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Chapter 1: Legal Framework of Multimodal Transport Operators

Objectives:

- To gain basic understanding of legal systems & regimes as applicable to freight management in general and multimodal transport operators in particular
- To understand the responsibilities and rules governing the multimodal transport operators
- To understand the different scope and perspectives of multimodal transport operations
- To understand the legal rules of multimodal transport operators
- To understand the liability of multimodal transport operators
- To understand the legal perspectives of the multimodal transport operator's responsibilities through an examination of decided court cases

1. Introduction to the Freight Market and Freight Forwarding

Trade and Freight

The trading nations of the world could not have developed to the extent they have without sufficient and efficient means of transport.

Transportation has been essential to span across the oceans of the world and across rivers, highways, airspace and every other means to get the goods from one location to another.



The growth of business, commerce and industry is very much connected with the development of transportation. These sectors are inter-twined.

The following table illustrates the growth in global trade and the attendant growth in the cargo transportation services.

UNCTAD and the WTO estimated that 90% of the world's transportation service revenue is from sea freight.

The Evolution and Revolution in the Freight Business

More importantly, the world has continuously seen changes and new developments over the past decades that have played to shape the role of logistics management, and the practices and procedures in the area of cargo transportation.

Some of the more recent and notable changes that have influenced how world trade and cargo transportation has evolved:

- Containerisation



Malcolm P. Mclean, the “Father of Containerization”, had the idea of rationalizing goods transport by avoiding the constant loading and unloading from one means of transport to another.

The “Ideal X” is mentioned as the first container freighter. This ship left Newark on 26th April 1956 carrying 58 containers, which it transported to Houston. The first ship designed to carry only containers is the “Maxton”, a converted tanker, which could carry 60 containers as deck cargo. That was in 1956. Since then, ships were designed for optimum stowage of containers in the hold and on decks.

ISO standards were first developed for “General Purpose” containers and later these extended for other purpose containers like open tops, flat-racks, reefers, etc.

- The collapse and/or opening of the major socialist countries which meant not only flourishing of business, commerce and industry but also the dismantling of previous consumer prohibitions, trade barriers and no-fly/no-ply territorial restrictions.



Freer Trade & Movement of Ships & Cargo Planes

- The popularity of not just bilateral but multi-lateral Free Trade Agreements (FTA). More pronounced is the creation of common markets like the European Union.



FTA not only promoted trade but also changed the way cargo transportation is handled

- The “Global Village” where corporations do not see borders and boundaries, but looking more at cost, time and profits.



As one management “Guru” said: “The World Is Getting Flat”.

The industrialized world is no longer characterized by scarcity of products and services. If you cannot supply this product at the optimal price and time, chances are your competitor – local or foreign – probably can. And to get the optimal pricing and timing in response to your consumers’ needs/desires, just because you are an American Corporation, does not mean that you have to be based solely in America, employ only Americans and use only raw materials and sub-contractors based in America.

- Revolution in supply chain management with new concepts like “lean inventory”; “just-in-time” manufacturing; meeting the anticipation of the active consumer instead of supplying the passive consumer; outsourcing (off-shoring) of functions previously done in-house to third party providers (the 3PLS).



Nimble planning for cost/profits and time optimization

- The evolution of modern multi-modalism, which resulted directly from, the rapid changes in the structures of supply chain. The traditional freight forwarder has proceeded from a person who does straight point a to point b one-mode cargo transportation to an organization that caters to clients who needs now encompass multi-leg and multi-mode transportation with transit warehousing, repacking and multi-regulatory documentation. The multi-modal operator (MTO) literally transports and delivers cargo for you “door-to-door”, quoting you a “through freight rate” and issues you a through bill of lading.



Seamless through transport by one operator

- The advent of the super container vessels (above 8,000 TEUs capacity) and ultra large crude carriers (the largest ULCC currently carries 654,763 DWT cargo) brought about by the need to achieve economy of scale given rising fuel and labour costs concerns.

For time-sensitive cargo there is the Techno Super Liner (TSL) capable of 50 knots (93km/h) carrying 1,000 tons cargo.



Tsl Experimental Ship, The Hisho

In the air, airbus is planning the 3-deck plane with 150 tons capacity & range of 5,260 nautical miles.

- Heightened security concerns giving rise to new requirements in rigid cargo declaration, cargo prohibition, cargo screening, cargo tracking, double-hull tanker requirements (also to meet environmental concerns), etc.



- New technologies and trends in logistics brought about by constantly improved communication systems like the internet, GPS systems, radio frequency exchange (RFID), image processing, bar coding and scanning, among others.



