Thesis for the Degree of Master of Law

A Study on the Liability System of the Multimodal Transport Operator under the Chinese Maritime Law

Supervisor: Prof. Dae Chung

February 2008

Department of Maritime Law

Graduate School of Korea Maritime University

Tang Xiaojing

Table of Contents

Abstract in Korean Language

중국해상법상의 복합운송인의 책임제도에 관한 연구

탕효청
한국해양대학교
대학원 해사법학과
지도교수: 정대

전자기술의 발전 및 경제의 글로벌화 현상에 따라서 운송서비스의 고도화가 진행되고 있다. 현대의 운송서비스는 다양한 운송방식을 조직화하고 있을 뿐만 아니라 고도로 통합된 운송이 이루어지도록 제조, 마케팅, 및 기타 작업을 결합한다. 이러한 운송서비스의 고도화 시대에 복합운송은 경제활동에 있어서 생명선과 같다.

국제복합운송은 컨테이너 운송에 기초하고 있는데, 그것은 최적의 운송 이익을 구현하도록 국제운송을 조직화하는 방법이다. 컨테이너 운송의 고속화로 인해서 복합운송은 국제거래에 있어서 중요한 운송방식이 되고 있다. 그것은 다양한 운송양식을 분리시키는 전통을 깨뜨리면서 해상, 철도, 육상, 및 항공운송을 조직적 협력 체계로 결합시킨다. 전통적 운송방식과 비교할 때, 국제복합운송의 과정은 보다 복잡하며, 법률상 논의도 다소 부족한 것이 현실이다.

복합운송을 조정하기 위해 여러 국제운송협약이 도입되었지만, 각 협약의 내용이 다르다. 현재까지 현행의 운송법제와의 충돌이

기본적으로 제거되지 않았고, 또한 고객 간의 이해조정도 이루어지고 있지 않다. 국제복합운송 및 국제거래의 발전에 따라서 복합운송의 관련당사자 및 복합운송인의 책임의 문제를 조정하는 방법의 차원에서 현행의 복합운송법제가 일반적으로 구속력이 있어야 하는 것이 바람직하다고 할 수 있다.

중국은 세계에서 가장 큰 해상국가이다. 중국 경제의 성장과 함께 국제거래의 규모가 확대되고 있는 추세에 있다. 이러한 흐름에 따라서 외국과의 무역에 수반한 복합운송과 관련한 법적 문제도 증가하고 있다. 이와 관련하여 중국 해상법상으로 복합운송인의 책임법제가 완전하지 않을 뿐만 아니라 국내 운송법제와의 충돌로 인해 복합운송인의 책임이 통일적으로 규율되지 못하고 있는 실정이다. 중국 해상법상 복합운송인의 책임법제가 완비되기 위해서는 각국의 선진법제를 참고할 필요가 있으며, 국제협약의 내용도 충실히 반영할 필요가 있다.
중국 해상법상의 복합운송인의 책임법제는 다음과 같은 점에서 정비될 필요가 있다.

첫째, 복합운송인의 책임제도가 효율적이고 공정하게 기능하도록 구축되어야 한다. 현재의 중국 해상법과 계약법은 복합운송인의 책임과 관련하여 별도로 기능하고 있어서 복합운송의 발전에 기여하고 있지 않다. 따라서 복합운송인의 책임과 관련하여 공정한 책임 분배의 원칙을 확립할 필요가 있다.

둘째, 복합운송인의 책임제한에 관한 법을 완비할 필요가 있다. 이러한 법은 단일성과 예측가능성을 반영하도록 해야 한다. 즉 복합운송에 관한 법은 단일한 법률이어야 하며. 그 법의 내용이 복합운송관련 당사자에게 예측가능성을 부여하여야 한다는 것을 의미한다.

Chapter 1 Introduction

1.1. The Purpose of Study

By the 1990s, in the waves of economic globalization, international trade continued to expand. As an important carrier of international trade, international maritime industry develops so fast, so the international maritime legislation also will be brisk again and a number of new international conventions or civil rules have emerged.

China is a big maritime country in the world. China has 18,700 km's mainland coastline and 14,000 km's island coastline. Currently, the Chinese mainland has 1460 ports, which have 835 deep-water berths beyond 10,000 tons. Opening ports are more than 130 and the international maritime fleet has more than 37 million dwt. China maintains a large fleet of ships，ranking the fifth on the list of major maritime transportation states[1]； she is also a state with a large quantity of cargoes，so she is concerned with the protection of interests of cargo-owners too[2]. Shipping industry in boosting economic growth and development of foreign trade are a great contribution and dominant in Chinese foreign trade and transport. In recent years the Chinese foreign trade showed an upward trend, and then the compensation of damage to the goods also increased simultaneously. The consciousness grows up and people use the law to protect their own interests. The research to the responsibility system of the carrier is also more and more pressing.[3]

At the same time, current international maritime transport law was not in unified state. This situation is not conducive to the development of international shipping

---

[1] According to World Ocean Transportation Report for Year 2004 issued by the United Nations' Trade & Development Conference，the Chinese total ship tonnage is 4,741,888 tons which occupies 6.1% of the world total tonnage and ranks the fifth in the world list.www.chinaship.com. According to the statistics of 2004，the Chinese ship construction industry has completed more than 8,500,000 tonnage of ship construction that occupies 15% of world total ship construction and China has ranked third in the world ship construction list． www.finance.sina.com.cn

[2] In China，about 90% of import and export cargoes are transported by sea．
Li Hai, A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p.336.

[3] Zhangjun Li, Research on International Maritime Carrier's liability system, Law Press, 2006, p.1.

and international trade. Because of lack of relatively unified legal system that can adjust International multimodal transport, the development of international multimodal transport has been constrained. Currently, the international maritime legislation increases actively and the Chinese Maritime Code also needs to be changed on the agenda. Since July 1, 1997 the Chinese Maritime Code has come into effect. 10 years of maritime judicial practice showed that the Chinese Maritime Code on liability of international maritime carrier had some legal issues and needed to be improved.[4]Although the Chinese Maritime Code and Contract Law of China had some rules related to the multimodal transport, it still lacks workability. Because the Chinese multimodal transport legislation is not uniform, domestic transportation legislation is different, and also both the legislation applies to international multimodal transport and domestic multimodal transport, the limit of liability of the operators differs from that of the international rules. That means that differences of the responsibility and risk allocation between the operator and the goods' interest exist. In China, the framework of the legal system adjusting international multimodal transport has not been built yet. The Multimodal Transport Operator(MTO)'s responsibility system is the core of the international multimodal transport law. Therefore, a comprehensive look at liability system of the international multimodal transport operator has the practical significance to make the analysis and forecast of the international prospects of unification. In South Korea, the amended Commercial Law also contains a special provision to the responsibility of the multimodal transport operator. If China wants to improve the legislation, China should also learn more laws and regulations from other countries. In accordance with the actual situation in China itself, this paper tries to study other countries' laws and make some suggestions for Chinese Law about the liability of multimodal transport operator. Just as a famous maritime law expert said, it is very important and even essential to use the method of comparison in the study of laws. In other words, you cannot truly know your laws unless you know the laws of other countries.[5]

---

[4] Ibid.

[5] William Tetley, Maritime Liens and Claims, first edition, London: Business Law Communications Ltd., 1985, preface, p.1.

1.2. The Scope and Method of Study

Liability of international multimodal transport operator joins many important areas in the maritime law. From its legal content, it is the determination of rights and obligations. In a certain sense, it can be the distribution of responsibility. Maritime carrier's liability system means that the carrier bears the special contractual obligations under the contract of carriage of goods by sea and in case of breach of the contractual obligations, he should bear the liability. They correspond and balance rights and obligations between the two sides, involving in the fundamental interests of the parties.

In this paper, the scope of the study is limited to the international carriage of goods by sea, so both international sea passenger transportation and domestic coastal and inland waterway transport are excluded. The theme of this paper is liability system of multimodal transport operator under the Chinese Law, and it will be compared with other countries and regions on related systems.

First of all, liability system of multimodal transport operator is involved in "Contract Law of China", "Chinese Maritime Code", the single-transport regulations, and many other legal provisions. The paper mainly researches on the relevant provisions of "Contract Law of China" and "Chinese Maritime Code ".

Secondly, international multimodal transport not only involves domestic law, but also involves a number of international conventions or civil rules. The paper also focused on "transport documents uniform rules", "1991 multimodal transport document rules", "Hague Rules", "Hamburg Rules" and related laws under the Chinese law.

At the same time, years of judicial practice show that the carrier's liability is the biggest problem that had more disputes, and that the international and domestic legislation on the provisions of the carrier's liability is not perfect currently.[6]

[6] Zhangjun Li, op. cit., p.2.

Chapter 2 Overview of International Multimodal Transport

2.1. Concept and Structure of Multimodal Transport

2.1.1 Development and Unification of Titles about International Multimodal Transport

Although international multimodal transport of goods is widely used in the world, there is no official name of it. There are some related words: Combined Transport, Through Transport, Successive Transport, Container Transport and Unimodal Transport in opposition to multimodal transport[7]. These words are full of

[7] Combined Transport and multimodal Transport generally is not different. According to the regulations of ICC on multimodal transport documents, it means that at least in two modes of transportation, the goods are received from one country and shipped to the destination country. Strictly speaking, multimodal Transport is more precise than combined transport. Because just from the semantic sense, combined transport also includes intermodal transport made up of each single mode of transport. In practice, the combined transport indeed is used intermodal transport but not limited to the multimodal transport, such as: Combined Transport Documents of China Ocean Shipping Corporation can be used for intermodal transport made up of each single mode of transport. Before the word of multimodal transport appears, most people use Combined Transport to express such modes of transportation. Although the term is still used by some shipping companies or the parties, its frequency is greatly reduced. It can be anticipated that when the "United Nations Convention on International Multimodal Transport of Goods" come into force, the term of Combined Transport will eventually be displaced by the term of multimodal Transport. (2) Successive Transport refers to the same transport contract performed by different carriers. Each one of carriers is independent but all parties of the contract. (3) Through Transport refers to Combined Transport among the same mode of transport. Similar to multimodal Transport, the mode of transport is only one mode. (4) Unimodal Transport refers to constitute a mode of transport from one carrier (as a party to the contract of carriage the carrier is only one, but the actual carrier may exceed one. That is the contract carrier can hand over the transport to the actual carrier transport to discharge). (5) Container Transport. Because the transshipment of container transport among all different modes of transport is very convenient, the use of the multimodal transport container were very common. Because of this, although Container Transport sometimes is not necessarily formed

consanguineous relationship with international multimodal transport of goods, and always get confused. Ralph De Wit said that although there are some obvious differences between these conceptions, but still easy to get confused in the actual practice, so nomenclature can not be the only dependence to determinant the property of a transport contract.[8]

2.1.2 International Convention, Rules and Comprehension of Laws about International Multimodal Transport in a Different Country

Not only glossary need be unified, the rules of transport are also different in International Convention and municipal laws. Some primary rules are analyzed as follows:

1. International Conventions

   a) Warsaw Convention

   Multimodal transport is an advanced system for organizing transport. It united several kinds of transports together for delivery cargo quickly and at a low cost. Multimodal transport is shown in Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage by Air) in 1929 at the beginning. It is accounting to the unified rules or protocol during more than two different modes of shipping, using same transport credential or transfer through broker agent to organize different modes of shipping assort with each other well.

---

by the multimodal transport and multimodal transport is not necessarily used containers, the practice was often used to confuse the two. If the two are defined the same meaning, the difference is this: the former is a technical term while the latter is a legal term. (6) In addition, on multimodal transport, in English "Multimodal Transport" and "Multimodal Carriage" are both said, there is no distinction, only the former is more commonly used and the latter is generally a rare occurrence. See, " ICC uniform rules on the combined transport documents in 1975 ", a 2;

Ralph De Wit, "multimodal transport ", the first part of the first chapter, London labor and legal publishing, 1995 version; Souichirou verified, “multimodal transport carrier's responsibility and bills of lading”, Editor Aliki Kiantou - Pampouki " the report of 15th international conference on comparative law in 1998 in Bristol ", pp. 149-158 http://tetley.law.mcgill.ca/M-P.htm.

[8] Ralph De Wit, Multimodal Transport 4, Lloyd’s of London Press Ltd.,1995

b) United Nations Convention on International Multimodal Transport of Goods

International Multimodal Transport is defined in *United Nations Convention on International Multimodal Transport of Goods* (May 1980). This convention restrict the International Multimodal Transport must employ at least two different modes of shipping, and must take over cargo in a country to another country by the multimodal transport operator. Cargo transport business for performing single mode transport contract should not be regarded as an international multimodal transport.[9] Such as: From Beijing to Shanghai, then the goods is shipped to Busan.

There are two features of this definition. Firstly, it divides Multimodal Transport and Through Transport clearly that Multimodal using more than one modes of shipping while Through Transport using only one mode of shipping. Secondly, the convention insists the internationalism of shipping, and point out cargos must delivery through different countries.[10] Comparing with other modes of shipping, the distance of international multimodal transport is more complex, thus internationalism becomes a important feature. In actual practices,

[9] United Nations Convention on International Multimodal Transport of Goods (May 1980), Article 1, Item 1

[10] Different from General International Convention that judged the international standard as the identity of parties, the sign of the contract or the place of performance, United Nations Convention on multimodal transportation focused the transport. According to the above requirements, its judgment of an international standard is: the place to take the goods and the goods are delivered to the designated location in different countries. But in the author's view, if the "international" standard is whether the transport routes are through different countries, the coverage seems to be broader. For example, the place to take the goods is Florida, the place of delivery is Alaska. This time, although the origin and destination of the same in the United States, transport routes must be across Canada, whether this is an international multimodal transport? According to the United Nations Convention on the multimodal transport, it is obviously not an international multimodal transport. But if the damage accident occurred in the waters of Canada and the multimodal transport contract also provides network liability system, then Canada Law will probably become the applicable law dealing with incidents of damage. It is to make the multimodal transport with an “international” color. But after all, taking over the goods and delivery at the location of the same country and transport routes across different countries are very rare, so the standard in general should be the same with the United Nations Convention on the multimodal transport.

most multimodal transport is international multimodal transport. So most literatures refer multimodal transport are treaded of international multimodal transport, and people talk about multimodal transport always on the international level. So general speaking, “Multimodal Transport” is the pronoun of “International Multimodal Transport”. In this dissertation, “Multimodal Transport” represents “International Multimodal Transport” if there is no special comment.

c) UNCTAD/ICC Rules for Multimodal Transport Documents (1991)

United Nations Convention on International Multimodal Transport of Goods still need some time become effective because of two reasons. Firstly, this convention is in possession of mandatory applicability. In the third item, it indicates this convention is mandatory when multimodal transport document be signed accord with this convention.[11] For some country, this mandatory applicability request is hard to accept at present. Secondly, it is hard to satisfy the condition to make the convention become effective; it will become effective after twelve months of more than thirty countries join in this convention, but there are only seven countries join in this convention up to now. So pertinent international organization worked out a temporary rule to insure multimodal transport can carry on well before the convention become effective. This temporary rule, *UNCTAD/ICC Rules for Multimodal Transport Documents*, worked out bases on *Uniform Rules for a Combined Transportation Document* (1975), references *United Nations Convention on International Multimodal Transport of Goods.*

UNCTAD/ICC Rules for Multimodal Transport Documents didn’t define multimodal transport. But according to “Multimodal Transport Contract” and “Multimodal Transport Operator (MTO)” which defined by it, the only one difference of definition of “Multimodal Transport” between *UNCTAD/ICC Rules for Multimodal Transport Documents* and *United Nations Convention on International Multimodal Transport of Goods* is the former didn’t restrict the internationalism. It only restrict multimodal transport must use at least two

[11] United Nations Convention on International Multimodal Transport of Goods(May 1980), Article 3, Item 1

modes of transport, and it use the phrase “Multimodal Transport” but not “International Multimodal Transport”, so this role can be used both on international multimodal transport and internal multimodal transport. Added to this, the definition of multimodal transport has no more difference between two conventions.

