

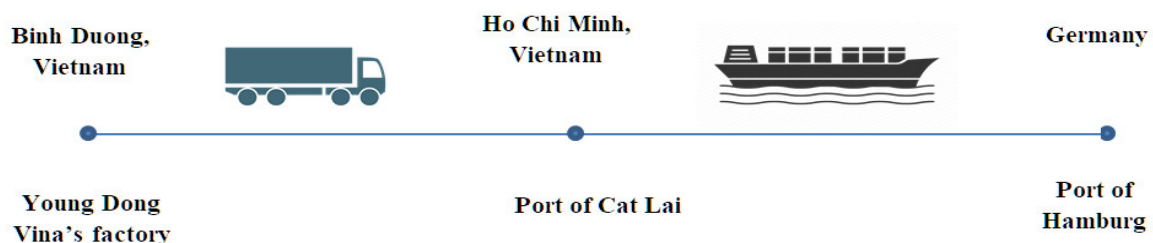
LIABILITY OF MULTIMODAL TRANSPORT CARRIERS FOR DELAY IN DELIVERY OF GOODS — THE IMPACT OF THE SUEZ CANAL BLOCKAGE

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This paper considers if multimodal-transport carriers ('MTCs') will be liable for late delivery of goods in a hypothetical scenario which is impacted by the Suez Canal blockage under the ASEAN Framework Agreement on Multimodal Transport ('AFAMT'), and other international legal instruments such as the United Nations Convention on International Multimodal Transport 1980 ('MT Convention'), United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea ('Rotterdam Rules'), the UNCTAD/ICC Rules for multimodal transport documents ('UNCTAD/ICC Rules 1992'). Furthermore, this paper will explore which legal instruments among the four instruments provide fairer liability rules for both the MTC and cargo owner in the hypothetical case.

1. Introduction

International multimodal-transport operations ('MTOs') are known as the movement of goods by a combination of different modes of transport from one country to another.¹ This kind of transport service is offered to satisfy the needs of parties who are responsible for the delivery of goods under international sale of goods contracts. In this article, the fictional company Young Dong Vina Ltd. ('Young Dong Vina') will be used as an example.² In particular, for the movement of a container of polyester yarn from a Young Dong Vina factory in Binh Duong, Vietnam, to the port of Hamburg in Germany, there are at least two modes of transport involved. A truck is used to carry the container of polyester yarns from Young Dong Vina's factory in Binh Duong to the port of Cat Lai in Ho Chi Minh, Vietnam. The container of polyester yarn will then be carried by a vessel from the port of Cat Lai to the port of Hamburg in Germany.



Under the sale-of-goods contract, Young Dong Vina is responsible for delivering the goods to Hamburg, Germany. Instead of arranging various unimodal-transport contracts for each leg of transport, Young Dong Vina enters into a single (international multimodal-transport) contract with U&G Logistics Corporation ('U&G'). Under this multimodal-transport contract, U&G will act as the main carrier to move the container of polyester yarn from Young Dong Vina's factory to the port of Hamburg. Therefore, Young Dong Vina will deal with one single contract, one carrier, and one single transport document. Furthermore, U&G is a specialised multimodal transport carrier (MTC). U&G will use its transport network systems to ensure Young Dong Vina's container of polyester yarn will arrive at the port of Hamburg smoothly and on time. If there is a delay during road transport, U&G will (at its cost) re-arrange the following carriages or minimise transit time.³ The container of polyester yarn would arrive at the port of Hamburg on the time as agreed in the contract between U&G and Young Dong Vina. Even though multimodal-transport operations are acknowledged as cost-effective, secure and timely

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¹ *Nations Convention on International Multimodal Transport of Goods*, opened for signature 1 September 1980, [1980] ConTS 435 (not yet in force) art 1(1) ('*Multimodal Transport Convention*').

² In this article, Young Dong Vina Ltd is assumed as a webbing company. Its target customers are textile companies in Europe and the US.

³ Association of Southeast Asian Nations, 'Multimodal Transport Law and Operations' (Training Material, 2014) ch 1.

transportation,⁴ there are circumstances causing U&G failure of in-time delivery of goods. In particular, in March 2021, the ship ‘Ever Given’ blocked the Suez Canal (the Canal which shorts the shipping route between Asia and Europe) for six days.⁵ This blockage caused more than two hundred vessels (including the U&G vessel) to be stuck in the area.⁶ To avoid the traffic, the U&G vessel changed its regular route. However, the vessel arrived at the port of Hamburg ten days later than the expected time, and four days later than the time it may have taken if it had waited at the Suez Canal for the Canal to be unblocked. As a result, Young Dong Vina’s customer refuses to receive the delivery and requests Young Dong Vina to be liable for damage which the customer incurred. Besides compensating its customer, Young Dong Vina incurs \$3,031 extra costs for warehousing the container of polyester yarn during the time (13 days) Young Dong Vina looks for another customer interested in the container of polyester yarn. Furthermore, Young Dong Vina has to compensate its customer \$15,000 because it fails to deliver goods on time under the sale-of-goods contract. Young Dong Vina wonders whether it could claim the responsibility of U&G because the container of yarn arrived ten days later than expected. In other words, Young Dong Vina claims the responsibility of U&G for the late delivery of the container of yarn because there was a delay in the delivery of goods when the container of yarn arrived ten days later than expected.⁷

Liability for the delay in delivery in MTOs is one of the issues of concern by 90% of UNCTAD respondents (including state representatives, the transport industry, and scholars).⁸ However, to date, there is no mandatory international law dealing with the MTC liability for late delivery of goods. In May 1980, UNCTAD adopted the very first Convention on International Multimodal Transports of Goods (‘MT Convention’) in Geneva to facilitate the development of multimodal transport.⁹ The latest attempt at international law governing MTOs was the 2008 Rotterdam Rules.¹⁰ The Rotterdam Rules are the result of an ambition to produce a uniform regime in the area of sea carriage providing for ‘modern industry needs in terms of door-to-door carriage’.¹¹ However, the MT Convention and Rotterdam Rules have not yet come into effect, because they have not gained sufficient backing from members. In the absence of a uniform international instrument for MTOs, MTC liability has been governed by contractual model laws (such as UNCTAD/ICC Rules 1992)¹², regional, or national laws.¹³

Since each region, country, and MTC has different sets of rules to determine MTC liability, the determination of MTC liability for delay is unpredictable, and uncertain. Therefore, the answer to the question of whether U&G will be liable for the late delivery of goods will depend on which set of rules applies to the case. As the MTO between U&G and Young Dong Vina in the hypothetical case was concluded in Vietnam, an Association of Southeast Asian Nations¹⁴ state member, AFAMT¹⁵ will be applied to determine U&G liability for the late delivery. This paper will examine the regulations on MTC liability for delay in delivery of goods under AFAMT in comparison with those regulations under the MT Convention, Rotterdam Rules, and UNCTAD/ICC Rules 1992.¹⁶ This paper will also explore which legal instruments (AFAMT, the MT Convention, Rotterdam Rules and UNCTA/ICC Rules 1992) provide fairer rules in the determination of MTC liability for delay in the hypothetical

⁴ Sunanda Majumder et al, ‘Multimodal Transportation and International Trade Facilitation: Bangladesh Perspective’ (Conference Paper, Bangabandhu Sheikh Mujibur Rahman Maritime University, April 2019).

