

**LL.M BUSINESS CORPORATE AND MARITIME LAW
UNIVERSITY ERASMUS OF ROTTERDAM**

**THE MULTIMODAL TRANSPORT SYSTEM IN THE ANDEAN
COMMUNITY**

An Analysis from a Legal Perspective

By

Nicolás Martínez Devia *

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* Colombian Lawyer with postgraduate in tax law of the University Externado de Colombia and Master in Business, Corporate and Maritime Law of Erasmus University of Rotterdam. Lecturer of multimodal course in some colombian universities and consultant to several colombian and international companies regarding tax, custom, free trade zone, transport, financing and foreign trade planning. Likewise, consultant to certain port Companies of Colombia regarding diverse aspects related to financing schemes and the development of the respective port concessions.

List of Abbreviations

AC	Andean Community
ACFA	Andean Council of Foreign Affairs Ministers
ACC	Andean Community Commission
AIS	Andean Integration System
ICC	International Chamber of Commerce
GSAC	Andean Community General Secretariat
MTD	Multimodal Transport Document
MTO	Multimodal Transport Operator
UNCTAD/ICC Rules	UNCTAD/ICC Rules for Multimodal Transport Documents of 1992
UN Model	United Nations Convention on International Multimodal Transport of Goods of 1980
UNIDROIT	International Institute for the Unification of Private Law

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THE MULTIMODAL TRANSPORT SYSTEM IN THE ANDEAN COMMUNITY

An Analysis from a Legal Perspective

CHAPTER 1 - INTRODUCTION

Transport may be understood as the action or effect of carrying one thing from one place to another. From an economic point of view, this is an activity based on the demand for goods and its main function consists of carrying these goods from places where the usefulness is low to others where it is high. In this context, it is obvious that trade will develop in places where efficient modes of transport with reasonable prices exist.

In order to increase the level of trading between different places, towns, regions or countries, it is necessary to reduce transportation costs. In some cases, that reduction can be reached by using two or more modes of transport.

Since the introduction of the container in 1965 by the maritime industry the use of multimodal transport has increased dramatically. A container, that is, 'A box made of aluminum, steel or fiberglass used to transport cargo by ship, rail, truck or barge'¹, allows the transport of large amounts of goods inside it 'without being unpacked for sorting or verification when being transferred from one means of transport to another'²

Transport companies involved in international trade have been developing for several years and creating new technologies to enable more efficient distribution of containers along multiple modes of transport. Nevertheless, there is a problem nowadays because a container designed for one transport mode can often not be used in another mode.

¹ See the definition in the Glossary of Maritime Terms in American Association of Port Authorities at: <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=1077&navItemNumber=545>

² See United Nations Conference on Trade and Development. Implementation of Multimodal Transport Rules. Report prepared by the UNCTAD secretariat at: <http://www.unctad.org/en/docs/posdtetlbd2.en.pdf>, p. 6.

Another current problem of multimodal is that there is no international uniform liability framework for multimodal transport. According to Shommer³

“The current liability framework does not reflect developments that have taken place in the transport market. (...). Today there is still no international uniform regime in force that governs liability for loss, damage or delay arising from multimodal transport. Instead the present legal framework consists of a complex array of international conventions designed to regulate unimodal transport, diverse regional or subregional agreements, national laws and standard term contracts.”

Particular attention has been paid to the difficulties arising from this lack of international uniformity; the foremost is how to determine the applicable convention or law when losses occur during the transport of goods. For instance, if the same case is brought into the courts of The Netherlands, Germany or The United States, the law applicable to the loss and the final result may vary due to differences in each jurisdictional court’s interpretation on how to tackle the issue.

One of the most common solutions that have been used in those countries is to apply a system known as the “network system”, whereby each leg of the transport is governed by its own unimodal liability system.

However there are several practical disadvantages when this system is applied. Firstly, the system is not predictable for a shipper because he does not know in which stage the damage will occur and, consequently, which liability system will be applied. Secondly, it does not give an answer in relation to non localized losses as well as to situations in which the damage occurs gradually in different transport modes.

³ See Dr. Tim Shommer, ‘International Multimodal Transport. Some thoughts with regard to the “Scope of application”, “Liability of carrier” and “Other conventions” in the UNICITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]’ at: <http://lawspace.law.uct.ac.za:8080/dspace/bitstream/2165/59/1/SchommerT+2005.pdf> at p. 4

In response to the disadvantages of the network system, the “uniform system” dealt away with the multiple liability laws and replaced them with one single liability regime covering the entire carriage of goods by two or more modes of transport and one responsible party who would assume the liability for all the losses or damages that could occur to the goods during the transport.

Although the uniform system has never been implemented in its pure form, nevertheless it has led to the creation of a third system known as the “modified system” that provides uniform liability for non localised damages and a network liability system for localised damages. There are some Regional Agreements such as Mercosur, The Andean Community, ALADI and The Association of South East Asian Nations that have based their provisions in this modified system⁴.

In this document I will focus on the analysis of the Multimodal Transport Law developed by the Andean Community (hereinafter AC), a Subregional Organization comprised of four countries: Bolivia, Colombia, Ecuador and Peru who since 1993 have enacted a modified system of multimodal Transport through the Decision 331 of 1993⁵.

Taking into account that the substantive provisions of the Decision are mainly derived from those of the United Nation Convention on Multimodal Transport and the UNCTAD/ICC Rules for Multimodal Transport Documents, the main objective of this document is to analyze the AC’s Multimodal Transport Law in the light of those rules in order to determine its main features, differences and regulatory gaps.

With the purpose of reaching this objective, it is first of all necessary to differentiate some of the main aspects of Multimodal Transport as well as to provide an overview of the AC organization. Chapter 2 will introduce the study by providing an overview of Multimodal Transport. The definition of Multimodal Transport, its problems, the theoretical solutions to these problems and some proposals to reach uniformity will be described in this chapter. Chapter 3 will explain briefly some aspects of the AC, such as

⁴ Above, note 2 at p. 2

⁵ It should be stressed that Decisions are legislation instruments of the Andean Community, for more information see point 3.2. below.

the Member Countries, the main objectives of this organization, and the features of its rules Chapter 4 will analyze the most important legal aspects of the AC's Decisions in relation to Multimodal Transport in the light of the United Nation Convention on Multimodal Transport and the UNCTAD/ICC Rules for Multimodal Transport Documents in order to determine the special features, differences and regulatory gaps of the AC Law. Moreover, the current situation of the AC rules will be analysed. Chapter 5 will conclude by identifying the special features, differences and regulatory gaps in the previous chapter and suggesting possible measures that can be introduced in order to improve the AC Law.

CHAPTER 2 -OVERVIEW OF THE MULTIMODAL TRANSPORT

2.1. Definition of Multimodal Transport

According to an ALADI's report⁶, the movement of cargo by two or more modes known as 'intermodal transport' can be carried out in three different ways:

a) A segmented intermodal transport is a process in which the cargo owner agrees independently with each of the transport companies that they are going to transport the goods. Different documents of transport are issued by each company to the cargo owner depending on the stage that they will carry out. If the cargo suffers damage, loss or delays in its delivery, each transport company will be liable for its own stage based on the rules applicable to the transport contract.

b) Combined intermodal transport is a process in which the cargo owner agrees with a freight forwarder through a freight forwarding contract to transport certain goods using different modes. Acting as a principal in the freight forwarding contract, the freight forwarder subcontracts the actual carriage to carriers in order to transport these goods. In this process, the cargo owner is not party to the contract of carriage between the freight forwarder and the subcarriers.

If damage or loss of goods takes place during the transport of the goods, the cargo owner has the right to claim directly against the freight forwarder to obtain the compensation for his damages. Nevertheless, the freight forwarder can voluntarily assign his rights to the cargo owner to sue the subcarrier or subcarriers that caused the loss or damage. Thus, the cargo owner rather than suing the freight forwarder, sues the subcarriers directly to obtain the compensation of his damages.

⁶ See ALADI (Asociación Latinoamericana de Integración), Foro para Determinar la Viabilidad de Elaborar y Aplicar una Norma Regional de Transporte Multimodal, Documento Base Versión 10, at: <http://www.aladi.org>

The cargo owner should determine in which stage of the journey the damage has taken place in order to address the claim. However, when he cannot determine where the loss has occurred he should claim against all the carriers involved in the transport of his goods.

c) Multimodal Transport is a process in which the owner of the cargo agrees to move cargo by at least two different modes of transport under a single contract and under a single transport document with a carrier known as a multimodal transport operator. The operator bears responsibility for the cargo from the moment he takes possession of the goods up until the moment of their delivery.

According to De Wit⁷ 'A contract for the multimodal carriage of goods contains an undertaking by a carrier, who is called the multimodal transport operator, to perform carriage of goods by at last two different modes of transport from the place where the goods are taken in charge to a place designated for delivery'

With respect to De Wit's definition, it is worth mentioning that one of the most important characteristics of this kind of contract, is that the carrier of the goods - the Multimodal Transport Operator (hereinafter MTO) - acquires legal responsibility for the entire transportation of the goods, 'from the moment that the goods are taken over from the consignor until the moment that they are delivered to the consignee'⁸, regardless to whether he has performed the whole carriage, part or even no part of it. If the cargo has suffered any damage during the transportation from the place of origin to the destination, the MTO must bear legal responsibility for it to the cargo owner.