UNCTAD/ICC Rules for Multimodal Transport Documents (1991) is widely used in actual practice at present. Not only because the widely requirement of the multimodal transport conception, but the main reason is the suitable applicability. *United Nations Convention on International Multimodal Transport of Goods* is full of constraint, and *Uniform Rules for a Combined Transportation Document* (1975) requires issue multimodal transport document at first. Different with these two conventions, *UNCTAD/ICC Rules for Multimodal Transport Documents* applying all of the transport contract in spite of by print, by oral and etc; in spite of there are one mode of transport or more than one transport; and in spite of issue the document or not. There is another reason, *UNCTAD/ICC Rules for Multimodal Transport Documents* (1991) absorb main concept of *United Nations Convention on International Multimodal Transport of Goods*, but it is more clarify and simplicity and remove some incidentals item to make it more acceptable.

2. Rules and Understands of the Multimodal Transport in Different Countries

International convention has precedence of internal law, but there is no efficient international convention of the international multimodal transport, so some times internal law is a criterion of the international multimodal transport.

Many countries do not provide related low about the multimodal transport. So far, there is no role refers multimodal in Japanese Law. There is only one Japanese code of mercantile law refers successive transport (Article 579), multimodal transport is not included. In Japanese, multimodal transport is understood as using more than one mode of transport and undertake by only one carrier during the whole transport.[12] Multimodal transport in Japanese phrase is “Fukugou p

[12] Souichirou verified, “multimodal transport carrier's responsibility and bills of lading”, Editor Aliki Kiantou - Pampouki " the report of 15th international conference on comparative law in 1998 in Bristol ", p. 149

unsou", but this phrase is stem from the phrase "Combined Transport".[13]

Germany amends the transport law in 1998, one of the amendments is adding the multimodal transport, and this law became effective in 1 Jul. 1998. [14]Holland is the first country formulates the multimodal transport in to the law. [15]The definition of the multimodal transport in *New Civil Code of the Netherlands* is nearly the same as it in *United Nations Convention on International Multimodal Transport of Goods*. [16]

There are two sets of law include multimodal transport in China, maritime law and contract law, but only maritime law define multimodal transport. Article 102 of Chinese Maritime Code defines multimodal transport as follow: "A multi modal transport contract as referred to in this Code means a contract under which the multi modal transport operator undertakes to transport the goods, against the payment of freight for the entire transport, from the place where the goods were received in his charge to the destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage." Contract law prescribes the multimodal transport, but it does not mention the concept of it. It is a little absence to spread multimodal transport. Fortunately, some of the articles held for multimodal transport, it is not a serious effect. Article 123 in *Contract Law of the Peoples Republic of China*: "Where other laws provide otherwise in respect of a contract, such provisions shall prevail." The contract law prescribes the chapter 17 is acceptable for all transport contract in article 288: "A transportation contract is a contract whereby the carrier carries passengers or cargoes from the starting place of carriage to the agreed destination, and the passenger, consignor or consignee pays for the ticket-fare or freight." According to comparing with common law, these laws have the recedence, including the ocean shipping multimodal transport. Because there are no more roles in other transport rule, other multimodal transport also should follow the standard of contract law.

---

[13] Souichirou verified, "multimodal transport carrier's responsibility and bills of lading", Editor Aliki Kiantou - Pampouki " the report of 15th international conference on comparative law in 1998 in Bristol ", p. 149

[14] Rolf Herber, "The New German Transport Legislation", 33 European Transport Law 591 (1998).

[15] Ralph De Wit, "multimodal transport ", the first part of the first chapter, London labor and legal publishing, 1995 version, p.3.

[16] Netherlands New Civil Law (N.B.W. Nieuw Burgerlijk Wetboek) Art. 40, it states in 2002

2.1.3 The Essential Component of International Multimodal Transport

1. This kind of transport must use Combined Transport Bill of Lading. This bill of lading shows the relationship of right, obligation and liability exempt between multimodal transport operator and freighter, confirm the transport properties, and it is the main accord to identify multimodal transport and general transport.
2. Multimodal transport operator receiving the omnidistance freight from shipper in single rate.
3. International transport is essential.
4. At least two different modes of transport during whole transport. According to the maritime law, marine transport must be included in multimodal transport contract.

The advantages of international multimodal transport are: give freighter and owner more convenience, multimodal transport operator sign a transport contract with the owner, then organize through carriage, during whole transport, only need one consign, one charge, one sheet, unify settlement of claim and omnirange takes charge.[17]

1. Essential Requirements

According as *United Nations Convention on International Multimodal Transport of Goods* and general way, the requirements to compose of international multimodal transport are as follow:

a) A multimodal transport contract is essential. The contract confirms the contract relationship and transport properties of right, obligation and liability exempt between multimodal transport operator and freighter. It can be made by oral, paper or electronic form.
b) One multimodal transport operator take charge of whole freight transport. This operator is the party of the contract, and he also issues the multimodal transport documentation. This operator is not the agency of freighter or actual carrier. Not only freighter is the multimodal transport

[17] Zhangjun Li, op. cit., p.249

operator, but Non-Vessel Operating Common Carriers (NVOC) also can become the transport operator.

c) At least two modes of transport should be used in whole shipping.

d) Transport must pass through different countries.

2. Two Questions

There are two questions about essential requirements above discussed as follow: Firstly, is multimodal transport document essential to become international multimodal transport?

Most viewpoints deem multimodal transport document is an essential certificate to composing international multimodal transport.[18] But I think multimodal transport document is not essential although it widely used in multimodal transport. First of all, multimodal transport document is only a certificate of multimodal transport, but not the contact. International convention and commercial usage are admitting this. Without it, multimodal transport contract still valid. Secondly, according to article 3 item 1 of *United Nations Convention on International Multimodal Transport of Goods*, the convention force only need multimodal transport contract. Thirdly, *UNCTAD/ICC Rules for Multimodal Transport Documents (1991)* also has similar rule in article 1 item 1. In addition, this role allot without multimodal transport document, multimodal transport operator should complete delivery. Although these rules haven't become effective or do not have enough effect, they still influence the normalization and uniform of international multimodal transport. So, international multimodal transport can work without multimodal transport document.

Secondly, some scholar doubt multimodal transport contract need notify shipping is achieved by more than one modes of transport or not. They worried about actual carrier using different way of shipping to complete shipping because of some reason. So it is not suitable to appointment the mode of shipping. It remains a question that mode of shipping article is essential or general in multimodal transport contract.

In my opinion the idea of including mode of shipping into contract, it should be

[18] Bing Tai, Some Legal Problems on the International Multimodal Transport, From Study on Chinese Maritime Code, Law Press, No.3, 2001, p.141.

essential. Firstly, if multimodal transport does not be written in the contract, there will be the doubt of whether belong multimodal transport contract. Next, besides the transport contract between multimodal transport operator and freighter, there are a lot of other complex relationships. Without a clear contract, there will be some hidden danger, and it is hard to ensure who should take response when there is bother. In addition, the liability haven't been unified, there are some different roles to deal with it. There is no standard form of multimodal transport contract, and each organization has their own form, such as BIMCO using Combiconbill and Combidoc, FIATA using FBL. If the properties of transport are not included in contract, it is hard to clarify relationships. In last case, if carrier changes mode of shipping and result in loss to others, the carrier should take the liability for breach of contract no matter it is essential article or general article.

2.2. Development of Multimodal Transport

Chairman Mao ze-dong, the former leader of China, once said"if you want to know a thing from the head to the tail, you must study its history."[19]I believe this is also true in respect of the study of Multimodal Transport. In occident developed countries, international multimodal transport is regarded as a revolution. From *Warsaw Convention* in 1929 to *United Nations Convention on International Multimodal Transport of Goods* in 1982, international multimodal transport developed a lot.

USA and Canada represent North America. The ecommerce improvement of USA and Pacific Asia Region lead the forming of transportation corridor among American west coast, middle side and east inland. As early as 1980, federal government of the USA passed a series of act to encourage developing multimodal transport. In international transport, the Shipping Act in 1984 and the Ocean Shipping Reform Act in 1988 eliminate obstacle between Liner Company and other transport company, and enervate engross of Liner Company in international shipping business. Intermodal Surface Transportation Efficiency Act (ISTEA)

[19] Chairman Mao Ze-dong: Against the Rigid Belief in Books, this article was collected in the Selected Articles Written by Mao Ze-dong, Beijing: the People's Publishing House, 1965, p.20.

adopt in 1991 gave wing to the development of American multimodal transport.

In Canada, based on independent railway, land, water way and aviation foundation, consider with the starting point and end point, cost of shipping, benefit, reliability and efficiency, a multimodal transport network was set up.

In Europe, because of the geography, multimodal transport has it own advantage. The multimodal transport between some developed countries developing quickly. But because of the history, different countries hold different opinions, the transport system do not unified in range of Europe, and there are a lot of different technical standard, freight rate and etc. In developing countries, multimodal transport is restricted by a lot of reason, such as lack of capital construction, lack of electronic communication, and bottle neck of management. Such as in some clearance, quarantine field, the operational procedures and operating is complex and behindhand. With more clarify of international division of labor, international trades are always between developed countries and developing countries. But developing countries do not have enough consciousness to improve the whole conveying chain. So most multimodal transport are in developed countries; comparing with multimodal transport in North America, multimodal transport of whole Europe is behindhand.[20]

According to the above paragraph, developing multimodal transport needs government should open transport business, break monopoly, encourage building up competitive mechanism and eliminate separation between branches of trade. In the same time, there should has perfect transport organization and management system.

With the development of Chinese economy and open door to the outside world, the needed of internal multimodal transport and international multimodal transport are improving. In 1962, China has lain out the document of land-waterway multimodal transport. Later, the documents of land-railway multimodal transport and railway-waterway multimodal transport were worked out. In Mar. 1989, China process the trans-container system multimodal transport type approval test, and it push on the normalization and the modernization of container transport. Especially

[20] Jianjun Zou, Development of International Multimodal Transport, www.blog.airnews.cn

after 2000, China increases the cooperation on international multimodal transport with Canada, America and other developing countries. The cooperation and the communication create new chance of develop multimodal transport. The program cooperate with Canada is meaningful, government send a lot of staffs to Canada study, and it bring up a lot of talent to provide new thinking of developing multimodal transport.

In recent years, for adapting and fitting foreign trade transportation, China has use international multimodal transport with some counties and area. Up till now, the routes of international multimodal transport has included multimodal transport through ocean shipping to inland of Japan, inland of America, inland of Africa, inland of West Europe, inland of Australia and the Siberia land-bridge transport service traffic through Mongolia or Russia to Iran, West Europe and North Europe. In spite of this, comparing with other developing countries, multimodal transport in China is still far behind and developed slowly because of low economy state-of-the-art, disunion transport organization and management, strict policy, weak foundation and hang behind mind.

2.3. Legal Rules of International Multimodal Transport

Because the time of emergence of international multimodal transport is not long enough, an institution is not perfect. Even in some developed countries there is no perfect rule in the commercial law or maritime law. This is similar to maritime transport situation before 1924 Hague Rules[21], In America, there is no role related multimodal transport, the accountability of carrier is judged by judges in each state. [22]Same cases always got different justices. International community working out convention to determinate the obligation and liability of parties, ensure and encourage develop and prosper of multimodal transport.[23] In 1973, ICC established *Uniform Rules for a Combined Transport Document* and edited in 1975.

[21] S. Mankabady,"Legal Aspects of Carriage of Goods by Container", International and Comparative Law Quarterly, Vol. 23, 1974, p.321.
[22] Xianglan Zhang, Maritime Law, Wuhan University Publishing, 2001, p. 115.
[23] Erik Chrispeels, "The United Nations Convention on International Multimodal Transport of Goods: A background notes", European Transport Law, Vol. XV No. 4, 1980, pp. 358-359.

It is not international convention, so it can not force to implement, and it belong to international commerce tradition. In May 1980, United Nations established *United Nations Convention on Multimodal Transport of Goods*. But less countries response to it, it hasn't become effective yet. Then UNCTAD and ICC established *Rules for Multimodal Transport Documents* to obtain the agreement and participation in the world. This document is based on the *Uniform Rules for a Combined Transport Document (1973)*. To be the transition of *Uniform Rules for a Combined Transport Document (1973)*, *Multimodal Transport Documents (1991)* have been implemented since 1992. The core of convention established by UNCTAD and ICC still is focus take the aim of standardize responsibilities.

Chapter 3 Legal Status of Multimodal Transport Operator

3.1. Multimodal Transport Operator

3.1.1 Definition of Multimodal Transport Operator in Law

In 1975, UNCTAD defined multimodal transport operator as combined transport operator, who signs multimodal transport document (include legal person, company and legal entity). But in internal law, the people who sign document must have authorization or issued, so multimodal transport operator should belong to this kind of people. In strict meaning, combined transport operator includes transport in more than two different modes, and it also includes the shipping with same transport. This definition paid more attention on issue document, but didn't treat multimodal transport operator as the main part in contract in law. This definition is not powerful.

United Nations Convention on International Multimodal Transport of Goods (1980) and *UNCTAD/ICC Rules for Multimodal Transport Documents* (1991) use "multimodal transport operator (MTO)" to clarify the role.

United Nations Convention on International Multimodal Transport of Goods (1980) defined MTO as follows: " '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 multimodal transport operations， and who assumes liability for the performance of the contract." (Part 1, Article 2). In *UNCTAD/ICC Rules for Multimodal Transport Documents* (1991) part 1 article 2: "Multimodal transport operator (MTO) means any person who concludes a multimodal transport contract and assumes liability for the performance thereof as a carrier." Obviously, these two definitions are more

formal then the role in 1975 to indicate the legal status of MTO.[24]

Article 102 of Maritime Code of the Peoples Republic of China defines multimodal transport as follows: "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, from the place where the goods were received in his charge to the destination and to deliver them to the consignee by two or more different modes of transport, one of which being sea carriage." So the definitions of MTO between international convention and internal law are nearly the same.

3.1.2 Character of Multimodal Transport Operator in Law

A MTO is 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. He always only performs a part of transport. Even some MTOs do not join the transport but only organize transport. [25]On one hand, MTOs need to sign transport contract with freighter, to take charge of transport, and receive whole money; on the other hand, MTOs need to sign contract with carriers in different district, to organize whole transport, and to pay freight charges to carriers. But the only one who signs a multimodal transport contract with freighter or shipper is a MTO. A freighter does not have contractual relationship with carriers. The character of MTO is that he is the main body of multimodal transport.