⁵ Reuters, ‘Ever Given, the Ship that Blocked Suez Canal in March, Crosses the Canal Again’ (Blog Post, 21 August 2021) <<https://www.reuters.com/world/middle-east/ever-given-ship-that-blocked-suez-canal-march-crosses-canal-again-2021-08-20/>>.

⁶ Aljazeera, ‘Maritime Traffic Jam Grows Outside Blocked Suez Canal’ (Blog Post, 26 March 2021)

<[⁷ *Cambridge Dictionary* \(online at 1 August 2023\) defines ‘delay’ as ‘the situation in which you have to wait longer than expected for something to happen, or the time that you have to wait’.](https://www.aljazeera.com/news/2021/3/26/maritime-traffic-jam-grows-outside-blocked-suez-canal#:~:text=A%20maritime%20traffic%20jam%20burgeoned,waterway%20and%20disrupting%20global%20shipping.>.</p></div><div data-bbox=)

⁸ *Multimodal Transport: the Feasibility of An International Legal Instrument — Report of the Secretariat*, UN Doc CTAD/SDTE/TLB/2003/1 (13 January 2003) 16 [42].

⁹ John Boyd, ‘UNCTAD Convention on International Multimodal Transport’ (1979) 73(3) *The American Journal of International Law* 523.

¹⁰ Jose Angelo Estrella Faria, ‘Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules’ (2009) 44(3) *Texas International Law Journal* 312.

¹¹ Ling Zhu, M Deniz Guner-Ozbek and Hong Yan, ‘Carrier’s Liability in Multimodal Carriage Contracts in China and its Comparison with US and EU’ (Conference Paper, International Forum on Shipping, Ports and Airports, January 2010).

¹² These rules have been widely used by the transport industry. In particular, the FIATA (International Federal of Freight Forwarders Associations) and BIMCO (Baltic and International Maritime Council) have incorporated the UNCTAD/ICC Rules 1992 into their widely used multimodal-transport documents. However, the rules are contractual.

¹³ In international trade, disputes related to international contracts’ contents are usually settled by the national law where the contract is mainly performed. International conventions or regional laws do not apply to parties in international contracts directly. However, if the state where the national law is applicable joins international conventions or regional laws, its national law will copy or make a direct reference to the contents of international conventions or regional laws. Therefore, when I mention applicability of regional laws means applicability of national laws which copy or refer to regional law on multimodal transport. When I refer to national laws, I mean national laws which have their own regulations on multimodal transport.

¹⁴ ‘ASEAN’.

¹⁵ Association of Southeast Asian Nations, *ASEAN Framework Agreement on Multimodal Transport*, 17 November 2005 (‘AFAMT’).

¹⁶ Although the MT Convention, Rotterdam Rules, and UNCTAD/ICC Rules 1992 do not have mandatory effect, they are the best attempts on creating a uniform international law for MTOs at the international level.

case. In this article, the fairness will be decided based on the balance of interests between cargo owners and MTCs. In other words, fair rules are rules which can balance the interests between cargo owners and MTCs.

Before examining the MTC liability for delay, this paper will (1) find out when these four legal instruments, AFAMT, the MT Convention, Rotterdam Rules, and the UNCTAD/ICC Rules, apply, and (2) explore whether the four legal instruments consider there to be a delay in delivery when the container of yarn arrives ten days later than expected.

2. When will AFAMT, the MT Convention, Rotterdam Rules, and the UNCTAD/ICC Rules Apply?

Under the MT Convention,¹⁷ UNCTAD/ICC Rules,¹⁸ Rotterdam Rules,¹⁹ and AFAMT,²⁰ delay in delivery means that MTCs will be presumed at fault for loss caused by the delay. However, will MTCs bear liability for the loss, and to what extent will MTCs bear the liability? The answers to these questions will depend on which set of rules apply. Therefore, before analysing the MTC liability in the hypothetical case, this paper will provide an overview of the scope of application of these four sets of rules for multimodal transport operations.

As stipulated in article 2 of the MT convention, the Convention may apply to international multimodal-transport contracts as long as *either* the place where the goods are taken on *or* the place where they are delivered is in a state which has ratified the Convention.²¹ This means that the international multimodal carriage of goods — which has either a start point or an end point in a contracting state, irrespective of the types of multimodal-transport documents issued — will fall within the scope of the MT Convention. In other words, the Convention’s provisions will be referred to in settling disputes arising from the such carriage. However, the language of article 1(7) of the MT Convention confirms that the Convention does not cover all types of international multimodal transport. In particular, only multimodal carriage of unit loads is governed by the Convention because goods carried under multimodal transport contracts must be in the form of ‘any container, pallet or similar article of transport or packaging’.²² In other words, the MT Convention only covers multimodal transport contracts under which the consignor is a business entity. The reason is that usually, only business entities request the transport of whole containers or other unit loads between places. Individual customers tend to seek a service to transport individual items (which can be then stored in a unit load) instead of a whole unit load. Because transactions for the carriage of these items fall outside the scope of the Convention, the MT Convention still leaves gaps in multimodal-transport law if the Convention comes into force. In consideration of the art of the MT Convention and the evolution of Internet-based transactions, a question arises whether the MT Convention has an effect in relation to electronic contracts (e-contracts on the internet) of multimodal transport. The MT Convention does not provide a clear answer on whether it covers internet-based multimodal-transport contracts. However, art 1(10) of the Convention specifies that under the Convention, “‘Writing” means, inter alia, telegram or telex.’ Furthermore, article 5(3) clarifies that multimodal-transport documents which are evidence of multimodal-transport contracts do not need to be signed by hand, but can be signed by any mechanical or electronic means. These articles of the Convention imply that the Convention applies to multimodal-transport contracts in electronic forms, such as contracts by telegram or telex with an electronic signature. Although the telegram and the telex have an electronic component, multimodal-transport contracts recorded in these forms are still paper-based contracts.²³ Therefore, it is possible to conclude that the MT Convention does not recognise internet-based transactions of multimodal transport.

¹⁷ *Multimodal Transport Convention* (n 1) art 16 (1).

¹⁸ *UNCTAD/ICC Rules for Multimodal Transport Documents*, UN Doc TD/B/FAL/INF 117 and Corr. 1 (24 January 1991) r 5.1 (‘*UNCTAD/ICC Rules*’).

¹⁹ *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, opened for signature 23 September 2009, [2009] ConTS 546 (not yet in force) art 1 (‘*Rotterdam Rules*’).

²⁰ AFAMT (n 15) art 10 (1).