2.2. Problems that Arise in the Multimodal Transport

Currently there is no an international regime in force that governs the carriage of goods through various modes of transport. Instead, this topic is regulated by different

⁷ De Wit Ralph, *Multimodal Transport Carrier Liability and Documentation* (Lloyd's of London Press Ltd 1995), p. 3

⁸ *Ibid.*, p. 3

unimodal transport conventions.⁹ This lack of uniform regulation has given rise to certain problems such as ‘the determination of the law to be applied to a specific transport operation, whenever several transport modes are used’¹⁰.

As was exposed by Sturley¹¹ in a Congress carried out in Vienna in 2007 to celebrate the fortieth annual session of Uncitral, some problems can arise if damage occurs in a transport between two countries located in different continent:

“Suppose that a shipper in Berlin wishes to have cargo transported to Chicago, and that it arranges to have the cargo carried by road from Berlin to Rotterdam, by sea from Rotterdam to Montreal, and by rail from Montreal to Chicago. ‘...’ as many as six different legal regimes could govern each of the six distinct segments of the single multimodal journey under a single contract of carriage: (1) The European CMR would govern any cargo damage that occurred during the Berlin-to-Rotterdam road leg. (2) The bill of lading would probably govern any cargo damage that occurred in the port of Rotterdam after delivery by the trucker before loading on the vessel (although the bill of lading terms could be displaced by mandatory Dutch law to the extent applicable). (3) The Hague-Visby Rules would govern any cargo damage that occurred during the Rotterdam-to-Montreal sea leg. (4) The bill of lading would probably govern any cargo damage that occurred in the port of Montreal after discharge from the vessel before delivery to the railroad. (5) The mandatory Canadian law governing domestic rail carriage would govern any cargo damage that occurred

⁹ In Europe there are several transport conventions applicable such as: Hague Rules 1924, Hague/Visby Rules 1968 and Hamburg Rules 1979 on maritime transport. CMNI 2001 on inland navigation. CMR of 1956 and CMR/Protocol 1978 on road transport. CIM 1980 and COTIF/CIM 1999 on rail transport. Warsaw Convention 1929, Hague Protocol 1955 and Montreal Convention 2003 on air transport.

¹⁰ Prof Dr. K.F. Haak, ‘The Harmonization of Intermodal Liability Arrangements’ in European Transport Law Vol XL No. 1 – 2005, p. 14.

¹¹ See Papers presented at the UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July 2007, Vienna. Carriage of goods in the 21st century Michael Sturley Sea carriage goes ashore: relationship between multimodal conventions and domestic unimodal rules at: <http://www.uncitral.org/pdf/english/congress/Sturley.pdf>, pp. 2-3.

on the train before crossing the U.S. border. (6) The U.S. Carmack Amendment might (or might not) govern any cargo damage after crossing the U.S. border (depending on the U.S. court in which the dispute was heard).”

Indeed, if damage occurred during this transaction several unimodal conventions and national laws could govern each of the distinct segments. In this case for instance, the liability limit of the Hague Visby Rules (2 SDR per kilogram)¹² or the liability limit of the CMR (8.33 SDR per kilogram)¹³, could be applicable. Moreover, certain countries could apply their own transport regulations to determine the limitation of liability in cases in which there is no international convention applicable. This creates a complex situation because different liability requirements, exclusion clauses, limits of liability and time bars for suit could be applicable.

This situation is even worse in cases in which it is not possible to identify the transport mode where the loss occurred, or when the damage occurs gradually throughout the course of the carriage, or in stages which particular convention is not applicable. In those cases there is no a specific liability regime to be applied, it will vary depending on the conflict of law rules applied by the court where the carrier is sued.

2.3. Theoretical Solutions to the Problems of Multimodal Transport

With the aim of solving the liability problems of the multimodal transport, three systems have been developed: The network liability system; the uniform liability system and the modified liability system which will be analyzed next.

2.3.1. Network Liability System

According to Haak¹⁴

“In this system the liability regime applicable on a multimodal transport agreement is comparable to a chain that is composed of the

¹² Article IV 5 (a) Hague - Visby Rules. The Hague Rules as Amended by the Brussels Protocol 1968.

¹³ Article 23 - 1 Convention on the Contract for the International Carriage of Goods by Road (CMR)

¹⁴ Above, note 10 at p. 15

regimes that normally apply on each trajectory of the total voyage using a different mode of transport. In other words, different regimes apply to the separate parts of the journey as if the involved parties had drawn up separate contracts for each of them”

It should be noted that, on the one hand, if the damage occurs during some stage of the transport and there is an applicable convention, the convention provisions should be applied to determine the liability. On the other hand, when there is no applicable convention, national laws should be applied to determine the liability.

The main advantage of this system is its adaptation to each of the unimodal transport conventions depending on the stage where the damage occurs. Nonetheless, this system has some disadvantages as it is not predictable to the shipper because he cannot anticipate at which stage damage to the goods will occur. Hence, he does not know which liability regime will apply to the damage of his goods. Likewise, this system does not cover the situations where there is no international convention applicable in certain stages of the carriage. Apart from these disadvantages, the system does not give a solution to the cases in which the loss cannot be localized or in which the damage occurs gradually throughout the course of carriage by different modes or where delay occurs.

2.3.2. Uniform Liability System

In this system the multimodal contract of carriage is seen as a “*sui generis contract*” that covers the liability of the MTO from the place of origin to the destination in relation to the damages of the goods.

According to this system, the liability regime of the MTO for loss, damage or delay is always the same from the moment he has taken the goods to the moment he delivers them without taking into consideration the mode of transport where the loss or damage occurs, or whether the MTO executes the transport. In this liability system, as is said by

Haak¹⁵ ‘(...) the same set of rules apply irrespective of the stage of transport during which loss, damage or delay occurs’.

The most important advantage of this system is its certainty, the shipper knows from the beginning to the end of the transport which set of rules will be applicable in case of damage of his cargo, without considering in which stage or mode it occurred. Moreover, it covers situations in which the damage occurs gradually throughout the course of the carriage by different modes and includes provisions in relation to the liability of the MTO when delay on delivery has taken place.

The major disadvantage of this system is the fact that normally the MTO does not perform the whole transport by himself, he usually subcontracts to sub carriers who perform certain parts of the transport. When damage occurs in a stage in which the MTO is liable for that damage towards the shipper according to the uniform liability rules, whereas, the sub carrier is only liable towards the MTO based on a unimodal law that governs the stage of the multimodal carriage that was executed by the sub carrier. Therefore, there may be situations in which according to the uniform system, the MTO would have to pay more compensation to the shipper than he will recover from the sub carrier.

In situations of non localized losses, the MTO should pay the shipper according to the uniform system but he cannot start proceedings against a single responsible sub carrier because the stage where the damage occurred is undetermined. Therefore, the MTO will be required to start proceeding against all the sub carriers involved in the transport to obtain the reimbursement of the amount paid, and even in this case there is no guarantee that the MTO gets a compensation because the sub carriers can refute the evidence given by him or can invoke the exceptions of the unimodal conventions or national laws applicable to the case.

¹⁵ Above, note 10 at p. 15

2.3.3. Modified Liability System

It can be defined as ‘a compromise’ between the provisions of the network and uniform system.¹⁶ This compromise may have different combinations, ‘making a system more uniform or more network – like’¹⁷. In accordance with this system the limits of liability of the MTO will vary depending on whether the damage is localized or non-localized.

On the one hand, if it is possible to recognize the mode of transport where the damage occurred, the limits of liability applicable to that mode in accordance with the international convention or national law of the transport will apply to the MTO. However, when it is not possible to establish where the damage occurred, the MTO’s limit of liability will be determined according to the uniform system.

The liability systems provided in United Nation Convention on Multimodal Transport and the UNCTAD/ICC Rules for Multimodal Transport Documents one can think that are modified liability system.

According to Schommer the predictability for both the shipper and MTO is one of the most important advantages of this system:¹⁸

“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 network liability 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 modified liability regime, the MTO will always be able to recover fully his damages against his subcontractor who caused the damage. By taking into account only the liability limit of the applicable unimodal transport law, rather than 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 the damage occurs between two modes of transport and no unimodal liability

¹⁶ Above, note 10 at p. 15

¹⁷ Ibid., at 15

¹⁸ Above, note 3 at p. 27

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 recourse action against his subcontractors.”

It is worth mentioning that such predictability is not always as higher as Schommer said because the MTO is not always able to recover fully his damage against the subcontractors. The amount recovered will be determined based on the applicable law chosen by the court where the claim is lodged. This law may vary from court to court depending on the conflict of law rules.

Moreover, it should be mentioned that despite this advantage, the application of this system could be complex. As Haak said¹⁹

“The disadvantage of a modified system is that application of its provision may be excessively complex. It may also fail to appeal widely, as it provides neither the full benefits of a uniform system, nor fully alleviates the concerns of those who favour a network system, but it does entail almost all of the disadvantages of both systems like the necessity to adapt the existing unimodal conventions”

In spite of the complexity of this system in practice, one might think that currently it is the best option to be applied. This system offers a convenient solution to one of the most important problems of the multimodal transport: the liability of the MTO towards the shipper and the way in which the MTO can take recourse actions against his subcontractors.

¹⁹ Above, note 10 at p. 43

2.3.4. Some Proposals to Reach the Uniformity in the System of Multimodal Transport²⁰

Since the beginning of the twentieth century, some proposals to regulate multimodal transport have been developed. Initially, a proposal was discussed in the meetings of the Committee Maritime International (CMI) that took place in the 1911 and 1913 conferences in Paris and Copenhagen, respectively, where the implementation of the International Code of Affreightment was analyzed.

