted average of the unimodal limitations of liability. Such a floor should take due account of MTO practice—of the fact that MTCs typically use actual-carrier sub-contractors to perform one or more segments of the MTO. Indeed, if there occurs damage to, loss of, or delay in delivery of goods, it is not only cargo owners that should be able to seek compensation, but also MTCs. The problem here for MTCs is that generally, the contractual relationships between them and their actual-carrier sub-contractors are governed by unimodal conventions. Therefore, proceedings under these relationships will always fall outside the scope of any international legal instrument on MTC liability. If such an instrument sets a limitation of liability limit that is over-favourable to cargo owners, MTCs will face unfairness. Cargo owners would be able to bring proceedings against MTCs without MTCs being able to bring proceedings against their actual-carrier sub-contractors—the ones responsible as a matter of fact for the loss sustained by cargo owners under the MT contract. Conversely, if a limitation of liability is less favourable to cargo owners, cargo owners will face unfairness. This unfairness could cause motivate cargo owners to favour unimodal contracts over multimodal ones. Therefore, to promote the development of the global MT industry, a legal instrument on MT would do well to adopt the limitations of liability proposed by this thesis, for both contemplatory and non-contemplatory loss.

For the limitation of liability for contemplatory loss, this thesis proposes a formula to calculate the amount of limitation rather than fixing a numerical value. To fix such a value, it would be necessary to use empirical data that is currently unavailable. Only the limitation of liability for contemplatory loss may be based on the weighted average of unimodal limitations. Non-contemplatory loss is, by nature, less likely to be reasonably foreseeable and therefore (much) more likely to be unlimited. For reasons of fairness, MTCs should not be liable for any

such loss, and liability for it should be limited to the total freight payable under the MTO and no more.

For the time bar provided by an international legal instrument on MT to be fair, the instrument should ensure not only that cargo owners have an opportunity to bring proceedings against MTCs, but also that MTCs have an opportunity to bring proceedings against their actual-carrier sub-contractors. Since the shortest unimodal time bar is 12 months long, the instrument should adopt a time bar of nine months. Such a time bar would provide both cargo owners and MTCs sufficient time to bring proceedings against their contractual counterparties—cargo owners against MTCs and MTCs against their actual-carrier sub-contractors.

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