Global connectivity on the information superhighway

Electronic commerce is getting more pronounced in the area of cargo transportation with e-manifests and electronic bills of lading, the cornerstone of shipping documentation.

The dawn of the information or digital age started towards the last decade of the 20th century and will continue to unfold well into the 21st century.

Logistical/transportation systems now have the capability to deliver products at exact times. Customer order and delivery can be performed in hours and the necessary documentation in even shorter time. The frequent occurrence of service failures of the past is now replaced by a growing business philosophy and commitment to zero defect. Perfect orders – delivering the desired assortment and quantity of products to the correct location on time, damage-free and correctly invoiced – are now the norms for a well-run business. All these high-level performance are capable of being done at lower total cost and with the commitment of fewer financial resources than in the past.

The world of cargo transportation has indeed progressed and proceeded from the old days of the American “Wells Fargo” type horse-drawn wagons and the British Colonial “East India Company” type sailing boats set-ups to the modern day Federal Express, Schenker, and APL Logistics type multi-national corporations engaged in cargo transportation.

The Role of the Freight Forwarder

With the growth of alternate methods of transport, the increasing specialized services that go with it and the rapidly changing information technological demand, the intermediaries – the shipping and forwarding agent – has to constantly develop and innovate to connect the shipper with the carriers.

However his role and responsibility remains largely the same. Be it a “freight forwarder”, a “freight forwarding agent”, a “logistics specialist”, a “speediteur” or a “commissionaire de transport”, his functions are essentially the same or similar in all parts of the world.

His role is essentially as the intermediary between either the consignor or the consignee of the goods on one hand and the transport carriers, stevedores, customs authorities, local truckers, container depots, packers, unstuffers/stuffers and other third parties to negotiate on behalf of the owners of goods.

International freight forwarding is the delivery of goods from the exporter’s premises (or from the port or point of origin) to the port or point of destination (or to the importer’s premises).

The freight forwarder may also:

- Accept less than container load (LCL) shipments from individual shippers, and then combines them for delivery to the carrier in full container load (FCL) shipment
- Provide a wide range of services like export services available from a customs broker, arrange for the insurance, export packing, transit warehousing and trucking for shipment

2. The Advent of the MTO

However, the market for the delivery of goods has become increasingly complex and involved many services, customs, inspections, local trucking and/or rail, international carriage (which may involve transshipment/feeder shipment), knowledge of local and international laws and customs and security and insurance and health considerations. There is also the need to have early/prompt reporting, manifesting, declaration and scanning to comply with terrorism prevention concerns. The freight forwarding function has undergone a strong sea change to accommodate all these developments.



The freight forwarder has emerged as a multimodal transport professional and shippers and consignees are only too willing to use and appreciate the convenience, simplicity, security and efficiency of multimodal transport services.

The shippers and/or consignees are willing to pay a premium for these conveniences and benefit of dealing with one professional for the whole array of services performed often via many modes of transport and over several foreign terrains.

The market potential for integrated transport systems represented by multimodal services became phenomenal.

There has also been recognition by shipping lines that they must provide more than just port to port transport.

These hitherto dedicated ship-operators have moved to achieve strategic alliances with transport companies, warehouse operators, inland transporters and packers to provide seamless services.

Freight forwarders and other traditional “intermediaries” were thus challenged by these new vessel-owning multimodal service operators.

They responded quickly with the development of non-vessel owning and non-vehicle owning multimodal service operations and integrated logistics support services, the NVOCCs.

In an ocean shipment, the forwarder may 'buy' the shipping space, in a special arrangement with the carrier, and 'resell' the space to individual shippers, instead of receiving a commission. In such an arrangement, the forwarder functions as an independent distribution or logistical company known as the NVOCC (non-vessel operating common carrier) or NVOG (non-vessel owning carrier).

Such complex interrelationship brings together carriers, terminal operators and multimodal service companies and they may or may not always have their own carrying capacity.

Transport is no longer a single standalone business – it is an integral part of the total logistics supply chain.

This is a new network. Obviously, it also gives rise to a new way of looking at risks and liabilities.

The Risks and Liabilities of the Freight Forwarder, NVOCC & MTO

There are a large number of intermediaries, sub-contractors and sub-sub-contractors between the shipper and the actual carrier on any given part of the multimodal movement and this complicates the scope of liabilities and responsibilities for the cargo.

Who is responsible for what, when, why, how and in what amount? This gives rise to a phenomenal headache.

In addition, the use of pallets, lift vans, containers and other unitization and co-loading practices leads to the prevalence of hidden or concealed damage. In spite of the best efforts of insurers, claimants, investigators, surveyors and others, the concealed damage may not be attributed to any particular operator.