In 1963 the Governing Council of the International Institute for the Unification of Private Law (hereinafter UNIDROIT) approved a 'draft convention on the international combined transport of goods'²¹. This document, which stemmed from all the preparatory works done by this Institute since 1949²², introduced the term of principal carrier (nowadays MTO) and provided the liability of the carrier based on the application of the pure network system.

In 1969 attempts to regulate the multimodal transport were done by the CMI through the draft Convention on Combined Transport Tokyo Rules of 1969. However, these rules never entered into force.

The drafts prepared by UNIDROIT and CMI were joined in 1970 in one single text known as the 'Rome Draft'. This document was modified during 1970 and 1971 and was the foundation of 'The Draft Convention on the International Combined Transport of Goods', better known as the 'TCM draft'. This draft never entered into force, but its provisions were reflected in some models of bill of lading such as Combiconbill, and in the 'Uniform Rules for the Combined Transport of Document' of the International Chamber of Commerce²³.

²⁰ Above, note 7 pp. 147-160 to see more details of the history of different attempts to draft a multimodal convention.

²¹ Above, note 2 at p. 9

²² Above, note 7 at p 150 - foot note 989

²³ Above note 2 at page 9

In 1972, in the framework of the UN/IMCO Container Conference, it was proposed the creation of a group of experts to study the economic implications of the adoption of multimodal transport rules and to prepare a draft convention on this issue. This task was assumed by UNCTAD which prepared the United Nations Convention of Multimodal Transport of Goods in 1980. Although this convention never entered into force, it is particularly important because it has been used as a model to regulate multimodal transport in several countries and regions around the world.

Among the recent attempts to create a uniform system of multimodal transport it is worth mentioning that in 1973 the International Chamber of Commerce (hereinafter ICC) recommended a set of rules to be incorporated into multimodal documents. Those rules were replaced in 1992 by a new set of rules that were drafted by the ICC and UNCTAD. Those provisions have been used in a wide number of 'standard bills of lading and multimodal transport documents such as the Baltic and International Maritime Conference's (BIMCO) Combiconbill and in the Uniform Rules for a Combined Transport Document of the International Chamber of Commerce (ICC) '²⁴. It should be noted that those rules are applicable only if they are incorporated in the contract by the parties and they only have legal effect when they are not in conflict with mandatory laws.

²⁴ Above, note 2 at p. 9

CHAPTER 3 - THE ANDEAN COMMUNITY

3.1. General Overview

The AC is a subregional organization of South America originated in 1969 when the Cartagena Agreement was signed between five South American countries: Bolivia, Chile, Colombia, Ecuador and Peru. The aim of the organization is to improve the standard of living of the people through integration and economic and social cooperation between the Member Countries.

The Member Countries of the AC have changed since the formation of the organization. On February 1973 Venezuela became member of the Community and on October 1976 Chile left it. In 2006 Venezuela decided to withdraw from the AC and, on the other hand, Chile re-joined the AC as an associate member on September of the same year.

In the seventies, a policy of close markets was applied by the Member Countries in order to protect their national industry. Thus, high customs rates were imposed to restrict the import of products from third countries. However, this policy collapsed in the eighties because the economies of the Member Countries went through a deep debt crisis which made the change of the policy to an open market one necessary.

Under the new policy the Andean Countries eliminated trade tariffs, created a free trade area where goods can circulate freely and liberalized the service sector, especially, the transport area. Those measures have promoted the trading level of these countries in the last 15 years.

Nowadays, the AC is comprised by four permanent members: Bolivia, Colombia, Peru and Ecuador and one associate member: Chile²⁵. The permanent members of the organization represent a group of 96 million²⁶ of people approximately, with a GDP of US\$675.96 billion in 2007. Those countries exported US\$64.277²⁷ million and imported

²⁵ Chile, as associate member, is allowed to go to the meetings of the Andean Community Bodies as observer. However, it does not have the right to vote in the meetings.

²⁶ See Central Intelligence Agency of United States - The world fact book at: <https://www.cia.gov/library>

²⁷ FOB value

US\$57.968²⁸ million in 2006²⁹. Colombia was the country that registered the highest level of exports, following by Peru, Ecuador and Bolivia, respectively. Furthermore, Colombia, Peru and Ecuador contributed in 2005 with the traffic of 2.789.658 TEUs³⁰.

3.2. Objectives of the AC and its Decisions

According to article 1 of Cartagena Agreement³¹ the main objective of the AC is to promote the development of its member countries under equitable conditions through integration and economic and social cooperation. In order to reach this purpose different bodies and institutions of the AC have issued several legislation in relation to subjects such as: competition, customs, trade, energy, financial integration, infrastructure, intellectual property, investments, macroeconomic policies, migrations, rules of origin, sanitary and phytosanitary standards, telecommunications, tourism and transportation.

Regarding the bodies of the AC, it is worth mentioning that the Andean Integration System (hereinafter AIS) is comprised by different institutions such as the Andean Council of Foreign Affairs Ministers (ACFA)³²; the Andean Community Commission (ACC)³³; the Andean Community General Secretariat (GSAC)³⁴; the Andean Presidential Council and the Andean Court of Justice, among others.

²⁸ Ibid

²⁹ See Comunidad Andina at: <http://www.comunidadandina.org/estadisticas.asp>

³⁰ See The International Association of Ports and Harbors. World Container Country League 2005 at: [www.iaphworldports.org/world_port_info/ContainerCountryLeague\(2005\).pdf](http://www.iaphworldports.org/world_port_info/ContainerCountryLeague(2005).pdf)

³¹ See Comunidad Andina Cartagena Agreement – at: <http://www.comunidadandina.org/ingles/normativa>

³² In articles 15 to 20 of Cartagena Agreement and Decision 407 del Consejo Andino de Ministros de Relaciones Exteriores sobre el Consejo Andino de Ministros de Relaciones Exteriores, is possible to find more information about the Andean Council of Foreign Affairs. This Decision is available at: <http://www.comunidadandina.org/normativa/dec/407.htm>.

³³ In articles 21 to 28 of the Cartagena Agreement and Decision 471 de la Comision de la Comunidad Andina sobre el Reglamento de la Comunidad Andina, is possible find more information about the Andean Community Commission. This Decision is available at <http://www.comunidadandina.org/normativa/dec/471.htm>.

³⁴ In articles 29 to 39 of Cartagena Agreement and Decision 409 del Consejo Andino de Ministros de Relaciones Exteriores sobre la Secretaria General de la Comunidad Andina, it is possible to find more information about the General Secretariat of the Andean Community. This Decision is available at <http://www.comunidadandina.org/normativa/dec/409.htm>.

The first-mentioned three bodies issue two of the most important instruments of the corpus iuris of the AC³⁵: Decisions and Resolutions. The Decisions that are issued by the ACFA and the ACC ‘(...) become part of “Community law”, the Member Countries are bound by them from the date of approval and they are directly applicable in the Member Countries from the date of publication. These legal instruments must be adopted by consensus of all Member Countries and have to take into account the guidelines set up by the Andean Presidential Council. On the other hand, the Resolutions are issued by the GSAC and their main purpose is ‘making sure the Decisions of the ACFA and of the ACC are complied with and executing them’³⁶.

In the next chapter the AC’s legislation in the field multimodal carriage of goods will be explained.

³⁵ Article 1 of the Cochabamba Protocol, available at: <http://www.comunidadandina.org/normativa/tratprot/cochabamba.htm>, establishes the following:

‘Article 1.- The legal system of the Cartagena Agreement consists of:

- a. The Cartagena Agreement, its Protocols and additional instruments;
- b. This Treaty and its Amending Protocols;
- c. The Decisions of the Andean Council of Foreign Ministers and of the Commission of the Andean Community;
- d. The Resolutions of the General Secretariat of the Andean Community; and
- e. The Industrial Complementarity Agreements and any such other agreements as the Member Countries may adopt among themselves within the context of the Andean subregional integration process’.

³⁶ MDC Moncada Castillo, ‘Towards the improvement of the Andean Community of Nations: A comparative study of the Andean Community of Nations and the European Community’, Erasmus University of Rotterdam, at p. 30

CHAPTER 4 - THE MULTIMODAL TRANSPORT SYSTEM IN THE ANDEAN COMMUNITY

Multimodal Transport in the AC is regulated by three main Decisions: Decision 331 of 1993, Decision 393 of 1996 and Decision 477 of 2000. Decision 331 sets up the basis for promoting the use of multimodal transport in the AC and establishes rules related to: the requirements to provide this service in the Member Countries, the multimodal transport contract, the liability of the multimodal transport operator and the applicable jurisdiction. This Decision was amended by Decision 393 of 1996 which clarifies that Decision 331 is applicable to 'international' multimodal operations'. On the other hand, Decision 477 updates the AC's legislation relating to international customs transit in order to facilitate the multimodal transport operations between the Member Countries and between them and third countries. In addition to those decisions, Resolution 425 of 1996 establishes the requirements that have to be fulfilled in order to be registered as a MTO in the AC.

