

# Multimodal Transport: Liability of Third Party Under International Carriage of Goods

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## ABSTRACT

The increase in international trade is followed by the increase in the carriage of goods services. There are various transportation modes for international carriage of goods, namely: land, sea, air, and multimodal. The problems often arise when goods are lost, damaged, or delay. Especially when using cross-border multimodal transportation, which causes difficulty determining who is the responsible party; It becomes more complicated when a third party performs the carriage of goods, but he is not the party of a contract between the consignor and the Multimodal Transport Operator (MTO). This research uses the normative legal method to determine the third party's liability in the international multimodal transport carriage of goods. This paper suggested that the third party rely on the Himalaya clause to extend limitation liability to the MTO. Several conditions are to be fulfilled when the party would like to use the Himalaya clause, such as acceptance from the third party, explicit determination of who are the third party, kind of acts or omissions, and separate contract between the MTO and the third party.

**Keywords:** *Himalaya clause, International Carriage of Goods, Liability, Multimodal Transport, Third Party.*

## 1. INTRODUCTION

The development of international trade is followed by the development of the international carriage of goods. There are some modes of transportation according to the international carriage of goods: by road, rail, sea, air, and multimodal transport. Multimodal transport is a combination of two, three, or all modes of transportation and put the goods into a container to keep them safe [1].

Multimodal transport is one kind of transport that is used in contracts for the carriage of goods. The methods of multimodal transport are giving advantages and disadvantages. The carriage of goods in multimodal transport begins at taking over the goods and continues until the designated delivery of the goods. It systems usually called "door-to-door" transport. One person is responsible for performing a contract carriage of goods, which is called Multimodal Transport Operator (MTO).

MTO is the only person who makes a multimodal contract carriage of goods with the consignor or seller. The performance of multimodal contract carriage of goods involves other parties such as carriers, sub-contracted carriers, stevedores, terminal operators, warehouse workers, or crew members. All of those parties are called third parties. How if the delivered goods

are lost, damaged, or delay. Who will be liable for it? The MTO or the third parties? Can the third parties be held liable because they are not in the multimodal contract carriage of goods? For instance, Kirby Case 2004; Kirby, a cargo owner, hires International Cargo Control (ICC) to deliver goods (machines) from Australia to Huntsville, which involves a third party. When goods are delivered by train, the goods are damaged, and the third parties do not want to take any liability [2].

Those complicated conditions are compounded by the absence of international legal instruments of multimodal transportation. Each unimodal transport (by road, rail, sea, and air) is regulated by each unimodal convention. For example, road transport by the convention on the Contract for the International Carriage of Goods by Road (CMR 1956). There are two legal instruments which are regulating multimodal transportation: first, the United Nations Convention on International Multimodal Transport 1980 (MT Convention), and second, the Convention on the Carriage of Goods [wholly or partly] [by sea] 2001 (Rotterdam Rules). Nevertheless, both of them are never come into force until now.

Based on the description abovementioned, there are two legal problems which need to be discussed a) How does the third parties' liability under multimodal transport

contract carriage of goods when lost, damaged, or delayed goods occur? b) How should the third parties' liability under multimodal transport contract carriage of goods when lost, damaged, or delayed to the goods occur?

## 2. METHOD

This research uses the normative research method. The normative research method is the study about norm; whether the norm is vague, empty, or conflict. Secondary data is used in this research: primary (legal instruments related) and secondary legal materials (books, journal articles, Internet). Those data were collected by conducting library research. The legal problems and collected data are analyzed by statute, conceptual, and case approach.

## 3. RESULT AND DISCUSSION

### 3.1 Definition of Multimodal Transport

According to Article 1.1 MT Convention: "International Multimodal Transport means the carriage of goods by at least two different modes of transport on the base of multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.....".

As one of the drafters of the MT Convention, the United Nations Conference on Trade and Development (UNCTAD) stated three elements of multimodal transport. First, the MTO is a single operator in multimodal transport responsible for the carriage of goods in "door-to-door" movement with one document of transport. Second, multimodal transport involves integrated factors. It consists of different stages (sea, air, rail, or road), different modes of transport, the base of liability, and levels of liability. The third, multimodal transport, is a non-static system. It is adjusted to the development of trade and carriage of goods, follows the development of communications and technologies, such as ordering goods through the Internet and paperless document of transport [5].

### 3.2 Multimodal Transport Contract Carriage of Goods

The international carriage of goods by multimodal transport needs to be transformed into a contract. According to Article 1.3 MT Convention: "Multimodal transport contract means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport".