²¹ *Multimodal Transport Convention* (n 1) art 2 regulates as follow:

“The provisions of this Convention shall apply to all contracts of multi modal transport between places in two States, if:

(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the multi modal transport contract is located in a Contracting State, or

(b) The place for delivery of the goods by the multimodal transport operator as provided for in the multimodal transport contract is located in a Contracting State.”

²² *Multimodal Transport Convention* (n 1) art 1 (7).

²³ See Judith Gliniecki and Ceda Ogada, ‘The Legal Acceptance of Electronic Documents, Writings, Signatures, and Notices in International Transportation Conventions: A Challenge in the Age of Global Electronic Commerce’ (1992) 13(1) *Northwestern Journal of International Law & Business* 117.

Adapting to the new business practices when the internet emerged, the UNCTAD/ICC Rules 1992 ensured it could apply to all multimodal-transport contracts, including ones formed via the internet. More specifically, rule 1 (1.1) provides that ‘these rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the “UNCTAD/ICC Rules for multimodal transport documents”, ... whether a document has been issued or not’. Furthermore, rule 2 (2.6) reaffirmed the recognition of multimodal-transport documents recorded in electronic data interchange messages. Instead of emulating the MT Convention, in which electronic formats are treated the same way as written formats, the rules use the phrase ‘electronic data interchange messages’²⁴ to ensure applicability to most business practices (which involve communicating electronically) in multimodal transport. In addition to e-contracts in multimodal transport, the rules also govern all types of multimodal transport, including carriage of any property or live animals.²⁵ From the scope of applicable liability, the UNCTAD/ICC Rules 1992 arguably provide a better “model” for a model instrument for multimodal transport transactions than the MT Convention does because the rules are suited to current business practices. Unfortunately, as clearly stated in rule 1 (1.1), the rules are only contractual. In other words, MTOs and consignors have to make a reference to UNCTAD/ICC Rules 1992 in their contracting if they wish the rules to be in settlement of any contractual disputes. Because the rules are reproduced or referred to in contracts, the rules prevail over contractual provisions (to which the rules conflict), to the extent they do not increase the burden on MTCs.²⁶ However, the rules do not override mandatory laws applicable to multimodal-transport contracts with which they conflict.²⁷

Like the UNCTAD/ICC Rules (1992), the Rotterdam Rules were drafted over the period (from 1996) when business transactions via the internet were becoming common.²⁸ Therefore, the Rotterdam Rules expressly recognise transactions concluded via the internet. Articles 1(17) and (18) state that under the Rotterdam Rules, a contract can be formed via any electronic means of communication, including the internet, and recorded by any electronic transport record such as electronic bills of lading. In other words, the Rotterdam Rules recognise the development of information communication technologies to communicate and conclude multimodal-transport contracts in any electronic form. The rules use the phrases ‘electronic communication’ and ‘electronic transport record’ so as to apply to any type of electronic transaction, including internet-based transactions and other electronic transactions (using technology to be developed in the future). Unlike the UNCTAD/ICC Rules 1992, which apply to carriage contracts irrespective of the kind of goods, the Rotterdam Rules apply only to the carriage of goods such as ‘wares, merchandise and articles’.²⁹ However, in comparison with the MT Convention which applies to the carriage of containers only, the Rotterdam Rules have a wide scope of application in terms of the goods that they cover. In the case of multimodal transport, as the Rotterdam Rules are by nature for sea carriage, they only apply to multimodal-transport contracts (including electronic contracts) that involve sea carriage.³⁰ Additionally, the place of receipt or delivery or the port of loading or discharge must be located in a state having ratified the rules for the rules to be applicable.³¹ In comparison with the MT Convention, the rules have a wide scope of application in geographic terms. The reason is that the rules apply not only in the case where the place of receipt or delivery of the goods is located in the state of a contracting party, but also in the case where the port of loading and discharge of goods is located in the state of a contracting party.

Similar to the Rotterdam Rules, AFAMT applies to all types of multimodal-transport contracts including e-contracts,³² and irrespective of the kind of goods and the type of multimodal transport documents.³³ However, unlike the Rotterdam Rules and the other two legal instruments, AFAMT only applies to contracts performed by MTCs which are registered in AFAMT member countries.³⁴ Also, AFAMT only applies to contracts which have *either* the place where MTCs take the goods into their charge *or* the place where the goods are delivered in AFAMT member countries.³⁵

²⁴ UNCTAD/ICC Rules (n 18) r 2 (2.6).

²⁵ Ibid r 2 (2.10) regulates that ‘Goods means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the MTO, irrespective of whether such property is to be or is carried on or under deck’.

²⁶ UNCTAD, ‘Implementation of Multimodal Transport Rules’ (UNCTAD/SDTE/TLB/2, 2001) [31].

²⁷ UNCTAD/ICC Rules (n 18) r 13.

²⁸ See Malcolm Clarke, ‘Multimodal Transport in the new millennium’ (2002) 1(1) *WMU Journal of Maritime Affairs* 71.

²⁹ Rotterdam Rules (n 19) art 1 (24).

³⁰ Ibid art 1 (1) regulates that ‘contract of carriage means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage’.

³¹ Ibid art 5 (1).

³² AFAMT (n 15) art 1 defines that “‘in writing’ includes telegram, telex, fax or any other means which prints, records, repeats or transmits messages by mechanical, electronic or any other kind of instrument or apparatus intended for such purposes”

³³ Ibid art 1 defines that “‘goods’ means any property, as well as containers, pallets or similar articles of transport or packaging not supplied by the multimodal transport operator, irrespective of whether such property is to be or is carried on or under deck”.

³⁴ Ibid arts 2, 29.

³⁵ Ibid art 2.

In the hypothetical case, there are two modes of transport involved in delivering the container of yarn from Vietnam to Germany including road and sea transport. In addition, the place where the container of yarn was taken into the MTC's charge is in Vietnam, and Germany is the place where the container of yarn should be delivered. Therefore, the MT Convention, and Rotterdam Rules will mandatorily apply in the determination of U&G's liability as long as either Vietnam or Germany ratifies these conventions. As Vietnam is an ASEAN member state which incorporated AFAMT into their national law, AFAMT will mandatorily apply to the hypothetical case if U&G is registered in Vietnam. However, the UNCTAD/ICC Rules 1992 will only apply to the hypothetical case if the rules are incorporated in the MT contract between Young Dong Vina and U&G. When the UNCTAD/ICC Rules 1992 are agreed in the MT contract, these agreements will be effective if they are not contrary to the applicable mandatory law.

3. What does 'delay in delivery of goods' mean?

In the hypothetical case, the cargo owner, Young Dong Vina considers whether the MTC, U&G will bear liability for economic loss (caused by the failure to deliver the container of yarn 'on time') which the cargo owner incurred. The answer to this question depends on whether the applicable legal instrument considers there to be a delay in delivery of goods when the container of yarn arrives at the port of Hamburg ten days later than expected. Therefore, it is important to explore how the four legal instruments, including the MT Convention, UNCTAD/ICC Rules 1992, Rotterdam Rules and AFAMT, define 'delay in delivery of goods'.