The duty of MTO is to take charge and organize to implement multimodal transport contract. Article 317 of Contract Law says: "A multi-modal carriage operator is responsible for performing, or arranging for performance of, the multi-modal transportation contract, and it enjoys the rights and assumes the obligations of a carrier throughout the course of carriage." *Contract Law of the Peoples Republic of China* defines as follows: "A transportation contract is a contract whereby the carrier carries passengers or cargoes from the starting place of

[24] Furong Li, Legal Position of MTO, From Practice in Foreign Economic Relations and Trade, Practice in Foreign Economic Relations and Trade Magazine, No.8, 2004, p.18.
[25]Zhangjun Li, op. cit., p.248

carriage to the agreed destination, and the passenger, consignor or consignee pays for the ticket-fare or freight." [26]

Although definitions of multimodal transport are different in maritime law and contract law, maritime law only focus on marine transport, but the legal statuses of these two laws are the same. Multimodal transport operator has the duty to organize and complete the multimodal transport contract.

A MTO has obligations to perform multi-modal transportation contract. The Chinese "Maritime Law" and "Contract law" to the obligation of MTO have not made the minimum obligations as the multimodal transport operator. The obligation of MTO was at multi-modal transportation contracts. Generally, the MTO contractual obligations include two sides. First, multimodal transport operators have to choose reasonable care and supervise section carrier. Second, a MTO must take care of transport of goods during the transport. Period of MTO's responsibility to multimodal transport of goods is from the receipt of the goods to the delivery of the goods. In the meantime, the MTO's obligations embodied mainly: the multimodal transport operator has the obligations to understand the nature of the goods and pay attention to the goods; Based on the instructions of the shipper to fulfill contract obligations.

The loss, damage or delay happened during the Period of responsibility. A MTO should take responsibility. As mentioned above, the essential characteristic of multimodal transport operators is the subject of its multimodal transport contract and has the relationship with the shipper. Therefore, he should properly be responsible for the transportation and should also be responsible for no matter where the loss, damage or delay happened. Worth mentioning is that CMC does not provide the cargo liability of the multimodal transport operator for delay.

According to multimodal transport features in the event of loss, damage or delay, the stakeholders of the goods can only prosecute the multimodal transport operator for damages. In judicial practices, the stakeholders of the goods prosecute multimodal transport operators and the carrier, and then ask them jointly and severally liability.

---

[26] Ping Jiang, The note of Contract Law Of P.R.C. , Law Press, p.209.

According to the character of law, the legal status of multimodal transport operator is as follows: a multimodal transport operator signs multimodal transport contract with a freighter and a carrier in his own name, and he is the main body of international multimodal transport, and takes responsibility of it.

3.1.3 Classification of Multimodal Transport Operator

Generally speaking, multimodal transport can be classified into two kinds according to whether the multimodal transport includes the marine transport.

1. Vessel Operating Multimodal Transport Operators (VO-MTOs): they always undertake the transport on the ocean, and they sigh sub-contract with other carrier to assign other models of transport.
2. Non-Vessel Operating Multimodal Transport Operators (NVO-MTOs): NVO-MTOs can be any operators except marine transport operator, even some agents, brokers or load and unload companies without any transport.

No matter VO-MTOs or NVO-MTOs, the legal status is the same.

3.1.4 Status of International Multimodal Transport Operator

Multimodal transport as integrated transport is made up of by many parties and the legal relations are very complicated.[27]

A MTO is 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. He always only performs a part of transport. Even some MTOs do not join the transport but only organize transport. On one hand, MTOs need to sign transport contract with a freighter, to take charge of transport, and to receive whole money; on the other hand, MTOs need to sign contract with carriers in different district, to organize whole transport, and to payi freight charges to carriers. But the only one who signs multimodal transport contract with freighter or shipper is a MTO. A freighter does not have contractual relationship with carriers. The character of MTO is that he is the main body of multimodal transport.

[27] Zhangjun Li, op. cit., p.248.

International multimodal transport always uses some different modes of transport. A MTO always only performs a part of transport. Even some MTOs do not join the transport but only organize transport, and they sign transport contract with other carriers and share part of the transport with them. But the only one who signs multimodal transport contract with freighter or shipper is MTO. A freighter does not have contractual relationship with carriers. So the character of international multimodal transport is the relationship between a MTO and a district operator. In this contract relationship, a MTO is the main body of multimodal transport; it impersonates the property of MTO and the legal status of MTO in the international multimodal transport.[28]

Because international multimodal transport combines different modes of transport together, it relates to a lot of people. Therefore, the legal relationship is very complex. The relationships are including: MTO and owner, MTO and district operator, MTO and the carrier, MTO and agent, MTO and sub-carrier, consignee and MTO, consignee and agent, consignee and sub-carrier, and etc. It is obvious that a MTO should be the core of these complex relationships, and others should be around MTO. So, the importance of clarifying different legal relationships is to determine the legal status of MTO. There is no big doubt of MTO in the world, so the key is to determine who can bear the status of MTO.

3.1.5 Qualification of Multimodal Transport Operator

In international conventions, there is no clear role to point out the qualification of MTO. Only in Article 4 Item 3 of United Nations Convention on International Multimodal Transport of Goods says: “The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.”

Because a MTO is the organizer and underwriter of multimodal transport, it is essential to confirm the qualification of MTO in order to strengthen, to manage and to control international multimodal transport. It is the premise of carrying on the multimodal transport well. A MTO needs to adapt multimodal transport on law and

[28] Ibid., pp.247-248.

service. Some essential requirements are as follows:[29]

1. Professional knowledge, technique and experience on international transport
2. Integrated branch business and agent network formed by international transport
3. Enough financial resources

According to the overseas experiences and the internal practical situation, China published *trans-container multimodal transport management rule*. It defines the qualifications to be MTO as follows:

1. It shall be a corporation with legal person status in the People's Republic of China;

2. It shall have an organizational structure, a permanent place of business, necessary installations and equipment and adequate management personnel which are compatible with multimodal transport operations;

3. It shall have more than three years of experience in international transport of goods or agency business with appropriate domestic and overseas agency services.

4. It shall have a registered capital of not less than Renminbi ten million yuan (RMB 10 million) and sound credibility. When establishing new operating branches, the MTO`s registered capital shall be increased by Renmibi one million yuan for each new operating branch.

5. It shall comply with all other requirements as set out in the law and regulations of the People's Republic of China. [30]

3.2. Multimodal Transport Operator and the Forwarding Agent

When a forwarding agent appears in the international multimodal transport, the situation is a hot potato in actual practices. A MTO is based on a forwarding agent.[31] A forwarding agent can be the MTO in multimodal transport. But, when a forwarding agent takes on the role of MTO, the legal status, right, obligation, liability and prescribed period for litigation are all changed. So it is very important

[29] Yongfu Wu, International Container Transport and Multimodal Transport, People Traffic Publishing, 1998, p. 162.

[30] The management rules of International container multimodal transport.

[31] Yongfu Wu, op. cit., p. 155.

to clarify the situation and status of forwarding agent. But, it is hard to clarify a forwarding agent because a forwarding agent always takes part in other roles such as an owner, a consignor, and a carrier. The agent relationship includes incognito agent and second hand agent, etc. Those make it more difficult to solve the problem. In practice, clients can not get compensation because they can not find the right defendant.[32]

3.2.1. Definition and Legal Status of Forwarding Agent

There is no unified conception of forwarding agent in the world. [33]The world biggest forwarding agent organization, International Federation of Freight Forwarder Association, defines it as follows: a forwarding agent is the people who work for client to make benefit through transport for client. A forwarding agent is not a carrier. A forwarding agent can take part in activities about transport contract, such as consignment, storage, declaration, acceptance and gathering.[34] CSCAP explains that a forwarding agent gets transport for a client, but he is not a carrier.[35] Holland transport law defines a forwarding agent as the man who signs transport contract with a carrier for his own profit.[36]

According to the definition in provisions of the Peoples Republic of China on Administration of the International Goods Shipping Agency Industry, the understanding of forwarding agent is as follows: The international goods shipping agency industry cited in these Provisions refers to the industry in which those agencies are with the entrustment of a consignee or consignor and in the name of a client or their own names, engaged in international goods shipping and related business for the client and charge a service fee. [37]

Generally speaking, a forwarding agent always plays the role of agency. A

---

[32] Rolf Herber, op. cit, p.592.
[33] Zhigang Yang, International Freight Forwarders Business Guide, People Traffic Publishing, 1997, p.216
[34] http://www.shipping.com.cn/news/law/98/law_cw14.htm.
[35] Zhigang Yang, op. cit., p.5
[36] http://www.forwarderlaw.com/feature/fenex.htm
[37] Provisions of the Peoples Republic of China on Administration of the International Goods Shipping Agency Industry, Article 2

forwarding agent carries on business with requirement of clients and collects fees. The aftereffect of his act of law in scope of the delegated authority should be taken by principal. That means that a forwarding agent is only responsible for his own mistake.

With the revelation of container transport and the development of international multimodal transport, William Tetley points out that the business field of forwarding agent extends a lot and the legal status has big change.[38] A forwarding agent not only can be the agency to broker agent clearance of goods, insurance and storage, but he also can be the party of transport contract. That means that he can be the international multimodal transport operator to sign the transport contract and undertake all liability of whole transport, which be called "NVOCC"..

NVOCC is the carrier who does not hold ship and he uses ship of ship operator to service owner and undertake obligation to carry. [39]NVOCC and forwarding agent can be the same person. In Europe, a forwarding agent is himself when transacting for owner, but he becomes NVOCC when undertaking obligation to carry for carrier.[40] In international multimodal transport, if a forwarding agent plays the role of MTO to carry on all or part transport, he shall be defined as NVOCC or common carrier without transport, but in other position, he is still a forwarding agent.

3.2.2. Types of Forwarding Agent

Traditionally, most of the time a forwarding agent is the agency of owner or consignor. But, in real cases, the problem is that the identity of forwarding agent cannot be showed clearly under the contract. Sometimes there is no written agreement between forwarding agent and owner or consignor. Most of the time,

---

[38] See William Tetley, "Responsibility of Freight Forwarder", 22 European Transport Law 89 (1987).

[39] Initially, NVOCC only referred to the carrier without ships at sea, and later became generic term of no public transport carrier.

[40] Yongfu Wu, op. cit., 155; Lars Gorton, "Freight Forwarders and International Carriage in American Administrative Legislation", 7 European Transport Law 209-266 (1972).

owners or consignors thought that a forwarding agent is the carrier.[41]

With a forwarding agent business becoming more popular, the forwarding agent can be the agency of the carrier. In the business of international multimodal transport, a forwarding agent can be the agency of international multimodal transport operator. Because of the complex relationship, it is more difficult to choose the right defendant through identifying the status of forwarding agent by owner or consignor.

Generally speaking, in real cases, the status and situation of forwarding agent are as follows:

1. The forwarding agent in name of principal to do business. This is a normal agency relation. Because the status of both sides is clear, here I do not give unnecessary details.
2. The forwarding agent in name of himself to do business. In this situation, there are some different conditions:

a) The forwarding agent in name of himself declares to be the agency to sign the contract with the third party.

This situation is the incognito agency in Anglo-American law system. It appears a lot in the transport agency. This form in the freight forwarder's practices was often observed.[42] Embodied in international multimodal transport, the situation is twofold: First, the freight forwarders are as the owners of goods or shippers' agent. He in his own name signed international multimodal transport contract with a third party without opening the client, but on the contract it must be stated that he is an agent. At this time, the parties of the multimodal transport contract are the owner (or the shipper) and the third party signing multimodal transport contract with freight forwarders. The second situation is freight forwarders as a MTO agent. Similarly, he in his own name makes international multimodal transport contract with the shipper (Consignor) and does not open client's identity, but on the contract it also must be stated as an agent. In such circumstances, it is not very complicated

[41] Lei Zheng & Xiaohui Yan, On maritime cargo carrier's claims recognition, World Seaborne, 1999, p .28.

[42] Jianhua Zhang, On Freight Forwarders and the Legal Status and Responsibilities, World Seaborne, 1999，p. 34.

to determine which party is in international multimodal transport operator's position. The client is an international multimodal transport operator and a party of international multimodal transport contract. A freight forwarder is still in the traditional status of agent.[43]

b) A forwarding agent signs contract with the third party in his name for interest of the principle.

Such a situation is an agency in the disclosure of agent relations and indirect agency at the common law systems in Anglo-American law system. Such relations appear in the international multimodal transport. The application of this legal theory is as follows. Freight forwarders make the multimodal transport contract with shippers; the parties are freight forwarders and shippers, but not client and the shipper. In other words, a freight forwarder is the international multimodal transport operator, and is responsible for the multimodal transport contract. He should be responsible for the direct responsibility of legal consequences to making the contract with the shipper.

But on the client's rights and obligations, civil law and Anglo-American law system have a different view. Under civil law’s theory, a client should not directly claim the rights to the shipper only with the multimodal transport contract. When the international multimodal transport operator transfers the rights and obligations of transport contract to the client, the client can claim the rights to the shipper and bear the legal consequences of indirect agent. Under Anglo-American law system, the disclosure of clients without the transfer of MTO rights and obligations of transport contract can claim rights directly to the shipper. This is right to intervene of the client. While the shipper found an undisclosed client, he could also directly claim rights to the client. This is the third person's right to choose. The regulations to agency relationship that Article 402 and 403 of the Chinese Contract Law provides are similar to that of Anglo-American law system. In 1995, the regulations allow that the international cargo agents can use their own name to serve the client, but also affirm that the international freight forwarders can develop the international multimodal transport business based on a hidden agent or an indirect

[43] Bing Tai, op. cit., p.141.

agent.[44] But the rights to intervene and choose are not provided, so that the use of both rights should continue in accordance with the contract law.

In short, this type of agent relation is relatively complex, but theoretically it is to be divided the legal status of the parties. In the practice, probably the biggest problem is that if cargo agents for the client's interests dealt with their business and did not open their identity under these circumstances for a third party or the other parties, they are often difficult to distinguish who is the real international multimodal transport operator and often confused to identify freight forwarders.

c) A forwarding agent signs contract with owners, takes on the transport with his own transport or engages other people.

Under these circumstances, legal relationship is very clear. A freight forwarder is international multimodal transport operator. However, freight forwarders do not own mostly their own ship, so he was referred to as the previous text NVOCC and complete MTO obligations through a sub-contract.

d) Forwarding agent to be the intermediary.

Freight forwarders only provide transport-related information and the opportunity to promote international multimodal transport carrier and the shipper to sign the multimodal transport contract and get the certain payment from this. Under such circumstances, a freight forwarder is the legal status of an intermediary and need not sign the contract with any party. He has the right to request compensation, assume fiduciary duty and muse not provide false information or intentionally conceal the important facts with contracts.[45]

3.2.3. Differences of Multimodal Transport Operator and Forwarding Agent

1. The business fields of international MTO and Forwarding agent.

   The business fields of international MTO and Forwarding agent are as follows:

---

[44] The People's Republic of China Ministry of Foreign Trade and Economic Cooperation, "the People's Republic of China international cargo transport agents regulations"(Jun 1995), Article 2, Item 17.