A multimodal transport contract has a different character than other contracts for the carriage of goods.

A multimodal transport contract is not the sum of unimodal transportation contracts. It is a *sui generis* contract "which has nothing in common with unimodal conventions but is one of a kind, related with the liability of carriers" [6]. The consignor only concludes one contract with the MTO for the entire transportation. There are no separated contracts between the consignor and the individual carrier who perform the various transport legs.

Another characteristic of multimodal transport contracts is the MTO. MTO is the person or entity who takes responsibility for the whole process of the carriage of goods. He acts as a principal, not as an agent. As a principal, the MTO could hire a third party to perform its obligations.

However, in reality, the liability of loss, damaged, or delay to the goods is not that easy. There is a distinction between the party which concluded the international multimodal transport contract carriage of goods with the party who performs it (persons who really carrier the goods). The sub-contracted carrier performs parties such as stevedores, terminal operator, warehouseman, or a crew member as the third party who performs the contract. How is the liability of the third party? They were not concluded multimodal contract carriage of goods with the consignor.

### 3.3 Liability of the Third Party under Multimodal Transport Contract Carriage of Goods

- 1) *Third parties rights under a contract*: Contract binds the parties who concluded it. Those parties are mandatory to do their obligation under the contract, but there is a possibility to involve third parties to perform the contract. Even though the third parties did not conclude the contract, they could benefit from the promisor because they perform promisor obligations. Two elements cause third parties to get protection and benefit under a contract: assignment and relationship. The assignment transfers contractual rights to a third party, and relationship means whether the promisor acts as an agent or principal [7]. According to Article 6:110 Principles of European Contract Law, the third party has the right to extend the limited liability of the promisor unless the third party renounces the rights or by notice from the promisor or promise that they deprive the right of the third party.
- 2) *Himalaya Clause*: Third-party under international multimodal or by sea transport which uses Bill of Lading could use Himalaya clause to extend their liability to the MTO even though they are not an original party to the contract [8]. Here is an example

of Himalaya Clause in *Whitesea Shipping v. El Paso* 2009: “It is hereby agreed that no servant or agent of the carrier (including any person who performs work on behalf of the vessel on which the goods are carried or any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment”.

According to Defendants in *Whitesea Shipping v. El Paso*, there is a contrary between the Himalaya clause and Article III Rule 8 The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules): “Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. ....” Nevertheless, in the end, the Judge concluded that the Himalaya clause in the Bill of Lading does not have a characteristic as a contract of carriage under the Hague Rules. The clause is recognized as a contract of exemption which was ancillary to other contractual arrangements. Furthermore, its goals are to protect the third party from a claim against the consignor, consignee, or MTO.

The Himalaya clause also protects Norfolk Southern Railway as a servant or independent contractor from *Hamburg Sud* under *Kirby Case* 2004. Kirby and his insurance company held Norfolk liable. However, Norfolk defends that he can rely on both of the bills of lading. Even though he is not an original party to the contract between Kirby and the ICC, he is entitled to obtain protection. The US Supreme Court holds that Norfolk, as a railroad carrier, is entitled to protect the liability limitations in the International Cargo Control (ICC) and *Hamburg Sud* Bill of Lading.

The judgment in *Scruttons Ltd. v. Midland Silicones Ltd.* 1962 was different. *Scrutton* as a stevedore, can not rely on extending the limited liability of carrier even though there is a Himalaya clause in the Bill of Lading. It caused no clear considerations, which is stated that *Scrutton* is involved in the original contract. Based on the cases above, the Himalayas Clause cannot always give protection to the third party. It is casuistic, depends on the Judge's interpretation, the system of law, choice of law,

contract, and consensus between the parties involved under multimodal transport contract carriage of goods.

- 3) *International Legal Instruments According to the Existence of Third Party under Multimodal Transport Contract Carriage of Goods*: Some international legal instruments regulate multimodal transport: MT Convention, FIATA Multimodal Transport Bill of Lading, Unimodal Convention, and Rotterdam Rules.

First, Article 15 MT Convention states the MTO has liability for acts or omissions of the third party he hired to perform the multimodal transport contract carriage of goods. The acts or omissions of the third party are recognized as MTO acts or omissions. However, unfortunately, the MT Convention is never come into force until now.

Second, according to Clause 2, paragraph 2.2, FIATA Multimodal Transport Bill of Lading recognizes the right of the third party to extend limitation liability to the MTO as same as in the MT Convention. The lack of FIATA is not a complicated law. It is only soft law. Thus, the FIATA is not mandatory. The merchant is free to use or not to use the FIATA as a legal basis for their multimodal transport contract carriage of goods.