Although the MT Convention, UNCTAD/ICC Rules 1992, Rotterdam Rules and AFAMT are different from one another in their wording, all of these four sets of rules similarly define that delay in delivery as failure to deliver goods to the destination 'on time'. However, the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT have a different view from that of the Rotterdam Rules on when the goods are delivered 'on time'. Under the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT, goods are delivered 'on time' if they arrive at the destination within the time specified in the contracts by shippers and MTCs.³⁶ In the case where the time for delivery is not specified, goods are delivered 'on time' if they arrive at the destination within a 'reasonable time'.³⁷ In contrast to these legal instruments, the Rotterdam Rules consider goods are delivered 'on time' only when goods are delivered to the destination within the specified time.³⁸ Instead of being expressed in a contract, this time can be agreed upon verbally (or in any communication exchange methods) between shippers and MTCs after the contract is formed.³⁹ Article 21 of the Rotterdam Rules does not adopt the concept of 'reasonable time' in the case where parties in multimodal transport operations do not specify the time to deliver goods. Therefore, under the Rotterdam Rules, if shippers and MTCs do not specify the time for delivery, it is unclear whether the delay in delivery will ever occur in this case. The majority of stakeholders joining sessions of the UNCITRAL Working Group on the Rotterdam Rules supported the rules to remove the term of 'reasonable time' in defining delay in delivery because they believed the term 'reasonable time' was too vague.⁴⁰ From the judicial perspective, Lord Macmillan in *Stage Line Ltd v Foscolo Mango & Co Ltd*⁴¹ also commented that he did not believe it is easy to make standards (which can be applicable globally) to measure 'reasonable time'. It completely depends on the judge, who decides case by case when goods are reasonably delivered. Therefore, this uncertainty in the determination of 'reasonable time' may result in high costs and risks of litigation for MTCs.⁴² However, there are cases where standard-form contracts or bills of lading⁴³ such as BIMCO Multidoc 95 do not specify the expected time for delivery of goods. In these cases, if shippers are a regular customer such as the shipper in *United Transport Systems & Pie Import Export*,⁴⁴ they may rely on the delivery time which they have previously experienced with MTCs to approximate the time for their goods to be delivered to a destination. Furthermore, shippers may rely on the estimated time for delivery published on the MTCs' website to promise the delivery time of goods in a sale of goods contract with its buyers. Will courts see the estimated time for delivery of goods published on the MTCs'

³⁶ *Multimodal Transport Convention* (n 1) art 16 (2); *UNCTAD/ICC Rules* (n 18) r 5.2; *AFAMT* (n 15) art 11 (1).

³⁷ *Multimodal Transport Convention* (n 1) art 16 (2); *UNCTAD/ICC Rules* (n 18) r 5.2; *AFAMT* (n 15) art 11 (1).

³⁸ *Rotterdam Rules* (n 19) art 21.

³⁹ *Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008)*, UN Doc A/CN.9/645 (30 January 2008) [67].

⁴⁰ *Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)*, UN Doc A/CN.9/621 (17 May 2007) [183].

⁴¹ *Stage Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328.

⁴² *Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)*, UN Doc A/CN.9/621 (17 May 2007) [183].

⁴³ Bills of lading are known as evidence of contracts of carriage of goods. See *Multimodal Transport Convention* (n 1) art 10; *UNCTAD/ICC Rules* (n 18) r 3; *AFAMT* (n 15) art 6; *Rotterdam Rules* (n 19) art 41.

⁴⁴ *United Transport Systems & Pie Import Export* [1995] 889 F Supp 94. In this case, Pie Import Export expected the carrier to deliver their goods to their assigned destination within six to ten days as they priorly experienced with United Transport System. However, the carriers took five weeks to deliver the goods to the destination. As a result, Pie Import Export refused to pay United Transport System as they believed United Transport System failed to deliver the goods on time.

websites, *or* the delivery time which shippers may have previously experienced with MTCs as the time which MTCs are committed to delivering goods to the assigned destination?. If the answer to this question is yes, the approach which the Rotterdam Rules have adopted to define delay in delivery will not cause any issues in determining the MTC liability for late delivery of goods. However, if the answer is no, under the Rotterdam Rules, shippers may not be able to seek compensation from MTCs against loss resulting from the failure of MTCs to deliver goods ‘on time’.

Overall, in the hypothetical case, if the expected delivery time for the container of yarn is indicated either in the MT contract or in the MT documents, irrespective of whichever set of rules among the four sets of rules is applicable. Delay in delivery occurs when the container of yarn arrives at the port of Hamburg ten days later than the expected time. However, if there is no prior indication of the expected delivery time at the port of Hamburg, late delivery may not occur even though the container of yarn arrived at the destination ten days later than usual. When the MT Convention, UNCTAD/ICC Rules 1992, or AFAMT apply, the concept of ‘reasonable time’ will be deployed to determine whether the delay in delivery happened in this case (the case where no indication of the delivery time was previously expressed). However, when the goods are delivered within a reasonable time will be decided by judges based on the situation of each particular case. Similar to the judge in *Turner’s Farms Incorporated & Maine Central Railroad Company*, other judges may see reasonable time to deliver goods as the time which is ‘necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and conditions surrounding the transaction’.⁴⁵ Therefore, judges may take into account factors such as the blockage in the Suez Canal when determining if late delivery of goods occurs. If U&G successfully proves that its ship was deviated to avoid the congestion at the Canal, judges may see reasonableness when the container of yarn arrives at the port of Hamburg ten days later than the usual time. However, when the Rotterdam Rules apply, there will definitely be no delay in the hypothetical case. As analysed above, under the Rotterdam Rules, late delivery of goods happens only when the goods are not delivered within the expected time prior indicated by both MTCs and cargo owners. If no late delivery of goods happens, Young Dong Vina cannot claim U&G liability for the damages it incurred.

Under an MT contract, cargo interests pay for MTCs to be responsible for carrying the goods from one place to another place. Moreover, cargo interests may use MTO services to perform their obligation to deliver goods in a sale of goods contract in which they entered. MTO services are also used by cargo interests to transport materials used for their production processes from one place to their factory in another place. Therefore, even if there is no expected delivery time indicated, MTCs should conduct their obligations within a ‘reasonable time’ to help cargo interests achieve their purposes when they enter a MTO contract. As analysed above, there may be no *de jure* delay in the hypothetical case when the concept of ‘reasonable time’ is adopted. However, it will be fairer for cargo owners if judges see a delay when the goods are not delivered within a ‘reasonable time’. Otherwise, when the delay is determined based on whether the goods arrive at the destination within the expected delivery time, the delay will not happen if there is no prior indication of the delivery time. In this case, MTCs can take as long as they want to deliver goods because they know they will not be liable for damage if the goods are not delivered within a ‘reasonable time’. Therefore, this paper concludes that the definition of delay in delivery adopted by the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT is fairer for both cargo owners and MTCs than the definition adopted by the Rotterdam Rules.