[45] Bing Tai, op. cit., p.142.

International MTO	Forwarding Agent
1. Full container load service	1. Inspection of stowage, unload of goods
2. Supervising mixed stuffing and in cases	2. Container mixed stuffing and unpacking
3. Supervising meterage weight and size	3. Associating, allocating, transfer
4. Declaration. Generally speaking, it is owner's risk, but MTO also can transact it.	4. Package goods
5. Issue international multimodal transport document	5. Booking cargo space, storage
6. Booking cargo space	6. International multimodal transport
7. Arranging, managing and supervising whole journey	7. International express delivery
8. Insurance, claim for compensation	8. Declaration, checking, insurance
	9. Preparing documents, pay money, balance, sundry expense
	10. Broker agent solicitation, other related business and etc.
	11. Agent other international transport business

From the above table, making the difference of both parties by compared with the business scope of international multimodal transport operator and freight forwarder is not easy because the business scope of both parties overlaps. For example, the business scope of international multimodal transport operators in addition to the

whole journey transport could also include attendant services, such as warehousing, customs, etc.; Business scope of freight forwarders includes international multimodal transport and related services attendant, but also includes other services, such as international express. Therefore, the business scope of the cargo agents covers the business scope of international multimodal transport operator.[46]

2. The standard to identify MTO and Forwarding agent.

According to the definition of international multimodal transport operators on the provisions of the United Nations Convention, its elements include as follows:

a. The one that made international multimodal transport contract with the sender;
b. The one that is charged of the responsibility for performing the contract;
c. Identity of MTO is himself.
d. However, these standards are too abstract. In actual operations, how to determine freight forwarders is the one that is charged of the responsibility for performing the contract. Furthermore, although the United Nations Convention as the basis of these elements has a certain degree of influence, its effect seems to be the foreseeable future. Even some scholars believe that it may not be effective forever.[47] This makes these powerful elements subject to certain

---

[46] Zhigang Yang, op. cit., p.216; Yongfu Wu, op. cit., p.155.

The People's Republic of China Ministry of Foreign Trade and Economic Cooperation, "the People's Republic of China international cargo transport agents regulations"(Jun 1995), Article 17

The business scope of table, for the actual operation of international multimodal transport operators or cargo agents, may differ slightly. Especially for international multimodal transport operators with transport tools or possess and carriers that need sub-contract operators without transport tools, its scope of services are often different. Additionally the different management system in all countries or regions, has a certain extent to the business. Yet, overall, the main and general business scope of international multimodal transport operators and freight forwarders reflected in the above table. Another need be pointed out that is the business scope of the above-mentioned international multimodal transport operators mainly directed against the container cargo. Because multimodal transport mainly used containers, the mode of transport mainly can be developed and expanded because of the container, the multimodal transport container business of international multimodal transport operators is highly representative. However, the scope of these operations also apply to other forms of group transport and the transport of spare parts, only some details need to make some changes.

[47] Caslav Pejovic, “Document of Title in Carriage of Goods By Sea: Present Status and Possible Future Directions”, J.B.L. 478 (2001).

impact.

Accordingly, currently 1991 ICC Rules in the universal application of practice and some samples of standard contracts made more specific provisions to the elements of international multimodal transport operators:[48]

A. The one that made international multimodal transport contract with the sender;
B. The one signed multimodal transport document with own name;
C. The one with the identity of the carrier performs inter-modal transportation obligations.

Based on the above standards, standard "a" and standard "b" can make a judgment from the contract or document form. So, judging whether the cargo agent is the international multimodal transport operator finally sees whether he as himself performs the multimodal transport contract for a carrier. On this issue, a freight transport agent is the one as a carrier or an agent, or to say, he is himself or an agent in transportation's role. Law scholars began discussions long ago and can distinguish two by a lot of various standards. The case also raised its applicable criterion.

After researching the relative case, Prof. William Tetley thought that the basic which could distinguish the two were as follows:[49]

A. The cargo agents on the contract and transport document should assume the obligations of the characteristics

B. The relationship of parties of the contract in the past;

C. Whether to sign the bill of lading

D. The shipper is aware of which carriers completed the actual delivery of goods;

E: Payment methods: the payment that cargo agents asked is the amount of the

[48] 1991 ICC Rules Article 2,Item2: any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier. Many standard contract samples were against the combined transport. Compared with this, FBL in 1992 and FWB 1997 on the regulations of MTO were seemed more advanced and more representative: freight forwarder" means the MTO who issues the FBL (or FWB) and is named on the face of it and assumes liability for the performance of the multimodal transport as a carrier。See Standard Form Contracts for the Carriage of Goods 23-40, 127-130, LLP Professional Publishing, 2000.

[49] William Tetley, supra note 38, p.81.

freight and other costs. Then they request an additional amount of the fee or percentage as their gratuity or all-inclusive figure.

In the case of Zima Corp. v. m/v Roman Pazinski, the New York Court thought that the problem was the standard of judging the identity of cargo agent. The problems included:[50]

A. How to regulate the parties on the transport documents, in particular the cargo agents should assume obligations.
B. Is there any evidence to indicate the usual position of the party transactions in the past trade? In previous transactions, freight forwarders generally are as an agent or carrier.
C. Who issued the transport documents, particularly who with what identify signed the bill of lading.
D. Freight forwarder how to calculate their profits. If he received from the shipper not including payments to the freight of actual carrier, then his identity should be a freight forwarder, not carrier; If the shipper paid the freight forwarders including the cost of transportation arrangements and the freight, then this freight forwarder may be regarded as the carrier.

In 1993, Beijing Maritime Arbitration Commission heard a case of damage claims related that whether freight forwarder is the carrier or agent, the Arbitration Commission considered the following factors:
A. Which name? (With the own (freight forwarder) name or the name of the carrier) he enters into a contract with the shipper.
B. Whether to issue the bill of lading in the own name.
C. Whether to receive the freight in the own name or the carrier.[51]

The judgment standard of NSAB General Conditions on this problem underwent a continuous development and evolutionary process. NSAB 1974 rules first

[50] 493 F. Supp 268, 273 (S.D.N.Y., 1980); See also Malcolm Clarke, Container: Proof That Damage To Goods Occurred During Carriage, M Schmitthoff ·RM Goode (ed.), International Carriage of Goods: Some Legal Problems and Possible Solutions 10 (1988), Published by Center for Commercial Law Studies. The case mainly confirmed the identity of cargo agent that was the shipper's agent or the independent agent.
[51] Lei Zheng & Xiaohui Yan, op. cit., p. 28.

established the rules of fixed price criterion. According to the standard, if the cargo agents received a fixed price from customers but not note the content of this price, this freight forwarder should be considered to be the carrier. This standard in practice rarely can be used and therefore has been abandoned in NSAB 1985 rules thoroughly. In 1985, rules the price criterion: if freight forwarders issued their transport document and showed themselves as the carriers, or set up of international road transport of goods contracts[52], this time freight forwarders may be deemed to be the carriers. Now, the revised NSAB 2000 Rules Article 2 Item regulates a freight agent. Where a freight forwarder completed the transport using his own transport tools or he expressly assumed the obligations of transport cargo, the freight forwarder can be seen as the carrier.[53]

Above division standards of freight forwarders and carriers have the same reference to distinguish freight forwarders and international multimodal transport operator. In conjunction with the conventions, the provisions of the contract and reference to the aforementioned standards or guidelines, the demarcation of the international freight forwarders and multimodal transport operators can be based on the following factors :

A. Made international multimodal transport contract with the sender;

B. issued multimodal transport document in the name of himself;

C. Multimodal transport contract shows he will be responsible for the entire transport (including to arrange transport through the distribution of contracts or complete their the whole journey transport himself or join in part transport) as well as be responsible for cargo loss or damage and delay in the entire transport;

D. Freight forwarders' charges: If freight forwarders only require a fixed amount of including freight and all other costs, then he is likely to play an international multimodal transport operator; If the freight forwarders requested not only freight and other miscellaneous charges, but also his commission, at this time freight forwarders is an agent.

E. The past trading relationship about freight forwarders, cargo owners and other

[52] In Europe, International Road transport of goods occupied a very important position. So the rule existed.

[53] Jes Anker Mikkelsen, "The New NSAB 2000", 33 European Transport Law 655-657 (1998).

parties.

In actual cases, these standards do not necessarily have to meet all. And in each case, their respective position may not be the same. In short, in actual cases, the identity and status of the cargo agents should be established by actual cases and reference to these standards.

3. Freight forwarders to participate in international multimodal transport of goods in a single or dual role

The revised German transport Law on the cargo agents had the characteristics. It provides freight forwarders' obligations broader than the carriers. In addition to the identity of the carrier to perform tasks as well as the carriers' attendant business within the scope of the business, original freight forwarders' responsibilities still exist such as selecting the optimal transportation routes and means of transport, protecting customer's requests for compensation. But, these obligations and the obligations as carrier are mutually independent. He fulfills those obligations with the identity of the agent.[54]

Likewise, in the international multimodal transport, cargo agents can be seemed as agents and international multimodal transport operators, but during a specific business he can only enjoy a status. In other words, if a freight forwarder as an international multimodal transport operator or he as the MTO performed attendant business, he can only be a victim and bear a direct responsibility for loss of or damage to the goods and apply to the liability of international multimodal transport operators and enjoy limitations of liability. When he performed other transport-related attendant operations for his customers, he is the agent. Within the customer authorized business, the legal consequences of his acts were undertaken directly by the agent. He was only charge of his negligence and manslaughter.

However, in practice, it is better to be clearly defined freight forwarders as an international multimodal transport operators and the scope of business as freight forwarders on the contract. From the table, the business of the two is more coincident. Especially the attendant business besides the entire multimodal transport is very difficult to distinguish what is managed by freight forwarders or

[54] Rolf Herber, op. cit., p.592.

multimodal transport operators.

3.3. Multimodal Transport Operator and Operators of Transport Terminals

International multimodal transport can not leave the cooperation with operators of transport terminals, so it is important to confirm the legal status of operators of transport terminals. *United Nations Conventions on the Liability of Operators of Transport Terminals in International Trade* (1991) Chapter 1 Article a defines as follows: "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use.[55] However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage.

In China, on January 1, 2001, Port Cargo Operations Rules regulate: port operators is to set up contracts with the client; "Port Act" states: port operators is the one that made port operations contract with the client and engaged the port business.

1. The scope of services that a port operator can provide is only the extent of transport-related services. In China, it refers to the service of the ship docked, the ship transporting the goods etc., including in providing for the provision of port facilities to ships, towing, cargo handling, storage, cargo handling.
2. The scope of services that a port operator can provide has certain geographical restrictions, which occurred in the region. This is to determine as important criterion whether it is the port business. For example, to the warehousing business, if in the port region, that is the port business; if not, it is not the port business. The harbor area refers only to the local water port.
3. Port operators were engaged in the port business of operations, which is the port

[55] Furong Li, op. cit., p.18.

business for purposes of profit with the business contract and settlement costs.

From the above definitions, the Chinese port operators have the following characteristics:

The range of services that Port operators provide mainly includes transport-related stockpiling, warehousing, custodian, within lighter in port, handling (including Barge), stowage, ping module, packing, unpacking, spacer, assembling and strengthened, and the container stacking, replacement of the goods, mixed, produce signs, replacement of packaging , packaging goods of simple processing services and for to provide leasing services leasing terminals. Port operators can specifically be divided into handling, warehousing, forwarding companies and trailers cum companies.

From the rules of port cargo operations, that shows that the port operator is referring to set up the operations contract with clients and shall complete cargo operations obligations according to the contract.[56] In the port operations contract, the port operator is an independent contractor and should independently complete operations task under contractual commitment. Port operators are independent subject, own the certain property, have a specific business purpose, and have his own scope of operations or the company's charter. His operations are not controlled by the carrier, but the final results must meet the requirements of clients. The Chinese Maritime Code(CMC) will not combine port operators with the carrier. Port operators as the third person divorced from the contract, can freely provide port services and establish an independent port operations contract.

But, as the third party outside the contract, he is an agent of the carrier and need not power of attorney. For instance, the port operator completed delivery of the goods based on the carrier's mandate, which is the exercise of the right to the performance of agents. In other words, independent contractor of the port operator in the contract does not affect him as a client. About the bulk of the goods' operations are also concerned to the problem whose agent the port operator is. In CMC,Article46:The responsibilities of the carrier with regard to the goods carried i n containers covers the entire period during which the carrier is in charge of the go

[56] Ibid.

ods, starting from the time the carrier has taken over the goods at the port of loadin g, until the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerized goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged. During the period, the carrier is in charge of the goods, the carrier shall be liable for loss of or damage to the goo ds, except as otherwise provided for in this Section.[57] The provisions of the precedi ng paragraph shall not prevent the carrier from entering into any agreement concern ing carrier's responsibilities with regard to non-containerized goods prior to loading onto and after discharging from the ship.

The preceding section shall not affect the carrier reached any agreement on the non-containerized cargo before and after unloading. Clearly, the carrier's responsibility for the cargo can be divided into two different situations: first, before container cargo delivered to the consignee, which is all of the carrier's responsibility. Port operator is the carrier's agent. Second, the bulk of the goods, without the particular contract agreement, in addition to unloading the business operations, the contract should be signed by the consignee, the consignee of the client rather than the carrier, the port operator at this time is agent of the consignee.

[57] Ibid.

Chapter 4 Legal Basis of Multimodal Transport Operator's Liability

4.1. Liability Principle of Multimodal Transport Operator

The carriers' liability in multimodal transport and related unique and complex problems are caused by integration of different stages of transport[58]。

4.1.1. International Regulation on Multimodal Transport Operator's Liability

The regulations are different between each single transport treaty on the compensation liability foundation. But it can be divided into rigid liability rule and negligence liability rule in general.

Negligence liability rule includes incomplete negligence liability rule, putative negligence liability rule and full negligence liability rule. Rigid liability rule means that a transport operator is responded to the damage, loss and delivery delay on the goods except for acts of Gods.

It is also instituted with unblamable liability rule. The Germany Transport Innovation Law has a good demonstration on the unity of transport operator liability principle in each transport laws.

The law unites various transport mode rules except for ocean shipping. Referred to International Road Transport Contract Treaty (CMR)[59], it unites the transport operator liability principle to rigid liability rule and it's the trend of international Law.

1. It is very similar between international road, railway and airlift on operator liability principle except for ocean shipping. Each treaty regulates as follows: an operator is responded for the damage in the period of transportation of the goods.

---

[58] Yeong-Seok Cheong, International Maritime Transport Law, Reformulated Version, Pan-Korean books Co., 2004, p.247.

[59] Cive Schmitthoff, Schmitthoff's Export Trade, 7th ed., Stevens & Sons, London, 1980, p.378.

Railway and road transportation liability principle is more close to the rigid liability rule. Furthermore, the damage and loss on goods in multimodal transport operator always occur in the period of continental section. So, it is more suitable to choose continental transport standard.

2.From the development of MTO treaty. United Nations transport unity regulation in 1973 and MTC of 1980 all chose negligence putative liability rule except UNCTAD／ICC regulation. In 1992, UNCTAD／ICC multimodal transport document rules adopts uncompleted fault accountability. [60] In general, MTC of 1980 and UNCTAD／ICC regulation all protect the benefit of shipper. Though UNCTAD／ICC regulation chose "navigation negligence and fire negligence", these two exoneration items were considered the backslide to MTC of 1980. On the surface, it looks like rigid liability rule that conflicts with negligence exoneration. But it is not true.