Third, The Hague-Visby Rules (HVR) is a unimodal convention for carriage goods by the sea. According to Article IV bis paragraph 2, the third party could rely on limitation liability to the carrier as long as they are sub-contracted.

Fourth, unimodal transport by road is regulated in the CMR. This convention also recognized the right of the third party to extend limitation liability to the carrier under Article 3 of the CMR.

Fifth, Article 18 of the Rotterdam Rules recognized limitation liability of any other persons who perform the contract carriage of goods by sea or multimodal to the carrier or MTO. Nevertheless, it is not applied to the maritime performing party. According to Article 19 paragraph 3, when the maritime performing party breaches its obligations under the Rotterdam Rules by acts or omissions, he shall be liable. The Rotterdam Rules have the same status as the MT Convention, which never enters into force as a legal basis for international multimodal or sea transport carriage of goods.

- 4) *Contract as the Model for the Third Party Liability under International Multimodal Transport Carriage of Goods*: Sales and Carriage of Goods are the private matter that is important to transform into a contract, especially if there are foreign elements. The difference in the merchant's country of origin would be associated with the system of law, tradition in the contract drafting, and choice of law.

In order to draft a good contract, a consensus is an important thing. According to the freedom of contract principle, the party of the contract is free to determine the form and substance of the contract as long as it is based on consensus, it does not violate the law, morality, and public order [9].

When the consignor drafts a contract with the MTO, they are free to stipulate the limited liability of the third party because it is allowed by the international legal instruments, based on the Himalaya clause and best practices. The limited liability of the third party is to give protection to them. Thus, first, the third party shall know a Himalaya clause in the international multimodal transport contract carriage of goods between the consignor and the MTO. It means the MTO shall inform the third party and accept the third party [10]. Since the Himalaya clause exists in the contract and the contract is valid, the third party has accepted the contract indirectly even though the third party would never become the contracting party between the consignor and the MTO.

Second, the third party under the Himalaya clause shall be defined clearly in the contract between the consignor and the MTO. Third, what type of acts or omissions of the third party could rely on the MTO liability. When the third party did a tort in the carriage of goods, could it still extend their limited liability to the MTO? For example, the goods are delivered damaged or lost. The clarity of the third party and kinds of limited liability of the third party are essential to avoid ambiguousness.

Fourth, there is a contract between the MTO and the third party. This contract would regulate the third party's obligation to the MTO in performing the carriage of goods. What are the technical matters that the third party shall do to the carriage of goods?, what kinds of acts or omissions by the third party could be held liable by the MTO? What about the amount of compensation?. It is related to "stipulation for another." This legal device is recognized by civil law countries [11].

Once the party stipulates specific conditions in a contract (between the consignor and the MTO), for example, limitation liability of the third party; technical matters in order to the carriage of goods by the third party are going to regulate in another contract between the MTO and the third party then the consignor could ask liability to the third party when the goods delivered are lost, damaged or delay. In other words, even though the third party was not signed the contract between the consignor and the MTO, he could still be liable when the goods delivered are lost, damaged, or delay because his existence is stated in the contract. The third party's liability is limited to the content of the Himalaya Clause and the contract between the third party and the MTO. Thus, it is imperative to make an explicit Himalaya clause under an international multimodal transport

contract carriage of goods to give legal certainty to all parties involved in the contract and its performance.

#### **4. CONCLUSION**

The third party under international multimodal transport carriage of goods could extend limitation liability to the MTO as long as there is a Himalaya clause in the Bill of Lading. The clause is not always used successfully to limit the third party liability when the goods delivered are lost, damaged, or delay. It was caused by the absence of international legal instruments of multimodal transport and the various court decisions (casuistic).

In order to make the liability of the third party under international multimodal transport carriage of goods more precise and give legal certainty to all parties involved, several conditions must be fulfilled. First, there is acceptance from the third party that the contract between the consignor and the MTO uses the Himalaya clause. Second, it shall be clearly defined according to who is the third party would perform the contract. Third, kind of acts or omissions by the third party could rely on the MTO liability when the goods delivered are lost, damaged, or delay. It shall be determined under the Himalaya clause.

Furthermore, fourth, there is a separate contract between the MTO and the third party. This contract is essential to regulate the relationship between the MTO and the third party. It could be used as a legal basis by the consignor or the MTO to ask liability of the third party according to "stipulation for another".

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