In this chapter, I will focus on the analysis of the Decision 331 of 1993 and Decision 393 of 1996, since they are the most important ones from the legal point of view. These two Decisions are mainly based on United Nations Convention on International Multimodal Transport of Goods of 1980 (hereinafter UN Model) and in the UNCTAD/ICC Rules for Multimodal Transport Documents of 1992 (hereinafter UNCTAD/ICC Rules). Indeed, in these Decisions it is possible to find a mixture of articles of both regulations. However, it must be stressed that these Decisions have certain features which differ from the UN Model and UNCTAD/ICC Rules as well. Likewise, the Decisions have certain regulatory gaps which are covered in the Rules.

Next, I will discuss some articles of the Decisions in order to highlight the most important features and regulatory gaps of those articles.

4.1. Scope of application

The substantive and territorial scope is provided in articles 1 and 2 of the Decision 331 of 1993. According to these rules, the Decision applies to international multimodal transport contracts between two places, if the place of taking charge or delivery of the merchandise by the Registered Multimodal Transport Operator³⁷ (hereinafter MTO), as stipulated in the multimodal transport contract, is located in one Member Country of the AC. In addition, this Decision applies to MTOs operating to or from a Member Country.

An essential element of this scope is the definition of the ‘multimodal transport contract’. Under article 1 of the Decision the Multimodal Transport Contract is ‘The contract by virtue of which a multimodal transportation operator binds itself, in writing and upon a reception of a shipment fee, to carry out the multimodal transportation of merchandise’.

According to this definition the MTO needs to bind itself ‘in writing’³⁸. Therefore, one could say that this article sets up a new formality that differs from the corresponding definition for the term provided in the UN Model³⁹ and UNCTAD/ICC Rules⁴⁰. Those regulations do not establish this general requirement as the contract is in principle ‘consensual - form free’.

In relation to the ‘writing requirement’ provided by the Decision two fundamental questions arise. What are the legal consequences of a non-written contract? Is it an invalid contract?. In order to forestall differences of interpretation about these issues the Andean Court of Justice⁴¹ should give a uniform interpretation about it. Otherwise, the

³⁷ Article 1 of the Decision 331 of 1993 defines the term “Multimodal transport operator”, as “Any persons that enters into a multimodal transportation contract and assumes responsibility for its execution in capacity of carrier.

³⁸ Article 1 of the Decision 331 of 1993 defines the term “In writing”, as “A term encompassing a telegram, telex, fax or any other means of stamping, recording, repeating or transmitting what has been expressed via mechanical, electronic or any other kind of instrument that has been designed for that purpose”

³⁹ Article 1 (3) United Nations Convention on International Multimodal Transport of Goods

⁴⁰ Article 2 (1) UNCTAD/ICC Rules of Multimodal Transport Documents

⁴¹ According to articles 32 and 33 of the Cochabamba Protocol, The Andean Court of Justice can make interpretations of the provisions comprising the legal system of the Andean Community.

scope of this Decision may vary depending on the view of the court where the case is pending.

As regards the MTO, it should be stressed that he is the only person authorized to provide multimodal transport services in the AC⁴². Thus, the legal or natural persons that want to supply the transport services must be registered as MTO in the Registry of Multimodal Transport Operators. The requirements to be registered as MTO are provided in Chapter IV of the Resolution 425 of 1995 and they include the need to have a minimum capital, the appointment of a manager who represents the company, the acquisition of a liability insurance coverage for loss, damages or delay in the delivery of the cargo, among others.

In addition to the requirements established in the Resolution, all persons that want to be registered as MTOs need to fulfill the conditions set up in the law of the Member Country where they intend to provide their services⁴³. For instance in Colombia it is required to acquire an insurance coverage with particular specifications to guarantee the payment of customs duties of the goods that will be transported.

4.2. Multimodal transport document

Documentation provisions are laid down in Articles 3-5 of the Decision 331. Pursuant to Article 3, the multimodal transport document (hereinafter MTD) can be issued to be either negotiable or non negotiable at the option of the shipper.

Article 4 lists the details which must be included in the MTD such as the general nature of the merchandise, the main trademarks necessary for its identification, the apparent condition of the merchandise, the name and the main establishment of the MTO, the name of the shipper, among others. The document needs to fulfil fourteen different

⁴² Article 1 Resolution 425 1996

⁴³ For instance Articles 3 and 5 of the Decree 149 of 1999 of the Republic of Colombia set up some requirements for the persons or companies those want to provide their multimodal transport services from or to this country.

aspects, most of which are identical to those mentioned in the MTD under the UN Model⁴⁴

Nevertheless, article 4 does not expressly require a statement about the possibility of derogating the provisions of the Decision to be incorporated into the MTD. For that reason, it will be advisable to include in article 4 of the Decision a paragraph similar to article 28, paragraph 3 of the UN Model in the following terms: ‘The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Decision which nullify any stipulation derogating therefrom to the detriment of the consignor or de consignee’. Such paragraph would be important for protecting the shipper and consignee interests as it clarifies under which law the MT transport will be ruled. Besides, if a problem arises in relation to the performance of the MT contract, shipper and consignee will be able to check if any of the contract clauses is contrary to the Decision in order to ascertain if they are null. However, the lack of this statement in the MTD does not imply that the Decision will not be applicable.

Article 5 of the Decision 331 concerns the evidentiary effect of the MTD and the reservations made by the MTO on this document. This Article is similar to Article 3 of UNCTAD/ICC Rules because it establishes that the MTD is prima facie evidence of the taking in charge by the MTO of the goods. Furthermore, this article tries to summarize the main aspects of articles 9 and 10 of UN Model in relation to the reservations and evidentiary effect of the MTD. On the one hand, according to the first paragraph of article 5, the data contained in the MTD constitutes a presumption that the MTO has taken in charge the goods as described in the document, except if a contrary indication such as ‘(...) “weight, nature and number declared by the carrier”; “container filled by the carrier” or other similar statements’⁴⁵ has been incorporated into the printed text of added to the MTD by the MTO⁴⁶. Indeed, the MTD is proof of the MTO’s receipt of the

⁴⁴ Article 8 United Nations Convention on International Multimodal Transport of Goods

⁴⁵ Article 5 Decision 331 of 1993

⁴⁶ These indications are well known as ‘reservations’ in the transport field. One must note that there is no mention in the article in relation to the motivation of the reservation.

cargo as well as evidence of the contractual relationship between the MTO and the shipper.

On the other hand, second paragraph of article 5 provides that no proof to the contrary must be accepted if the MTD has been transferred or the electronic mail message of equivalent data has been sent to the consignee and he has acknowledged receipt of it, as long as he has acted in good faith. Thus, the MTD is considered ‘conclusive evidence’ so that it effectively excludes counter evidence. It should be noted, that the wording of this paragraph corresponds to the wording of other Transport Conventions, such as the Hague-Visby Rules⁴⁷.

Although the abovementioned articles 3 to 5 cover some of the main aspects of the MTD, there is one regulatory gap in these provisions which should be mentioned. The Decision does not state any consequences or sanctions regarding intentional misstatements or omissions by the MTO in the MTD which are accompanied by an intention to defraud the shipper or the consignee.

A fraudulent situation can take place when the carrier knows that the information entered in the MTD is incorrect but nevertheless he included it, as for example

“(...) when the MT document is antedated or some parcels are clearly missing or damaged, but the MTO is nevertheless induced by the consignor to issue a clean document’. In all the cases it is common practice for the consignor to give the issuer of the clean document a letter of indemnity (a so called “back-letter”) where the consignor promises to hold the MTO fully harmless of any consequences which might follow from the fact that the information in the document is incorrect (...)”⁴⁸.

⁴⁷ Art. 3 paragraph 4 Hague Visby Rules 4. “Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith”.

⁴⁸ See UNCTAD Report and Documents. The economic and commercial implications of the entry into force of the Hamburg Rules and the Multimodal Transport Convention at: <http://r0.unctad.org/ttl/docs-legal/rep-doc/Economic%20and%20commercial%20implications.pdf>, at p. 167.

In this situation, the MTO should be liable, without the benefit of limitation of liability provided in the Decision, for any loss, damage or expenses suffered by a third party, including a consignee, who has acted in good faith based on the description of the goods provided in the MTD.

4.3. Responsibility of the MTO

The main rules regarding this topic are laid down in articles 6 to 12 of the Decision 331 which concern different issues that will be analyzed below.

4.3.1. Period of responsibility

Similar to Article 4.1 of the UNCTAD/ICC Rules, Article 6 of the Decision 331 states that the MTO is responsible for the merchandise from the moment he ‘takes possession of the goods’ and up until the moment of their delivery. The moment of performance the delivery of merchandise by the MTO is defined in Article 8 of the Decision which includes five different situations that cover the delivery when negotiable and non negotiable documents have been issued and when no written document has been issued. For instance, when a negotiable MTD has been issued “to the bearer”, Article 8 states that the MTO performs his obligation when he delivers the merchandise to the person that presents to him one of the original copies of the MTD.