First, it is decided by the current situation on development of each single transport mode law. It is the trend to choose rigid liability as liability principle. It can be embodied in the Hamburg rules， so united liability regulation based on the rigid liability principal is the final end-result of multimodal transport operator liability principle.

Second, in current transport treaty, there is only little difference on exoneration issue between rigid liability principal and negligence putative liability rule. So, it almost has no conflict in the fact.

At last, because a lot of attributions exist, the negligence in the period of ocean shipping is rare. So, it has little influence on MTO liability rule. Therefore， it can be reserved as the edition on the rigid liability rule. This is easier to be accepted because this respected the existing carriers' liability system in a large extent.[61]

In a word，the liability rule on international MTO should adopt rigid liability rule as the basement to give the right on navigation negligence and fire negligence.

For loss of or damage to the goods, international goods transport treaty has regulation to deal with it. But, for delay in delivery, historically, because of the inherent risks and unpredictability of the sea trade, the delay claims are not

[60]Yu Guo & Dongnian Yi, Maritime Cargoes Transport Law, People's Court Press,2000, p.330.
[61]Ibid., p. 331.

recognized.[62] Even from "Hague Rules" or "Visby Rules," Carriage of Goods by Sea Act provisions of seaborne developed countries or shipping of bill of lading, they are not clear economic loss of liability provisions because of delay in delivery.[63] The Hamburg Rules are the first one to bring forward that delay in delivery is also a mode of damage to the goods. The participating countries of "Hamburg Rules" are not developed countries, but the Convention reflects the basic balance between the interests of both sides.[64] Other international treaties like railway transport treaty, road transport treaty, Warsaw airlift treaty etc. have specific regulation on delay in delivery. U.N MTO treaty and international C.C regulation at 1991 also have clear regulation on delay in delivery. The definition of delay in delivery under the Chinese Maritime Code is different from that of Hamburg Rules. In Article 50 of the Chinese Maritime Code, the first term regulates: Delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon. In comparison with that of Hamburg Rules, it is lack of the rule if the time of delivery is not clear.[65]

4.1.1 Chinese Law on Liability Principle of Multimodal Transport Operator

China is one of the few countries that have special regulation on multimodal transport. There are Maritime Law and Contract Law， but liability principle is different in the two Laws. So, there is problems on how to corresponding with each other.[66]

1． Correlative Regulation under Maritime Law

---

[62]William. TAD, Claims of Goods by Sea, Translator Yongjian Zhang etc. Dalian Maritime University Press,1993, p. 33.

[63] Huanning Wu, Maritime Law, Law Press, 1996, p. 96.

[64] Yuzhuo Si, The details of Maritime Law, Dalian Maritime University Press,1995, p. 182.

[65] Minxian Chen, Theory and Judicial Practice of Maritime Law, Beijing University Press, 2006, p. 167.

[66] Zhu Li, Study on the MTO"s Liability System, From Zhujiang Water Carriage, Magazine of Zhujiang Water Carriage, No.11, 2004, pp.36-40.

Maritime Law that becomes effective in 1992 has special regulation on multimodal transport contract. 105th and 106th items regulate the operator's liability principle. 105th item is the regulation on network liability system.106th item is the so-called "bear-all "regulation. It revises 105th item: if it can not confirm the damage and loss section on goods, the multimodal transport operator should compensate on it.

2. Correlative regulation under Contract Law

Contract law that becomes effective in 1999 has special regulation on multimodal transport contract as well. A 321st item base on network liability system regulates: when damage and loss section on goods can not confirm, operator compensate on it according to this chapter. So, it is obvious that Contract law is rigid liability principle. It is the same as Hamburg rules on liability mode. According to the 61st, 311s and 312nd items: Operator takes on both the rigid liability and can not enjoy the liability limitation. That says: when beyond attribution loss occurs, operator should demonstrate the goods damage section to apply to the single transport treaty that has liability limitation regulation. So operator can avoid going against the regulation in Contract law.

3. Problems arise from different regulation

From above, Maritime Law and Contract Law have complete different regulation on operator's liability principle, but they do not conflict each other in fact. Maritime Law requires that there must be ocean shipping mode in the multimodal transport progress. Contract Law only requires that multimodal transport is combined with two transport modes or above. Therefore, it can be considered that multimodal transport contract in Maritime Law is one of the models in Contract Law. Maritime Law is special law and Contract Law is common law. According to the principle that special law has precedence over common law, when multimodal transport includes ocean shipping mode, Maritime Law should be adopted firstly.

Maritime Law like Hague Rules and Hague—Visby Rules，also excessively protects the transport operator and establishes a lot of liability exoneration items. The limitation of compensation liability is low. With the development of ocean shipping skill and shipper degree, we will lose share in shipping market if we

insist on the incomplete negligence liability rule in the Maritime Law. .

Contract Law regulates the rigid liability principle on the operator. It shows the development trend that protects consumers in law.

But, the multimodal transport is different from the maritime transport which is a single form of transport. Even if the multimodal transportation included maritime transport, it cannot be applied to attribution principles and limitation of liability in the entire transport.

Strict liability in Contract Law tends to the cargo. It is precisely keeping with the development of the attribution principle of MTO and reflecting the private law to protect the consumer in development direction.[67] But, the regulations of Contract Law have ignored the provisions of Chinese specific national conditions and the world-shipping pattern. Now the world's marine transport is still controlled by few maritime countries. They want to protect the interest of the carriers, but neglect the interests of cargo owners. China also is not a maritime great power country, but because China has the conditions to become a maritime great power country, in the opening up 20 years China has headed in that direction. Contract Law cancelled a radical maximum limitation of liability, which made investors not pay for "unlimited" risk. This will certainly affect our multimodal development.

4.2 Limitation of Compensation Liability of International Multimodal Transport Operator

4.2.1 International Regulation on Limitation of Compensation Liability of Multimodal Transport Operator

International treaty and rules on multimodal transport have no uniform regulation on the liability limitation of operator because the gap is so large on each single transport mode in operator liability limitation. Such as calculating with the goods gross weight, ocean shipping is 2 SDR, road transport is 8.33 SDR, railway

[67] Depei Han, Private International Law, Wuhan University Publishing, 1997， p. 34.

and airlift are 17SDR.

Multimodal transport is developed from ocean shipping. Freight deputy and non-ship carrier are the most multimodal transport operator.[68] In their multimodal transport course, on one side, they are more accustomed to the sea transportation liability system, especially liability limitation of it. On the other side, multimodal transport operator can not get enough compensation from the ocean shipping section carriers. They do not want to take on the margin risk. MTC of 1980 can not become effective. One of the reasons is that it regulates the higher liability limitation to multimodal transport operator than ocean shipping carrier. However, it is unfair to shipper if a multimodal transport operator is regulated to take multimodal transport liability according to ocean shipping liability limitation because most of loss does not occur in ocean shipping course.

For this problem, the Germany Transport Innovation Law provides a sort of resolved project, so-called “corridor scheme”. It unites the compensation liability limitation to the same 8.33SDR per kg as international road transport for the carrier, but at the same time the law gave the two sides to make special agreement in 2 SDR to 40 SDR for the liability limits.[69]

This form that both sides freely stipulated the liability limits, on one hand, can meet the cargo’s side to forecast the transport’s risk. On the other hand, because multimodal transport operators joined in the stipulation of liability limits, it can bring into correspondence with the section carrier’s liability limits in a large extent. This contributes to multimodal transport operators to get recovery from the carrier, so it has become many people's support.[70]

However，the condition to implement “corridor scheme” is not mature at present. At first, from the viewpoint of transportation law, implementing this project relates both the inner benefit of transport system and an insurant, and also depends on

---

[68] Young T .Convention on multimodal transport: a goal that can't be achieved[EB/OL]. http://www.forwarderlaw.com.

[69] Trappe J., Multimodal Transport on the Current Law’s Review[J] Annual Report on Chinese Maritime Law, 2000, p.184

[70] Young T. CIFFA Submission to the Canadian Maritime Law Association on the C MI issues of transport law outline instrument[EB/OL].http://www.ciffa-com current issues of transport law.htm.

protocol with the external. So, the project can not give attention to both goods insurant and ship-owner.

At the current status that can not unite the limitation of liability of multimodal transport operator, “corridor scheme” also does not work. It seems that MTC of 1980 and UNCTAD/ICC Rules of 1992 can work well on it. When, including ocean shipping, the Hague—Visby Rules are adopted, the liability limitation is 666.67 SDR per piece or 8.33 SDR pre kg. Otherwise, road transport 8.33SDR per kg is adopted. So when including ocean shipping, if the loss occurs non-ocean shipping section, a multimodal transport operator still take on the liability according to lower ocean shipping liability limitation. Because the losses mostly occur in the course of road transportation, so it seems unfair to shipper. But, actually the Hague—Visby Rules adopt “Dual Orbital System” and regulate 666.67 SDR pre piece or gross weight 2 SDR pre kg. When the goods is light weight and high price, 666.67 SDR per piece will be adopted as liability limitation. From the viewpoint of it, it is actually advantaged to the shipper.

Korea Commercial Act also regulates the limitation of the damage to the goods. But, Article 136 and Article 137 of Korea Commercial Act do not apply to maritime transport.

Article 136 (Liability for Valuables)

With respect to money, valuable instruments and other valuables, a carrier shall be liable for damages only if the consignor has expressly stated their description and value when entrusting him with the carriage.

Article 137 (Amount of Damages)

(1) If the goods have been lost totally or have been delayed in arrival, the amount of damages shall be determined by the price prevailing at the destination on the day on which they should have been delivered.

(2) In case of a partial loss of or injury to the goods, the amount of damages shall be determined by the price prevailing at the destination on the day on which they have been delivered.

(3) Where the loss of, injury to and delay in arrival of the goods have arisen from the willfulness of or gross negligence of the carrier, he shall be liable for all

damages.

(4) Any freight and other expenses, the payment of which has been obviated by any loss of or injury to the goods, shall be deducted from the amount of the damages mentioned in the preceding three paragraphs.

4.2.2 Correlative Regulation on Compensation Limitation of Liability of Multimodal Transport Operator in the Chinese Law

1. Correlative Regulation under Maritime Code

Maritime Code stipulates that the liability limitation is 666.67 SDR per piece or gross weight 2 SDR pre kg in ocean shipping. It is lower than other transportation mode, such as international, domestic multimodal transport and other single transportation mode.[71] 106th item of Maritime Code stipulates that unlocalized damage to the goods is compensated according to operator liability limitation. So, though the operator has the evidence to prove the damage section, he would not provide, otherwise, he will pay much higher compensation than in unlocalized damage place.[72] In opposition to it, if the shipper wants to get much more compensation from other single mode treaty and domestic transportation law with higher liability limitation, he must have the evidence to prove the specific place of damage to the goods. Otherwise, the shipper can only get lower compensation according to Maritime Code.

2. Correlative Regulation under Contract Law

a. Compensation liability limitation on unlocalized damage for multimodal transport operator

When the goods damage section can not be confirmed, operator will take the liability according to Contract Law. Item 312 of Contract Law stipulates as

---

[71] Uniform Rules Concerning the Contract of International Carriage of Goods by Rail Article 30 - Compensation for loss § 2 Compensation shall not exceed 17 units of account per kilogram of gross mass short. Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956) Article 23.3.Compensation shall not, however, exceed 8.33 units of account per kilogram of gross weight short.

[72] Zhangjun Li, op. cit., p.280.

follows: the compensation on loss of or damage to the goods performs according to contract in advance. In case of no contract, it accords to Item 61 of Contract Law. In that case, compensation should be equal to the sum due to damage, including the benefit after executing contract, so there is no limitation to unlocalized damage of liability compensation sum for multimodal transport operator.[73]

b. Compensation liability limitation on localized damage for multimodal transport operator

(1) Damage compensation liability limitation on transport section that dominated by domestic transport law

When damage to the goods occurs in transport section that dominated by domestic transport law, compensation liability limitation is made according to railway, road, air or waterway goods transportation contract. In term of it, all single mode transportation operators take on the actual damage on the goods. So there is no limitation to localized damage for operator.

(2) Damage compensation liability limitation on transport section that dominated by single mode transport treaty.

When damage to the goods occurs in transport section that dominated by single mode transport treaty, according to the present and effective single mode transport treaty, compensation liability limitation on damage is from gross weight 8.33SDR to 17SDR pre kg. So, when damage occurs, the operator would like to prove that the damage happens in a specific transport section dominated by single mode transport treaty. Otherwise, he will take on the heaviest compensation according to Contract Law.

4.3 Period of Liability of Multimodal Transport Operator in the Chinese Law

Period of Liability is considered the time domain that doer carries out obligation and takes the liability.[74]

[73] Ibid.

[74] Bing Tai, op. cit., p.143.

a) Period of Liability of operator in single transport treaty

For period of liability of ocean shipping operator，the Hague Rules regulates that it is from loading goods on board to unloading goods because there is different understanding on loading goods on board and unloading goods. It is not clear on period of liability in the Hague rules. So, lots of shipping companies use "Tackle to Tackle" principle, i.e. from goods lifting off ground to goods lifting off deck.

The Hamburg Rules extend the period of operator's liability. Its start is from the operator's getting goods. Its end is to the operator's delivering goods. So, it increases the liability of operator, and other international shipping treaties, such as international road shipping treaty, international railway shipping treaty and international airlift shipping treaty, have the similar regulation with Hamburg rules.

b) Period of Liability of operator in UN multimodal transport treaty

UN multimodal transport treaty imitates the Hamburg Rules. Its regulation on period of liability to multimodal transport operator is from getting goods to delivering goods for operator.

According to the regulation on multimodal transport treaty, there is two forms in taking over goods:

（1）from shipper or deputy, it's the most common mode.

（2）according to the laws and rules, goods must get from authorized transport governor or third party.

According to the regulation on multimodal transport treaty, there is three forms in delivering goods:

（1） delivering to the shipper；

（2） if shipper does not pick up the goods, it must be under the domination of shipper.

（3）according to the laws and rules, goods must give to authorized transport governor or third party.

3. Period of Liability of operator in China laws

Item 103 of Maritime Law regulates period of liability on multimodal transport operator as well: from getting goods to delivering goods, though multimodal

transport operator can sign individual contracts with the each single transport section carrier, it does not impact his liability in whole transport course.[75]

On November 21, 2002, Botening Ltd, as the carrier signed the bills of lading for Sichuan Electric Power Import and Export Corporation, the consignee is the Eastern Republic of Georgia Power Company Limited (hereinafter referred to the east), the notifier is BERTLINGCASPIANLTD (Hereinafter referred to as "B"); The port of uploading goods is Shanghai, China; The port of discharge goods is Poti, Georgia; The delivery of goods is Fan Kinsjoch, Georgia; freight prepaid. On November 18 the goods were loaded by the shipper, and cum count. On January 8 and January 16, 2003, the eastern and B company signed two incidents memorandum that No. G255, G220, G221 Khadori power generator stator fell to the ground from the platform of trucks dropped from the port, Poti to the Khadori power station, causing damage to equipment, the cause of the accident is caused by a fracture Bandage.