4. MTC Liability for Delay in Delivery

When a delay is considered as having occurred, cargo interests will consider whether the MTCs bear liability for the delay and to what extent they will bear liability. This part will find the answers to these questions. Furthermore, this part will conclude which liability rules of the four legal instruments, including the MT Convention, Rotterdam Rules, UNCTAD/ICC Rules 1992, and AFAMT provide a fair provision for both the cargo interest and MTC in the hypothetical case.

4.1. Will the MTC Bear Liability for Delay in Delivery of Goods?

There are different approaches adopted in the MT Convention, UNCTAD/ICC Rules, Rotterdam Rules, or AFAMT to determine MTC liability for delay. In particular, the MT Convention stipulates that MTCs will be liable for loss resulting from delay in delivery of goods unless they can prove that they took reasonable measures to avoid the delay and the consequences of delay.⁴⁶ When *either* the UNCTAD/ICC Rules *or* the Rotterdam Rules apply, MTCs can prove (1) that they are not at fault for causing (applying for both of the regimes) or contributing

⁴⁵ *Turner’s Farms Inc v Maine Central Railroad Company* [1980] 486 F Supp 694.

⁴⁶ *Multimodal Transport Convention* (n 1) art 16(1).

to the occurrence of delay (applying for the Rotterdam Rules), or (2) that the delay was caused by an event or act listed in the defence lists of both the regimes.⁴⁷ If MTCs fail to prove these two cases, they have to compensate shippers or cargo owners for the loss caused by the delay. As mainly imitating the provisions of the MT Convention and the UNCTAD/ICC Rules,⁴⁸ AFAMT has adopted the principles of ‘due diligence’⁴⁹ and ‘fault exemption’⁵⁰ in the determination of MTC liability. Therefore, when AFAMT applies, MTCs will bear liability for delay if they fail to prove (1) that they took reasonable measures to prevent the delay,⁵¹ and (2) that the delay was caused by some event or act listed in the defence list in article 12. Given the four legal instruments, the provisions of the MT Convention on the determination of MTC liability are less favourable for MTCs than the provisions of the other sets of rules. The MT Convention only gives MTCs only one ground (exercise of due diligence) to avoid bearing liability for delay in delivery, while the UNCTAD/ICC Rules, Rotterdam Rules, and AFAMT give MTCs two cases (including (1) *either* exercise of due diligence *or* no-fault, and (2) exceptional fault). In addition, the MT Convention imposes more responsibility on MTCs when the Convention requires MTCs to exercise due diligence in all cases, including the case where cargo owners are at fault or negligence. Therefore, shipping companies such as U&G may not feel the MT Convention is attractive to them if the Convention removes ‘the exemption of carrier’s liability for error in navigation or management of the ship’.⁵² However, if the MT Convention is applied to determine MTC liability for delay in the hypothetical case, the approach of liability adopted by the Convention will give more favour to the MTC than the approach of liability adopted by the UNCTAD/ICC Rules does. In particular, when it is unknown how long it will take to unblock the Suez Canal, the deviation of the ship (taking another route rather than the regular route) shows U&G’s effort to avoid the delay and damages caused by the delay. Although the new route caused the ship to arrive at the port of Hamburg after six days (the time which the ship might be late if it waited for the Suez Canal to be unblocked), the deviation of the ship, in this case, is justified. As a result, when the MT Convention applies, U&G may not bear liability for the delay. This result may be different when the UNCTAD/ICC Rules apply. As mentioned above, under the UNCTAD/ICC Rules, if U&G wants to escape the liability for the delay, it has to prove *either* that it is not at fault for causing the delay *or* that its vessel deviated because of acts conducted in the navigation or management of the ship.⁵³ However, U&G cannot prove that it is not at fault for causing the delay, because U&G caused a longer delay than it should have been when its vessel deviated from the regular route. Furthermore, acts conducted in the navigation of the ship are known as acts ‘resulting in collisions, groundings, or violent contact with other perils of the sea’.⁵⁴ Delay in delivery caused by errors in the navigation of the ship can be understood that the delay occurs when the ship has sea accidents (such as collisions or groundings) due to mistakes in the operation of the ship. If this understanding of the delay caused by errors in the navigation of the ship is adopted widely, U&G cannot use the defence of errors in the navigation of the ship as an excuse from liability for the delay. The reason is that the delay was caused by both the blockage of Suez Canal and the deviation of the ship. The delay was not caused by sea accidents which the ship experienced due to mistakes in the operation of the ship. The last opportunity for U&G to escape its liability for the delay is to prove that its vessel deviated due to acts done in the management of the ship. However, judges such as Gorell Barnes in *The Glenochil* (which was re-cited in *Kalamazoo Paper Co. v Canadian Pacific Railway*)⁵⁵ may consider an ‘act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself’. If Barnes’s explanation is broadly adopted, the delay in delivery due to errors in the management of the ship is a delay caused for the purpose of the safety of the ship. In the hypothetical case, U&G caused a longer delay when it changed the route of its vessel. However, the decision to change the route of the ship is taken on facts at the time, not after. In particular, the deviation of the ship is for the purpose of avoiding the congestion in the Suez Canal, not for the purpose of the safety of the ship. Therefore, U&G cannot defend itself against liability for the delay by proving the deviation of its vessel was an act done in the management of the ship.

⁴⁷ UNCTAD/ICC Rules (n 18) r 5; Rotterdam Rules (n 19) art 17.

⁴⁸ *Implementation of Multimodal Transport Rules — Report of the Secretariat*, UN Doc CTAD/SDTE/TLB/2 (27 June 2001) 28 [107].

⁴⁹ The principle of ‘due diligence’ requires carriers to perform what they can and what they think is reasonable to ensure goods arriving at the destination on time. See Victor Chacon, *The Due Diligence in Maritime Transportation in the Technological Era* (Springer International Publishing, 2017) 105.

⁵⁰ When I mention a regime adopts the principle of ‘fault exemption’, I mean the regime provides a list of exceptional cases where carriers can rely on to excuse themselves from the liability for damage, loss, and delay in delivery of goods.

⁵¹ AFAMT (n 15) art 10.

⁵² *Multimodal Transport: the Feasibility of An International Legal Instrument — Report of the Secretariat*, UN Doc CTAD/SDTE/TLB/2003/1 (13 January 2003) 12-13 [26].

⁵³ UNCTAD/ICC Rules (n 18) r 5(4) lists two defences which MTCs can rely on to defend themselves from being liability for damage, loss or delay in delivery of goods. Those defences include fire, and errors in the navigation and the management of the ship. The hypothetical case does not involve in fire. As a result, the only defence which the MTC in the hypothetical case can rely on is errors in the navigation and the management of the ship.

⁵⁴ Frank Arness, ‘Error in Navigation or Management of Vessels: A Definitional Dilemma’ (1972) 13(3) *William and Mary Law Review* 638, 643.