However, unlike article 14.2(b)(iii) of the UN Model, Article 8 of the Decision does not contain a rule that allows the MTO to perform his obligation of delivering the goods by handing over the merchandise to an authority or other third party whom the goods must be handed over pursuant to the law applicable to the place of deliver. One might think that including an article in this respect would be convenient for situations in which the merchandise cannot be delivered to the shipper or his proxy. This kind of situation may take place ‘where the parties to the MT contract have been deprived of their freedom to decide on the modalities of cargo handling and storage in the country of destination of the cargo or when particular usages apply at the place of destination’.⁴⁹

⁴⁹ Ibid., at p. 170

Regarding the term ‘takes possession’ and ‘delivery of the merchandise’ the Decision does not indicate from or to whom the MTO has to take or deliver the goods. One might think that the MTO always needs to take the merchandise from the shipper or deliver it to the consignee. However, there are situations where the ‘goods are often taken in charge by the MTO from a person other than the consignor and delivered at their destination to a person other than the consignee’⁵⁰. This issue has been recognized by some transport law conventions⁵¹ which provides that the MTO can take the merchandise from a person other than the shipper and that the goods can be delivered to a person different from the consignee. Therefore, if a person is appointed to act on behalf of the shipper or the consignee and the goods are lost or damaged when they are in custody of such a person, the MTO will not be liable.

In order to clarify this topic in the Decision, it would be advisable to include an article similar to article 4 (2) of the Hamburg Rules⁵² that states that the goods can be taken by the MTO from a person other than the shipper and delivered at their destination to a person other than the consignee.

4.3.2. Basis of Responsibility

Similar to article 16 of the UN Model⁵³, the responsibility of the MTO under article 9 of the Decision is based on the idea that ‘the carrier is prima facie liable if he does not

⁵⁰ Ibid., at p. 169

⁵¹ Hamburg Rules article 4.2. (a) and (b) and UN Model article 14.2. (a) and (b)

⁵² Hamburg Rules. Period of responsibility.

“ (...)

2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods

(a) from the time he has taken over the goods from:

(i) the shipper, or a person acting on his behalf; or

(ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over. (...)”

⁵³ Article 16 United Nations Convention on International Multimodal Transport of Goods. **Basis of liability.** 1 The multimodal transport operator shall be liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in

deliver the goods safely and in time at the agreed “destination”. In continental law terms, the carrier undertakes an “*obligation de resultat*”⁵⁴.

The prima facie liability means that

*“(…) a presumption of liability is created against the carrier, consisting in fact of two elements: it is presumed that the carrier has committed a fault or negligence, and that this fault or negligence is actually the cause of the loss or damage. In other words, the cargo claimant is not required to prove that the carrier was at fault or how the damage might have occurred.”*⁵⁵

According to article 9 of the Decision, the MTO is responsible for the loss of or any damage to the merchandise, as well as any event causing the loss, damage or delay in delivery which occurred when the goods were in his possession. Nevertheless, he will not be liable if he proves that he, his employees, agents or other any person on whose services they rely for the performance of the contract, took all the measures that could reasonably be required to avoid the occurrence and its consequences. This presumption imposes the onus of proof on the MTO, because he is the party that can have more knowledge of the facts that caused the loss, damage or delay of the merchandise.

In these types of claims, ‘the claimant must prove that a contract of carriage existed upon which he is entitled to an action against the carrier’⁵⁶ In other words, ‘the claimant makes his case by showing that the goods were received by the carrier in good order and condition, and that they were missing or damaged at destination’⁵⁷

The MTO could try and refute the claim of the cargo owner in three ways. First, he can refute the evidence of loss or damage given by the claimant particularly the goods

delivery took place while the goods were in his charge as defined in article 14, unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences. (...)

⁵⁴ Above, note 7 at p. 332

⁵⁵ Ibid., at p. 334

⁵⁶ Ibid., at p. 333

⁵⁷ Ibid., at p. 334

condition and number. Second the MTO can invoke the exceptions provided by the Decision (see point 3.3.4.). Third, the MTO can establish that he, his employees, agents or other any person on whose services he relied on for the performance of the contract, took all the measures that could reasonably be required to avoid the occurrence and its consequences.

The last situation is provided in similar terms in article 5.1 of the Hamburg Rules and in article 16.1 of UN Model. The word ‘reasonably’ means that the MTO should do ‘what is reasonable to expect from a diligent MTO for the purpose of avoiding occurrences, and consequences of such occurrences’⁵⁸. If he does not do what is expected, he should pay compensation for the loss or damage that he causes.

4.3.3. Exemptions from responsibility

It is not always the case that the loss, damage or delay in delivery of the merchandise is only caused by fault or negligent act of the MTO, as various actors and circumstances can contribute to or aggravate the cause. This issue has been recognized by almost all transport law conventions⁵⁹ that have included an article that if more than one cause has contributed to the occurrence of the damage, the MTO should not be liable if and to the extent that he proves that the damages resulted from another cause established as an exceptions in the conventions.

This issue has been recognized by the Decision 331 which in article 11 provides that the MTO can invoke certain exceptions in order to avoid responsibility for the loss, damage or delay in the delivery of the merchandise.

Initially, the old article 11 of the Decision was similar to article III-1 of Hague Visby Rules that was based on the theory of overriding obligation. According to this theory, the carrier of goods by sea has the obligation to exercise due diligence of making the ship seaworthy before and the beginning of the voyage. When he does not exercise that

⁵⁸ Above note 48 at page 172

⁵⁹ For instance Article 17, 5 CMR; Article 18,2 CMNI; article 5-7 Hamburg Rules; article 17 UN Model Convention.

due diligence, he can not invoke the immunities of article IV-1 of the Hague Visby Rules.

In this sense, the last paragraph of the old article 11 established that the MTO was not liable where the loss or damage are the result of the ship's inability to navigate as long as he proved that he had exercised due diligence to make the ship seaworthy at the beginning of the trip. Thus, if the MTO proved that he had exercised due diligence he could invoke the exceptions of liability provided in article 11⁶⁰. These exceptions were similar to those of article IV2 (a) and (b) of the Hague Visby Rules

It should be noted that article 11 was only applicable to losses, damages or delays in delivery of the merchandise shipped by sea or inland water transport. Therefore, it excluded its application to other transport modes such as rail and road transport.⁶¹

Article 11 was amended in 1996 by article 6 of Decision 393 which leaves out the reference of the overriding obligation and introduces a new set of exceptions that are applicable to all transport modes. According to the current article 11, the MTO will not be responsible if he proves that the loss, damage or delay in the delivery of the merchandise was due to the following circumstances: 1) An act or omission of the shipper, consignee or their representatives or agents; 2) insufficiency of defective packing of goods, their marks or numbers; 3) handling, loading, unloading and stowage or the goods effected by the shipper, the consignee or their agents; 4) inherent vice or defect in the merchandise which includes the loss resulting from the nature of the goods such as breakage, rust, decay, wastage, leakage and 5) strike, lock out, stoppage or

⁶⁰ The previous article 11 of the Decision 331 of 1993 established the following:

'Notwithstanding the stipulations of article 9, the multimodal transportation operator shall not be responsible for the loss, damage or delay in delivery of merchandise shipped by sea or inland water transport, when such loss, damage or delay occurred during the transportation due to:

- acts, negligence or failure by the captain, sailors, pilot or employees of the carrier, in the navigation or handling of the ship,
- Fire, unless caused by an act or omission of the carrier;

Provided that, in the cases where the loss or damage are the result of the ship's inability to navigate, the multimodal transportation operator is able to prove that due diligence was exercised to make the ship seaworthy at the beginning of the trip.'

⁶¹ There is no information available about the records of this topic. Therefore, it was not possible to determine the reasons why this article only included exceptions to the sea mode of transport.

restraint of labor beyond the control of the MTO. In order to invoke the mentioned exceptions the MTO is not required to prove his due diligence.

Most of these exceptions are similar to those of article IV-2 of the Hague Visby Rules⁶². However, the Decision has an additional exception (No 4) which deals with the handling, loading, unloading and stowage or the goods by the shipper, consignee of their agents which is similar to the exception of article 17(4)(c) of the CMR. One can think that this exception was included to provide protection to the MTO for errors or mistakes committed by the shipper, consignee or their agents in the manipulation of the cargo in which he has not directly participated.

4.3.4. Localised damage

Article 16 of the Decision 331⁶³ provides the “modified liability system” which includes elements of both the uniform liability system and the network liability system. Indeed, this article states that when the loss or damage to the merchandise occurs during one particular stage of the multimodal transport where an applicable international convention or mandatory laws establishes a higher limit of liability than the one provided by the parties, those limits must apply.

This system of liability differs from the system provides under articles 19 of UN Model and 6.4. of the UNCITRAL/ICC Rules. According to the Decision, in order to apply the limits of an international convention or mandatory law, it is necessary that the limits provide in those rules are higher than the limits provided by the parties. On the other

⁶² For instance the exceptions including in the subsection i), j), m) n) and o) of article IV sub 2 of the Hague Visby rules according to: “(...) 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(...)

i) Act of omission of the shipper or owner of goods, his agents or representative.

j) Strikes or lockouts of stoppage or restraint of labour from whatever cause, whether partial or general

(...)

m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

n) Insufficiency of packing,

o) Insufficiency or inadequacy of marks. (...)”

⁶³ Modified by article 7 of Decision 393 of 1996

hand, if the UN Model⁶⁴ is to apply the limits of the international convention or mandatory national law, it is only necessary that these limits are higher than the limit that would follow from application of the Convention. Moreover, UNCITRAL/ICC Rules⁶⁵ only require that the international convention or mandatory national law applicable to the particular stage of the multimodal transport would have provided another limit of liability if a separate contract had been made for that particular stage of transport⁶⁶.

Therefore, one can argue that Decision 331 establishes a new approach to the application of the limits provided in unimodal conventions and national laws. These limits should be applicable only if they are higher than the limits agreed by the parties. This might mean that the system is based on a contractual agreement between the parties and that they determine which liability limit is applicable. In situations in which the parties fail to provide such limit one may think that the limits of article 13 of the Decision will apply, as this is the general rule of limitation of liability that may supplement the stipulations of the parties.