The Shanghai Maritime Court judged this case. The bill of lading was the land and sea multimodal transport bill of lading. The defendant, as the carrier of bill of lading of multimodal transport, accepted the commission from cargo shipments, issued a bill of lading, and had an obligation to protect the safety of goods. Therefore, he should be responsible for the cargo during the entire transport and deliver the goods in the port of delivery locations with the original bill of lading. The accident memorandum proved that damage to the goods happened in the transport to delivery location. The defendant thought that when the goods were damaged, it was beyond its scope of responsibility and inadmissible.

The bill of lading printed the words "multimodal-negotiable”. The defendant in the trial also confirmed the words, which shows that the defendant was multimodal cargo operator. So the key is that whether the damage happened in the period of liability of MTO. Whatever based on CMC or United Nations Convention on the multimodal transport of goods, or ICC the intermodal document uniform rules, the period of liability of MTO are all from receiving the goods to delivery and during the period of liability the goods were controlled by MTO. "Controlled" is legal

[75] Zhangjun Li, op. cit., p.274.

possession of the significance. Here, there are stages of " accept the cargo" and "deliver the goods". "Accepted the goods” as long as the cargo is in charge of the carrier, whether the goods are on board at this time. "Deliver the goods" as long as the goods have been divorced from the actual charge of the carrier, whether the goods are on board.[76]

[76] See www.ctie.webtextiles.com

Chapter 5 Liability System of Multimodal Transport Operator

5.1. The Building Mode of Liability of Multimodal Transport Operator

Multimodal transport is different from the traditional unimodal transport, which has greatly changed the risk and liability distribution mechanism on the basis of a international unimodal transport rules. But, building a predictable and equitable international multimodal cargo liability is more complex and arduous than unimodal transport occasions.

First, building the liability of international multimodal transport of goods that faces existing unimodal transport conventions and domestic law is difficult to reconcile the relationship. The international multimodal transport of goods is based on the multimodal transport contract by two or more different unimodal transports. Then, a MTO takes over the cargo from one country to another country and finishes delivery of the cargo. In essence, the multimodal transport as a new form of independent transport is based on multimodal transport contract and tied to the unimodal transport.[77] A multimodal transport operator has the liability for the goods from taking over goods to delivery of goods during the entire transport. Formally multimodal transport achieves the cross-border movement of goods by two or more different combinations of unimodal transport such as sea or air transport. The unimodal transport conventions have mandatory effect of all types of international cargo unimodal transport. The unimodal transport conventions with its mandatory are eligible to require the unimodal transport among multimodal transport. Thus, cargo damage of multimodal transport, if only controlled by the corresponding transport conventions, as liability limitation of the unimodal Transport conventions has differences. And then, it will happen to the mess phenomenon that the liability of international multimodal transport of goods is

[77] Zhangjun Li, op. cit., p.277.

made up of each other unimodal transport limitation of liability. But, If not this, it is going to have conflicts between such a limitation liability and unimodal transport limitation of liability.

Second, the international multimodal cargo transport cargo damage has fixed two forms that are 1ocalized and unlocalized. Once the multimodal transport of goods occurred to be harmed, such damage can either be sure to occur in a particular type sector of unimodal transport or impossible to determine the time it occurred. Localized and unlocalized damage made building liability of multimodal transport more complicated. Although localized damage is applicable to use the unimodal transport rules that the damage happened in some locations. But, for unlocalized damage, the unimodal transport conventions cannot be applied to and it will have to find another solution.

Thirdly, in the international multimodal transport, the legal relations of transport tend network structure because the multimodal transport is an independent form of transport based on multimodal transport contract. Multimodal transport operators and shippers have legal relationship based on multimodal transport contract. In turn, multimodal transport is combined of by a series of unimodal transport. When a multimodal transport operator performs multimodal debt, he has the legal relationship with the different transport carriers based on unimodal transport contract. The legal relationship constitutes the multimodal network taking the multimodal transport operator and carriers as core.[78] When the goods were harmed, external relations of compensation is constituted by the liability that MTOs pay to the stakeholder of the goods. A multimodal transport operator has the right to require the carrier to recover damages, which is the internal relation of claims. And internal relation of claims in applicable law is controlled by the unimodal transport conventions or domestic legislation. If balancing internal relation of claims and external relation of compensation, the external relation of compensation should also be adjusted by the unimodal transport conventions or domestic legislation. However, this will only be possible when goods occurred to localized damage.

[78] He Wanzhong & Zhao Ping, Compensation of MTO's Cargo Damage, From Hebie Law, Mazagine of Hebei Law, No.3, 2004, p.48.

5.2. Existing Liability System of Multimodal Transport Operator

In international and national rules on multimodal transport, the liability system of the multimodal transport operator essentially uses two basic types: network liability system and uniform liability system. Meanwhile, in view of two systems, rules or laws often are revised. That resulted in amended network liability system and amended uniform liability system.

1. Network Liability System

The basic concept of network liability system balanced with the liability system of unimodal transport in the maximum extent.[79] Network liability system refers to the whole transport controlled by the multimodal transport operator and its responsibilities are sure of the location law where the cargo occurred to be harmed. Under network liability system, the liability system of each unimodal transport conventions applies to the corresponding multimodal transport and coexists with other conventions. If there is not a mandatory international convention in a transport sector, domestic law is applicable.

In a network liability system, different rules apply depending on the unimodal stage of transport during which loss, damage or delay (hereafter "loss") occurs. There is an "alternative" or fall-back" set of rules for cases where loss cannot be localized.

To a large extent, the present international legal framework governing multimodal transport contracts can be characterized as a network system by default: due to the absence of an applicable international instrument on multimodal transport, liability varies according to the stage of transport to which a particular loss can be attributed and any relevant international or national mandatory unimodal liability rules; for cases where a loss cannot be localized, standard form contracts typically provide "fall-back" rules on terms which tend to be favorable to the carrier. However, according to statistics, the location of accidents of 80% of loss of or damage to the goods in multimodal transport can be confirmed.[80]

[79] William J. Driscoll, “The Convention on International Multimodal Transport: A Status Report.”, J. Mar. L. & Comm. Vol. 9 No. 4, 1978, p. 447.

[80] M. G. Graham, “The economic and commercial implications of Multimodal Convention”, Papers

Increasingly, subregional, regional or national mandatory laws relating to multimodal transportation may also be relevant; typically, these regimes provide for a modified system, based on the 1980 MT Convention and/or the UNCTAD/ICC Rules.

In a network system, a carrier's liability is primarily governed by rules applicable to the mode during which loss occurs. Concerns in relation to recourse actions, as set out above, do not arise for the contracting carrier (MTO). However, the disadvantage of this approach, particularly for transport users, is that applicable liability rules, as well as incidence and extent of a carrier's liability are not predictable, but vary from case to case, thus placing an extra burden on cargo-claimants in the form of increased insurance premiums and 18 ultimately higher costs of claims recovery/administration. Any debate considering the adoption of a network system of liability would need to particularly focus on universally acceptable "fall-back" provisions on liability and limitation of liability for cases where loss cannot be localized.

Network liability system's the biggest advantage maximally avoids the conflict between the law of the multimodal transport and unimodal transport, but there are many intractable problems. In network liability system, multimodal transport operators and cargo owners are unpredictable what liability system the claims can be applicable to, so as to take uncertainty risk assessments to cargo owners. The complexity also led to increasing insurance costs.[81] Meanwhile, the system could not be applied to the circumstances which are unable to determine the losses ("not attributable loss"), the gradual loss and delay in the transport of goods. In addition, if the transport sector is neither a mandatory application of international conventions nor domestic law, the liability of the system will have a legal vacuum. Only in 1961 UNIDROIT in draft convention on multimodal transport of goods has adopted network liability system. Thereafter, the system shall be dismissed.

2. Modified network liability system

---

of Seminar on UN Multimodal Transport Convention held by Southhampton University's Faculty of Law on Sep. 12th 1980, p.F6.TD/MT/CONF./16/Add. 1, p. 6.

[81] Engene A. Massey,"Prospects for a New Intermodal Legal Regime: A Critical Look at the TCM", J. Mar. L. & Comm., Vol. 3, No. 4, 1972, p.755.

The basic idea of the pure network system is preserved in the so-called 'modified network liability system'.[82] The MTO is still liable for loss of or damage to the goods according to the international convention that governs the part of the journey where the damage occurred. However, the modified network system allows for modification by statute or by parties´ agreement with regard to parts of the transport where no mandatory laws apply. Theoretically, therefore, problems like the aforementioned liability gaps or problems of localizing the damage can be solved. Liability gaps which occur because there are sections of the journey where no liability regime is in force can be closed by applying a liability regime, either contractually or by statute. Problems of localizing the damage can be solved by establishing rules giving the carrier presumed liability in cases where localizing the damage is not possible, for example, applying an international convention that is applicable during other parts of the journey. Obviously though, these modifications can be effectively set up only by a statute of a mandatory nature. This is because modification done by contractual agreement will almost certainly always favor the carrier, because in most of the cases it is he as the stronger party who determines the contractual terms.

In theory, the modified network liability system is able to solve some problems, which occur in this liability system in its pure form. However, these problems can only be satisfactorily solved with the help of statutes, because solving the problems contractually will always favor the stronger party. Also, the modified network liability system does not answer the questions mentioned above concerning perishable goods and delay in delivery. Furthermore, it also creates new problems. These arise with regard to the question about which of the rules governing certain parts of a journey may be modified by the parties. For example, the question arises whether mandatory international conventions applying to certain legs of the transport should be considered mandatory only, if they are mandatory in their entirety or whether they should be considered mandatory if only parts of them are mandatory. This question, which in the end can only be answered by the courts, leads to uncertainty with regard to which liability regime will be applicable, one of

[82] Zhu Li, op. cit., pp.36-40.

an applicable convention or the one agreed upon in the contractual agreement.

In this liability system when the unknown loss or legal vacuum happened, the provisions to amend network liability system in the form of legal or contractual requirements is called overall clause.[83]

Despite these problems, the modified network liability system is used by some of the standard transport documents in use. In 1973 ICC adopted the Modified network liability system.

3. Uniform liability system

In 1980 MTC adopted uniform liability system.

According to the so-called uniform liability system the liability of the MTO is - as the term itself indicates - the same from the beginning to the end of the transport, regardless of the mode of transport actually used. This theoretical liability concept is based on the idea that a multimodal transport contract is a contract *sui generis* ie. This is a contract which has nothing in common with unimodal contracts. The liability regime governing multimodal transport under this approach is – theoretically at least – a blank page. Therefore, it could be a regime with or without strict liability, one with presumed fault or without, a system containing or not containing certain limits of liability and so on.

The greatest advantage of the uniform liability system is its predictability, especially with regard to the shipper. He knows right from the start which liability regime the operator has agreed upon. As the same set of rules apply to all phases of transport from the beginning to the end, no unknown factors will come into play. In contrast to the liability gaps described above with regard to the network liability system, under the uniform liability system, the liability of the carrier will always be the same. This not only results in clear and predictable claim proceedings, but also allows the parties to choose the appropriate insurance coverage for their risks. Furthermore, because the same liability rules apply throughout the journey, for the shipper it is no longer important to find out at which stage of the transport the damage occurred, which simplifies his claims enormously. It is also possible to

[83] Yang Zhao & Zhengliang Hu, “Research on MTO’s liability system”, Journals of Dalian Maritime University, No.1-2, Vol.1, 2002, p.7.

handle problems concerning the gradual occurrence of damages. Problems with regard to delay in delivery as experienced in the network liability system are eliminated under the uniform liability system.

The uniform liability system, however, entails certain problems as well which affect the MTO in particular. In the normal scenario, the MTO subcontracts certain parts of the transport to sub-carriers, and the MTO is liable for damages to the shipper according to the uniform liability rules, while the liability of the sub-carrier towards the MTO is subject to the unimodal law governing the transport where the damage occurred. Consequently, in cases where the MTO can localize the damage, it may very well be that the MTO cannot fully recover the amount he is liable to the shipper in a recourse action against the sub-contractor. This will be the case if the liability of the MTO under the uniform liability system results in a larger amount than the liability of the sub-carrier under the unimodal rules governing this certain part of the carriage. In cases where the MTO cannot localize the damage the situation is even worse, and in fact no different to the network liability system. Under the uniform liability system, the MTO, like the shipper under the network liability system, might not be able to establish and accordingly prove where the damage occurred and therefore might be forced to claim against all the carriers involved, which will lead to added expenses. Furthermore, he might suffer irrecoverable damage because of the existing liability gaps between the various stages of the transports. This is because the uniform liability system simply shifts the uncertainty about the outcome of a cargo claim from the shipper to the MTO.[84]

Another problem might be the fact that it appears strange - at least at first sight – that a sea carrier will not be equally liable as a MTO performing the sea leg of the carriage himself, simply because they are subject to different legal systems.

4. The Amended Uniform Liability System

Amended uniform liability system also is called variable uniform liability system[85]. That is formed by modifying the uniform liability system, based on UNC's uniform liability system and a liability system that liability limit is the exception. According to this system, whether the accident determined the actual freight transport sector,

[84] Tim Schommer, "International Multimodal Transport", www.lawspace.law.uct.ac.za.

[85] Tingzhong Fu, Some legal problems of Mutimodal Transport, World Seaborne, 2000, p.55.

all can be used the rules of the Convention[86]

According to the so-called modified uniform liability system the liability of the MTO depends on whether it is possible to localize the damage or not. If, on the one hand, the damage cannot be localized, a uniform liability approach will be applicable, ensuring the basic liability of the MTO. If, on the other hand, the damage can be localized, the liability of the MTO will be determined with reference to the applicable unimodal transport law governing this type of transport. Theoretically, this determination can differ as follows. First, the fallback on the liability limits of the applicable unimodal transport law could occur in every case where this limit is higher *or* lower than the basic liability of the MTO. Secondly, the fallback on the liability limits of the applicable unimodal transport law could occur only in so far as the unimodal low provides higher limits of liability. Thirdly, and most unlikely to happen in practice, is to refer to applicable unimodal transport law only in cases where this law provides lower limits of liability.

With regard to these three theoretical possibilities, one could, with regard to the applicable unimodal transport law, also differentiate between applicable international conventions and applicable national laws that may govern this part of the transport.

The modified uniform liability approach tries to combine the uniform- and the network liability systems in order to minimize the problems arising in both of them. Parts of the uniform liability approach are used by establishing a uniform liability system with a certain limit of liability in cases where it is not possible to localize the damage; parts of the network liability system are used by allowing reliance on unimodal transport laws in cases where it is possible to localize the damage. The establishment of the uniform liability approach ensures a basic liability system, which guarantees predictability for both shipper and MTO. The establishment of the idea of the network liability system ensures that liability between shipper and MTO on the one hand, and MTO and his subcontracted carriers on the other hand, are identical. Thus, under the modified liability regime, the MTO will always be able to recover his damages fully against his subcontractor who caused the damage.

---

[86] Xinping zhang, Maritime Law, China Politics and Law University Press, 2002, p.312.