⁵⁵ *Kalamazoo Paper Co v Canadian Pacific Railway* [1950] SCR 356.

The Rotterdam Rules and AFAMT have adopted a similar approach as the UNCTAD/ICC Rules in the determination of MTC liability (the approach which gives MTCs two types of defences from liability). However, U&G may not bear liability for the delay if *either* the Rotterdam Rules *or* AFAMT apply. U&G is unable to prove that it was not at fault to contribute to a longer delay in delivery when its ship was deviated from the regular route. U&G can defend itself by proving that the ship was deviated to avoid the congestion at the Suez Canal caused by the accident of the Ever Given ship. As a result, the accident of the Ever Given ship at the Suez Canal contributed to a longer delay for U&G logistics Corporation at the destination. Article 24 of the Rotterdam Rules stipulates when ‘a deviation constitutes a breach of the carriers’ obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention’. In addition, article 17.3 of the Rotterdam Rules listed fifteen defences, including accidents of the sea, which MTCs can use to defend themselves against the liability for delay. Unlike the UNCTAD/ICC Rules, article 17.3 of the Rotterdam Rules does not mention (in the list of the defences) the phrase of nautical faults, which is ‘faults in the navigation and management of the ship’. However, as mentioned above, accidents on the sea may be a result of faults in the navigation of the ship.⁵⁶ In order to escape from the liability for delay, the Rotterdam Rules require U&G to prove the accident of Ever Given ship caused or contributed to its delay in the delivery of goods.⁵⁷ As analysed above, U&G cannot prove that the accident of Ever Given Ship caused U&G a longer delay in delivery of goods. However, U&G can prove that the accident contributed to the longer delivery because the ship deviated to avoid the congestion caused by accident. Since the Rotterdam Rules try to reduce uncertainty in the determination of MTC liability,⁵⁸ the rules make clear that it is not necessary for the defences listed in article 17 must cause the delay. As long as there is a connection between the events and circumstances listed in article 17 and the delay in delivery. U&G is not liable for delay. Because of this clarification, the Rotterdam Rules provide a different result for the determination of liability of U&G from the UNCTAD/ICC Rules.

Unlike the UNCTAD/ICC Rules and the Rotterdam Rules, AFAMT does not require U&G to prove that it is not at fault for causing the longer delay. Instead of proving that U&G is not at fault, U&G can prove that its extended delay in delivery is a result of its exercise of due diligence.⁵⁹ In addition, U&G can also prove that one of the events or circumstances listed in article 12 caused the delay. In the worst case, courts strictly enforce article 12 of AFAMT. U&G must prove a direct causal relationship between the extended delay and the events and circumstances listed in article 12. U&G then cannot rely on the article 12 to defend itself from liability for the delay. However, much as under the MT Convention, AFAMT accepts the exercise of due diligence as a defence from liability for MTCs. U&G can still not bear liability because its deviation of the ship, which caused an extended delay, was caused by its exercise of due diligence to avoid the delay caused by the congestion at the Suez Canal.

In the hypothetical case, the deviation of the ship is reasonable since it cannot know how long it may take to unblock the Canal. It is unfair if U&G has to bear liability for the extended delay when it tried its best to prevent the delay caused by the traffic jam in Suez Canal. The extended delay, in this case, is unforeseen. As analysed above, it seems that the MT Convention, Rotterdam Rules, and AFAMT contain fairer provisions than the UNCTAD/ICC Rules do in the determination of whether MTCs such as U&G are liable for the later delivery due to faults in the deviation of the ship. In particular, the lists of defences given to MTCs by the MT Convention, Rotterdam Rules, and AFAMT are more adequate than the lists given by the UNCTAD/ICC Rules in the case of delay of the hypothetical case.

4.2. To What Extent Does the MTC Bear Liability?

When the delay in delivery occurs, cargo owners may incur different types of loss, such as physical damage to or loss of goods and other financial loss.⁶⁰ Physical damage to, or loss of goods can be understood as the kind of damage, that happens to the goods themselves.⁶¹ In other words, when physical damage or loss happens to goods, the goods will usually go bad, or completed destroyed, or lose their value. Therefore, physical damage to or loss of goods caused by late delivery usually happens to goods in which conditions will be changed over time such as

⁵⁶ Frank Arness, ‘Error in Navigation or Management of Vessels: A Definitional Dilemma’ (1972) 13(3) *William and Mary Law Review* 643.

⁵⁷ Rotterdam Rules (n 19) art 17.3.

⁵⁸ Kyriaki Noussia, ‘Carrier Liability under the Rotterdam Rules’ (Research Paper, Law School, University of Exeter, December 2017)

⁵⁹ AFAMT (n 15) art 10(1).

⁶⁰ Olena Bokareva, ‘Liability for Delay In Multimodal Transport under the Rotterdam Rules’ (2013) 19(3) *Journal of International Maritime Law* 245.

⁶¹ Riyadh A M Al-Kabban, ‘Recovery of Losses, Damages, and Delay in Delivery in the Admiralty Cases According to the Iraqi Jurisprudence’ (1989) 4(2) *Arab Law Quarterly* 149, 151.

the perishable goods in *Paramount Export Company v British Airways PLC*⁶², or the seasonal goods in *The Paper Magic Group, INC. v J.B. Hunt Transport, INC.*⁶³ Financial loss (broadly defined) means financial loss other than physical loss or damage to goods.⁶⁴ However, the financial loss (broadly defined) resulting from late delivery can be loss such as loss of business, or extra expenses for storing goods which Young Dong Vina incurred in the hypothetical case. In addition, in *Gee and others v Lancashire and Yorkshire Rail Co*,⁶⁵ late delivery of the cotton caused the plaintiff loss of profit and loss of the paid wages to the workmen. As the UNCTAD/ICC Rules 1992 mentioned in their Explanation of the Rules, financial loss (broadly defined) resulting from delay does not include consequential loss (as defined by the UNCTAD/ICC Rules 1992), which is financial loss resulting from the physical damage to or loss of goods.⁶⁶

If late delivery causes physical damage to or loss of goods, the extent of MTC liability will be determined in compliance with provisions on the limitation of MTC liability for damage or loss to goods. In particular, when each of the MT Convention, UNCTAD/ICC Rules 1992, Rotterdam Rules,⁶⁷ and AFAMT applies, the following provisions determine MTC liability for physical damage or loss: article 18.1 and 18.3 of the MT Convention, rule 6.1 and 6.3 of the UNCTAD/ICC Rules 1992, article 19 of the Rotterdam Rules, and article 14 and 16 of AFAMT. However, this paper will not analyse these provisions in detail because the aim of this paper is to focus on the determination of MTC liability in the hypothetical case. The goods transported in the hypothetical case are polyester yarn, which is not perishable or seasonal. Therefore, the late delivery will not result in physical damage to or loss of goods or consequential loss, but rather result in other loss in the form of financial loss such as loss of business, and expense for storing the goods. Consequently, this paper will only discuss MTC liability for the economic loss instead of the liability for physical damage to or loss of goods, and for loss resulting from physical damage to or loss of goods.