Moreover, one might say that the MTO governed by the Decision 331 will not be interested in proving that the loss or damage occurred in certain leg of transport if that leg is subject to a higher limit than the one agreed with the shipper under the MT contract. The MTO would prefer to compensate the cargo claimant based on contractual provisions that are more favorable to his interests, that is, where the limits agreed are lower.

The implications of this situation is to shift the MTO's burden of proof to the cargo claimant as the latter will be interested in proving that the loss or damage occurred during a particular leg where the compensation limit is higher. When the cargo claimant

⁶⁴ Article 19 UN Model

⁶⁵ Article 6.4 UNCITRAL/ICC Rules

⁶⁶ In other words, the main difference between the UN Model and the ICC Rules regarding the limitation of liability of the MTO in cases of localised damage is that in the former it is applicable the limits of the international convention or mandatory national law as long as those limits are higher than the limits provided by the UN Model. Whereas in the latter, the liability limits of the international convention or national laws will apply without taking into account if those limits are higher than the limits provided by the UNCITRAL ICC Rules.

‘does not succeed in proving where the loss or damage has occurred’⁶⁷ the limit agreed by him with the MTO will apply and he can ignore the higher limits that he would hope to get. Additionally, it is worth considering that the MTO is not interested in proving that the loss or damage has taken place on a stage that is subject to a lower limitation of liability because in any case ‘he is bound by the minimum limit’⁶⁸ that he has agreed with the shipper.

Finally, it is noteworthy that there is a regulatory gap in the application of article 16 of the Decision as it is not clear which law system will determine whether an international convention or mandatory national law is applicable. It could be the law of the contract or the law where the dispute is decided, it will vary depending on the court where the case is pending, because each court will apply its own conflict of law rules to determine the applicable law. Therefore, this regulatory gap creates uncertainty in relation to which legal regime will be applied where the damage is localised. For that reason it would be advisable to introduce in the Decision an article that provides the conflict of law rules that will apply in these cases.

4.3.5. Delay in Delivery

There are different views regarding the importance of regulating the delay in delivery of the cargo in the Multimodal Transport Laws. On the one hand, experts⁶⁹ have held that it is necessary to regulate this issue because otherwise the questions related to the carrier’s liability for delaying the delivery would be left to national law and there will not be uniformity. Secondly, experts have considered that if there is no regulation about this issue in the multimodal laws, it would create a discrepancy with the other applicable conventions that contain provisions related to liability for delay. Because according to the network principle adopted in the multimodal conventions⁷⁰, the carrier will always be exposed to the liability established in unimodal conventions about this issue.

⁶⁷ Above, note 7 p. 428

⁶⁸ Ibid., at p. 427

⁶⁹ See UNCITRAL. Working Group III Document A/CN.9/WG.III/WP.74 at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html at paras. 23 – 24.

⁷⁰ For instance article 16 of the Decision 331 of 1993 or article 19 of the UN Model

On the other hand, there is another position⁷¹ that holds that it is not necessary to include this kind of provision in the MT law as it should be done by the parties and there is no factual evidence that it is needed. Likewise, it is suggested that this type of rules increase the transport cost's because the carriers facing exposure to this liability will be required to purchase insurance to cover their potentially maximum exposure and will factor this cost into their freight rates.

The multimodal law of the AC has followed the first view whereby it is necessary to include a provision relating this matter as it provides uniformity to the system. Article 10, paragraph 1 of Decision 331 contains a definition of the term 'delay in delivery'. This situation occurs in two cases: 1) When the merchandise has not been delivered within the time expressly agreed with the shipper; and 2) when in the absence of such agreement, within the period, given the circumstances of the case, it would be reasonable to demand the merchandise from a diligent MTO.

According to paragraph 2 of article 9 of the Decision 331⁷² the MTO is only responsible for delayed delivery⁷³ if there is a breach in the first situation. It follows that he will be liable if two requirements are fulfilled: First, if there is a declaration of interest in delivering the merchandise within an agreed period of time by the shipper; and second, if that declaration has been accepted by the MTO.

In addition, it is noteworthy that Article 10, paragraph 2 of the Decision 331 provides that if the merchandise is not delivered within 90 consecutive days following the agreed date or the reasonable time expected of a diligent MTO, the claimant may treat the goods as lost.

In relation to damages resulting from delay in the delivery, or any indirect loss or damages other than the loss or damage to the merchandise, article 17 of the Decision

⁷¹ See UNCITRAL Working Group III Document A/CN.9/WGIII.WP.91 at: http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html at paras. 8 - 14

⁷² This article is similar to article 5.1. UNCTAD/ICC Rules in accordance with "the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO".

⁷³ The second situation of article 10 of the Decision 331 - *delay in absence of agreement* - is not covered by the liability provides in the second paragraph of article 9 of the Decision.

provides that the liability of the MTO is limited to a sum that does not exceed the equivalent of freight under the multimodal transport contract. Hence, this article provides a maximum value for indirect losses than can be recovered by the cargo claimant.

Some examples of indirect losses illustrate the above principles: 1) Damages related to losses supported by the cargo claimant resulting when the physical integrity of the merchandise damage has changed and the cargo is prohibited from being sold to consumers for public or health reasons; 2) Damages related to loss of profits that the cargo claimant has suffered because of the reduction of merchandise. In these cases, the cargo claimant has the burden of proof of these damages and he will only recover, as a maximum, the amount of freight that he has agreed with the MTO.

4.3.6. Responsibility for servants and agents

Article 7 of the Decision 331 concerns the vicarious liability of the MTO. According to this provision, the MTO will be responsible for the actions and omissions of: 1) His employees or agents while they were performing their duties; or 2) any other persons of whose services he makes use for the performance of the multimodal transport contract. In those cases the MTO will respond as if those acts and omissions were his own.

According to this article, the scope of the vicarious liability of the MTO not only covers his employees or agents as it is extended to his subcontractors for the performance of the multimodal transport contract. This extension of liability is important because it prevents that the MTO disclaims his liability referring the shipper or consignee to turn against the subcontractor(s) that have performed the additional carriage.

4.3.7. Limitation of Responsibility

Article 13 of the Decision 331, which is very similar to article 6.1 UNCITRAL/ICC Rules, provides that the MTO liability for damages resulting from the loss of or damage

to the goods is limited to a sum not exceeding 666.67 SDR⁷⁴ per bundle or unit, or 2.00 SDR per kilogram of gross weight of the merchandise lost or damaged, if that is larger.

However, those limits can be higher according to article 15 if the contract does not include carriage by ocean or inland water way. In this case the limitation amount rises to 8.33 SDR per kilogram of gross weight of the loss or damaged goods. This means that the responsibility limits of the MTO could vary depending on the use of the sea and inland water transport to perform the multimodal carriage. ‘The distinction is justified by the argument that whenever a water trajectory is included, this tends to considerably outweigh the other trajectories, from a economical point of “view”’,⁷⁵

With the concept of package for containerized or palletized goods, article 14 of the Decision 331 states that if the container pallet or similar transportation element is loaded with more than one bundle or unit, all bundles or units of cargo transported according to MTD that are contained in such article of transport are deemed a bundle or unit of cargo transported. Nevertheless, if that information is not available in the MTD, all the bundles or units contained in such article or transport are deemed as a single cargo unit transported.

The abovementioned approach is similar to that in article 18 paragraph 2a) of UN Model and in article 6.2. of the UNCITRAL/ICC Rules. Nevertheless, one might argue that the Decision and article 6 of the UNCITRAL/ICC Rules have a regulatory gap regarding the lost or damage of the container or pallet itself, when it is not owned or supplied by the MTO. For that reason, it would be prudent to follow the approach in article 18 paragraph 2b of the UN Model whereby ‘In cases where the article of transport itself has been lost or damaged, that article of transport if no owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit’.

⁷⁴ The SDR’s are defined in terms of a basket of major currencies used in international trade and finance. At present, the currencies in the basket are the euro, the pound sterling, the Japanese yen and the United States dollar (...). The amounts of each currency making up one SDR are chosen in accordance with the relative importance of the currency in international trade and finance. The determination of the currencies in the SDR basket and their amounts is made by the International Monetary Found Executive Board every five years. For more information see wikipedia at http://en.wikipedia.org/wiki/Special_Drawing_Rights

⁷⁵ Above, note 7 at p. 425

Finally, it should be noted that article 18 of Decision 331 contains a limit in relation to the accrued responsibility of the MTO. This cannot exceed the limits of responsibility for the total loss of the merchandise. This approach is similar to that in article 6.6 of the UNCITRAL/ICC Rules.

4.3.8. Breaking the limits

Generally, one can say that the aforementioned limits are breakable if the cargo claimant proves that the loss, damage or delay in delivery of the cargo has resulted from a personal act or omission of the MTO committed with the intention of causing that loss, damage or delay, or that the MTO acts rashly and with the knowledge that such loss, damage or delay would probably result⁷⁶.

It is important to stress that the acts and omissions that can break the limits, are those ascribable ‘in person’ to the MTO. In other words, the acts and omissions of the MTO’s employees or agents or any other person whose services he relies for the contract performance, do not cause the breaking of the limits. Indeed, the cargo claimant cannot break the limits when he brings any action directly against the employees, agents or third person hired by the MTO, because there are not any express mechanisms in the Decision that enable him to do so.