By taking into account only the liability limit of the applicable unimodal transport law, rather than applying the law as such, as the network liability system does, ensures that there will not be any problems with liability gaps. This is because in the case where damage occurs between two modes of transport and no unimodal liability regime is applicable, the uniform liability system of the multimodal regime will apply. In the case where the fallback occurs only when the unimodal transport law provides higher limits of liability than guaranteed under the basic liability of the MTO, there are no problems of uncertainty or unpredictability. On the contrary, the shipper will be able to claim damages up to a higher limit – a limit to which the MTO is also able to take his recourse action against his subcontractors.[87]

In 1992 UNCTAD/ICC adopted the Modified Uniform Liability System.

There is another kind of sharing liability system. It means that the multimodal transport operators and all of the carriers in the contract carved up the transport sector and the liability is sure in the law of each transport sector. Such system is actually the simple combination of a unimodal transport and does not really play to the superiority of multimodal transport, so it is rarely used now.

5.3. The Principle of International MTO's Liability

1. MTO liability should be consistent with the development of the transport laws

As previously mentioned, currently the liability system of the multimodal transport operator can be divided into two basic types, namely Uniform Liability System and network liability system. From the point of legal economics, a good system should be predictable that the perpetrator will have to bear the risk. The legal party can be predictable to know how much liability and risk he will bear before the trade starts. Then he can decide to pay attention and insurance coverage so as to reduce costs and improve the efficiency of the transaction. Unified legal system of various modes of transport is the best choice whether multimodal risks and responsibilities achieve predictability in multimodal transport. If unable to complete reunification, the legal system should also provide predictability of the

[87] See Tim Schommer, supra note 84.

risks and responsibilities to the legal parties.

Network liability system brings great unpredictability to cargo owners. Therefore, the liability system of multimodal transport operators developed from network liability system to modified network liability system then to uniform liability system. By comparison, three of the liability systems are meeting the requirements of the cargo owners to the transport risks.[88]

From the development the transport of law, gradual reunification of the various modes of transport law is a trend. If the transport laws achieve reunification, the legal framework for multimodal transport will come. However, the unity of multimodal transport laws needs to be based on the consistent legal system in various modes of transport. It need a long process. Therefore, the regime the differences of liability in current transport law cannot be evaded. The unity formally is only to transfer the risks to the MTO from cargo owners.

2. MTO's liability system should be consistent with own characteristics of multimodal transport of goods

Legal framework of multimodal transport of goods must meet multimodal own characteristics in order to develop the multimodal transport of goods. The establishment of MTO's liability system should be paid to following real characteristics:

a. Currently there are five main modes of transport(sea, road, rail, sea and air) in multimodal transport. But, air transport is rarely used. Air transport in intermodal transport is at the secondary position.

b. 90% of the multimodal transport includes sea transport different from the air transport.[89] Multimodal Transport of Goods by sea is still transport sector of the longest distance and the main mode in multimodal transport. Therefore, liability system of the MTO completely abandoned the liability of the maritime system that is not realistic. Maritime liability system's characteristics, in addition to lower limitation of liability, is that " Hague - Visby Rules" adopts the principle of incomplete the liability with fault meaning the carrier's nautical fault and fire

[88] Zhu Li, op. cit., pp.36-40.
[89] See V. The reform of German law-multimodal transport [EB/0L]. http:// www. Forwarderbtw.com

exemption. These two exemptions in a short period of time is unlikely to abolish. Therefore, under the condition that the maritime law cannot unify with other transport laws in principle of MTO's liability, it should be retained two fault exemptions.

c. In despite of land transport which is no longer than sea transport in the multimodal transport, the time of transport of the goods on land is often longer than the sea, often facing the danger more than sea. In practice, the damage was mostly in the land sector. Therefore, the carrier's liability in the land transport law as the unified standard of MTO's liability system is closest to the actual situation and furthest reduce the difference between MTO's liability system and the carrier's liability of damage sector. Particularly in a non-attributable loss, using the land transport standards is fair to both parties. Thus, if MTO's liability system takes uniform liability system, it should be based on liability system of the land transport law.

d. From the cause of loss in the multimodal transport of goods, the loss cannot be attributed mostly. Containerized cargo losses usually were found when the containers were discovered. But the damage sector often does not know the reasons. The loss of non-attributable exists in large quantities, which makes MTO severely disadvantaged. First, multimodal transport operators cannot usually prove that they have taken care of the goods and so they cannot get exemption; second, after multimodal transport operator took the liability for the loss of non-attributable, he was unable to recover damages from the sector carrier because the damage sector cannot be found. Therefore, the revised mesh responsibility for the loss can not be attributed regardless of their "final responsibility clause" provisions of applicable principles of attribution. Multimodal transport operators are not likely to be protected by the exemption. So, in this condition the modified uniform liability system is the better choice.

5.4. Liability of Multimodal Transport Operator under the Chinese Law

Now in Chinese law the legal, administrative rules and regulations on the multimodal transport mainly have Maritime Law (SECTION 8, Chapter IV),

CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (SECTION 4, CHAPTER 17)and international multimodal transport, container. These rules and regulations are similar, but not all the same. Therefore, on the basis of analysis, Chinese liability of multimodal transport is further improved.[90]

5.4.1 Introduction of Chinese Liability of Multimodal Transport

Generally, the relevant provisions of "Contract Law" should apply to all contracts, including the multimodal transport contract. However, according to the law of Chapter VIII, Article 123: " If there are provisions as otherwise stipulated in respect to contracts in other laws, such provisions shall be followed. " It shows that multimodal transport contract involved in maritime sector will be adjusted by Chinese Maritime Code. International multimodal transport (container) only as sector regulation is implemented by the Transportation and Railways Ministry and the intention is to strengthen and control international multimodal container transport. Therefore, it does not belong to the scope of Contract Law Article 123 "other law". So the provisions that are contrary to " Chinese Maritime Code " or "contract law" will be considered invalid. The multimodal transport having no sea transport sector will be subject to Chapter IV, Section IV. When the loss or damage occurred in the transport sector can not be identified, Article 311 in Contract Law provides for strict liability.

1. Special rules on multimodal transport contract in Chinese Maritime Code

a. The concept of multimodal transport

Chinese Maritime Code regulates the concept in Chapter V from Article 102 to 106.Article 102 shows the concept of multimodal transport contract:
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, from the place where the goods were received in his charge to the destination and to deliver them to the consignee by tw o or more different modes of transport, one of which being sea carriage.

[90] Zhu Li, op. cit., pp.36-40.

Thus, this article's regulations are only subject to the multimodal transport contract including the sea transport sector. Otherwise Article 102 also shows MTO: The multimodal transport operator as referred to in the preceding paragraph means the person who has entered into a multimodal transport contract with the shipper eit her by himself or by another person acting on his behalf.[91]

b. Basis of liability

Article 105 adopts network liability system.

If loss of or damage to the goods has occurred in a certain section of the transport, the provisions of the relevant laws and regulations governing that specific section of the multimodal transport shall be applicable to matters concerning the liability of the multimodal transport operator and the limitation thereof.

If loss of or damage to the goods happened, the regulations can be applied to the loss or damage. If not sure, according to Article 106, the liability of MTO will adjust to be decided by the carrier of sea transport.

Article 106:

If the section of transport in which the loss of or damage to the goods occurred could not be ascertained, the multimodal transport operator shall be liable for comp ensation in accordance with the stipulations regarding the carrier's liability and the l imitation thereof as set out in this Chapter.

In Chinese Maritime Code Chapter IV is sure of the basis and scope of MTO's liability according to the uncertain damage including the rules of transport of goods by sea. According to Chapter IV Section 2, the liability of carrier to the loss or damage of goods is similar to Hague Rules or Visby Rules.

The responsibilities of the carrier with regard to the goods carried in containers co vers the entire period during which the carrier is in charge of the goods, starting fro m the time the carrier has taken over the goods at the port of loading, until the good s have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerized goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship unt il the time the goods are discharged therefrom. During the period the carrier is in ch

[91] Zhangjun Li, op. cit., p. 273.

arge of the goods, the carrier shall be liable for the loss of or damage to the goods, except as otherwise provided for in this Section.[92]

The provisions of the preceding paragraph shall not prevent the carrier from enteri ng into any agreement concerning carrier's responsibilities with regard to non-conta inerized goods prior to loading onto and after discharging from the ship.

The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Then he can depend on Article 51 of the exceptions (including nautical fault and fire) to exempt his liability to the loss or damage.

c. Delay

Different from Hague Rules, the carrier is responsible for delay.

Article 50:

Delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon.

The carrier shall be liable for the loss of or damage to the goods caused by delay in delivery due to the fault of the carrier, except those arising or resulting from causes for which the carrier is not liable as provided for in the relevant Articles of this Chapter.

The carrier shall be liable for the economic losses caused by delay in delivery of the goods due to the fault of the carrier, even if no loss of or damage to the goods had actually occurred, unless such economic losses had occurred from causes for which the carrier is not liable as provided for in the relevant Articles of this Chapter .The person entitled to make a claim for the loss of goods may treat the goods as lost when the carrier has not delivered the goods within 60 days from the expiry of the time for delivery specified in paragraph 1 of this Article. The definition about delay in delivery in Chinese Maritime Code tries to reduce the carrier's responsibility. That means if the delivery time is not agreed before, the carrier need not pay economic loss because of delay in delivery. Because of the definition, it will lead to the carrier's liability more strict if delivery is not at time. Contrary, it will lead litigation and claims of the goods' party are difficult. This is in violation

[92] Zhu Li, op. cit., pp.36-40.

of international practices and the Chinese civil liability.[93] In recent years the judicial practice showed that the rights and interests of the cargo had not been properly protected. Because there is no clear time of cargo delivery, cargo interest is actually still in the "Hague Rules".[94]

2. International multimodal transport of container on the MTO's liabilitys

These Regulations shall apply to the international multimodal transport of goods by containers by waterway, highway and rail.[95]

a. MTO's liability

Section 1 of Article 27 shows that the multimodal transport operator shall be liable for loss of or damage to or delay in delivery of the goods while the goods was in his charge.

Section 2: If the goods have not been delivered within 60 consecutive days following the date of delivery expressly agreed upon, the consignee may treat the goods as lost.

Section3 adopts network liability system.

Where the loss of or damage to or delay in delivery of the goods occurred in one particular stage of the multimodal transport, the multimodal transport operator's liability and the limitation thereof shall be governed by the relevant laws and regulations of that particular stage of transport.

If the loss or damage sector can be sure, the limitation of MTO's liability is applied to the section.

If not, Section 4 can be used.

Section 4: Where the occurrence of loss of or damage to the goods cannot be attributed to a particular stage of the multimodal transport, the limitation of liability of the multimodal transport operator shall be defined as follow:

---

[93] Wei Gao, Carrier's liability when delay,， Annual Report on Chinese maritime law,1994, Dalian Maritime University, 1995, p. 117.

[94] Zengjie Zhu, mixed liability system of the Carriage of Goods by Sea Marine Trial, No.4 1997, p. 6.

[95] Management Rules of International multimodal transport of goods by containers, Article 2:These Regulations shall apply to the international multimodal transport of goods by containers by waterway, highway and rail.

If the multimodal transport includes the carriage by sea, the limitation of liability shall be governed by the Maritime Code of the People's Republic of China;

If the multimodal transport does not include the carriage by sea, the limitation of liability shall be governed by the relevant laws and regulations.

b. Basis of liability

Section 4 is not concerned to the basis of liability. Under this condition, Article 27 Section 1[96] decides the basis of MTO's liability. In addition to the carrier's liability of Article 18[97] and Article 19 section 1[98], MTO cannot invoke any defenses or exceptions.

If the carrier does not cause the loss or damage, the MTO must pay the liability. In addition, Section 4(b) also regulates: If the multimodal transport does not include the carriage by sea, the limitation of liability shall be governed by the relevant laws and regulations.

c. Limitation of liability

Article 28 Section 1 regulates the Limitation of liability where delay in delivery cannot be attributed to a particular stage of the multimodal transport.

Section 1:

Where delay in delivery cannot be attributed to a particular stage of the multimodal transport and the multimodal transport includes a sea leg, the limitation of liability of the multimodal transport operator for delay in delivery shall not exceed the freight payable under the multimodal transport contract.

Section 2:

---

[96] Management Rules of International multimodal transport of goods by containers Article 27 section 1: The multimodal transport operator shall be liable for loss of or damage to or delay in delivery of the goods that happened while the goods were in his charge.

[97] Management Rules of International multimodal transport of goods by containers Article 18: For loss of or damage to the goods as well as losses sustained by the multimodal transport operator, the consignor shall take the responsibility upon himself or be liable therefore, if such loss or damage has resulted from any of the following causes: The container body and seal are goods and intact, the goods were counted, packed and sealed by the consignor or shipped in the consignor`s container; Inferior quality of the goods, or shortage or deterioration of packed goods, while the external packing appears to be in good condition; Insufficiency or illegibility of marks or inadequacy of packing .

[98] Management Rules of International multimodal transport of goods by containers Article 19 Section 1: The consignor shall be liable for losses sustained by the multimodal transport operator of a third party if such losses were caused by the fault or neglect of the consignor. The consignor shall remain liable even if the multimodal transport document has been transferred by him.

Where the loss of or damage to the goods occurred concurrently with delay in delivery, the multimodal transport operator's liability shall be that as his liability for the loss of or damage to the goods.

Any claim against the multimodal transport operator relating to the losses resulting from loss of or damage to or delay in delivery of the goods shall be subject to the limitation of liability provided for in Article 27 and 28 hereof, whether such claims are founded in contract, in tort or otherwise. [99]

The multimodal transport operator is not entitled to the benefits of the limitation of liability provided for under Articles 27 and 28 hereof if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.[100]

3. Contract Law on the MTO's liability

a. The concept of multimodal transport

Contract law shows this in Acticle 17 Section 4 from article 317 to 321.

Article 317: A multi-modal transportation business operator shall be responsible for the performance or the organizing of performance of the multi-modal transportation contract, enjoy the rights and assume the obligations of the carrier for the entire transport.

Article 318 envisaged the possibility of making engagements on different sections of the transport on their respective responsibilities for different sections between

[99]Management Rules of International multimodal transport of goods by containers, Article 29:Any claim against the multimodal transport operator relating to the losses resulting from loss of or damage to or delay in delivery of the goods shall be subject to the limitation of liability provided for in Article 27 and 28 hereof, whether such claims are founded in contract, in tort or otherwise.

[100] Management Rules of International multimodal transport of goods by containers, Article 31: The multimodal transport operator is not entitled to the benefits of the limitation of liability provided for under Articles 27 and 28 hereof if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

MTO and each carrier joining in all transport sectors.[101]

b. Documents of multimodal transport

Article 319: A multimodal transportation business operator shall issue multi-modal transportation documents upon receiving the goods from the shipper. The multi-modal transportation documents may be negotiable or non-negotiable, as requested by the shipper.[102]

Article 320: Where a multimodal transportation business operator suffers losses due to the fault of the shipper when shipping the goods, the shipper shall bear the liability for damages even if the shipper has transferred the multi-modal transportation documents to other parties.[103]

c. Liability of MTO

Article 321: Where the damage to, destruction or loss of goods occurs in a specific section of the multi-modal transportation, the liability of the multi-modal transportation business operator for damages and the limit thereof shall be governed by the relevant laws on the specific model of transportation used in the specific section. Where the section of transportation in which the damage or destruction or loss occurred can not be identified, the liability for damages shall be governed by the provisions of this Chapter.