Unlike the MT Convention and Rotterdam Rules, the other two sets of rules for multimodal transport operations allow cargo owners to claim MTC liability for financial loss against late delivery only if cargo owners expressed their need for timely delivery which MTCs accept to satisfy.⁶⁸ This regulation of the UNCTAD/ICC Rules and AFAMT is favoured by the industry because the industry argues that MTOs should only bear liability for delay in delivery provided that 'delivery by a specific day was expressly agreed in a transport document'.⁶⁹ When MTCs enter into the carriage of goods contracts, it is their responsibility to carry the goods to the destination on time. Therefore, it is arguable that it is unfair for cargo owners if they lose their right to claim liability for late delivery in the case where they did not express the need for timely delivery. In common practice, it is understandable that the international transport of goods, especially by sea, involves risks which may cause late delivery. As a result, companies involved in production processes usually ensure that they have enough production materials to avoid interruptions by late delivery to their production processes. However, if late delivery may affect their business severely, they usually emphasise the need for timely delivery with MTCs. Therefore, when the UNCTAD/ICC Rules or AFAMT apply, these regimes will not cause Young Dong Vina (in the hypothetical case) any more difficulties in claiming MTC liability than would the MT Convention and Rotterdam Rules.

Unlike the Rotterdam Rules, the other three sets of rules similarly limit MTC liability for financial loss resulting from delay to the total payable freight for the whole journey (see table 1 below).

⁶² *Paramount Export Company v British Airways plc*, 14 Civ 7859 (CD Cal, 2016). In this case, Paramount Export Company claimed against British Airways' liability for the rotten fruit which was resulted by three days delay in delivery.

⁶³ *Paper Magic Group Inc v JB Hunt Transport Inc*, 2001 WL 1003052 (ED Pa, 2001). In this case, Paper Magic Group Inc claimed J.B. Hunt Transport for late delivery of 2432 cartons of boxed Christmas Cards.

⁶⁴ Lord Brandon in *Leigh Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 explained that the loss that the plaintiff in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 incurred is economic loss because the loss was not 'the result of loss and/or damage to their property'.

⁶⁵ *Gee v Lancashire and Yorkshire Rail Co* (1860) 158 ER 87.

⁶⁶ UNCTAD/ICC Rules (n 18) 5.

⁶⁷ As stated in art 18 of the Rotterdam Rules (n 19), the Rules only apply to determine the extent of MTC liability if damage or loss to goods occurred during the sea legs or in the case where the location of the damage or loss to goods is unable to be determined.

⁶⁸ UNCTAD/ICC Rules (n 18) r 5.1; AFAMT (n 15) art 10.

⁶⁹ See generally UNCTAD, 'Implementation of Multimodal Transport Rules' (UNCTAD/SDTE/TLB/2, 2001).

Table 1. The limitation of liability for delay

	The amount of limit
The MT Convention (article 18)	2.5 times the freight payable for the goods delayed but not exceeding the total freight payable under the multimodal transport contract
The UNCTAD/ICC Rules (rule 6.5)	Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport
The Rotterdam Rules (article 60)	2.5 times the freight payable on the goods delayed
AFAMT (article 18)	Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport

Let us assume that all the loss resulting from the delay which Young Dong Vina incurred in the hypothetical case is compensable. In this case, the Rotterdam Rules provide for a limitation of MTC liability that is more favourable to Young Dong Vina (as cargo owner) than would the other three sets of rules. In other words, U&G will have to provide greater compensation under the Rotterdam Rules than it would under the other three sets of rules. In particular, the total financial loss which Young Dong Vina incurred in the hypothetical case is \$18,031. Because the delivery of the container of polyester yarn was delayed, the freight payable for the goods delivered late will be the total freight payable under the MT contract. If the freight payable under the MT contract between Young Dong Vina and U&G is \$8,500, the amount which Young Dong Vina can recover under the four sets of rules would be as follows:

Table 2. The recoverable amount for Young Dong Vina

	The recoverable amount
The MT Convention (article 18)	(2.5 times the freight payable for the goods delayed but not exceeding the total freight payable under the multimodal transport contract) The recoverable amount = $2.5 * \$8,500$ (the total freight payable under the multimodal transport contract because the whole cargo was delayed) = \$21,250 but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case would be \$8,500
The UNCTAD/ICC Rules (rule 6.5)	(Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport) The recoverable amount = the loss (\$18,031) but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case would be \$8,500
The Rotterdam Rules (article 60)	(2.5 times the freight payable on the goods delays) The recoverable amount = $2.5 * \$8,500$ (the total freight payable under the multimodal transport contract because the whole cargo was delayed) = \$21,250. Therefore, the recoverable amount in this case would be \$21,250
AFAMT (article 18)	(Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport) The recoverable amount = the loss (\$18,031) but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case would be \$8,500

If the polyester yarn was packed in four different loading units, let us say that one of these loading units was delivered late. The amount for the limitation of MTC liability for delay provided for by the MT Convention and Rotterdam Rules is lower than the amount provided by the UNCTAD/ICC Rules and AFAMT. In other words, U&G will have to pay Young Dong Vina more under the UNCTAD/ICC Rules and AFAMT than it would under the MT Convention and Rotterdam Rules. Table 3 below demonstrates the amount which Young Dong Vina may recover under the four sets of rules (in the case where only one of the four unit loads of polyester yarn was delivered late).

Table 3. The amount recoverable by Young Dong Vina in the case where part of the goods was delivered late

	The recoverable amount
The MT Convention (article 18)	(2.5 times the freight payable for the goods delayed but not exceeding the total freight payable under the multimodal transport contract) The freight payable for the goods delayed = $\frac{1}{4} * \$8,500$ (the total freight payable under the multimodal transport contract because the whole cargo was delayed) = \$2,125 The recoverable amount = $2.5 * \$2,125$ (the freight payable for the goods delayed) = \$5,312 but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case would be \$5,312
The UNCTAD/ICC Rules (rule 6.5)	(Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport) The recoverable amount = the loss (\$18,031) but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case would be \$8,500
The Rotterdam Rules (article 60)	(2.5 times the freight payable on the goods delays) The freight payable for the goods delayed = $\frac{1}{4} * \$8,500$ (the total freight payable under the multimodal transport contract because the whole cargo was delayed) = \$2,125 The recoverable amount = $2.5 * \$2,125$ (the freight payable for the goods delayed) = \$5,312. Therefore, the recoverable amount in this case would be \$5,312
AFAMT (article 18)	(Not exceeding the equivalent of the freight under the multimodal transport contract for the multimodal transport) The recoverable amount = the loss (\$18,031) but not exceeding \$8,500 (the total freight payable under the multimodal transport contract). Therefore, the recoverable amount in this case will be \$8,500