4.3.9. Determination of the Cargo Value

The common problems that arise in determining the cargo value to compensate the loss of damage of the merchandise are: 1) The price fluctuation in the merchandise from the place where the MTO takes the goods in his charge to the place of delivery; and 2) The subjective value of the merchandise that the shipper awards to it that could exceed its objective market value. In order to solve those problems article 12 of the Decision 331, following the provision 5.5. of UNCITRAL/ICC Rules provides a standard for determining the value of the goods.

⁷⁶ Article 19 Decision 331

Pursuant to this article, the amount of compensation will be set according to the value of the merchandise in the place and at the time of its delivery to the consignee⁷⁷. When the merchandise could not be delivered, the amount will be set in accordance with the value at the place and at the moment it should have been delivered. The value of the goods should be determined according to the commodity exchange price, or lacking that, according to its market price or, if there is no commodity or exchange market price, in accordance with the usual value of the merchandise of the same kind and quality.

This article is important because it helps to determine the maximum value that the MTO will pay to the cargo owner or the consignee for the loss of or damage to the goods. According to article 18 of the Decision 331, the “accrued responsibility” of the MTO shall not exceed the limits of responsibility for the “total loss of the merchandise”. Thus, when the determination of the cargo value in accordance with article 12 shows that the cargo value is less than the applicable limits provided by article 13 the cargo value established in article 12 will apply.

4.3.10. Claims in tort

There are situations in which the MTO, his subcarriers and servants can be sued in tort by the cargo owner or third parties. When the MTO does not perform all the legs of the transport and he agrees with subcarriers that they carry out certain legs, there is no contractual relationship between the cargo owner and the subcarrier. Therefore, if damage takes place in a subcontracted leg, the cargo owner could sue the subcarrier based on tort and, consequently, he might avoid the liability limits of the Decision.

In order to avoid this situation, article 23 of the Decision states that the MTO, his employees, agents or other person of whose services he avails himself for the performance of the contract, can invoke all the rules and regulations of the Decision to all the claims filed against them, irrespective of whether or not those claims are based on contractual or extracontractual liability. This article discourages extracontractual

⁷⁷ It is known as a ‘Destination Value’. This article is similar to article 19 of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) and article 32 of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail. (Cotif-CIM)

claims filed by the cargo owner as it allows the parties involved in the multimodal transport to invoke the limitation of article 13 of the Decision 331. .

4.4. Responsibility of the Shipper

Article 20 of the Decision 331 provides the responsibility of the shipper which is based on the provisions 8.1 and 8.2 of the UNCTAD/ICC Rules and article 12 of UN Model. Article 20 establishes that the shipper is liable for damage resulting from the inaccuracy or insufficiency of all the information submitted by him to the MTO for the MTD, related to the general nature of the merchandise, its trademarks, number, weight, volume, quantity and its dangerous nature. That responsibility starts the moment that the MTO takes possession of the goods. The shipper should compensate the MTO in those circumstances even if the MTD has been transferred.

It is common practice that the transport forms are supplied in advance by the MTO to the shipper or to the freight forwarders. The relevant information of the cargo usually is inserted by the latter in the transport form. In many cases, the MTO only signs the document with the information provided by the shipper or the freight forwarder without checking the accuracy of the information provided. Therefore, this article is important in order to protect the MTO when the information provided by the shipper is not accurate.

As regards the ‘dangerous nature of the goods’, one can say that in order to determine whether a good is dangerous, the applicable law that covers the leg of transport where the damage has taken place should be analyzed. One might think that if the damage occurs during the sea leg, it should be necessary to review the International Maritime Dangerous Goods Code issued by the International Maritime Organization⁷⁸. However, if the damage has taken place in the air leg, it should be necessary to review the IATA Dangerous Goods Regulations⁷⁹. When it is not possible to determine where the damage occurred, there is not a clear answer about the applicable regulation. In order to solve this, the best approach would be to include a specific definition of dangerous goods in

⁷⁸ See International Convention for the Safety of Life at Sea (SOLAS), 1974, International Maritime Organization at: http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647#vii a

⁷⁹ See information about Dangerous Goods Regulation in the International Air Transport, at <http://www.iata.org/ps/dgr>.

the Decision. This definition might be based on the UN Recommendations on the Transport of Dangerous Goods developed by the Committee of Experts on the Transport of Dangerous Goods of the United Nations⁸⁰.

4.5 Time bar

The cargo claimant has a period of nine months for bringing any legal or arbitral action relating to multimodal transport against the MTO⁸¹. The nine months time bar period commences from the date on which the goods should have been delivered or if the goods have not been delivered, from the ninety calendar days after they should have been delivered given the circumstances of the case.

It is important to note that this period only covers actions of the cargo claimant against the MTO. However, if the MTO wants to bring a judicial or arbitral proceeding against the shipper, he can do it without taking into account such time bar. For that reason, the MTO has an advantage over the cargo claimant because he will only be restricted by the time bar of the applicable national law of the country where he brings the judicial or arbitral proceedings which in many of the cases is more than nine months⁸².

In order to fill this regulatory gap regarding the time bar, it would be advisable to modify the first part of article 22 of the Decision 331 by introducing a similar text to the first part of paragraph 25 of the UN Model⁸³.

The text of the first part of article 22 of the Decision 331 may be the following: ‘Any action related to the multimodal transport under this Decision shall be time barred if judicial or arbitral proceedings have not been instituted within a period of nine months’.

⁸⁰ See UN Recommendations on the Transport of Dangerous Goods. Model Regulations at http://www.unece.org/trans/danger/publi/unrec/rev13/13nature_e.html

⁸¹ Article 22 of the Decision 331

⁸² For instance in the case of Colombia, According to article 993 of the Code of Commerce the time bar to bring directly or indirectly actions related to transport contracts is two years. See the Colombian Code of Commerce at <http://encolombia.com/derecho/CodigoComercioColombiano/CodComercioLibro4-8.htm>

⁸³ Article 25 United Nations Convention on International Multimodal Transport of Goods **Limitation of actions** 1. Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. (...)

The advantage of filling this regulatory gap is that it gives uniformity in the time bars to the actions from both the MTO and the shipper.

4.6 Jurisdiction

Article 24 of Decision 331 allows the claimant at his choice to bring an action in a competent court of any of the following places: 1) The main place of residence of the MTO; 2) the place where the multimodal transport contract was signed; 3) the place of taking the goods in charge for multimodal transport; 4) the place of delivery the goods; and 5) any other place designated for that purpose in the multimodal transportation contract and indicated in the MTD.

The main place of residence of the MTO is not specified in the Decision, thus it might be the MTO's place of incorporation or of effective management or of registration. To clarify this issue, the criteria would involve 'the place of registration' rather than the main place of residence. The place of registration is usually the same place where the company was legally incorporated⁸⁴ according to Decision 331 of 1993 and Resolution 425 of 1996.

4.7 Arbitration

Article 25 of the Decision 331 authorizes the parties to submit their differences over the multimodal transport contract to arbitration. The place of arbitration has to be determined following the jurisdiction rules aforementioned under point 4.6. The types of arbitration that could be used are not mentioned. Thus, one can say that it could be institutional or ad hoc arbitration depending on the parties' autonomy.

4.8 Complementary provisions

With respect to the final provisions of the Decision it is worth mentioning two of them: On the one hand, Article 26 states that any stipulation in the MTD that diverges directly or indirectly from the provisions of Chapter 3 of the Decision⁸⁵ should be null and void, particularly if it is unfavorable to the shipper or the consignee.

⁸⁴ Article 31 of Decision 331 of 1993 in conjunction with article 1 Resolution 425 of 1996.

⁸⁵ It includes, inter alia, the responsibility of the MTO and shipper, the limitation of responsibility, notifications, claims and actions, jurisdiction and arbitration

On the other hand, article 27 of the Decision 331 modified by article 8 Decision 393, provides that unless otherwise arranged, provisions of international agreements applicable to multimodal transport contracts must prevail over the stipulations of the Decision. However, it is required that all the countries involved in the multimodal transport operation are parties to the Convention. For example, if there is a MT operation from Colombia to Germany and both countries are contracting states of a new multimodal international convention, the provisions of the new convention will prevail over the provisions of the Decision 331.

4.9 Current situation of the Multimodal Transport in the Andean Community

One can say that the Multimodal Transport Rules in the AC in the last 15 years have been used very little, and as a result there is no case law outlining the jurisprudence and doctrine of this issue. A few reports prepared by IIRSA in 2003⁸⁶ and ALADI in 2007⁸⁷ support this statement. ALADI's report has analyzed some of the causes of the lack of application of these rules in South America from different perspectives such as shippers or cargo owners', MTO's, insurance companies', airports', port authorities' and governments' views.

From the cargo owners' perspective the report identified the following causes: Firstly, they do not understand the concept of multimodalism and the advantages that the system brings to them. Secondly, there is a lack of offer of this kind of services in the region. For instance, in Colombia there are only 14 MTOs⁸⁸ registered and in Peru, Bolivia and Ecuador there are no companies registered⁸⁹. Thirdly, some banks and customs authorities of the AC countries do not accept the evidentiary function of the MTD, making it a procedural challenge to carry the goods from one country to another.