Moreover, the existing regulations of carriers by single-modal methods like the Hague-Visby Rules and the Warsaw Convention or the CIM or CMR which each apply to one method of transport does not assist to resolve the complicated web of multimodal relations.

Each set of rules applies different principles of responsibilities and limits for the carriers on each mode.

The saving grace may be the application that if the stage in the multi-modal movement at which the damage or loss occurred could not be determined, it is presumed that the loss/damage occurred during the sea leg.

Attempting to define the freight forwarder

J Kaufman explained in the case of *New York freight forwarders v FMC [1965] AMC*: “Ocean freight forwarders act, in essence, as an export department for the shipper clients. An exporter who ships goods abroad customarily consigns the merchandise to a freight forwarder who then makes all the arrangements for dispatch to a foreign port.”

We look again at all the various roles the freight forwarder plays when he is said to be performing a service for a customer, the shipper.

Thus the forwarder will secure (book) cargo space with a carrier, give advice on government licensing requirements, export and letter of credit intricacies, arrange for the cargo to be loaded on board the designated vessel.

He will arrange for all necessary shipping documents including the dock receipt, shipping order, delivery order, bill of lading, export declarations, licences, permits and consular invoices as may be required.

Often the forwarder performs accessorial services such as arranging insurance either under his own policy or the exporter’s open marine policy.

What the forwarder essentially does is that, prior to a shipment, he will advise on the best port to use taking into consideration the freights to the port, sailing dates, port congestion, direct/indirect service, number of intermediate ports of call and any special needs of the product in question, packaging, licences, cradles, special equipment, police escorts, security, road limitations, etc.

He will check and arrange for export/import licences, and ensure requirements of letters of credit are met.

The forwarder will then arrange collection, local trucking, container release, stuffing, delivery to carriers after due booking of space and negotiations of freight.

The documentation is arranged and goods cleared with customs and other authorities.

The movement of the goods will be coordinated with the loading schedule of the vessel and separate cargo lots will be consolidated into groupage shipments to save freight charges or secure best prices.

Ancillary services will be covered, such as marine insurance, export packing, warehousing, consolidation, markings and intermediary storage if required and delivery documents as required by the letter of credit or as instructed by the shipper.

He may negotiate on behalf of the clients for more favourable freight rates/structures, free use or enter into freight service agreements.

The forwarder will arrange with a network of agents in the other countries for the reception and handling of the cargo and delivery to the final consignees.

This network may consist of branches, associates, agents or other freight forwarders on a back-to-back basis, representative basis or with other trade counterparts.

3. The Freight Forwarder as an Agent

It is very hard to establish an accurate definition of the freight forwarder.

Rowlett J In *Jones V European & General Express Co* expressed the view that "... all he does is act as an agent for the owner of the goods. That is, not as a carrier." This may be somewhat unfair to the forwarder.

In today's context, it will also largely be untrue as many freight forwarders do also act as carriers, issue their own bills of lading or airway bills and are nvoocs (non vessel operating common carriers).

Goodard expressed himself in equally vague language in the case of *C C Pisani V Brown, Jenkinson & Co Ltd [1939] Llr*. To him, a forwarder is someone who is "... Willing to forward goods for you ... to the uttermost ends of the earth. ... they undertake to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work, they have performed the contract."

The term freight forwarder can be defined as:

"any person which holds himself out to the general public to ... provide and arrange transportation of property, for compensation, and which may assemble and consolidate shipments of such property and performs or provides for the performance of breakbulk and distributing operations with respect to such consolidated shipments and assumes responsibility for the transportation of such property from point of receipt to point of destination and utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers, by sea, land or air, including any combination thereof."

4. The Freight Forwarder as a Principal (Carrier)

If he enters into their own contract of carriage, he is a carrier and liable as such and cannot pretend to be "a mere freight forwarder" – See *Claridge, Holt & Co Ltd V King & Ramsay*.

Similarly, where a freight forwarder carries out the local delivery or collection of goods himself, he will be liable for that part of the carriage himself as a carrier.

Further, the question must be asked if the freight forwarder's liability when acting as a carrier will be that of a common carrier or a private carrier.

The distinction is important because the common carrier has a much higher duty of care and his liability is strict and he is liable for all losses, damage howsoever caused, whether he is at fault or not, subject only to 4 exceptions:

- a) Act of God
- b) Act of the Queen's enemies

- c) Inherent vice of the goods
- d) Consignor's own fault

His own or his servant's negligence must not be involved.