If the goods were carried in (the four) different loading units and if two or more of the loading units are delayed, the recoverable amount which Young Dong Vina can claim from U&G will be as shown in table 2. In other words, when at least 50% of the goods were delivered late, Young Dong Vina can claim a higher amount of compensation (equivalent to 2.5 times the freight payable for the goods delayed) under the Rotterdam Rules than it would be able to claim under the other three sets of rules.⁷⁰ Whether under the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT, Young Dong Vina would receive the same amount of compensation, equivalent to the freight payable for the whole contract. The reason is that for 50% of the cargo being delayed, the freight payable will be at least 50% of the freight payable for the whole contract. When the MT Convention applies, the recoverable amount which Young Dong Vina receives will be limited to:

- 2.5 times the freight payable for the goods delayed; and
- Not exceeding the total freight payable under the multimodal transport contract.⁷¹

However, the amount 2.5 times the freight payable for the goods delayed in this case will be (at least) equivalent to:

- $2.5 \times 50\%$ of the freight payable for the whole contract; or other words
- 125% of the freight payable for the whole contract.⁷²

As a result, Young Dong Vina can receive compensation equivalent to the freight payable for the entire journey when two (i.e. half) or more of the loading units are delayed.

Although it is not so in the hypothetical case, it may happen that (1) late delivery causes both physical damage to or loss of goods, on the one hand, and other loss in the form of financial loss, on the other, or (2) the goods are delayed more than ninety days. In the case where delay causes both physical damage to or loss of goods, on the

⁷⁰ Rotterdam Rules (n 19) art 60.

⁷¹ *Multimodal Transport Convention* (n 1) art 18.

⁷² Hugh M Kindred and Mary R Brooks, *Multimodal Transport Rules* (Kluwer Law International, 1997) 109.

one hand, and other loss in the form of financial loss, on the other, the four sets of rules adopt the same approach to determine to what extent MTCs will be liable for the loss. In particular, under the four sets of rules, cargo owners can receive compensation up to the limitation of MTC liability for the total loss of goods.⁷³ In the case where the goods are delayed more than ninety days, all the other sets of rules with the exception of the Rotterdam Rules treat the goods as lost.⁷⁴ In other words, if late delivery is more than ninety days, under the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT, MTC liability will be capped at the amount of limitation which each set of rules set for the total loss of goods.⁷⁵ However, the answer to the question of what the limitation of MTC liability for the total loss of goods is will depend on which set of rules applies. Each set of rules for MTC liability has different approaches to determining to what extent MTCs will be liable for loss of goods.

Overall, the rules on the limitation of MTC liability provided by the MT Convention are more favourable to MTCs than the rules provided by the Rotterdam Rules, UNCTAD/ICC Rules and AFAMT are. Comparing the four sets of rules, we notice that the amount of compensation for loss resulting from delay which MTCs have to pay is highest under the Rotterdam Rules. Under the MT Convention, what is required is a double calculation to conclude how much MTCs have to pay to cargo owners for loss resulting from late delivery.⁷⁶ However, in the case where the whole of the cargo load is delayed, there is no difference in how much compensation cargo owners can receive under the MT Convention, UNCTAD/ICC Rules, and AFAMT. In the case where cargo is partly delayed (as analysed above),⁷⁷ the approach adopted by the MT Convention requires MTCs to pay less compensation than the approaches adopted by the other three sets of rules. So is it favourable for cargo owners when the MT Convention applies? No: it is unfavourable, because the amount of compensation which cargo owners can receive under the MT Convention is lower than the amount of loss which cargo owners can claim under the other three sets of rules. However, if the limitation of MTC liability for delay under any set of rules were to increase, there would be an increase in liability-insurance premiums for MTCs.⁷⁸ As a result, the freight payable by MTOs would increase. In the case where the freight payable by MTOs is too high, cargo interests will continue to use unimodal-transport operations instead of MTOs to transport their goods. Therefore, to facilitate the development of MTOs, the limitation of MTC liability for delay should be more favourable to MTCs. Since the MT Convention provides for a lower cap on liability for delay, MTCs may find the MT Convention contains fairer provisions on the limitation of liability than the other set of rules do.

5. Conclusion⁷⁹

This paper has examined which set of rules on MTC liability for the delay—the set of rules under the MT Convention, under the UNCTAD/ICC Rules 1992, under the Rotterdam Rules, and under the AFAMT—is fairest, for both the cargo owner and MTC, in the hypothetical case that the paper proposes. To be “fair”, the relevant rules must balance the interests of the cargo owner and the interests of MTCs. After comparing MTC liability for delay under the four sets of rules, this paper has found that each set of rules includes both fair and unfair provisions. In particular, the MT Convention, UNCTAD/ICC Rules 1992, and AFAMT will determine more fairly whether there is a delay in delivery because these sets of rules adopt the concept of ‘reasonable time’. Although the term of ‘reasonable time’ may cause some uncertainty (by requiring judgement), the term does set up a standard for determining whether there is a delay in the case where there is no prior agreement on the delivery time. As regards the question of whether the MTC will bear liability for delay, the provisions of the MT Convention and AFAMT are fairer than those of the Rotterdam Rules and UNCTAD/ICC Rules 1992. The reason is that the MT Convention and AFAMT give the MTC (in the hypothetical case) more opportunities to avoid liability for delay. Since it is reasonable for the MTC to deviate its ship to avoid the blockage of the Suez Canal, the MTC should not bear liability for any delay occurring in this case. Regarding what extent the MTC will be liable for delay, the limitation of MTC liability for delay provided by the MT Convention is fairer to both the MTC and cargo owner than the limitation provided by the other three sets of rules. Although a double calculation is required to find out how much compensation the MTC will have to pay for the loss caused by the delay, the MTC will have to pay less when the MT Convention applies.

⁷³ *Multimodal Transport Convention* (n 1) art 18; *UNCTAD/ICC Rules* (n 18) r 6.6; *Rotterdam Rules* (n 19) art 60; *AFAMT* (n 15) art 19.

⁷⁴ *Multimodal Transport Convention* (n 1) art 16; *UNCTAD/ICC Rules* (n 18) r 5.3; *AFAMT* (n 15) art 11.

⁷⁵ As the delay in the hypothetical case is only ten days from the expected day for delivery and causes only financial loss, this paper will not analyse in detail the MTC liability in the case the delay exceeds ninety days.

⁷⁶ Hugh M Kindred and Mary R Brooks, *Multimodal Transport Rules* (Kluwer Law International 1997) 109.

⁷⁷ See above p 23.

⁷⁸ ‘Note by the Secretary-General: Comments by Governments and International Organisation on the Draft Convention on the Carriage of Goods by Sea’ (1976) 7 *United Nations Commission on International Trade Law Yearbook* (A/CN.9/109, 1976) 193, 218.

⁷⁹ This paper comparatively examines the MTC liability for delay in the hypothetical case under the MT Convention, Rotterdam Rules, UNCTAD/ICC Rules 1992, and AFAMT. Therefore, the conclusions on which liability rules are fair for the parties are only true for the circumstances in the hypothetical case. These conclusions may not accurate for all cases in practice.