The carrier's liability

Article 311: A carrier shall be liable for damages for the damage to or destruction of goods during the period of carriage unless the carrier proves that the damage to or destruction of goods is caused by force majeure, by inherent natural character of the goods, by reasonable loss, or by the fault on the part of the shipper or consignee.

The loss or damage's liability assessment

Article 312: The amount of damages for the damage to or destruction of the goods shall be the amount as agreed on in the contract by the parties where there is such

[101] Contract law Article 318: A multi-modal transportation business operator may enter into agreements with the carriers participating in the multi-modal transportation in different sections of the transport on their respective responsibilities for different sections under the multi-modal transportation contract.

[102] Contract law Article 319.

[103] Contract law Article 320.

an agreement. Where there is no such an agreement or such agreement is not clear, nor can it be determined according to the provisions of Article 61 of this Law, the market price at the place where the goods are delivered at the time of delivery or at the time when the goods should be delivered shall be applied. Where the laws or administrative regulations stipulate otherwise on the method of calculation of damages and on the ceiling of the amount of damages, those provisions shall be followed.[104]

d. Delay in delivery

The rules of Chinese Contract Law are more clear and reasonable than Chinese Maritime Code about economic loss compensation and liability when happened to delay in delivery. Article 290 of Contract Law expands the definition of delay in delivery to "within the prescribed time or within a reasonable time". And article 113 of Contract Law makes reasonable and foreseeable principle as a basis for determining liability. The scopes of compensation of economic losses limited "Where a party failed to perform or rendered non-conforming performance, thereby causing loss to the other party, the amount of damages payable shall be equivalent to the other party's loss resulting from the breach, including any benefit that may be accrued from performance of the contract, provided that the amount shall not exceed the likely loss resulting from the breach which was foreseen or should have been foreseen by the breaching party at the time of conclusion of the contract." This shows that the rules of Chinese Contract Law about delay in delivery are more closed to the International Convention than Chinese Maritime Code.[105]

5.4.2 Legislation on Liability of Multimodal Transport Operator in China

Contract law and Maritime law are both used modified network liability system and no other rules to the MTO's liability and limitation of liability. Both of overall

[104] Contract law Article 61: Where, after the contract becomes effective, there is no agreement in the contract between the parties on the terms regarding quality, price or remuneration and place of performance, etc. or such agreement is unclear, the parties may agree upon supplementary terms through consultation. In case of a failure in doing so, the terms shall be determined from the context of relevant clauses of the contract or by transaction practices

[105] Zhangjun Li, op. cit., p.155.

clauses are similar, meaning that when it cannot be sure of where the loss of or damage to the goods happened, it will pay according this article.[106]

This would be a good reflection in the case that Xiamen Marine Court dealt Hungary International Trade Ltd.(here after HIT) prosecute Hong Kong Futianin Shipping Ltd.(here after HKF). The seller as the shipper after loading in the container gave the goods bought by the plaintiff to HKF (The first defendant) carrying. HKF signed and sent full bill of lading of multimodal transport. On the bill of lading, the receiving goods' location is in Xiamen, the discharge location is in Budapest, Hungary and the consignee is the plaintiff. After the goods were arrived at Hong Kong, the goods were carried by Xing Company (The second defendant). And then Xing Company would carry the goods to Europe and go to the end location Budapest, Hungary by rail. But when the plaintiff as the consignee of the bill of lading found empty boxes of goods, the plaintiff claimed the loss of the goods and reasonable costs for this loss other to the two defendants. The first defendant HKF as full transport's MTO shall be wholly responsible for the entire process. The second defendant Xing Company as second carrier should also be held responsible for the loss. When the goods happens to the loss in the course of transport, CMC adopts network liability system to International multimodal transport. Based on CMC and international shipping practices, this case adopted network liability system. In this case the loss of goods were identified in transport sector carried by Xing Company, but HKF as intermodal operator fails to remove wholly liability for the transport. Therefore the court judged HKF had the obligation to compensate loss of the goods of HIT.

However, Contract Law adopts strict liability and has no limitation of liability. In CMC Chapter IV is used no fully fault liability and provides for limitation of liability of the carrier. So they have vary widely difference that the loss can not be attributed. The regulations of the various modes of transport in Chinese law are similar to international conventions of Unimodal Transport, meaning that the liability tends strict liability. But limitation of liability could hardly be

[106] Yang Zhao & Zhengliang Hu, op. cit., p.10.

reconciled.[107] Therefore, Chinese MTO's liability system also needs to give more perfect.

[107] Zhangjun Li, op. cit., p.155.

Chapter 6 Conclusion

Several international transport conventions adjusting the multimodal transport have been introduced, but until now it had not yet fundamentally eliminated the conflict with the existing transport legislation and balanced the interests of the client. With the development of international multimodal transport and international trade, in the context of how to adjust relations with many of the parties and determine the liability, people eagerly hope that the existing multimodal transport system forms generally unified binding legal norms.

Each carrier has applied to its own regulations and these different regulations for the carrier's liability are different. Different forms have different liability, but different liability leads to the different liability for compensation.

From the existing international conventions related to liability for compensation, Hague Rules used a single standard method of compensation, meaning that every one or each unit of damage should be paid not including the gross weight per kg for the damage. Visby Rules and Hamburg Rules used double compensation, meaning that every one or each unit of damage and the gross weight per kg for the damage should be paid. Meanwhile, the compensation of damage to the container was also made clear. Multimodal transport not only provides a dual method of compensation, but also provides a single standard of compensation. For example, under the entire process of multimodal transport including the sea or inland waterway transport, multimodal transport operators pay compensation according to double compensation, whichever is the higher. Conversely, under the entire process of multimodal transport not including sea or inland waterway transport, multimodal transport operators pay compensation according to per kg gross weight.

Under international transport conventions, the carrier's liability is based on two types. Hague -Visby Rules used incomplete fault responsibility system. Hamburg Rules and United Nations Convention on International Multimodal Transport of Goods(1980) used complete fault responsibility system. According to United Nations Convention on International Multimodal Transport of Goods(1980), the basis of the multimodal transport operator's liability conclude that the multimodal

transport operator should pay the compensation for the loss, damage of goods or delay in delivery during the management of the multimodal transport operator, unless he can permit himself, his servants or agents to avoid the occurrence and consequences has taken all measures to meet the requirements.

The responsibility of multimodal transport on the legislation is basically network liability system and uniform liability system. Uniform liability system made the multimodal transport contract pure and clear. But, uniform liability system is also inadequate in case of using the same means of transport. The responsibility for the multimodal transport operator and the carrier using the single means of transport is different. For the same damage, whether or not compensation is granted is not fair.[108]

From the viewpoint of the multimodal transport operator, network liability system has its advantages. Its responsibility for the claimant is the same as the responsibility for the carrier and the actual operator. So it can recover the amounts of compensation that the claimant should pay. From the viewpoint of the claimant and the shipper, network liability system has its shortcomings. In many cases, particularly with the closure of the container, when the goods were lost, the place of damage is difficult to determine locations occurred in one or more stages of the transport. Therefore, a claim for damages is very difficult. Different transport system may have the liability gap. Sometimes responsibility system may depend on the agreement of multimodal transport operator and the sub-contractor. These shortcomings led to the unpredictability. Whoever is the seller of the goods or the buyer, it is difficult to know whether a responsibility system, the limitation of liability, or possible legal system applies to loss of or damage to the goods or not.

Currently, the multimodal transport convention mainly uses uniform liability system and network liability system as subsidiary. This approach naturally has the positive significance. The multimodal transport is not only the simple combination between each unimodal transport, but a new mode of transport, so it need a new law to adjust it.[109]

---

[108] Yonghui Yang , Study on the development of the multimodal transport operator, Press on Qingdao Serfarer Institute Transacftion, 1997, p.58.
[109] Ibid.

As the long transport and trading practices resulting in the carrier’s responsibility are different under different modes of transport, United Nations Convention on International Multimodal Transport of Goods is not essentially removing the conflict with the existing transport legislation to balance the interests of the parties. Although the Convention regulates the form of the multimodal transport operator's responsibility, the Convention coming into force recently is very slim. So adjusting the legal relations among many of parties under multimodal transport in fact has irreparable differences. If the limit of uniform liability system in the multimodal transport can be used widely, only each country should join in the United Nations Convention on International Multimodal Transport of Goods and take practical action to assist its entry into force. It is necessary to make adjustments unify the responsibility of the carrier under the different modes of transport.

Some suggestions are made as follows.

First, it is necessary to construct a fair and efficient liability system of MTO.

The Contract Law of China and the Chinese Maritime Code contain the multimodal transport operators’ responsibility system, but both provide for their own position. Both laws are not conducive to the development of multimodal transport because the unity is an inevitable trend.

The China Civil Code has been making, so it may stipulate a special section for multimodal transport-related contents. In that case, the contents should reflect fair value and the interests of both the value orientation. It is necessary to formulate an equitable attribution principle and reserve the limitation of liability that would fully embody effective priority.

Second, it is necessary to perfect to rules on liability limitation of multimodal transport operator in China. The rules should incarnate combination of oneness and predictability. Oneness and predictability are traditional value that international goods transportation legislation always pursues. Oneness requires the multimodal transport regulated by either the China Civil Code or the Chinese Maritime Code. Where the actual damage of goods happens, it is necessary to protect the security and to obtain convenient and rapid disposal on dissension of trade. Predictability can make a party to know the social risk of his action and adopt the timely action to

transfer the risk. We can use the Convention of 1980 for reference. If damage to the goods occurs in a specific course of multimodal transport, the compensation limitation is higher than that in unlocalised damage to the goods according to the international treaty or mandatory national law, so the claimant of compensation can buy insurance as the lowest compensation limitation according to the international treaty or mandatory national law. Therefore, it is very important for the claimant of compensation and operator with such extent of oneness and predictability.

References:

I. Chinese References

Books:

1.Deming Zhao, International Maritime Law, Beijing University Publishing,1997

2.Depei Han, Private International Law, Wuhan University Publishing, 1997

3.Exiang,Wan, Foreign Commercial Maritime Trial Guidance , People Count Publishing,2001-2006

4.Gelin Zhu and Taizuo Zhou, Foreign Trade Transportation, Chinese Translation Publishing,1983

5.Jianming Cao, Private International Law, Law Publishing,1998

6.Jiyi Zhang translator, The Establishment of the Hamburg Rules and the Provisions of the Explanation, Foreign Trade Education Press,1985

7.Liming Wang, Study Contract Law, People's University Publishing,2002

8.Muzhu Shen, CMC Comparative Study, China Politics and Law University Publishing, 1998

9.Tingzhong Fu, Maritime Law and Practice, Dalian Maritime University Publishing,2001

10.Wanzhong He, Legal Issues Study on International Cargo Multimodal Transportation , Law Publishing,2002

11.Xianglan Zhang, Maritime Law, Wuhan University Publishing, 2001

12.Xianming Chen, CMC Theory and Judicial Practice, Beijing University Publishing,2006

13.Xuzhuo Si, The Study of Maritime Law, Dalian Maritime University Publishing,2002

14.Xuzhuo Si, The Cases' Study of Maritime Law, Intellectual property Publishing,2003

15.Xumei Xiao, CMC Interpretation, People Count Publishing,1994

16.Yimo Gu, Foreign Trade Transportation Services, Intellectual property Publishing,1993

17.Yongfu Wu, International Container Transport and Multimodal Transport, People Traffic Publishing,1998

18.Zengjie Zhu translate, Existing international multimodal transport regulations overview -- the implementation of the multimodal transport rules, People traffic Publishing,2002

19.Zedong Ke, The Latest CMC -- Transporting Goods Responsibility, Yuanzhao Publishing,2001

20.Zhigang Yang, International Freight Forwarders Business Guide, People Traffic Publishing,1997

21. Jiyi Zhang translator, The Establishment of the Hamburg Rules and the Provisions of the Explanation, Foreign Trade Education Press,1985

Articles:

1. [Bri], Terry, Guoding Guo, Three of the Convention on the Comparative Analysis, International Maritime Law Practice, Dalian Maritime University Journal,1996

2. Hongjun Shan, the Carrier's Liability, China Annual Symposium 2002, Dalian Maritime University Publishing,2003

3. Hong Zhao, The Carrier Loss For the Delay In Delivery of Compensation, CMC Research, No.4 2001

4. Jianhua Zhang, On Freight Forwarders and the Legal Status and Responsibilities, world seaborne, No.2,1999

5. Lei Zheng and Xiaohui Yan, On Maritime Cargo Carrier's Claims Recognition, World seaborne,No.6,1999

6. Lixin Han, International Carriage of Goods by Sea and the Actual Responsibility of the Carrier Finds, China Annual Symposium 1996,Dalian Maritime University Publishing,1997

7. Tingzhong Fu, International Multimodal Transport of Goods by a number of legal issues, world seaborne, No.3,2000

8. Ulrich H.Wittkopp,Thomas Wambach(the authors), Shuangjuan Wei(the translator), CMC Research, No.5,Law Press,2001

9. Yonghui Yang, MTO Responsibility Research and Development, Qingdao Ocean Crew Journal, No.4,1997

10. Zaiyang Wu and Xuewei Ni, Comparison of the Multimodal Transport Contract and the Future Trends, Zhujiang Watercraft, No.4,2001

11. Zengjie Zhu, Carriage of Goods By Sea Mixed Liability System, Marine Trial. No.4,1997

12. Zengjie Zhu, Carriage of Goods by Sea Act of international unity,CMC Research, Law Publishing, 2000

13. Zhaohua Jin, Carrier Responsibility, People Justice, No.2,1997

14. Zhengliang Hu, The International Maritime Cargo Carrier Used the Principle of the Responsibility, China Annual Symposium 1990, Dalian Maritime University Publishing,1991

15. Zhengliang Hu and Yang Zhao, International Cargo MTO Liability System, Dalian Maritime University Journal, No.1-2,2002

II. Foreign References

1. Carver,Bill of Lading,London Sweet & Maxwell,2001.

2. Charles Debattista,Sale of Goods Carried by Sea,Butterworths,London,1999.

3. David W.Robertson,Admiralty and Matitime Law in the United States,Coralina Academic Press,2001.

4.John F.Wilson, Carriage of Goods By Sea, Financial Time Titman Publishing, 1998.

5. M.Bool, The Bill of Lading as a Document of Title to Goods,An Anglo-American Comparison,1997.

6. Nicholas Gaskell,Bill of Lading:Law and Contracts,LLP.2001

7. Paul Todd,Carriage by Sea, Sweet & Maxwell,2003.

8. Simon Baughen,Shipping Law(Second Edition),Gavendish Publishing Limited,London.Sydney,2001.

9. Uncitral Transport Law(Draft),2002-2006

10. William Tetley,International Maritime and Admiralty Law,Les Editions Yvon Blais Inc.,2002.

11. W.P.Bennett,The Bill of Lading as a Document of Title,Cambridge University Press.

12.Yeong-Seok Cheong: The international maritime transport law, Reformulated version, Pan Han books Co., 2004