He cannot unilaterally exempt himself, although he may otherwise limit his liability by using contractual trading conditions.

The Private Carrier or The Common Carrier

On the other hand, the private carrier is an ordinary bailee. Reasonable care is all that is necessary. He will only be liable for his negligence and that of his servants/agents in respect of any loss/damage which occurs during transit.

The burden is on him to prove he was not negligent.

Today, freight forwarders commonly proclaim themselves not to be common carriers and reserve their rights to accept/reject shipments.

Moreover, present day forwarders trade on printed Standard Trading Conditions (STC) either their own design or based on an industry standard such as the Standard Trading Conditions of the Singapore Logistics Association.

There are, of course, rare cases where trading conditions are not used or are not applicable in a particular transaction but this is rare today.

The Singapore Logistics Association's STC specifically provided that its members are not common carriers.

Sometimes the STC may not have been incorporated into a particular transaction through lack of notice to the client. See *Mccrutchon V David Macbrayne Ltd [1964] 1wlr.*

A forwarder is sometimes a through carrier. A carrier may accept responsibility for the outward transmission of goods in respect of which he is the initial carrier.

It could be that delivery is required to an inland point beyond the port of arrival in case of carriage by sea.

In that case, the legal status of the initial carrier will depend upon the exact nature of the contractual relationship entered into by him with the initial shipper.

If the initial carrier issues a through bill of lading covering the entire transit right up to the final consignee, he will be liable as a carrier under the terms of the bill of lading for all sections of the carriage whether the loss/damage occurs while the goods are in his charge or not.

On the other hand, where a document is issued that does not constitute a through bill of lading covering the entire transit, the initial carrier will only be liable as a carrier while the goods are in his hands.

Where loss/damage occurs while the shipment is in the hands of successive carriers, his liability will be only that of a mere freight forwarder who arranges with the other carriers and who will be liable for any loss at each stage under their control.

The forwarder may find himself in the position of a carrier in relation to international carriage if so designated under the terms of any international convention; say the CMR, CIM or Warsaw convention.

These will be discussed later.

The status of freight forwarder by land will depend upon whether he is actually carrying the goods himself for all or part of the transit.

When forwarding is being effected by means of a sea transport, the status of the freight forwarder is usually quite clear.

Domestic freight forwarding usually involves grouping and consolidation of small shipments to obtain favourable freight rates or “full loads”.

The foreign freight forwarder, on the other hand, performs a wider range of functions including warehousing, insurance and packing while often acting as a freight or loading broker and/or ship’s agent at the same time.

Air Cargo Freight Forwarding



Freight forwarding by air is usually under the aegis of the International Air Transport Association (IATA).

Uniform regulations have been agreed upon by member airline companies to govern freight forwarders wishing to forward and consolidate shipments on their behalf in return for commission paid by the airlines concerned.

A forwarder who is not an IATA sales agent cannot claim commission but he can benefit from bulk rates. Sometimes he issues his own airways bills and charges his own rates under the House Air Waybill (HAWB) while forwarding the consolidations under a Master Air Waybill (MAWB).

The forwarder, whether for air or sea carriage, in using his own house bill acts as a carrier to his clients.

Upon consolidation, he may choose to request the carriers to issue directly to him the Master Bill of Lading listing himself as the shipper and the his agents abroad as the consignees with the actual consignees appearing as a “Notify Party”.

The forwarder or his agents clears the shipments under the Master Bill of Lading, unstuffs the containers and delivers individual shipments against surrender of the individual House Bills of Lading.

5. Existing Unimodal Regimes

The risk of bearing liability for the default of subcontractors, for which they do not have to answer fully or at all, is made more probable for multimodal operators due to the existence of internationally agreed liability regimes in all four modes of carriage.

The Warsaw Convention and its amending Protocols almost universally regulate air transport.

Sea carriage is widely governed by the Hague, Hague-Visby or Hamburg Rules.

Road and rail transport in Europe are controlled by the CMR and COTIF conventions.

There is also an international convention directed to the operators of transport terminals regarding their responsibilities at shipment and transshipment points between modes, but has not yet come into force.

Each of these conventions sets out distinct regime of carrier’s responsibilities and liabilities for the mode of transport they govern. In addition, they differ in significant ways, especially in the limits of carrier liability.

Since these international conventions are imposed as compulsory law in those countries that adhere to them, multimodal operators have to respect them in their dealings with their subcontracted unimodal carriers.

In other words, the terms of the multimodal operators’ agreements with the actual carriers is largely established and controlled by the relevant unimodal regime.