⁸⁶ See IIRSA – Iniciativa para la Integración de la infraestructura regional sudamericana (IIRSA) – Document Transporte Multimodal en Sudamérica Hacia una articulación normativa de carácter regional at <http://www.iirsa.org>

⁸⁷ Above, note 6 at p. 4 to 9.

⁸⁸ [It is noteworthy is required that the MTO is registered in order to apply the multimodal transport Decisions.](#)

⁸⁹ See UNCTAD. Document Expert Meeting on the Development of Multimodal Transport and Logistics Services Colombia Desarrollo – Obstáculos y retos del transporte multimodal y la logística. at: <http://r0.unctad.org/tl/ppt-2003-09-24/pdf/Colombia%20experience%20-%20AlciraBarrero%20done.pdf> at p. 14

Fourthly, the cargo owners feel that specific interest groups largely influence the regulatory framework, especially the carriers and insurers who have influenced the way in which the rules have been written.

The MTOs analysis was focused on other causes. In the AC countries, there is no suitable infrastructure to transfer goods between modes of transport. The cost involved is very high, the operations are time consuming and the safety and quality conditions for transferring goods are not suitable. Besides, the MTOs do not have a clear idea of their main rights and duties. Moreover, the carriers of the different transport modes are competing between themselves in order to get the cargo rather than working together to complement their services.

From the port and airport operators' points of view, there are deficiencies in the ports which make difficult to meet the demands of multimodal transport, particularly in relation to internal and access spaces, equipment and facilities. Likewise, they are looking to clarify their liability limits in a multimodal transport operation in relation to customs authorities, because in certain cases they are liable for the payment of the custom duties of the cargo when it is damaged or lost in their facilities.

Insurance companies have expressed their concern about the lack of precision and coherence of the laws and rules related to the liability system of the MTO. That hinders accurate risk-evaluation involved in the insurance contract and it lessens their chance of bringing subrogation actions against the person responsible of the loss or damage.

Finally, from the governments' perspective there is a lack of coordination in the various entities involved in multimodal transport in some states, due in part to the absence of a Competent National Agency in charge of MTO registrations. Furthermore, some of the custom officers located in the countries' borders are not well informed about how to treat the goods covered by an MTD. In many cases, the custom authorities in intermediary points of transport carry out custom inspections by opening the containers, which creates a danger to the containerized cargo and also increases the costs of the transport due to the time consumed by these inspections. .

In order to tackle these deficiencies, the ALADI has promoted the creation of an experts group of South America that started work last year on designing a new plan to increase the use of multimodal transport in all the countries of the ALADI Group⁹⁰. This plan involves management at both the national and regional level⁹¹.

The plan outlined on the ‘national level’ by the experts comprises the following issues: 1) Setting up in each country an Advice Committee in order to facilitate commerce and transport between the countries; 2) setting up a separate division in the Transport Ministry of each of the countries that acts as a Competent National Agency in charge of the Multimodal Transport; 3) carrying out an analysis in each country of the features of its real and potential trade flows in order to identify the infrastructure and services required to transport cargo; and 4) developing a policy that avoids the unnecessary costs in Multimodal Transport and promotes its use.

In comparison, the tasks identified on the ‘regional level’ are: First, setting up a legal framework that takes into account the interests of the different parties involved in the multimodal transport in order to create a common Latin American Transport Law. Second, the need for establishing similar laws in relation to the technical and safety rules, and provisions on the flows of containers and other cargo units. Third, they are looking for the approval of the International Chamber of Commerce of the ‘multimodal transport document’ that would be used in all the countries of the ALADI Region. Finally, they will work together with the aim of improving the physical infrastructures necessary for this kind of transport.

⁹⁰ Argentina, Bolivia, Brasil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

⁹¹ In the ALADI’s report mentioned in the footnote number 4, in the page 42 it is possible to find the complete explanation of the action plan adopted by the consulting group.

CHAPTER 5 - CONCLUSION

AC Member Countries have recognized that international multimodal transport is a way of assisting the expansion of the international trade of those countries and for that reason they have promoted the MT regulation and its application within the AC. Indeed, the Andean Community Commission and The General Secretariat of the Andean Community have issued four significant legal instruments on this matter: Decision 331 of 1993, Decision 393 of 1996, Resolution 425 of 1996 and Decision 477 of 2000. However, this MT system has not been used very much within the AC due to different kinds of inconveniences such as the lack of suitable infrastructure in the Member States, the lack of coordination between the various entities involved and the complexity of the current laws.

In relation to the current AC Multimodal Transport Law, it is noteworthy that it has been influenced by different provisions of the United Nations Convention on International Multimodal Transport of Goods and UNCTAD/ICC Rules for Multimodal Transport Documents. That Law has adopted the modified liability system which provides a suitable solution to some of the most common problems in the field of liability related to the multimodal transport. This system is useful to determine the liability of the MTO, especially in situations which the damage or loss cannot be localised and circumstances in which the damage occurs gradually throughout the carriage by different modes.

Indeed, the AC Law states that when one of the abovementioned situations has taken place the liability limits agreed by the MTO and the shipper will apply, and, in absence of such an agreement, the limits of article 13 Decision will apply. Nevertheless, in circumstances where it is possible to determine the stage of the transport where the damage has occurred and it is regulated by an International Convention or national law that provides a higher limit than the limit agreed by the MTO and the shipper or than the limits of the Decision, the limits set up in those laws will apply⁹². This is a suitable

⁹² When the limit provided in the International Convention or national Law is lower than the limit agreed by the MTO with the shipper, the latter will apply.

solution because initially both the MTO and shipper are free to negotiate and agree upon contract terms relating to the MTO liability for the loss, damage or delay of the cargo, based on their specific factual circumstances.

Despite the advantage of this system there is an unsolved problem in relation to the system of law that should be used to determine whether an international convention or a mandatory national law is applicable when the loss is localised. It could be the law of the contract or the law where the dispute is decided, it will vary depending on the court where the case is pending, because each court will apply its own conflict of law rules to determine the applicable law. This regulatory gap creates uncertainty in relation to which legal regime will be applied where the damage is localised.

With respect to the liability system it was possible to identify that in principle, the provisions of the Decision 331 regarding to this topic are similar to those of the UN Model as both are based on the presumed fault of the carrier. However, the Decision has introduced an additional article⁹³ that contains a list of exceptions which modify the fault-based approach of the Decision. Therefore, the MTO can avoid his liability by proving that he acted with due diligence, but also he can invoke the exceptions provided in article 11 that do not require the proof that he has acted with due diligence.

With regard to the multimodal transport contract, the AC Law has established a new formality that differs from the requirements established in the UN Model and UNCTAD/ICC Rules. According to the Decision, the MTO needs to bind itself 'in writing' to carry out the multimodal transport of the merchandise. Nonetheless, it is not possible to determine the legal effect of the omission of this requirement, but one might argue that it would be necessary that the Andean Court of Justice gives an interpretation about this term in order to provide uniformity of the system in all the Member Countries.

Although the AC Law has attempted to solve all the flaws of multimodal transport, it is possible to identify certain regulatory gaps. Under the Decision, the MTO is not subject

⁹³ Article 11 of the Decision 331 of 1993 modified by article 6 of Decision 393 of 1996

to any sanctions for intentional misstatements or omissions in the MTD with the purpose to defraud the shipper or the consignee. This fraud usually occurs when the carrier knows that the information entered in the MTD is incorrect but nevertheless he included it. With regard to the period of liability, there is no rule that releases the MTO from his responsibility of delivering the merchandise when he hands the merchandise over to an authority or a third party authorized to receive it pursuant the law of place of delivery.

Besides, in relation to the term 'takes possession' and 'delivery of the merchandise', the Decision does not indicate from or to whom the MTO has to take or delivery the goods. One might think that the MTO always needs to take the merchandise from the shipper or deliver it to the consignee. However, there are situations where the goods are taken from a person other than the consignor and delivered at their destination to a person other than the consignee. Therefore, it would be advisable to include an article in the Decision similar to article 4 (2) of Hamburg Rules that clarifies this situation.

Furthermore, it is worth noting that the term 'dangerous goods' is not defined in the Decision, this term is critical to determine when the shipper is liable for not informing the MTO the dangerous nature of the goods to the MTO. In addition, the Decision does not provide a time bar to bring actions against the shipper by the MTO, which is a clear advantage to the latter over the former.

Moreover, it should be stressed that the Decision contains some important features as it includes the liability of the MTO for his subcontractors to the performance of the multimodal transport contract. Most of the conventions only include the liability of the carrier for his servants and agents but not for third persons.

The AC law also includes an article about the determination of the cargo value that is important in order to calculate the maximum value that the MTO should pay as compensation for the loss or damage of the goods. Likewise, this law has adopted the view that it is important to regulate the delay in delivery the cargo in order to maintain the uniformity in this issue.

The aforementioned special features and regulatory gaps of the AC Law should be born in mind by drafters of the new Latin American Multimodal Transport Law. Although this new law is not the ideal one to achieve the worldwide uniformity of multimodal transport regulation, it is an important step in that process because it would represent one single law applicable in at least the 12 member states of ALADI. This would be an advantage for the ALADI countries during negotiations for the new worldwide uniform law because those countries can be seen as a block.

Notwithstanding the importance of agreeing a uniform law of Multimodal Transport in Latin America, further work by the relevant private parties and public authorities is required to put this law in practice. The problems identified by ALADI's report should be considered in order to improve the effectiveness of the regime in South America and reverse the existing environment in which these regulations are not applied.

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