Whenever loss or damage can be localized and attributed to one of the carriers, the multimodal operator may only be able to shift responsibility from itself to the limited extent of liability imposed by the governing unimodal convention.

As a result, all attempts to create uniform principles of responsibility and liability between shippers and multimodal operators have to take into account the existing conventions governing the unimodal carriers who actually execute the desired movement of the cargo.

6. Multimodal Rules

The international solutions proposed for the liability issues of multimodal transport adopt different approaches and therefore can result in significantly different distributions of risk and responsibility for the same incident.

Three sets of model rules for the regulation of multimodal transport have been established by the international community since 1973. The International Chamber of Commerce (ICC) devised the first significant set of rules, The *Uniform Rules for a Combined Transport Document* which were issued in revised form in 1975 (ICC Rules 1975).

ICC publications are not mandatory law but model contract terms. They cannot override existing law, such as the Unimodal Conventions in countries where they have been implemented.

The ICC 1975 operates by voluntary incorporation by the multimodal operator into its standard trading terms.

In Practice, The ICC Rules were accepted as the appropriate standard for the Model Combined Transport Bills Of Lading designed by such industry associations as the Baltic and International Maritime Council (BIMCO) and the International Federation of Freight Forwarders (FIATA).

Other interested parties, notably cargo owners and governments of developing countries were not enthusiastic about the industry's terms and conditions of operation.

They successfully persuaded the United Nations Conference on Trade and Development (UNCTAD) to prepare a different set of mandatory rules. The resulting UN Convention on International Multimodal Transport of Goods (MTC 1980) was adopted in 1980. It has been ratified by too few states to bring it into force and has very little governmental support. The MTC 1980 remains significant because it contains a set of model rules which be incorporated voluntarily, like the ICC rules, as part of the operator's standard trading conditions.

Recently a fresh attempt was made to resolve the unsettled question about the allocation of risks and liabilities in multimodal transport. The new initiative was the combined effort of the secretariats of both UNCTAD and ICC, which developed a New Set of Rules for *Multimodal Transport Documents* (UNCTAD/ICC Rules 1992). These rules are also voluntary and not mandatory. They have the advantages of being able to reflect a longer experience with multimodal operations.

Case Discussion A

A 20 foot general cargo container stc 50 units of general machinery and weighing 9230 kg and measuring 14.53 cbm was shipped on a combined transport bill of lading by Justdoit, A Mto.

The shipment, starting In Layang Layang, Malaysia was transported from the manufacturer's factory by Trucko, a transport firm used by Justdoit to the Malaysian Railway Depot at Sepang.

From Sepang, it was carried by rtm, a train operator by rail to Tanjung Pelapas Port. It arrived 12 hours before Justdoit's closeout time for their next sailing vessel and was allotted a slot.

The ship sailed to Amsterdam where it was unloaded.

After 12 hours in the Dutch container terminal, it was picked up by royal lines BV under an agreement to haul all of Justdoit's cargo at Amsterdam.

They picked up the container and carried it over the French border to Le Havre. From Le Havre it was delivered by a French trucker, Froir Frou, to the consignee upset electronics at Paris.

When the container was opened, 30 of the units of machinery were found damaged and parts broken.

Upset electronics was very upset. They had bought the goods on EXW (ex-works) basis.

Upset contacts Justdoit and claims that the damage occurred in transit and gives notice of claim.

Discuss

Case Discussion B

Fantastiq textiles of Chennai, India exports a container (FCL) of 170 bales textiles to St Jude import of Singapore through fastest transport P L, who is asked to make all the arrangements to bring the goods to Singapore.

The goods were bought on CIF basis and were for almost immediate transshipment to Thailand.

The container arrives in Singapore on "Koya Maru" on 15 may 2003 and is unstuffed at bang bang's warehouse.

Bang Bang are the unstuffing/storage contractors for fastest transport.

Bang Bang informs fastest that only 160 bales outturned upon unstuffing.

Fantastiq has an order for 170 bales with an LC clause stipulation – part shipment not permitted.

He brings in another 10 bales by air at a cost of SGD 5,000 for the goods and SGD 2,500 for airfreight.

Meanwhile, Bang Bang discovers the missing 10 bales in their warehouse.

Fantastiq now claims against Bang Bang:-

- a) SGD 5,000 for the original missing goods.
- b) SGD 5,000 for the 10 bales brought in.
- c) SGD 80,000 being penalty damages imposed by end buyer.
- d) SGD 15,000 for loss, damages, airfreight, documentation, loss of profit and administrative time.
- e) SGD 6,000 for storage for the first shipment and second shipment due to cancellation of order.

Discuss.